

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE ALCOHOLIC BEVERAGE CONTROL BOARD**

In the Matter of:)	
)	
BRUCE & CONNIE WERBA)	
d/b/a ALASKA PIKE SAFARIS)	OAH No. 13-1134-ABC
AND WILDERNESS ADVENTURES)	Board Case No. 13-12
_____)	

DECISION

I. Introduction

Bruce and Connie Werba are the owners of Alaska Pike Safaris and Wilderness Adventures (Alaska Pike). In conjunction with that business, they applied for an outdoor recreation lodge license for their Reindeer Lake Lodge. Anvik, Holy Cross, Grayling, Russian Mission, Kalskag, and Shageluk objected to the application under AS 04.11.470. The Alcoholic Beverage Control Board (Board) held public hearings on the application on May 30 and July 23, 2013. On the basis of public opposition, the Board voted to deny the application on July 23, 2013. Alaska Pike requested a formal hearing.

The Office of Administrative Hearings conducted a formal hearing in Anchorage on December 12, 2013. Bruce Werba, Connie Werba, and Joe Yingling testified in support of the application. Natasha Singh with Tanana Chiefs testified in opposition to the application on behalf of the federally recognized tribes of Holy Cross, Grayling, Anvik, and Shageluk. Shirley Cote, the Executive Director of the Board, testified on its behalf. All exhibits were admitted without objection.

The evidence demonstrates that the public opposition to Alaska Pike's application was based upon a misunderstanding of the specific type of license involved, and the restrictions upon selling alcohol which were inherent to that license. The Board should therefore grant the application.

II. Facts

Bruce and Connie Werba own and operate Alaska Pike. Alaska Pike offers guided hunting and fishing trips and has been in operation since 1993. The business operates seasonally, from mid-July through the first week of October.

Alaska Pike has a lodge located on private property at Reindeer Lake. The nearest community to Reindeer Lake is Holy Cross, 11 air miles and 25 river miles away. There is a winter trail to Reindeer Lake. However, during Alaska Pike's season, the only way to reach it is by boat or plane.¹

Alaska Pike's premises are not open to the public. The lodge is only open to its hunting and fishing guests. It does not have an open bar and does not serve meals to the public.² Alaska Pike's guests fly into Holy Cross, where they are picked up by Alaska Pike staff and taken up the river to Reindeer Lake. The guests may overnight at Reindeer Lake at the beginning or end of their visits; however, they are generally taken to remote campsites for the majority of their stay.³

Alaska Pike does not have a liquor license. In 2012, a corporate group from outside the State of Alaska asked Alaska Pike, in advance of its stay at Alaska Pike, to provide alcohol for its members. Alaska Pike agreed to purchase the alcohol for the corporate group. Ms. Werba ordered beer and liquor for the group under her name when she was in Anchorage. The alcohol was to be flown into Holy Cross.⁴ Holy Cross is a damp community, *i.e.*, sale of alcohol is prohibited but individuals in the community may import and possess statutorily limited amounts of alcohol. Ms. Werba did not realize at first that the order she placed was in excess of the allowed amount. When she arrived in Aniak, on her way back to Holy Cross, she realized that her order was greater than the allowed amount. She attempted to modify her order but was unable to. Ms. Werba was subsequently contacted by Board Investigator Eric Olsen regarding the order.⁵

The 2012 shipment led to an ABC Board investigation, which found that Alaska Pike had violated Alaska Statutes 04.11.010(a) and 04.16.090. The Board informed Alaska Pike that if it applied for an AS 04.11.225 Outdoor Recreation Lodge License, no charges would be filed for these violations.⁶ The 2012 oversized order is the only violation of state alcoholic beverage laws that is expressly admitted in the record. However, the record contains an unsworn statement from the Board's Executive Director that its investigator

¹ Bruce Werba testimony.

² Bruce and Connie Werba testimony.

³ Joe Yingling testimony.

⁴ Bruce and Connie Werba testimony.

⁵ Connie Werba testimony.

