

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE ALCOHOLIC BEVERAGE CONTROL BOARD

IN THE MATTER OF)	
Robert Stevens d/b/a)	
Fish Heads Bar and Grill)	
)	OAH No. 05-0534-ABC
)	Appeal of ABC Board
<u>Alcoholic Beverage Control Board License Action</u>)	Decision No. 05-01

DECISION AND ORDER

I. Introduction

This case is Robert Stevens' appeal of the February 17, 2005 action of the Alcoholic Beverage Control (ABC) Board, which denied continued operation under the license Mr. Stevens uses to operate Fish Heads Bar and Grill. The denial was based on a protest filed by the Matanuska-Susitna Borough (Municipality) under AS 04.11.480.

On January 23, 2006 and January 24, 2006 a formal hearing was held to hear Mr. Stevens' appeal. Mark T. Handley, Administrative Law Judge from the Office of Administrative Hearings conducted the hearing. Mr. Stevens was represented by his attorney, Chadwick McGrady. Anne D. Carpeneti, assistant attorney general, represented the ABC Board staff. Nicholas Spiropoulos, assistant borough attorney, represented the Municipality. The Municipality has taken the lead in defending its protest. The record closed at the end of the hearing.

Based on the evidence in the record, the Municipality's protest should be upheld and the denial of continued operation should be enforced, because the protest was valid, properly filed and was not arbitrary, capricious or unreasonable.

II. Facts

Fish Heads Bar and Grill is a bowling alley, restaurant and dance bar located at a highway crossroad, bordered on two sides by residential property. Mr. Stevens owns Fish Heads Bar and Grill and its license. The Municipality filed a protest against continued operation of Mr. Stevens' biennial license.¹ The protest was based on Mr. Stevens' violations of the local adult entertainment and noise ordinances at Fish Heads Bar and Grill. Mr. Stevens' appealed the protest.

¹ Stipulated Documents at pp. 1-148 (protest and its attachments).

The Board held a public hearing on the protest on February 17, 2005.² Based on the public hearing testimony, the Board concluded that the Municipality had not acted arbitrarily, capriciously and unreasonable in protesting continued operation under the license.³ Having reached that conclusion, the Board voted to deny continued operation but explained that either party could request an adjudicatory hearing under the Administrative Procedure Act (AS 44.62), and that continued operation would be allowed pending the outcome of that hearing.⁴

The decision of the Board at the public hearing was confirmed in a February 22, 2005 letter from the Board's staff, which provided a Notice of Defense and Request for Hearing form and informed Mr. Stevens of the need to complete and file the form within 15 days. Fourteen days later, on March 8, 2005, Mr. Stevens' requested a formal hearing. The Board referred the appeal the Office of Administrative hearings on July 7, 2005.

During the period leading up to the hearing, which originally was scheduled for November 2005,⁵ Mr. Stevens filed what was, in effect, a motion for summary adjudication.⁶ The motion asked that the Board's decision be reversed because the Municipality's protest was filed by an employee rather than by the assembly and because the protest document was undated, thereby raising a question about whether it had been timely filed and served on Mr. Stevens.⁷ The Municipality opposed the motion, arguing that the protest was timely filed on January 26, 2005, that Mr. Stevens received actual notice of the protest and participated in the public hearing held by the Board, and that the employee who filed the protest did so under a lawful delegation made by municipal ordinance.⁸ The Municipality also argued that, in any event, the deficiencies in filing and service alleged by Mr. Stevens would not render the protest arbitrary, capricious and unreasonable.⁹

By order dated November 15, 2005, Mr. Stevens' motion for summary adjudication was

² Stipulated Documents at pp. 318-342 (transcript of public hearing).

³ Stipulated Documents at pp. 337-339.

⁴ Stipulated Documents at pp. 339-341.

⁵ The hearing had to be rescheduled, first to December 2005 and ultimately to late January 2006, to accommodate Mr. Stevens' right to legal counsel of his choice. Mr. Stevens' counsel had a busy trial schedule and changes to that schedule ordered by the courts forced rescheduling of the hearing in this matter, as well as some of the prehearing processes.

