

**CITY OF OAKLAND**  
**AGENDA REPORT**

FILED  
OFFICE OF THE CITY CLERK  
OAKLAND

2010 FEB 25 PM 7:59

TO: Office of the City Administrator  
ATTN: Dan Lindheim  
FROM: Community and Economic Development Agency  
DATE: March 2, 2010

RE: **A Supplemental Report Regarding a Resolution Denying the Appeal of Lue R. Bells (Case # A 09-273) and Upholding the Planning Commission's Decision to Revoke the Deemed Approved Status for Alcoholic Beverage Sales from the Property Located at 5007 Bancroft Avenue**

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**SUMMARY**

This report provides three (3) attachments that were submitted to the Planning & Zoning Division with the Appeal letter submitted December 14, 2009 (case # A 09-273), but not included in the previous staff report to the City Council. Although not previously submitted, all the relevant issues raised in these documents are addressed in the City Council Agenda Report and supporting documents. Moreover, these attachments are all included in the Planning files and were (and are) available for public review; they were also included in the administrative record previously provided to the City Council.

Respectfully submitted,

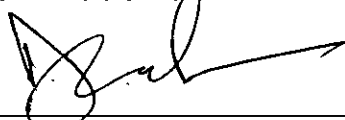


Walter S. Cohen, Director  
Community and Economic Development Agency

Reviewed by:  
Scott Miller, Zoning Manager  
Planning & Zoning Division

Prepared by:  
Aubrey Rose, Planner II

APPROVED AND FORWARDED TO THE  
CITY COUNCIL:



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Office of the City Administrator

Item: \_\_\_\_\_  
City Council  
March 2, 2010

**ATTACHMENTS:**

- A. Administrative Hearing Officer's Revised Order dated August 14, 2009
- B. Oakland Police Department's Appeal letter on Revised Order of August 14, 2009 dated August 19, 2009
- C. Legal brief by property owner's counsel for Planning Commission dated November 23, 2009

**Easley, Countess**

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**From:** S Rine [rine@ymail.com]  
**Sent:** Friday, August 14, 2009 11:14 AM  
**To:** candcisc@sbcglobal.net; ceasley@oaklandnet.org; Royal, Lenora; Adante Pointer  
**Cc:** Easley, Countess  
**Subject:** Revised Order: LARAZA BELLS

It did not occur to me that the market would be economical feasible without the sale of alcohol. I still have my doubts. However, my Order is hereby amended to:

**ADMINISTRATIVE APPEAL HEARING  
REVISED FINAL ORDER**

**S. D. Rine, Hearing Officer Presiding**

**In the matter of:**

**Ali Abad Omad, Mohsen Mohamed Albasiri,  
& Lue R. Bell.**

**Premises: 5007("5001") Bancroft Ave, Oakland CA**

**APN: 035-2362-001-00**

**Land-use status:**

**deemed approved alcoholic**

**ATTACHMENT A**

**beverage sales establishment**

**Case number DAA08-002**

**Findings of fact and Conclusions of law:**

**The hearing started on July 2, 2009. Further hearing was heard August 6, 2009. Ali Ahmad Obad's email request for further continuance was denied because it did not show good legal cause, as required in a previous order, and was not made in a proper manner.**

**The parties signed a stipulation to allow the deemed approval status of the alcoholic beverage sales establishment at 5007 ("5001") Bancroft Ave., Oakland, California to continue. This officer approved the stipulation on February 24, 2009.. While a hearing had been scheduled, no hearing was held because the parties reached agreement. That stipulation is binding**

upon the parties. The City of Oakland requested this hearing because it contends that the stipulation has been violated. That stipulation has seven conditions of approval which shall be addressed in order.

