

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE MARIJUANA CONTROL BOARD**

In the Matter of)
)
NIKI RAAPANA- ALASKA HEMPFEST) OAH No. 18-0901-MCB
)

DECISION

I. Introduction

Niki Raapana does business as Alaska Hempfest, which is a festival promoting cannabis. Alaska Hempfest 2018 (“Hempfest”) was held in June 2018. The festival grounds had two areas, one open to all ages, and another designated as “private” or “VIP” which was open only to guests over 21 years old. A number of people were observed smoking marijuana in the over-21 area.

Ms. Raapana, who was not observed to be smoking or otherwise consuming marijuana, was fined by the Marijuana Control Board (Board) \$10,000 for “allowing and encouraging violations of AS 17.38.040.” All but \$2,500 of the fine was suspended. The fine was later reduced to \$100.00.

AS 17.38.040 prohibits public consumption of marijuana. A person who violates that prohibition is “guilty of a violation punishable by a fine of up to \$100.” The evidence shows that even though Hempfest was held on private property, it was open to the public, in both its all ages area and the over-21 area. As such, any marijuana consumption there was in public. However, because there was no evidence that Ms. Raapana personally violated the prohibition against public consumption, in order for her to be fined under AS 17.38.040, she would have to have either “solicited” or “aided or abetted” another person to publicly consume marijuana.

The evidence shows that Ms. Raapana did not actively promote, and indeed took steps to discourage, marijuana consumption in the all ages portion of the festival grounds. However, she let attendees know that marijuana consumption was allowed in the over-21 area. This was more than tacit acquiescence. It was conduct that unmistakably communicated a design allowing and approving marijuana consumption and was sufficient to constitute her aiding or abetting her festival attendees’ public marijuana consumption. Accordingly, Ms. Raapana violated AS 17.38.040 and the fine of \$100 is upheld.

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II. Facts¹

A. *Pre-Hempfest advertising and communications with AMCO*

Niki Raapana is the owner, director, and organizer of Alaska Hempfest, a festival which is a marijuana advocacy and education event.² Prior to Hempfest, which was held on June 22 – 24, 2018, Hempfest advertised itself as having a VIP area where there would be marijuana consumption, which included a “VIP ONLY Smoking/Dab tent during festival!”³

The week before the festival, Ms. Raapana telephoned AMCO Chief of Enforcement James Hoelscher, to ask about a rumor that she had heard that AMCO was going to fine her \$100,000 in connection with Hempfest. In that conversation, Chief Hoelscher told her that she would be violating the law prohibiting public consumption of marijuana. Her response was that the event was “private.” Chief Hoelscher informed her that the event was considered “public” under applicable law.⁴ On the morning of June 21, 2018, Chief Hoelscher followed up with an email to Ms. Raapana explaining AMCO’s position.⁵

Following her conversation with Chief Hoelscher and receipt of his June 21, 2018 email, Ms. Raapana cancelled the VIP tent, VIP events, and scheduled parties. Ms. Raapana instructed vendors that there was to be no public consumption and made announcements to that effect during Hempfest.⁶

B. *Hempfest 2018*

AMCO Investigator Francis “Joe” Hamilton went to the Hempfest location on June 23, 2018. He drove there on a public road and was directed to a parking area. He did not purchase a ticket to attend and did not pay to get into Hempfest. No one asked him for a ticket or checked his identification when he entered.⁷

There was a sign at the entrance that contained a list of rules, which included a prohibition against smoking, vaping, and consuming alcohol in the public areas, as well as a prohibition against marijuana sales in all areas of the festival. Investigator Hamilton observed a line of vendors selling food, clothing, CBD products, and pipes, which led up to an open area in

¹ The following facts were established by a preponderance of the evidence.

² Testimony of Ms. Raapana.

³ Administrative Record (AR) 235.

⁴ Testimony of Chief Hoelscher.

⁵ AR 6 – 9.

⁶ Testimony of Ms. Raapana.