⁶ See October 11, 2005 Motion to Reverse the ABC Board's February 17, 2005 Decision.

⁷ Id.

⁸ See October 19, 2005 Opposition to Motion to Reverse ABC Board's February 17, 2005 Decision at pp. 2-7.

⁹ Id. at p. 1.

denied. The same order also denied his request to subpoena all the members of the Municipality's assembly and planning commission. The order denied the motion because, based on the undisputed facts, the Municipality's protest was properly authorized and properly filed.¹⁰

Prior to the hearing, the parties stipulated to the admission into evidence of a package of "Stipulated Documents" consisting of 342 pages in one volume filed November 1, 2005, and the transcript from January 9, 2006 court proceeding in which Mr. Stevens was convicted of violating the Municipality's noise ordinance. The 342 pages include citations, orders and transcripts in two other court cases resulting in conviction of Mr. Stevens for violating the Municipality's noise ordinance.¹¹ The Stipulated Documents also include completed noise/vibration complaint forms and, consistent with AS 04.11.480, a copy of the Municipality's protest and the transcript from the Board's February 17, 2005 public hearing.¹²

After postponements due to Mr. Steven's attorney's scheduling conflicts, a two-day evidentiary hearing was held in order to provide Mr. Stevens with an opportunity to show that the Municipality's protest was arbitrary, capricious and unreasonable.

At the hearing, the Municipality presented evidence of its history of problems with Mr. Stevens' operation of his business, Fish Heads Bar and Grill, since he took over ownership. The Municipality presented witness testimony from people who live near Fish Heads Bar and Grill and have complained about noise problems since Mr. Stevens took over.¹³ It also presented witness testimony from code compliance officers on problems with adult entertainment at Fish Heads.¹⁴ The Municipality's planning director testified to 88 documented complaints.¹⁵

At the hearing, Mr. Stevens testified about his operation, including about efforts to control noise. He attempted to show that he had done everything that could reasonably be done to reduce the noise emanating from Fish Heads Bar and Grill. He presented witness testimony from a maintenance technician who described the sound system and the disc jockey's control of the

¹⁰ This decision discusses the issues on which summary adjudication was denied, and the bases for the denial, so that the Board's final action will constitute a final decision on those issues.

¹¹ Stipulated Documents at pp. 149-292.

¹² AS 04.11.480(a) requires that the Board consider the protest and testimony from the public hearing when it considers whether to allow continued operation under a license.

¹³ E.g., Testimony of Dewey and Virginia Taylor, Joe Weber and Tara Gibbs.

¹⁴ Testimony of James Emery and George Hudson.

¹⁵ Testimony of Michael O'Brien.

music sound levels.¹⁶ The technician also testified to a complaint received about noise when the sound system was not on, explaining that he but the noise was due to someone chipping ice on the roof.¹⁷ The technician's testimony also confirmed some of the facts underlying complaints about adult entertainment.¹⁸

Throughout the hearing, Mr. Steven maintained his objection to the filing of the protest based on the delegation of authority that led to the protest being filed without direct participation by the Municipality's assembly members.

Based on this and the other testimony from the evidentiary hearing, the public hearing and the documents in the record, it is more likely than not that:

1. Mr. Stevens received actual timely notice of the Municipality's protest.¹⁹
2. The Municipality's protest was timely filed with the Board.²⁰
3. Mr. Stevens was aware that his operations were generating noise and vibrations that were disturbing his neighbors.²¹
4. Mr. Stevens took some steps to reduce the noise generated by his business, but these steps were not sufficient to bring his operations into compliance with the noise ordinance.²²
5. Mr. Stevens' operations continue to produce noise and vibrations that disturb his neighbors when they are in their homes with the windows closed.²³
6. Mr. Stevens twice violated the Municipality's adult entertainment ordinance.²⁴
7. Mr. Stevens has repeatedly violated the Municipality's noise ordinance.²⁵
8. The Municipality worked with Mr. Stevens in good faith in an attempt to encourage him to comply with the noise and adult entertainment ordinances before the Municipality filed its

¹⁶ Testimony of Thom Conway.