**(1) Façade improvement:**

**This condition of approval does not appear to have been violated.**

**(2) Cameras and surveillance:**

**The stipulation requires, inter alia, “Recordings from these cameras shall be retained for at least fourteen (14) days from the date of recording before destruction or reuse.” In addition to the city’s witnesses, Mr. Ali Ahmad Obad testified with regard to this condition. His testimony was evasive and decidedly not credible. Consequently, this officer finds that this condition has been violated. Additionally, Defendants were given the opportunity at the continued hearing to produce such a recording. No such recording was produced.**

**(3) Hours of operation:**

**This condition of approval does not appear to have been violated.**

**(4) Crime on the property:**

**From July 9, 2008 through July 9, 2009 there appear to of been eight arrests in or around the area of the market. From February 7, 2009 through July 9, 2009, the period after the stipulation was signed by the parties, there have been four arrests in or around the area the market. On February 7, 2009 an individual was arrested for spousal battery. On March 29, 2009, an individual was arrested for violation of Penal Code section 647 (f). On April 28, 2009 another individual was arrested for spousal battery. On May 18, 2009 an individual was arrested for misdemeanor bench warrant and was found to possess a controlled substance.**

**The stipulation states: "Defendants shall not permit, condone or**

**knowingly allow drug activity at the property.” Such violation was not proven.**

**The stipulations states: “Defendants shall not violate the provisions of the Alcoholic Beverage Control Act.” Such violation was not proven.**

**The stipulation states: ”Defendant’s shall not permit, condone or knowingly allow loitering on the property.” Such violation was not proven.**

**The stipulation states: “Any arrest involving the sale or use of any drugs or possession or use of firearms on the property, or involving the commission of a violent crime on the property, constitutes a violation of these stipulated conditions....” No such arrest was ever proven.**

**Violation of this condition of approval was not proven.**

**(5) Prohibited items:**

**Violation of this condition of approval was not proven.**

**(6) Security patrol:**

**The stipulation states: "A security guard patrols the premises during at least 12:00 noon to 12:00 midnight, to remove anyone buying, selling and using drugs, anyone consuming alcoholic beverages in the area adjacent to the premises, and anyone loitering for more than five minutes. During all hours of operation that a security guard is not present, roving security patrol shall patrol the property." In addition to the city's witnesses, Mr. Ali Ahmad Obad testified with regard to this condition. His testimony was evasive and decidedly not credible. Consequently, this officer finds that this condition has been violated. Additionally, Defendants were given the opportunity at the continued hearing to produce time records and record of payments for the security guard or guards. No such evidence was produced.**



**(7) Reputation and identity:**

**This condition of approval does not appear to have been violated.**

**Order:**

**The stipulation states: “Violation of any condition of approval set forth in this Order or any violation of the Performance Standards set forth in OMC 17.156.090, constitutes a violation of the Deemed Approved Activity’s Conditions of Approval and may result in hearing for revocation of the Defendants’ Deemed Approved Status pursuant to OMC 17.156 .150. The city may also seek enforcement costs and attorney’s fees incurred by the city.**

**Lue R. Bell is hereby found not to have violated the stipulation and consequently her right to continue to use the property for alcoholic beverage sales under “deemed approved” status is hereby allowed. Lue R. Bell is hereby found not to have violated the stipulation and consequently the city shall not seek to obtain enforcement costs and/or attorneys fees. All parties are to bear their own attorneys fees.**

**Ali Abad Omad and Mohsen Mohamed Albasiri, are hereby found to have violated the stipulation and consequently each of their rights to continue to use the property for alcoholic beverage sales under “deemed approved” status is hereby revoked.**

**Consequently, the liquor store at 5007(“5001”) Bancroft Ave in Oakland, California shall be ENJOINED FROM THE SALE OF ALL ALCOHOLIC BEVERAGES FROM 10 (ten) days of this order, and shall remain ENJOINED FROM THE SALE OF ALL ALCOHOLIC BEVERAGES until the liquor license is transferred to independent parties**

**completely unrelated to Ali Abad Omad and Mohsen Mohamed Albasiri, unless this order is timely appealed.**

**Ali Abad Omad and Mohsen Mohamed Albasiri are hereby found to have violated the stipulation and consequently the city shall have and recover enforcement costs, jointly and severally, from Ali Abad Omad and Mohsen Mohamed Albasiri of: a noticing fee of \$684, a hearing fee of \$1848.57 for July 2, 2009, a hearing fee of \$1268.18 for August 6, 2009, and \$452 for the cost of recording the hearings, for a total of \$4252.75.**

**At the discretion of this officer, Oakland Police Department extraordinary costs of \$1126.36 and city attorney's office attorney's fees of \$25,086, for a total of \$26212.36 and the hearing officer's fees are not to be enforced or recovered, unless this order is timely appealed. All parties are to bear their own attorneys fees.**