⁶ Ex. E.

had discovered that [Alaska Pike] [was] serving alcohol to the lodge and he advised [Alaska Pike] that the way to fix this was to get a lodge license so that [Alaska Pike] would be legal. So [Alaska Pike] had been serving alcohol before without a license.⁷

This assertion was not controverted and the record contains several tacit admissions that Alaska Pike had served its guests alcohol without having a liquor license.⁸

Alaska Pike applied for two liquor licenses. One application was located within Holy Cross itself. That other application was for an Outdoor Recreation Lodge License for Reindeer Lake. The ABC Board received written objections from Holy Cross (City of Holy Cross, Holy Cross Tribe, and Rebecca Demientieff),⁹ the Village of Grayling,¹⁰ the City of Russian Mission,¹¹ the Village of Kalskag,¹² Shageluk (City of Shageluk and Shageluk IRA Tribal Council).¹³

As noted previously, Holy Cross, 25 river miles away, is the closest community to Reindeer Lake. Grayling is “approximately 60 miles above Holy Cross.”¹⁴ Russian Mission is “approximately 70 miles below Holy Cross.”¹⁵ Shageluk is “approximately 60 miles above Holy Cross.”¹⁶

Both Alaska Pike applications were addressed at a May 30, 2013 ABC Board meeting. Mr. and Ms. Werba spoke on behalf of the applications. Eugene Paul, the Holy Cross tribal chief, spoke on behalf of Holy Cross, Anvik, Grayling, and Shageluk, in opposition to the applications. Mr. Paul’s concern was that “a liquor license is completely open to anybody that has money” and that the community did not have the law enforcement and other resources to

⁷ May 30, 2013 Board Meeting Transcript, Ex. B, p. 13. *Also see* Ex. A, p. 21.

⁸ *See, e.g.*, Bruce Werba statement: “[a]t no time have we ever exchanged money, you know, for any alcohol. It’s just a guest thing that we’re happy to give a guy, a client, would you like a beer and he says yes, hand him a beer.” May 30, 2013 Board Meeting Transcript, Ex. B, p. 11; Bruce Werba statement: “[t]he only reason why we’re trying to do this is so that the clients could have a drink. That’s it because sometimes we have corporate meetings there and they have drinks. They order vodka or whatever they would like to drink. . . . Other than that, we don’t need no license.” July 23, 2013 Board Meeting Transcript, Ex. C, p. 18.

⁹ Ex. A, pp. 13, 17 – 18.

¹⁰ Ex. A, p. 11.

¹¹ Ex. A, p. 12.

¹² Ex. A, p. 14.

¹³ Ex. A, pp. 15 – 16.

¹⁴ Ex. A, p. 11.

¹⁵ Ex. A, p. 12.

¹⁶ Ex. A, p. 15.

address alcohol abuse and its consequences. Mr. Paul stated that at a tribal membership meeting, attended by almost 50 people, opposition to the applications was unanimous.¹⁷

The written objection from the City of Holy Cross stated “there was an alcohol related death of an [Alaska Pike] employee in February 2011 on the snow machine trail between the [Alaska Pike] Lodge and Holy Cross.”¹⁸ Ms. Werba addressed that incident at the May 30 Board meeting:

MS. WERBA: Yes. Yes, and I want to make a correction. That snow machine accident, the person that died in that accident was not an employee and it had no relation to us.

CHAIR: So it was not a guest, not an employee?

MS. WERBA: No.

CHAIR: How did you get tied to it?

MS. WERBA: How did we get tied to that?

CHAIR: Yes, why is Holy Cross claiming that you were - - your company was somehow involved?

MS. WERBA: Because he was on his way back from the lake and he was not working for us. He went in for a ride and on his way back, he apparently was drinking.

CHAIR: Okay. So the common thread here is he was using Reindeer Lake. It had nothing to do with you?