¹⁷ Id. Mr. Conway admitted that he did not do anything to stop the ice chipping activity he believed to be the source of the noise.

¹⁸ Id. (testifying to an incident concerning performance (or simulation of sex acts behind a shadow screen and about his knowledge of that Fish Heads had been warned about performances by semi-nude dancers).

¹⁹ Stipulated Documents 1-3 & 319-341

²⁰ Stipulated Documents 1-3 & the explanation notations on that document in Municipality's Opposition to Motion to Reverse at page 2.

²¹ Recording of Hearing-Tapes 8-9; Stipulated Documents at pp. 5-113 & 213.

²² Recording of Hearing-Tapes 2-4; Stipulated Documents at pp. 208 – 291 & Ex. 9.

²³ Recording of Hearing-Tapes 2-4; Stipulated Documents at pp. 5-113

²⁴ Recording of Hearing-Tapes 1 & 9; Stipulated Documents at pp. 5-113

²⁵ Recording of Hearing-Tapes 2-4; Stipulated Documents at pp. 5-113, 289-291 & 293; Ex. 9 at pp. 106-107.

protest to continued operation under his license.²⁶

III. DISCUSSION

A local governing body may file a protest with the Board to protest continued operation under an alcoholic beverage dispensary license.²⁷ The Municipality filed such a protest concerning Fish Head Bar and Grill. The Board must deny continued operation unless it finds that the protest is arbitrary, capricious and unreasonable. The Board's inquiry is analogous to an appellate court's review of an appealed administrative action.²⁸ When reviewing a protest, the Board may not substitute its judgment for that of the local governing body.²⁹

The Board found the Municipality's protest not to be arbitrary, capricious and unreasonable at the February 17, 2005 public hearing, based on the record before it at that time. Under AS 04.11.480(a), the Board has no discretion to allow continued operation under the license if the Municipality's protest is not arbitrary, capricious and unreasonable. The only question for the evidentiary hearing, therefore, was whether evidence not brought out at the public hearing stage dictates a different conclusion—i.e. proves by a preponderance of the evidence that the protest was arbitrary, capricious and unreasonable. If Mr. Stevens failed to show through the evidentiary hearing that the Municipality's protest was arbitrary, capricious and unreasonable, the Board's initial decision at the public hearing should be upheld.

Accordingly, this decision turns on whether the evidence in the record, including that presented during the evidentiary hearing, shows that the Municipality's protest was arbitrary, capricious and unreasonable. First, however, because Mr. Stevens maintained throughout the hearing process that the protest was deficient due to the delegation of the protest filing function and timing of the notice of the protest, this decision will address those issues.

A. Protest Filed under Permissible Delegation of Authority

The Municipality has the authority to establish the procedure for filing a protest by ordinance. This is a local governing body protest. AS 04.21.080(16) defines "local governing body" for the purpose of filing a protest as follows:

"local governing body" means, as appropriate, a city council, a borough assembly, or a traditional village council, but does not include a corporation established under the

²⁶ Recording of Hearing-Tapes 1 & 9; Stipulated Documents 127-141.

²⁷ AS 04.11.480(a).

²⁸ *Stoltz v. City of Fairbanks*, 703 P.2d 1155, 1157 (Alaska 1985).

²⁹ *Id.*; 13 AAC 104.145(e).

Alaska Native Claims Settlement Act.

This definition allows certain local governments, including some that are not political subdivisions of the state, to file a protest. It does not dictate how or through whom the “local governing body” must act to file a protest. It does not prevent the Municipality, which is a subdivision of the state, and has statutory authority to prescribe the functions of municipal departments,³⁰ from passing an ordinance that requires its planning and land use department to file a protest for the Municipality under certain circumstances. The patent intent of the “local governing body” definition is to allow all local governing bodies, even those that are not subdivisions of the state, to file protests. Nothing in this definition suggests a restriction on how, within the bounds of law, a “local governing body” must act to file a protest. This definition does not restrict the powers of subdivisions of the state to act in conformance with their own laws.