**Dated: August 14, 2009**

# CITY OF OAKLAND



ONE FRANK H. OGAWA PLAZA • 6TH FLOOR • OAKLAND, CALIFORNIA 94612

Office of the City Attorney  
John A. Russo  
City Attorney

(510) 238-3601  
FAX: (510) 238-6500

Carolyn Ortler  
Deputy City Attorney

(510) 238-3988

August 19, 2009

Hand-Delivered

The Oakland City Planning Commission  
c/o Aubrey Rose  
250 Frank Ogawa Plaza, Suite 2114  
Oakland CA 94612

**Re: Appeal of (Revised) Order, for La Raza Market, 5001 Bancroft, Case DAA08002**

Dear Commissioners:

OPD's Alcoholic Beverage Action Team (ABAT) hereby appeals the August 14, 2009 (Revised) Order for (partial) revocation of the Deemed Approved Alcoholic Beverage status in the matter of 5001 Bancroft. This letter sets forth the basis for the limited appeal.

The appeal rests on two narrow issues: (1) The Order created a partial revocation of the property's Deemed Approved Alcoholic Beverage Sales status, revoking it as to the tenants but not as to the landlord; the result is improper and unenforceable; and (2) the Order includes language exceeding the jurisdiction of the City by mandating transfer of the state-issued ABC license.

This appeal presents an opportunity for the Commission to correct these irregularities without disturbing the intent of the Order, which is to prohibit sale of alcohol at this location.

## **1. Revocation of the Deemed Approved Status**

ABAT appeals the portion of the Order stating that landlord Lue R. Bells' "deemed approved status is hereby allowed," and that tenants Ali Abad Omad's and Mohsen Mohamed Albasiri's, "deemed approved status is hereby revoked."

The zoning runs with the land and lies with the property, not individual people; it is not possible to revoke the parcel's zoning status as to one person but not to another. The Deemed Approved status of the land is held by the landlord, who leases the property and thereby shares an interest in the permitted uses with the tenant. The zoning regulations apply to them jointly and severally.

**ATTACHMENT B**

The findings of fact set forth in the Order support the City's assertion that violations to the Conditions of Approval have occurred and continue to occur and that sale of alcohol at this location must cease. Thus, *the property's* Deemed Approved status (and not just that of the tenant) should be revoked to further the Order's intent.

## **2. Limitations Imposed by State Jurisdiction over Alcoholic Beverage Licenses**

ABAT also appeals the portion of the Order that states the property is enjoined from the sale of alcoholic beverages and shall remain so enjoined, "...until the liquor license is transferred to independent parties completely unrelated to Ali Abad Omad and Mohsen Mohamed Albasiri, unless this order is timely appealed."

California Constitution, Article XX, Section 22, vests alcoholic beverage licensing powers with the State of California. Thus, the jurisdiction of the City is limited to whether the sale of alcoholic beverages is a permissible use at the property. The City does not have authority to require certain actions taken on a state-issued ABC license.

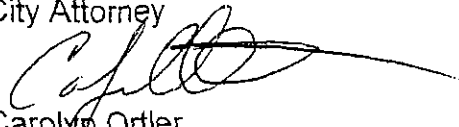
The Commission is hereby requested to eliminate language referencing the transfer of an ABC license from the Order in deference to the State's jurisdiction.

The appeal is expressly limited to the two narrow issues stated above and ABAT does not seek any other modifications to the (Revised) Order.

Very truly yours,

John A. Russo  
City Attorney

By:

  
Carolyn Ortler  
Deputy City Attorney  
Counsel to ABAT

SAMUEL J. CHASE  
(1883-1969)  
DOUGLAS S. CHASE  
(1918-2000)  
JONATHAN S. CHASE

LAW OFFICES  
**CHASE & CHASE**  
PORTOBELLO  
11 EMBARCADERO WEST, SUITE 230  
OAKLAND, CALIFORNIA 94607

MARTHA M. CHASE  
OF COUNSEL

TELEPHONE (510) 451-0383  
FAX (510) 444-8102

November 23, 2009

Planning Commission  
City of Oakland  
1 Frank Ogawa Plaza  
Oakland, CA 94612

re: City of Oakland vs. Obad, et al.; (LaRaza/  
Bancroft Market, 5001 Bancroft Ave, Oakland)  
Case No. DAA08002, Hearing Date: 12/02/2009

Dear Commissioners:

This brief in letter form is submitted on behalf of property owner Lue Retha Bells in opposition to the Limited Appeal by ABAT of the City of Oakland. ABAT asserts on appeal that the hearing officer in this matter, the Honorable S. D. Rine, was legally mandated to revoke the zoning status of the subject property as to the property owner, in spite of a specific finding of fact made by the Hearing Officer that the current owner, Lue Retha Bells, had not committed any zoning violations or any violations of the Agreement with the City.