MS. WERBA: Nothing.¹⁹

The ABC Board did not resolve the Alaska Pike applications during the May 30 meeting. It continued the matter until its next meeting, and instructed Alaska Pike to see if it could work with the local communities in the interim.²⁰ Ms. Werba contacted local community members about the license, which included attending a community meeting in Holy Cross. Her perception was that they had their minds made up about the application and thought it was for a liquor store.²¹

¹⁷ May 30, 2013 Board Meeting Transcript. Ex. B, p. 5.

¹⁸ Ex. A, p. 13. This same assertion was also made at the July 23, 2013 Board Meeting: “a couple years ago, a person living over there leaving the lodge there passed away on the trail. . . He was fairly intoxicated.” Ex. C, p. 9.

¹⁹ May 30, 2013 Board Meeting Transcript, Ex. B, p. 4.

²⁰ May 30, 2013 Board Meeting Transcript, Ex. B, pp. 12 – 16. *See, e.g.*, “CHAIR: . . . The problem is you have a public relations problem. You are surrounded by people that don’t want and are objecting to you getting this license and the fact you guys aren’t talking and you’re not trying to convince the elders and trying to convince those of your neighbors as to exactly what you’re going to do is what your problem is. I’m not inclined to grant this with so many people surrounding you objecting to this.” *Id.* at 12. “CHAIR: . . . We’re going to move this to the next meeting, give you guys a chance to work on it.” *Id.* at 15.

²¹ Connie Werba testimony; July 23, 2013 Board Meeting Transcript, Ex. C, pp. 3 – 4.

Alaska Pike withdrew its application for the location contained within Holy Cross itself because Holy Cross is a local option (damp) community where alcohol sales are banned.²² Its application for the Reindeer Lake Lodge location was addressed at the ABC Board's July 23, 2013 meeting. Mr. and Ms. Werba spoke on behalf of the application. They explained that the license Alaska Pike was applying for was only for its guests and off-duty staff, that it did not operate a bar, did not sell meals to the public, and was not open to the public.²³

Several people spoke in opposition to the application at the July 23 Board meeting. They all expressed general concerns about the lack of services available in the area if there was an alcohol-related incident, and spoke of the toll that alcohol abuse has taken on their communities.²⁴ In addition, several of the individuals who testified referred to the Last Chance, a liquor store located some distance away on the Yukon River.²⁵ There were concerns expressed that Alaska Pike would operate similarly to a liquor store, or that it could serve alcohol to members of the general public:

- “So [guests] can go in and buy a six-pack of beer while they’re staying there and any leftovers they can take in their bags and leave with it?”²⁶
- “When you’re in the - - when you open a liquor store, I would think - - you know, not a liquor store, in fact, even if it’s restricted, somehow or another, they’ll find a way to go around it.”²⁷
- “And the other thing is it’s only supposed to be people that are going to the lodge or that are employed at the lodge doesn’t really matter much either because if you go there to get an egg sandwich or sit there, you’re at the lodge, you can buy alcoholic stuff or even if

²² Ex. A, p. 5.

²³ July 23, 2013 Board Meeting Transcript, Ex. C, pp. 16 – 20.

²⁴ Natasha Singh July 23, 2013 Board Meeting Transcript, Ex. C, pp. 5 – 6. Ms. Singh’s December 12, 2013 hearing testimony on behalf of Holy Cross, Grayling, Anvik, and Shageluk was similar. Eugene Paul (Holy Cross Tribal Chief), Alfred Demientieff, Jr. (Holy Cross Tribal Council member), Leroy Peters (Holy Cross Tribal Council member), Agnes Housler (Russian Mission city administrator), Abe Bigler (Grayling IRA Council First Chief), David Mullan (Grayling IRA Council Second Chief), Rebecca Demientieff (Holy Cross Mayor), and Victor Ladeira (Holy Cross Vice-mayor) all expressed similar concerns. July 23, 2013 Board Meeting Transcript, Ex. C, pp. 8 – 16.

²⁵ Agnes Housler July 23, 2013 Board Meeting Transcript, Ex. C, p. 12; Abe Bigler, July 23, 2013 Board Meeting Transcript, Ex. C, p. 14.