The Municipality is authorized to organize itself in accordance with state statute through its charter and ordinances and to take official action by following the procedures set out in the charter or ordinances.³¹ A “borough assembly” is no more required to pass a special resolution to file a protest than it is required to pass a special resolution to charge someone with a violation of an ordinance, when it has delegated that duty to its police or legal department. A “borough assembly” may file many protests by simply passing a single ordinance setting out the criteria under which protests will be filed.³²

The Municipality passed such an ordinance and the protest filed in this case was filed in accordance with the procedure set out in that ordinance. Mr. Stevens’ reading of the ordinance is simply incorrect. The ordinance requires the filing of a protest if there has been a violation of the licensee’s land use permit. Once the Municipality determined that a violation of Mr. Stevens’ permit had occurred, the ordinance required the filing of a protest.³³

B. Protest Filing was Timely Filed

Mr. Stevens also argued that the Municipality’s protest was not timely filed because the signature on the protest was not dated and because the protest did not include a certificate that

³⁰ AS 29.20.400 (allowing governing bodies to establish municipal departments and distribute functions among them); AS 29.35.010(3) (including in the general powers of all municipalities the powers to establish and to prescribe the functions of municipal departments, offices and agencies).

³¹ AS 29.35.010(3) & (7).

³² AS 29.35.400; AS 29.35.080.

³³ MSB 8.40.010(A); MSB 8.40.030(A).

Mr. Stevens had been served with the protest.

It is undisputed that Mr. Stevens received actual timely notice of the protest. The procedure set out in the Board's regulations more than satisfies the notice requirements in AS 04.11.480(a). The statute sets out a process in which the Board takes up the merits of the protest at the initial hearing, rather than referring the matter for a formal hearing.³⁴ Mr. Stevens had actual notice of the initial, public hearing. He participated in that public hearing. He also participated throughout the prehearing and hearing process before the Office of Administrative Hearings. Though it might have been good practice for the Municipality to certify on the protest service of the protest document on Mr. Stevens, such a certification was not necessary as a practical matter to ensure that he has been afforded due process. The lack of a certificate of notice on the protest did not invalidate the protest.

C. Protest Not Was Arbitrary, Capricious and Unreasonable

The Board may reject the Municipality's protest against continued operation under Mr. Stevens' license only if the protest is arbitrary *and* capricious *and* unreasonable.³⁵ The Board's regulations set the following standards for protests:

A local governing body protest may be based upon facts that render the particular application objectionable to the local body, or may be based upon a general public policy. If based on a general public policy, the policy must have a reasonable basis in fact, may not be contrary to law, and may not be patently inapplicable to the particular application being protested. The board will not substitute its judgment for that of the local governing body on matters of public policy that have reasonable factual support.^[36]

Though some of these standards are made applicable explicitly only to applications (i.e., for new licenses, or for renewal or transfer of existing ones), the rationale behind them is equally applicable when the issue concerns continued operation of a biennial license. Simply put, the

³⁴ By regulation, the Board provides a protestor or licensee with an opportunity for a hearing under AS 44.62 (the Administrative Procedure Act) if dissatisfied with the initial decision on the protest. *See* 13 AAC 104.145 & 13 AAC 104.150. Though this additional hearing opportunity may not be strictly required when the protest concerns continued operation in the second year of a biennial license, rather than a new or renewal application, it nonetheless ensures that whichever party (protestor or licensee) is disappointed with the Board's decision based on the public hearing and written protest has a meaningful opportunity to present evidence and legal arguments in a less time-constrained proceeding, in an effort to show that the protest was or was not arbitrary, capricious and unreasonable.

³⁵ AS 04.11.480(a).

³⁶ 13 AAC 104.147(e).

Board must defer to a local governing body's protest if it has a reasonable factual basis and is consistent with (not contrary to) law, even if the governing body would not protest operation under the license in a different location or under different circumstances.

This was not a close case. The Municipality acted reasonably in filing its protest against Mr. Stevens' alcoholic beverage dispensary license. The protest was not arbitrary, capricious and unreasonable.