The facts of this case are as follows:

Lue Retha Bells is the owner of the real property located at 5001 Bancroft Ave, Oakland, CA. Lue Retha Bells is not an owner or operator of the business known as Bancroft Market and holds no licenses permitting her to sell alcoholic beverages. Bancroft Market is operated by tenant operators pursuant to a written lease with the owner.

The Agreement that was allegedly violated resulting in the revocation proceeding was dated and signed February 4, 2009. The final version of the Agreement was prepared by the City after final discussions between the City and the operators of La Raza/Bancroft Market and their counsel, outside the presence of Lue Retha Bells and her counsel.

**ATTACHMENT C**

The Agreement specifically identifies Lue Retha Bells as the Owner of the real property lot where La Raza/Bancroft Market is located (Page 1, lines 11-16). The Agreement first specifies that the Owner of the real property lot will complete façade improvements within six months (Page 2, line 9). Thereafter, the Agreement does not mention the Owner or require the Owner to take any action at all in regard to the Deemed Approved Activity. All further action regarding operation of Bancroft Liquors is to be taken by "Defendants" and neither "Lue Retha Bells" nor the "Owner" of the real property lot are ever identified as one of the "Defendants" nor required to perform any other acts or transactions under the terms of the Agreement. These terms of the Agreement are consistent with Lue Retha Bells' uncontradicted testimony at the August 6, 2009 hearing that she had never been informed by the City that she had not complied with the Agreement.

From the date of the Agreement executed February 4, 2009, until the revocation hearing on July 2, 2009, no communications regarding the Agreement or any alleged violations of the Agreement were directed to Lue Retha Bells and her counsel. From the content of materials submitted by the City immediately prior to the July 2, 2009 hearing, specifically the declaration of attorney Carolyn Ortler documenting communications of various kinds between Carolyn Ortler and attorney Adante Pointer, it is absolutely clear that the City expected all of the compliance activities specified in the February 4, 2009, agreement to be performed by the operators of La Raza/Bancroft Market, not Lue Retha Bells.

The content of all the materials submitted for the July 2, 2009 revocation hearing demonstrates that the City was charging only the Operators with alleged violations of the compliance conditions, not Lue Retha Bells. From the date of the Agreement onward, there was never any attempt made by the City to inform Lue Retha Bells of any of the ongoing issues that apparently existed between the City and the Operators of La Raza/Bancroft Market over compliance with the Agreement, and, in its written communications, the City uniformly referred to the alleged violator as LaRaza/Bancroft Market, not the owner of the property, Lue Retha Bells.

The July 2, 2009 revocation hearing in this matter focused primarily on the alleged violation of the Agreement by the Operators of La Raza/Bancroft Market in failing to provide a security guard at the business as set forth in the February 4, 2009 agreement, paragraph 6. The operators of LaRaza/Bancroft Market testified that they had employed more than one security patrol firm between February 4, 2009 and July 2, 2009, and brought forth at least one individual

to testify as to the presence of a security guard at the market.

At the July 2, 2009 revocation hearing, the only arrest incident documented at 5001 Bancroft after the date of the Agreement was a March 29, 2009 arrest for intoxication of an individual who had not purchased anything at that location.

At the conclusion of the July 2, 2009 revocation hearing, the Hearing Officer requested that the operators of LaRaza/Bancroft Market submit additional demonstrative evidence, including security camera tapes and payroll stubs showing payment of wages to a security guard. The hearing was continued to August 6, 2009

At the August 6, 2009 revocation hearing, Lue Retha Bells' testified that she had performed everything required of her under the terms of the Agreement and that she had never been told by the City that she had violated or failed to comply with the Agreement. Lue Retha Bells further testified that until receiving Notice of the hearing, she had no knowledge of any violations of the Agreement. No evidence was presented by anyone disputing the testimony of Lue Retha Bells.