²⁶ Agnes Housler July 23, 2013 Board Meeting Transcript, Ex. C, p. 13.

²⁷ Abe Bigler July 23, 2013 Board Meeting Transcript, Ex. C, p. 14.

you spend a night, there's really no stipulations on that so that doesn't mean anything either."²⁸

Toward the close of the July 23, 2013 meeting, the Chair stated:

Any license that we grant we grant in the public interest. The fact that you intend to follow the letter is only part of it. In order for this to operate in the public interest, you also have to convince your neighbors that that will be the case and you haven't done that and I, for one, am not going to approve this license unless and until you do that.^[29]

The Board voted to deny the license, the Chair stating “[i]f they want this license, they’ve got to get with the communities and convince them of what they have described as the use but right now, we do not pass this license.”³⁰ The Chair further explained: “[t]he Board was in a very difficult position in that we understood the type of license and the use. The problem was that the surrounding community did not and we would not put a license into an area that objected so strenuously.”³¹ The Board subsequently issued a denial letter on July 26, 2013.³²

III. Discussion

A. *Applicable Law*

Alaska Pike is applying for an outdoor recreation lodge license under AS 04.11.225:

(a) An outdoor recreation lodge license authorizes the holder to sell alcoholic beverages to a registered overnight guest or off-duty staff of the lodge for consumption on the licensed premises or in conjunction with purchased outdoor recreation activities provided by the licensee. An outdoor recreation lodge license may not be transferred.

* * *

(c) In this section, “outdoor recreation lodge” means a licensed business that provides overnight accommodations and meals, is primarily involved in offering opportunities for persons to engage in outdoor recreation activities, and has a minimum of two guest rooms.

If a license of this type is protested by a “local governing body,” the Board must deny the application unless the board determines that the protest is “arbitrary, capricious, and

²⁸ Victor Ladeira July 23, 2013 Board Meeting Transcript, Ex. C, p. 15.

²⁹ July 23, 2013 Board Meeting Transcript, Ex. C, p. 19.

³⁰ July 23, 2013 Board Meeting Transcript, Ex. C, p. 23.

³¹ July 23, 2013 Board Meeting Transcript, Ex. C, p. 24.

³² The denial letter states, in pertinent part, that the “Board voted to deny your application for an outdoor recreation lodge license.” Ex. A, p. 3. It does not contain any reason for the denial. *Id.* While this raises a potential argument that the Board did not comply with AS 04.11.510(b) (1) (“the notice of denial shall be furnished the applicant immediately in writing stating the reason for the denial in clear and concise language”); Alaska Pike has not raised the argument in this administrative proceeding. Accordingly, it is waived.

unreasonable.”³³ In this case, six communities—Holy Cross, Grayling, Kalskag, Shageluk, Russian Mission, and Anvik—have objected to the application. However, Alaska Pike’s lodge is not located within any of these communities, nor within the five-mile radius over which they have limited alcohol jurisdiction.³⁴ These protesting communities therefore do not have protest rights as “local governing bodies” under AS 04.11.480, and this proceeding is not one where a local government protest must be upheld unless “arbitrary, capricious, and unreasonable.” Instead, the community protests are ordinary “objections” under AS 04.11.470, which the Board must “consider” but is not required to defer to.³⁵

There are a variety of instances where the Board is required to deny an application. The only one relevant to this application is “if (1) the board finds, after review of all relevant information, that issuance of the license would not be in the best interests of the public.”³⁶ The Board’s regulation, 3 AAC 304.180, sets out several non-exclusive factors that the Board may consider “in whether it is in the public interest to deny . . . a license.” Those factors are whether the applicant, or its affiliates, have (1) committed a crime involving moral turpitude, (2) violated AS 04 or the Board’s regulations, (3) while a licensee in another state, violated that state’s alcohol beverage control laws, (4) committed a felony within the immediate preceding 10 years, or (5) are “untrustworthy, unfit to conduct a licensed business, or a potential source of harm to the public.”³⁷

As the applicant, Alaska Pike has the burden of proof by a preponderance of the evidence.³⁸ In essence, Alaska Pike must show that a license of the type for which it has applied would not be contrary to the public interest.