The Municipality protested the continued operation of Mr. Stevens' alcoholic beverage dispensary license based on two areas in which Mr. Stevens' operations have violated local law. Mr. Stevens' violations in either of these two areas would be sufficient in themselves to justify denying continued operation of his license.³⁷

First, the Municipality found that Mr. Stevens' operations had resulted in numerous violations the Municipality's noise and vibration ordinance.³⁸ The Municipality found that these violations were ongoing despite two prosecutions for violations. The Municipality also found that these violations were interfering with adjoining property owners' and residents' use and enjoyment of their property.³⁹ These findings were well supported by the written record and the testimony at the hearing.⁴⁰

Second, the Municipality found that Mr. Stevens had violated his local conditional use permit for liquor sales.⁴¹ The Municipality found that Mr. Stevens had twice violated his conditional use permit by having adult entertainment where liquor was sold, in violation of the Municipality's adult business ordinance.⁴² This finding was also well supported by the written record and the testimony at the hearing.⁴³

A local governing body protest based on either of these areas of local law violations would be reasonable. Supported as they were by the evidence presented by the Municipality, a protest based on these violations would necessarily result in the Board's denial of the continued

³⁷ The Municipality's protest is found in the Stipulated Documents at pp. 1-3

³⁸ MSB 8.52.

³⁹ MSB 17.70.100(A) requires property owners, like Mr. Stevens, who are operating under a conditional use permit to prevent that use from negatively impacting the use of adjoining properties through noise and other factors.

⁴⁰ Recording of Hearing-Tapes 2-4; Stipulated Documents 5-113, 289-291, 293, & Ex. 9 at pp. 106-107.

⁴¹ MSB 17.70.2009(A) & (B) governed Mr. Stevens' conditional use permit.

⁴² The regulation of Adult Businesses Ordinances are found in MSB 17.90.

⁴³ Recording of Hearing-Tapes 1 & 9; Stipulated Documents 5-113

operation under Mr. Stevens' alcoholic beverage dispensary license.⁴⁴ A protest is reasonable when it is based on "logical and traditional grounds" and those grounds are supported by the evidence.⁴⁵ Violations of law in connection with operations under the license are logical and traditional grounds for denying continued operation under a license.⁴⁶

The Municipality proved the violations. The Municipality also showed that the protest was needed to provide overdue relief to the Municipality and those owning land or living near Mr. Stevens' operations at Fish Heads Bar and Grill. The Municipality showed that these historical violations of local law are aggravated by Mr. Stevens' ongoing defiance of local law, which it makes it likely that these violations will continue as long as operation under Mr. Stevens' alcoholic beverage dispensary license is permitted.⁴⁷

The Municipality responded to numerous complaints about noise from adjacent residential property owners. When the Municipality discovered that its existing noise ordinance could not effectively deal with the problems created by Fish Heads Bar and Grill Bar, despite the fact that the noise was loud enough inside neighbors homes to cause their walls and belongings to vibrate throughout the night and into the early hours of the morning, the Municipality amended its noise ordinance. After the new noise and vibration ordinance was adopted by the Municipality, the public outcry from neighbors of Fish Heads Bar and Grill continued because their windows, walls and furnishings continued to vibrate to the bass notes of Fish Heads Bar and Grill dance music into the early morning weekend hours, despite their new law and their steady complaints.

At the time the Municipality filed the protest, it had received at least 88 complaints concerning noise from Fish Heads Bar and Grill.⁴⁸ Mr. Stevens had already been convicted of one violation of the Municipality's new noise ordinance. His conviction on a second violation was still pending, and he was subsequently convicted on that charge.

At the hearing, the Municipality showed that even after Mr. Stevens had by then been

⁴⁴ AS 04.11.480(a).

⁴⁵ *Stoltz v. City of Fairbanks*, 703 P.2d 1155, 1156-57 (Alaska 1985).

⁴⁶ *Alaska Alcoholic Beverage Control Bd. v. Malcolm, Inc.*, 391 P.2d 441 (Alaska 1964).