The revised final order of the Presiding Hearing Officer, the Honorable S. D. Rine, dated August 14, 2009, specifically finds:

"LUE R. BELL IS HEREBY FOUND NOT TO HAVE VIOLATED THE STIPULATION AND CONSEQUENTLY HER RIGHT TO CONTINUE TO USE THE PROPERTY FOR ALCOHOLIC BEVERAGE SALES UNDER "DEEMED APPROVED" STATUS IS HEREBY ALLOWED."

In their Limited Appeal, Appellant ABAT has not challenged and does not dispute the Hearing Officer's specific finding that Lue R. Bells did not violate the Agreement.

ABAT provides no authority for its assertion that the Hearing Officer cannot revoke the "deemed approved" status of a current property tenant unless he also revokes the approved status of all other persons with an interest in the property, including the owner. To the contrary, real estate law in general provides that all vested rights and interests in real property, including easements, licenses and uses, can be divided between co-owners; subsequent owners and between landlord and tenant. There is no principle or authority in real estate law or land use law that requires a hearing officer in a revocation proceeding to revoke a particular use in perpetuity, particularly when it would cause harm and forfeiture to an innocent party



found by the Hearing Officer to have committed no violations of use conditions.

The only principle advanced by ABAT in support of this assertion is that an application for a conditional use permit applies to the particular property, not to the individual applicant (See ABAT's Notice of Appeal) so that issuance of a conditional use permit limited solely to an individual applicant would be invalid under certain circumstances.

This argument fails to address the issue before the Hearing Officer. The issue before the Hearing Officer was not to issue a new permit to a new applicant, where no vested rights to ownership of business or property are concerned. Instead, the issue before the Hearing Officer was the proposed revocation of an existing vested right of use currently held by the tenants of the property pursuant to a lease with the owner of the property, Lue Retha Bells, based upon ABAT's claim that the tenants had violated the Agreement.

Because of the vested rights of owners and other parties holding the right to conditional use, the law governing applications for conditional use is simply not applicable to use revocation proceedings. "Injunctive relief which accomplishes the purpose of abatement is permissible", even where the injunction allows the use to continue (O'Hagen vs. Board of Zoning Adjustment (1971) 19 Cal.App.3d 151, 164). The law applicable to use revocation proceedings is fundamentally different than for a use permit application (Goat Hill Tavern vs. City of Costa Mesa (1992) 6 Cal.App.4<sup>th</sup> 1519).

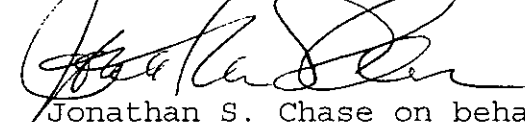
In this instance, the Hearing Officer enjoined the sale of alcohol by the tenant operators of Bancroft Liquors and, unless transferred by the tenant operators to an unrelated third party, the Hearing Officer's injunction will last until the expiration of their tenancy. There is simply no authority for ABAT's assertion that a use revocation order limited in scope to the term of the current tenant, or subject to any other reasonable limitation based upon the facts before the Hearing Officer, is invalid per se or invalid as applied. To the contrary, the diligence and conscientiousness of the Hearing Officer in carefully tailoring the remedy imposed to the nature and scope of the alleged violations of the Agreement should be lauded. The remedy imposed by the Hearing Officer also avoids abrupt economic forfeiture to the parties involved. Avoidance of forfeiture must always be a primary legal and equitable concern in revocation hearings as opposed to the permit application process.

Therefore, ABAT's Limited Appeal in regard to the scope of the use revocation order must be denied.

In regard to ABAT's Limited Appeal of the Hearing Officer's decision to require transfer by the tenant/operator of the State-issued ABC License, basic appellate law dictates that, because ABAT is not a State agency and lacks standing on this issue, this portion of ABAT's appeal must also be denied.

Thank you for your attention to this matter.

Respectfully Submitted,



Jonathan S. Chase on behalf of  
Lue Retha Bells

JSC/c

cc: Planning Commission (8 copies)  
Clinton Killian, Esq.  
Todd Boley, Esq.  
S.D. Rine, Esq.  
Staff