B. Merits of the Alaska Pike Application

The protests made against the Alaska Pike application were based upon community concerns regarding alcohol abuse, its consequences, and the lack of community resources to deal with those issues. The protests also reflected concerns that Alaska Pike would be operating a

³³ AS 04.11.480(a).

³⁴ See AS 04.11.497.

³⁵ *In re Pub Line, LLC*, OAH No. 09-0217-ABC (ABC Board, adopted July 14, 2009) at 5. (published at <http://aws.state.ak.us/officeofadminhearings/Documents/ABC/ABC090217.pdf>).

³⁶ AS 04.11.320(a)(1).

³⁷ 3 AAC 304.180(a)(1) – (2). There is an additional factor, which seems wholly inapplicable to an outdoor recreational lodge license, regarding whether sexual contact between persons, including consensual contact, has occurred on the premises. 3 AAC 304.180(a)(3).

³⁸ *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985); *Pub Line* at 5.

bar, serving to the public, and possibly selling alcohol for consumption off the premises. These concerns reflect a widespread misunderstanding of the type of license for which Alaska Pike applied. That license is an outdoor recreation lodge license, a type of license which limits sales to Alaska Pike's registered overnight guests and its off-duty staff. Alaska Pike would not, by definition, be allowed to sell alcohol to the public either on its premises or during its outdoor activities. Bruce and Connie Werba's remarks made during the Board's public hearings, as well as their hearing testimony, demonstrate that they are well aware of the limitations inherent in the license, that they know they cannot serve to the general public, but only their overnight guests and off-duty staff, and that they were requesting the license only to better serve their overnight guests.

It is unquestionable that the Board has "broad discretion in denial of liquor licenses for any reason found incompatible with the public interest."³⁹ Three Alaska cases which illustrate the Board's discretion regarding liquor licenses are as follows:

- The *Decker*⁴⁰ case involved the application for a liquor store license (beverage dispensary license) close to two local schools (high school and career center). The legal drinking age at the time was 19. The schools were experiencing teenage drinking problems. There were already a number of liquor stores in the area. There was substantial public support for the license. The Board found granting the license would contribute to the teenage drinking problem, frustrate the schools' efforts to deal with that problem, that the license was not necessary to serve the area's needs, and that the existing liquor stores adequately served the area's needs. The Board denied the license. Its denial decision was upheld by the Alaska Supreme Court.
- The *Pub Line*⁴¹ case involved the application for a common carrier license, located on a bus. The bus was already operating a service that transported its patrons between various locations, which included several bars. It wished to add bar service, contained on the bus, for its passengers. It would also deliver its patrons to their homes, within a limited service area. There was both support for and against the license, including a municipal objection under AS 04.11.470, against the license. The Board denied the

³⁹ *Decker* at 487 (quoting from Supp. No. 23 at 7 in 1 Senate Journal (1980), following p. 658).

⁴⁰ *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483 (Alaska 1985).

⁴¹ *In re Pub Line, LLC*, OAH No. 09-0217-ABC (ABC Board, adopted July 14, 2009), (published at <http://aws.state.ak.us/officeofadminhearings/Documents/ABC/ABC090217.pdf>).

application due to (1) safety concerns about the operation of a bar on a bus, 2) the municipal opposition based on its policies regarding “downtown development and alcohol control,” and (3) the difficulty with fashioning conditions upon a new type of alcohol dispensing establishment.⁴²

- The *Fish Heads*⁴³ case involved a governmental body protest, under AS 04.11.480(a), to an existing liquor license. Fish Heads had excessive noise complaints and was convicted of violating local noise ordinances. The governmental body protest was based, in part, upon the noise ordinance violations. The Board revoked the license based upon the governmental body protest. The Alaska Supreme Court upheld the revocation on appeal. The *Fish Heads* case is distinguishable on two grounds. First, because it involves the revocation of an existing liquor license due to proven violations, rather than the denial of an application. Second, because under the statutory scheme, an AS 04.11.480 governmental body protest must be upheld unless it is “arbitrary, capricious, and unreasonable,” whereas no similar deference is provided to an AS 04.11.470 objection. However, it demonstrates the discretion afforded the ABC Board in licensing decisions.