⁴⁷ In its protest at page 2 and during the hearing (Tape 10), the Municipality criticized Mr. Stevens' inclination to litigate the validity of ordinances rather than comply with them, and his lack of consideration for neighbors and their families. The Municipality argued that these factors indicate that violations will continue to be ongoing.

⁴⁸ It was clear from the testimony of the Municipality's witnesses that many more complaints would have been filed but for the neighbors' sense of futility that resulted from the ineffectiveness of filing earlier complaints.

twice convicted of violating this new noise ordinance, his establishment continued to generate enough noise and vibrations to disturb his neighbors sleep.

Both of Mr. Stevens' violations of the adult entertainment law occurred after the Municipality had sent Mr. Stevens a letter warning him of his need to comply with the local adult entertainment law. The letter also warned Mr. Stevens that a show he was considering hosting would violate the law, but he hosted it nonetheless.⁴⁹

Given Mr. Stevens' established history, it is more likely than not that the neighbors of Fish Heads Bar and Grill will not be able to sleep at night without hearing and feeling dance music, and the Municipality will continue to have to deal with frequent ordinance violations by Fish Heads Bar and Grill, unless operations under Mr. Stevens' alcoholic beverage dispensary license are discontinued.

Mr. Stevens repeatedly challenged the Municipality to provide him with a plan that would allow him to continue his current operations without reducing their profitability. It was, however, his responsibility to conduct his operation in conformance with local ordinances. If, as Mr. Stevens asserted, he will be unable to continue his operations at a profit without violating local law and disturbing his neighbors, it is Mr. Stevens' continued operations, and not his neighbors or the local laws that must go. Mr. Stevens did not show that he could not have stayed in business if he had complied with the laws that he violated. Rather, Mr. Stevens showed that he chose not to comply because he did not believe he should have to.

In sum, the Municipality's determination that continued operation would mean continued violation of its ordinances and continued disturbance of adjacent property owners had a reasonable basis in fact. The Municipality's protest, therefore, was not arbitrary, capricious and unreasonable.

IV. Conclusion

The Municipality's protest was properly filed. The Municipality was not required to bring the protest before its assembly or its planning commission prior to filing it with the Board.⁵⁰ Mr. Stevens had actual notice of the protest and the hearings. The lack of a certificate of notice on the

⁴⁹ The show was a well-known touring partially-nudity male dance act, which Mr. Stevens once cancelled in response to the Municipality's warning, then later, decided to host, despite the warning. The second violation involved his employees performing or simulating a sexual act behind a lighted screen.

⁵⁰ Alaska Statute 29.35.010(3) & (7).

protest does not invalidate the protest.⁵¹ Because Mr. Stevens' operations under his alcoholic beverage dispensary license repeatedly violated local ordinances, the Municipality's protest was not arbitrary, capricious and unreasonable.⁵²

The Municipality's protest, therefore, should be upheld and the Board should deny Mr. Stevens' continued operations under the license. The continued operation of the beverage dispensary license held by Robert Stevens, doing business as Fish Heads Bar and Grill Bar, should be denied based on a protest filed by the Municipality under AS 04.11.080(a).

DATED this 25th day of April, 2006.

By:
Mark T. Handley
Administrative Law Judge

⁵¹ AS 04.11.480(a).

⁵² *Stoltz v. City of Fairbanks*, 703 P.2d 1155, (Alaska 1985).

BOARD ACTION ON DECISION AND ORDER

The board having reviewed the proposed Decision and Order by the administrative law judge in: The Matter of Robert Stevens, d/b/a Fish Heads Bar and Grill, OAH Case No. 05-0534-ABC, hereby

Option 1: adopts the proposed decision in its entirety under AS 44.62.500(b).

Date: 6-15-06 By: C
Chairperson

Option 2: rejects the proposed decision under AS 44.62.500(c), and remands this case to the same/different administrative law judge to receive additional evidence on the following issues:

Date: _____ By: _____
Chairperson

Option 3: rejects the proposed decision under AS 44.62.500(c) and orders that the entire record be prepared for board review and that oral or written argument be scheduled in front of the board prior to final consideration of the decision in this case.

Date: _____ By: _____
Chairperson