



DHS suggested the drafting of a unified document regarding the unlicensed personnel issue that would represent the views of several state agencies which regulate health care facilities and practitioners in California. The Board indicated that it would support and actively participate in the development of such a collaborative document and referred the issue to its Education and Practice Committee for further consideration. At this writing, the Board plans to host the next meeting on this topic in Sacramento during January or February 1995.

Also at the November meeting, Board staff reported on recent attempts to promote the occupation of vocational nursing. Staff attended the first Hispanic Nurses Seminar organized by the *La Opinion* newspaper to speak on the opportunities in vocational nursing and requirements for licensure. The Board's *Licensed Vocational Nurse Fact Sheet* was available in Spanish and English for interested participants. Board staff also attended a career seminar at Castle Air Force Base to provide information on educational and career alternatives for military and civilian employees in preparation for the base's closure.

Also at the November meeting, Board staff reported that several candidates were recently observed sharing examination questions immediately after taking the psych tech licensure examination. To increase awareness of examination confidentiality, staff developed a statement which will be included with the oral instructions given to candidates prior to testing. The statement informs candidates that the unauthorized use of examination materials before, during, or after the examination violates the law and may be grounds for denial of licensure. The Board also plans to ask the directors of psych tech programs to emphasize examination confidentiality to their students.

■ FUTURE MEETINGS

January 20 in San Diego.
March 16-17 in Los Angeles.
May 19 in San Diego.



BUSINESS, TRANSPORTATION AND HOUSING AGENCY

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

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The Department of Alcoholic Beverage Control (ABC) is a constitutionally-authorized state department established in 1955 (section 22 of Article XX, California Constitution). The Alcoholic Beverage Control Act, Business and Professions Code sections 23000 *et seq.*, vests the Department with the exclusive power to regulate the manufacture, sale, purchase, possession, and transportation of alcoholic beverages in California. In addition, the Act vests the Department with authority, subject to certain federal laws, to regulate the importation and exportation of alcoholic beverages across state lines. ABC also has the exclusive authority to issue, deny, suspend, and revoke alcoholic beverage licenses. Approximately 68,000 retail licensees operate under this authority. ABC's regulations are codified in Divisions 1 and 1.1, Title 4 of the California Code of Regulations (CCR). ABC's decisions are appealable to the Alcoholic Beverage Control Appeals Board. Further, ABC has the power to investigate violations of the Business and Professions Code and other criminal acts which occur on premises where alcohol is sold. Many of the disciplinary actions taken by ABC, along with other information concerning the Department, are printed in liquor industry trade publications such as the *Beverage Bulletin* and *Beverage Industry News*.

The Director of ABC is appointed by, and serves at the pleasure of, the Governor. ABC divides the state into two divisions (northern and southern) with assistant directors in charge of each division; ABC maintains 26 field offices.

ABC dispenses various types of licenses. "On-sale" refers to a license to sell alcoholic beverages which will be bought and consumed on the same premises. "Off-sale" means that the licensee sells alcoholic beverages which will not be consumed on the premises. Population-based quotas determine the number of general liquor licenses issued each year per county; in 1995, the legislature applied

similar quotas to beer and wine licenses for a three-year period.

■ MAJOR PROJECTS

Regulating Decoy Programs May Take Awhile. ABC's use of minors for decoy operations was upheld last year by the California Supreme Court in *Proviso Corporation v. Alcoholic Beverage Control Appeals Board*, 7 Cal. 4th 562 (Apr. 7, 1994); legislation requiring ABC to develop and administer regulations governing the use of minors as police decoys—AB 3805 (Richter) (Chapter 1205, Statutes of 1994)—took effect on January 1, 1995. [14:4 CRLR 108-09] ABC intends to hold workshops and invite representatives of the beverage industry, law enforcement agencies, and communities in order to develop a consensus on the regulatory language, if possible. At this writing, these meetings are expected take place in early 1995 as ABC plans to begin the formal rulemaking process in March.

