

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

In the Matter of:)
)
BASILE GROUP LLC)
d/b/a Northern Lights Spa) OAH No. 14-0703-ABC
_____) Board Case No. 14-12

DECISION

I. Introduction

Basile Group, LLC (Basile) is an Alaska limited liability company that operates a spa which is located inside the passenger-only portion of the Ted Stevens International Airport (Airport). Basile applied for a beverage dispensary – tourism license (Tourism License) for that business. The Alcoholic Beverage Control Board (Board) held a public hearing on the application on April 29, 2014. The Board voted to deny the application on April 29, 2014. Basile requested a formal hearing.

The Office of Administrative Hearings conducted a formal hearing in Anchorage on September 25, 2014. Shannon Basile and Jeffrey Graham testified in support of the application. Robert Beasley, the Board’s Enforcement Supervisor, testified on its behalf. All exhibits were admitted without objection.

The evidence demonstrates that Basile’s application, for a Tourism License for a stand-alone spa, would have resulted in the granting of a license to a business type that had not previously been granted a license. Given the novel nature of licensed premises and the Board’s concern that there were already sufficient licenses within the Airport, Basile has not carried its burden of demonstrating that the license sought is not contrary to the best interests of the public. The Board should therefore exercise its discretion and deny the license.

II. Facts

Basile owns and operates a full service spa in the passenger-only section of the Airport. It offers hair styling, manicures, pedicures, tanning, and both table and chair massages. Basile applied for a Tourism License because it wanted to offer a glass of wine or a beer to its customers. It wanted to partner with other Airport businesses, such as Silver Gulch and Norton Sound, to offer local wines and beers to its customers.

The Airport agreed to allow Basile to serve alcohol as part of its lease agreement. Basile worked with the Municipality of Anchorage as part of the application process, and entered into an agreement with the Municipality that it would only serve beer and wine, but no hard alcohol. Basile also worked with the local community council.¹ Basile is willing to accept a Board restriction on its license, limiting it to the serving of beer and wine.²

There were no protests filed against the application. The Board's staff determined that there were no statutory or procedural impediments to granting Basile a temporary license and granted Basile a temporary license, subject to final approval from the Board.³

The issue of whether to grant Basile its permanent license went in front of the Board on April 29, 2014. During that meeting, the point was made that this was a Tourism License:

Board Member: Is this a tourism license and are those year-round?
Chair: Yes.⁴

* * *

Board Member; Mr. Chairman, I guess I understand the tourism aspect here but it looks to be a lot like an art gallery that was to serve alcohol, I'm sorry, and I understand the distinction here but . . .
Chair: Well, I think you have to back up a bit. The fact that the spa is there is - - don't confuse it. What they're looking for is to put another beverage dispensary license in the airport.
Board Member: And there are no limits for tourism licenses in the airport.⁵

* * *

Board Member: It just seems to me that it clouds the whole rec license tourism thing and I know that it's a different thing but if we're denying an art gallery's - - a license or a pool hall a license, I don't - - I - - it's together but it's not - - is it different because it's tourism at the airport. . . .
Chair: Yes.
Board Member: . . . we can look at it differently . . .
Chair: Yes
Board Member: . . . than a street corner?
Chair: Yes.
Board Member: Okay⁶

¹ Ms. Basile's and Mr. Graham's testimony; Ex. A, pp. 4 - 6.

² See Ex. 2, p 19; Mr. Graham's testimony.

³ Ex. A, pp. 1 - 2.

⁴ Ex. 2, p. 7.

⁵ Ex. 2, pp. 7 - 8.

Following that discussion, a different Board member, stated:

I don't think we need (indiscernible) beverage dispensary licenses there already, plenty of them, and it just doesn't really seem to make sense to make sense to put one in a spa, you know, especially with the issue we've had with the athletic club in Anchorage.⁷

The Chair then stated that "there's no indication that you have to get a massage while you're ordering your martini. It's a separate – it's a bar. That's the way it's been presented to us." The Chair further stated "the question is can Anchorage International Airport accommodate another bar, period."⁸ Later in the meeting, a Board member inquired:

[I]f it's – you understand what I'm saying, the rec licenses on a street corner versus a tourism license in the airport, why is – should we consider this spa versus an art store in there?⁹

The Chair's response was that "[b]ecause the statute treats them totally different" and that "[t]his is beverage dispensary, tourism, airport."¹⁰ The Board then voted 4 – 1 to deny the license.¹¹ After the vote, the Board explained further that it was concerned about adding the ability to serve alcohol in a spa setting.¹²

There is one Tourism License in the state where a spa can serve alcohol. This is the Ice Spa which is located in and owned and operated by the Anchorage Sheraton Hotel.¹³ At hearing, Robert Beasley, the Board's Enforcement Supervisor, explained that the Ice Spa's licensure was included within the Tourism License provided to the Hotel as a whole, and that in theory, the entirety of the Hotel could be licensed under the terms of its Tourism License. No free standing spa has been granted a liquor license of any nature. Mr. Beasley further explained that the Board's discussion regarding recreational licenses was occasioned because it had experimented in the past with expanding the scope of recreational licenses, experienced difficulties with that expansion, and the Board members were concerned that an expansion of the Tourism Licenses would result in similar difficulties.¹⁴

⁶ Ex. 2, p. 8.

⁷ Ex. 2, p. 9.

⁸ Ex. 2, p. 9.

⁹ Ex. 2, p. 14.

¹⁰ Ex. 2, p. 14.

¹¹ Ex. 2, pp. 14 – 15.

¹² Ex. 2, pp. 16, 21.

¹³ Ex. 7.

¹⁴ Mr. Beasley's testimony.

The Board's Executive Director issued a formal denial notice to Basile on April 30, 2014. Basile appealed the denial on May 27, 2014.

