

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD  
OF THE STATE OF CALIFORNIA**

**AB-8874**

File: 47-434987 Reg: 07067274

TUNEL 21  
928 Second Street, Sacramento, CA 95814,  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: October 1, 2009  
San Francisco, CA

**ISSUED JANUARY 6, 2010**

Tunel 21 (appellant) appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended its license for 10 days and indefinitely thereafter until it complies with the requirements of Business and Professions Code section 23038 and adds additional conditions to its license, for violations of Business and Professions Code sections 23396 and 23804.

Appearances on appeal include appellant Tunel 21, appearing through its counsel, Richard W. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

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<sup>1</sup>The decision of the Department, dated May 2, 2008, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on June 5, 2006. On November 13, 2007, the Department filed a six-count accusation charging that, on three dates in April 2007, appellant failed to comply with a condition on its license and with the requirements of Business and Professions Code section 23038.

At the administrative hearing held on February 21, 2008, documentary evidence was received and testimony concerning the violations charged was presented. The Department's decision determined that the violations charged were proved and appellant filed an appeal with this Board.

Written notice of the opportunity to file briefs in support of appellant's position was given on July 14, 2009, setting the due date for appellant's opening brief as August 14, 2009. Appellant did not communicate with the Board in any way until the afternoon of September 24, 2009, one week before the scheduled oral argument before the Appeals Board, when it filed an opening brief. Along with the brief, appellant notified the board that no one would appear for it at the Board hearing and that it waived oral argument. The Board has reviewed the brief and accorded it the appropriate consideration.

In its brief, appellant objects only to one of the three conditions imposed on the license to help ensure it complies with the requirements of a bona fide public eating place under Business and Professions Code section 23038. It contends that the Department is impermissibly expanding the definition of a bona fide public eating place by requiring that proceeds from sales of food must exceed proceeds from sales of alcoholic beverages.

Appellant bases this argument on an old California Supreme Court case, *Covert v. Board of Equalization* (1946) 29 Cal.2d 125 [173 P.2d 545]. This case is inapplicable, however, since it was decided under the very different provisions of the 1934 California Constitution, and Business and Professions Code section 23038 did not exist. In addition, the provisions allowing the Department to impose conditions on a license did not exist. (Bus. & Prof. Code, § 23800 et seq.) The condition in question is well within the discretion of the Department under sections 23800 and 23801.

ORDER

The decision of the Department is affirmed.<sup>2</sup>

FRED ARMENDARIZ, CHAIRMAN  
SOPHIE C. WONG, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>2</sup>This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.