ABC Establishes Moratorium on New Licenses. As a result of AB 463 (Tucker) (Chapter 627, Statutes of 1994), several cities and counties are now subject to a three-year moratorium on original "type 20" beer and wine licenses. [14:4 CRLR 110] Among other things, AB 463 provides that no application for an original retail off-sale beer and wine license may be made nor any original retail off-sale beer and wine license issued until January 1, 1998, for any premises where any of the following conditions exist at the time this section takes effect: the applicant premises are located in an incorporated city where the number of retail off-sale beer and wine licenses issued exceeds one license for each 2,500 inhabitants of the incorporated city; the applicant premises are located in a county where the number of retail off-sale beer and wine licenses issued exceeds one license for each 2,500 inhabitants of the county; or the applicant premises are located in a city and county where the total number of retail off-sale beer and wine licenses and off-sale general licenses issued exceeds one license for each 1,250 inhabitants of the city and county.

On January 3, ABC issued its final list of the counties and cities included in the moratorium. According to the list, 48 of the state's 58 counties are subject to the countywide moratorium; the ten counties



not subject to the countywide ban are Alameda, Contra Costa, Los Angeles, Marin, Orange, San Diego, San Mateo, Santa Clara, Solano, and Ventura. However, several cities within those ten counties are subject to the moratorium, including Berkeley, Oakland, San Rafael, Sausalito, South San Francisco, Burlingame, Orange, Costa Mesa, Los Alamitos, El Cajon, Escondido, La Mesa, Inglewood, and Malibu.

The moratorium is expected to result in a dramatic increase in the price of current beer and wine licenses to the public. Although it is possible to transfer licenses from person to person or premises to premises, many obstacles exist to doing so. For example, transfers must be approved by ABC, which now must notify local governmental agencies, in addition to local law enforcement agencies, of the application; upon protest, ABC must either deny the application or respond to the protest with written findings documenting the factors which outweigh the protest. Also, licensees who transfer to other cities are likely to be subject to city land use ordinances (see LITIGATION).

Rulemaking Update. ABC's proposed amendments to section 106, Title 4 of the CCR, relating to the advertising and merchandising of alcoholic beverages, still await review and approval by the Office of Administrative Law. [14:4 CRLR 108; 14:2&3 CRLR 115] In its proposed amendments, ABC is attempting to comprehensively address several promotional and marketing issues which are not covered by its current regulations. Its proposed changes to section 106 would add a table of contents for clarity; authorize and regulate "drink night" promotions; authorize and regulate consumer merchandise offers; authorize and regulate sweepstakes; authorize and regulate supplier participation in public service activities; authorize and regulate distilled spirits beverage lists and dispensing equipment; authorize and regulate supplier-sponsored entertainment at retail premises; and regulate contests sponsored by suppliers.

LITIGATION

On September 20 in *California Beverage Retailer Coalition v. City of Oakland*, No. A064898, the First District Court of Appeal reinstated an Oakland city ordinance regulating alcoholic beverage retailers; the ordinance establishes performance standards for licensed premises, requires merchants to post a notice of the standards, and provides that vandalism, drug sales, prostitution, and graffiti in violation of the standards are grounds for revocation of a nearby retailer's local permit to sell alcohol. To support the pro-

gram, most alcoholic beverage sales licenses within the city will be assessed a \$600 fee. In December 1993, the trial court held that the local ordinance is preempted by the ABC Act, and issued a preliminary injunction barring enforcement of the ordinance. [14:4 CRLR 111; 14:2&3 CRLR 119; 14:1 CRLR 89-90, 92]

On appeal, the First District reversed. The court explained that to qualify for injunctive relief, a plaintiff must show both irreparable harm, either existing or threatened, and likelihood of prevailing on the merits. The California Beverage Retailer Coalition (CBRC) argued that three effects could constitute irreparable injury arising under the ordinance: the \$600 fee, the sign-posting requirement, and the possibility of a finding of nuisance that may lead to an abatement action. However, the First District stated that the \$600 fee does not constitute irreparable harm because a remedy at law exists; CBRC can assert a cause of action for inverse condemnation to recover the value of the property right impaired. The court also found that the sign-posting requirement does not rise to the level of injury required to establish "irreparable harm." Finally, the court found that the possibility of a finding of nuisance that may lead to abatement is too attenuated to constitute irreparable injury. The ordinance requires the city to conduct at least two administrative hearings and provides the merchant with two other opportunities for administrative review by the planning commission and the city council before the city may file an action for abatement or refer the matter to ABC. If the city were to file an action to abate a nuisance or refer a case to ABC, the court acknowledged that then there might be a valid claim of irreparable harm; because the city had not filed an action to abate a nuisance or referred a case to ABC, the court held that this situation is not at issue in this case. Thus, the First District reversed the trial court's order granting the preliminary injunction, and the California Supreme Court denied CBRC's petition for review on December 14; thus, CBRC's challenge to the ordinance will continue in superior court.