The Board’s discretion in denying licenses is not unfettered, however. In a Pennsylvania case, that state’s Supreme Court held that it was improper for the Liquor Control Board to deny a retail-dispenser eating-place license application on the grounds that the statutory limit for such establishments had been reached, when the record showed that the applicant fell within the “resort area” exception to the statutory limit.⁴⁴ That case illustrates the point that the Board may not exercise its discretion to deny a license application based upon a misapprehension regarding the type of license.

In this case, the public protests are based upon a misunderstanding of the type of license involved. They do not provide a basis for denying the license.

The Board may properly consider matters that bear on the actual impact of the license on the public.⁴⁵ There is no evidence in the record that either of the Werbas, or any of their staff, have committed either felonies or crimes involving moral turpitude, or violated another state’s

⁴² *Pub Line* at 6.

⁴³ *Stevens, d/b/a Fish Heads Bar & Grill vs. State, Alcoholic Beverage Control Board*, 257 P.3d 1154 (Alaska 2011).

⁴⁴ *Myers v. Pa. Liquor Control Bd.*, 451 A.2d 1000 (Pennsylvania 1982).

⁴⁵ 3 AAC 304.180.

liquor laws, while being licensed in that state. However, they have expressly admitted ordering an over-limit alcohol shipment for service to their guests, and tacitly admitted to serving guests without having any type of liquor license. These instances provide the Board discretion to deny the application because the applicants have a previous history of violating Alaska's liquor laws (AS 04),⁴⁶ which could also support a finding that the applicants would not comply with the restrictions on its license, *i.e.*, be "untrustworthy, unfit to conduct a licensed business, or [are] a potential source of harm to the public."⁴⁷

However, in evaluating these factors, it must be noted that the Board's staff did not consider the alcohol violations serious enough to prosecute. Instead, it chose to offer Alaska Pike the option to come into compliance by applying for an outdoor recreation lodge license. As the Board Chair noted, an unlicensed lodge serving alcohol to its guests was "not an uncommon story . . . in this state. That's why --- this is why we put in a lodge license."⁴⁸ The Board staff did not oppose the license at either of the Board's meetings. Ms. Cote, the Board's Executive Director, who testified at the hearing, also did not testify in opposition to the license.

In summary, the Board's preliminary denial was based solely upon the public opposition to the application, which was founded upon a misunderstanding of the type of license at issue. While the Board has broad discretion to deny an application, there is no evidence in the record, other than the relatively minor violations which resulted in the filing of this application, showing that Alaska Pike would not operate the license properly. The Board should therefore exercise its discretion in favor of granting the license.

IV. Conclusion

The Board preliminarily denied this application due to public opposition. However, Alaska Pike demonstrated that it was applying for a limited type of license, which would not involve selling alcohol to the general public, and that it understood the limitations inherent in that type of license. In contrast, the public opposition was based upon a clear misapprehension regarding the type of license involved. Alaska Pike has therefore met its burden of proof. The Board should approve the application.

⁴⁶ See 3AAC 304.180(a)(1)(B).

⁴⁷ See 3 AAC 304.180(a)(2).

⁴⁸ Ex. B, p. 13.

DATED this 27th day of December, 2013.

By: Signed
Lawrence A. Pederson
Administrative Law Judge

Adoption

The Alaska Alcohol Beverage Control Board adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 11th day of February, 2014.

By: Signed
Signature

Robert Klein
Name

Board Chair
Title

[This document has been modified to conform to the technical standards for publication.]