III. Discussion

A. *Applicable Law*

Basile is applying for a beverage dispensary license for tourism purposes, a type of liquor license which is not restricted based upon population. The applicable statute is AS 04.11.400:

(d) The board may approve the issuance or transfer of ownership of a beverage dispensary or restaurant or eating place license without regard to (a) of this section if it appears that the issuance or transfer will encourage the tourist trade by encouraging the construction or improvement of

(1) a hotel, motel, resort, or similar business relating to the tourist trade with a dining facility or having kitchen facilities . . .

(2) an airport terminal.

If a license application is protested by a "local governing body," the Board must deny the application unless the board determines that the protest is "arbitrary, capricious, and unreasonable."¹⁵ Other objections must be considered by the Board, but no deference is required.¹⁶

There are a variety of instances where the Board is required to deny an application. Given the facts presented in the record, the only relevant statutory factor 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."¹⁷ 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." Of those factors, only one is applicable: "all other factors the board in its discretion determines relevant to the public interest."¹⁸ As the applicant, Basile has the burden of proof by a preponderance of the evidence.¹⁹ In essence, Basile must show that a license of the type for which it has applied would not be contrary to the public interest.

¹⁵ AS 04.11.480(a).

¹⁶ AS 04.11.470

¹⁷ AS 04.11.320(a)(1).

¹⁸ 7 AAC 304.180(a)(4). The other factors include conviction of a crime involving moral turpitude, a violation of either Alaska or another state's alcohol beverage control laws, commission of a felony within the preceding 10 years, or sexual contact, whether consensual or not, on the licensed premises. 7 AAC 304.180(a)(1)-(3).

¹⁹ *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985); *Pub Line* at 5.

B. *Merits of the Basile Application*

There were no protests filed against Basile's application. A review of the Board's minutes reveals that the Board members had two concerns with the application: whether there were already sufficient licenses in the Airport, and whether it should provide a liquor license to a stand-alone spa, which was not part of an overall licensed facility, which it had never done before.

It is unquestionable that the Board has "broad discretion in denial of liquor licenses for any reason found incompatible with the public interest."²⁰ Two Alaska cases which illustrate the Board's discretion regarding liquor licenses are as follows:

- The *Decker*²¹ 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*²² 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 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

²⁰ *Decker* at 487 (quoting from Supp. No. 23 at 7 in 1 Senate Journal (1980), following p. 658).

²¹ *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483 (Alaska 1985).

²² *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>).

alcohol control,” and (3) the difficulty with fashioning conditions upon a new type of alcohol dispensing establishment.²³

The Board’s discretion in denying licenses is not unfettered, however. This is illustrated by a Pennsylvania case, where 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.²⁴ That case makes the point that the Board may not exercise its discretion to deny a license application based upon a misapprehension regarding the type of license.²⁵

Basile argues that the Board’s preliminary denial was based upon its confusion that this case involved a recreational site license and not a Tourism License. A Tourism License may only be located in a hotel or an airport.²⁶ A recreational site license is for limited hours at recreational sites in conjunction with recreational events.²⁷ The Board’s discussion with its repeated emphasis that this case involved only a Tourism License demonstrates that the Board was well aware that this case did not involve a recreational site license. The references to the recreational site license, as explained by Mr. Beasley, demonstrated that the Board was concerned, based upon its prior experience in expanding the venues for recreational site licenses, that it would have similar poor experiences if it granted a Tourism License to a novel venue - a stand-alone spa. In other words, there was no confusion.

This factual situation is distinguishable from the Sheraton Hotel’s licensure which includes the Ice Spa because that spa is included under the Tourism License provided the entire facility, *i.e.*, it is not for a stand-alone spa. Regardless, the Board is properly allowed to consider each application on its own merits and is not constrained by precedent:

In determining whether issuance, renewal, transfer, relocation, suspension, or revocation of a license is in the best interests of the public, the board need not conform to or distinguish its decision from any action it has taken in the past on applications presenting similar facts, but may instead base its decision only on the particular facts before it.^[28]

²³ *Pub Line* at 6.

²⁴ *Myers v. Pa. Liquor Control Bd.*, 451 A.2d 1000 (Pennsylvania 1982).

²⁵ *See In re Werba d/b/a Alaska Pike Safaris, LLC*, OAH No. 13-1134-ABC (ABC Board, adopted February 11, 2014), (published at <http://aws.state.ak.us/officeofadminhearings/Documents/ABC/ABC131134.pdf>)

²⁶ AS 04.11.400(d).

²⁷ AS 04.11.210.

²⁸ AS 04.11.537.

Basile's hearing challenging the Board's preliminary denial of its Tourism License application was a *de novo* hearing as provided for in the Administrative Procedure Act.²⁹ None of the evidence presented by Basile at hearing was substantially different from that presented at the Board's April 29, 2014 meeting.

The Board may properly consider matters that bear on the actual impact of the license on the public.³⁰ In the *Decker* case, the Board's consideration of the number of licenses in an area as a factor in denying an application was deemed proper. In the *Pub Line* case, the Board considered an innovative use for a license as a factor in denying an application. This case involves both. Given these two factors, and the lack of any additional evidence on them, Basile has failed to demonstrate, by a preponderance of the evidence, that granting its license application is not contrary to the public interest.

IV. Conclusion

Basile had the burden of proof to demonstrate that its application was not contrary to the public interest. It failed to meet its burden of proof. The Board should, in the exercise of its discretion, deny the application.

DATED this 10th day of October, 2014.

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 1st day of December, 2014.

By: Signed _____
Signature
Robert Klein _____
Name
ABC Board Chair _____
Title

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

²⁹ AS 04.11.410(b)(1)
³⁰ 3 AAC 304.180.