In *Boccatto, et al. v. City of Hermosa Beach, et al.*, 29 Cal. App. 4th 1797 (Oct. 10, 1994), the owners of Boccatto's Groceries and Dan's Liquor challenged a Hermosa Beach ordinance which requires all off-sale liquor businesses to obtain conditional use permits in order to continue selling alcoholic beverages within city limits. In order to obtain a conditional use permit, businesses must comply with 15 conditions; these conditions require business owners to take certain steps to

prevent loitering, littering, unruliness, and boisterous activities of patrons outside the business or in the immediate area. The owners' legal challenge contended, among other things, that the ordinance is unconstitutional both facially and as applied to their businesses, because it is preempted by ABC's state-level regulation of alcoholic beverages; the owners also claimed that the ordinance denies them equal protection, is constitutionally vague and overbroad, constitutes an attempted taking of property, and is subject to arbitrary enforcement. Following a hearing, the trial court held that the ordinance is not preempted by state law nor unconstitutional either facially or as applied.

On appeal, the Second District Court of Appeal stated that the central issue in the appeal is whether the ordinance is unconstitutional because it represents an incursion into the state's preemptive jurisdiction over the regulation of the sale of alcoholic beverages. In analyzing this question, the Second District closely followed its own decision in *Korean American Legal Advocacy Foundation v. City of Los Angeles*, 23 Cal. App. 4th 376 (1994), which it found to have "strikingly similar circumstances." [14:2&3 CRLR 119] The Second District found that the only preemption argument that survives *Korean American* involves the effect of Business and Professions Code section 23790, which exempts from zoning ordinances off-sale liquor stores which predate the enactment of such ordinances provided that two conditions are met—that the premises retain the same type of retail license with a license classification, and the licensed premises are operated continuously without substantial change in mode or character or operation. In *Korean American*, the court held that section 23790 did not apply because the businesses in question had not been in operation continuously, as required by the statute. In *Boccatto*, however, the court acknowledged that "section 23790 does preempt local zoning ordinances at least insofar as such ordinances purport to regulate previously existing businesses." The court noted that appellants' second cause of action is premised on the preemptive effect of section 23790, and held that trial court erred in granting a motion for judgment on the pleadings as to this cause of action; however, the Second District held that four other causes of action based on preemption were properly dismissed based on the *Korean American* decision.

Appellants' remaining causes of action were civil rights claims brought under Civil Code section 52.1 and 42 U.S.C. section 1983. The Second District noted



that appellants "take the position that they fall within the purview of [section 52.1] because the City, by enacting the ordinance, has attempted to interfere with their right to sell alcoholic beverages 'by intimidation and threats of police action, fines, and penalties...." However, the court explained that "an action brought under section 52.1 must allege that the plaintiff who claims interference of his or her rights also allege that this interference was due to his or her 'race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute' as set forth in [Civil Code] section 51.7." According to the court, appellants' failure to so allege constitutes a failure to state a cause of action.

Similarly, to state a claim under 42 U.S.C. section 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law. According to the Second District, appellants' "vague allegations of prospective commercial disadvantage fall far short of demonstrating the kind of discrimination that would...support an action under section 1983." Accordingly, the Second District affirmed the trial court's judgment, except as to appellants' second cause of action, as to which it reversed the trial court's judgment.

At this writing, the U.S. Supreme Court is reviewing the Tenth Circuit Court of Appeals' decision in *Adolph Coors v. Bentsen*, 2 F.3d 355 (1993), which held that the right to print beer labels containing alcoholic content is constitutionally protected by the first amendment. [14:4 CRLR 108; 14:2&3 CRLR 114-15] If upheld, the decision will nullify a federal law enacted in 1937 which prohibits such information on labels. According to federal regulators, the purpose behind the 1937 law was to avoid so-called "strength wars" which broke out among brewers after the repeal of Prohibition. The Coors company contends that the law unlawfully prohibits it from disseminating information to the public which it claims the public has a right to know and ought to know. However, the Treasury Department's Bureau of Alcohol, Tobacco and Firearms and *amicus curiae* Center for Science in the Public Interest counter that Coors' real motivation to provide the public with information regarding alcoholic content is solely to refute a public image that Coors' beer is weaker than other beers. The Supreme Court heard oral argument on November 30; at this writing, it has not yet rendered its decision.

BANKING DEPARTMENT

Acting Superintendent:

Stan M. Cardenas

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Toll-Free Complaint Number:

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Pursuant to Financial Code section 99 *et seq.*, the State Banking Department (SBD) administers all laws applicable to corporations engaging in the commercial banking or trust business, including the establishment of state banks and trust companies; the establishment, operation, relocation, and discontinuance of various types of offices of these entities; and the establishment, operation, relocation, and discontinuance of various types of offices of foreign banks. The Department is authorized to adopt regulations, which are codified in Chapter 1, Title 10 of the California Code of Regulations (CCR).

The superintendent, the chief officer of the Department, is appointed by and holds office at the pleasure of the Governor. The superintendent approves applications for authority to organize and establish a corporation to engage in the commercial banking or trust business. In acting upon the application, the superintendent must consider:

(1) the character, reputation, and financial standing of the organizers or incorporators and their motives in seeking to organize the proposed bank or trust company;

(2) the need for banking or trust facilities in the proposed community;

(3) the ability of the community to support the proposed bank or trust company, considering the competition offered by existing banks or trust companies; the previous banking history of the community; opportunities for profitable use of bank funds as indicated by the average demand for credit; the number of potential depositors; the volume of bank transactions; and the stability, diversity, and size of the businesses and industries of the community. For trust companies, the opportunities for profitable employment of fiduciary services are also considered;

(4) the character, financial responsibility, banking or trust experience, and business qualifications of the proposed officers; and

(5) the character, financial responsibility, business experience and standing of the proposed stockholders and directors.

The superintendent may not approve any application unless he/she determines that the public convenience and advantage will be promoted by the establishment of the proposed bank or trust company; con-

ditions in the locality of the proposed bank or trust company afford reasonable promise of successful operation; the bank is being formed for legitimate purposes; the capital is adequate; the proposed name does not so closely resemble as to cause confusion with the name of any other bank or trust company transacting or which has previously transacted business in the state; and the applicant has complied with all applicable laws.

If the superintendent finds that the proposed bank or trust company has fulfilled all conditions precedent to commencing business, a certificate of authorization to transact business as a bank or trust company will be issued.

The superintendent must also approve all changes in the location of a head office; the establishment, relocation, or discontinuance of branch offices and ATM facilities; and the establishment, discontinuance, or relocation of other places of business. A foreign corporation must obtain a license from the superintendent to engage in the banking or trust business in this state. No one may receive money for transmission to foreign countries or issue money orders or travelers checks unless licensed.

The superintendent examines the condition of all licensees when necessary, but at least once every two years. The Department is coordinating its examinations with the Federal Deposit Insurance Corporation (FDIC) so that every year each agency examines certain licensees. New and problem banks and trust companies are examined each year by both agencies.

The superintendent licenses Business and Industrial Development Corporations which provide financial and management assistance to business firms in California.

Acting as Administrator of Local Agency Security, the superintendent oversees security pools that cover the deposits of money belonging to a local governmental agency in any state or national bank or savings and loan association. All such deposits must be secured by the depository.

James Gilleran resigned from his position as SBD Superintendent on September 30, in order to accept the position of Chair and Chief Executive Officer of the Bank of San Francisco. Chief Deputy Superintendent of Banks Stan M. Cardenas will serve as Acting Superintendent of Banks until Governor Wilson appoints a successor to Gilleran.

MAJOR PROJECTS

Federal Regulators Publish Revised CRA Regulations. In December 1993, the Office of the Comptroller of the Currency (OCC), the Federal Reserve Board,