⁷ Testimony of Investigator Hamilton.

front of a stage. To the right of the stage, there was a roped-off area. At the entrance to the roped-off area, he saw a sign reading:

Private 420 OK! SEC 17.38.040 Public Consumption Ban "It is unlawful to consume marijuana in public. A person who violates {this} . . . is guilty of a violation punishable by a fine of \$100." Alaska Hemp Fest abides this law. Show ID 21 +⁸

Investigator Hamilton observed one person smoking marijuana surreptitiously in the all ages area. He was able to enter the over-21 area without anyone asking him for a pass or checking his identification. He observed several people smoking openly outside in the over-21 area. There were also two tents in the over-21 area, one of which was a "VIP" tent, which was closed; he could not observe anything that occurred inside that tent.⁹ The "VIP" tent was not operated by Hempfest or Ms. Raapana. It was operated by a business known as Bushwackers.¹⁰ The other tent observed by Investigator Hamilton was the "Looking Glass" tent. The "Looking Glass" tent was open on one side; he was able to see inside it and also poked his head inside the tent. He smelled marijuana coming from that tent and observed people smoking marijuana inside the tent.¹¹

Ms. Raapana made the space available to both Bushwackers and the "Looking Glass" to put their tents up.¹² Ms. Raapana set up the over-21 area because some of the vendors were planning marijuana product demonstrations. Ms. Raapana did not regulate marijuana consumption in the over-21 area.¹³ However, she testified that she warned everyone the entire space was considered public by AMCO and that marijuana consumption was as their own risk.¹⁴

While at Hempfest, Investigator Hamilton observed a woman, who identified herself as "Tina Smith," on the stage. While on the stage, Ms. Smith informed the spectators that smoking marijuana in public was not allowed, but that it was safe to smoke in the "Looking Glass" tent.¹⁵

Mesha Pool was a vendor participant at Hempfest. She came to the festival site on June 21, 2018 and spoke to Ms. Raapana. In that conversation, Ms. Raapana informed her about her conversation with AMCO staff. Based upon that conversation, Ms. Pool changed her plans and decided to only make a hempseed avocado ice cream for the event. Ms. Pool heard Ms. Raapana

⁸ Testimony of Investigator Hamilton; AR 219 – 220.

⁹ Testimony of Investigator Hamilton.

¹⁰ Testimony of Ms. Raapana.

¹¹ Testimony of Investigator Hamilton; AR 219 - 220.

¹² Testimony of Ms. Raapana.

¹³ Testimony of Ms. Raapana.

¹⁴ Testimony of Ms. Raapana.

¹⁵ Testimony of Investigator Hamilton; AR 220.

on the loudspeaker during Hempfest advising people not to consume marijuana in the public areas. She also heard the stage manager make similar announcements over the loudspeakers. However, Ms. Pool observed people consuming marijuana in the over-21 area and did not see anyone being asked for a badge or a pass to enter the over-21 area.¹⁶

C. The fine and Ms. Raapana's appeal.

Following the event, the AMCO director requested the Board fine Ms. Raapana \$10,000 “for allowing and encouraging violations of AS 17.38.040 which prohibits public consumption” and that \$7,500 of that fine be suspended.¹⁷ On August 16, 2018, the Board fined Ms. Raapana \$10,000, with \$7,500, of that amount suspended. A letter dated August 23, 2018 notified Ms. Raapana of the Board’s action and of her right to request a hearing.¹⁸

Ms. Raapana requested a hearing to challenge the fine.

After Ms. Raapana filed her appeal, but before the hearing was held, AMCO administratively reduced the fine to \$100, the upper limit for a non-licensee under AS 17.38.040.

The case went to hearing on April 26, 2019. Ms. Raapana represented herself and testified on her own behalf. Mesha Pool testified for Ms. Raapana. Assistant Attorney General Harriet Milks represented the Alcohol and Marijuana Control Office (AMCO). AMCO Director Erika McConnell, Chief of Enforcement James Hoelscher, and Investigator Francis “Joe” Hamilton testified for AMCO.

III. Discussion

The central issue in this case is whether Ms. Raapana, as the owner/director/organizer for Hempfest, can be held liable and fined by the Board, under AS 17.38.040, for people having smoked or otherwise consumed marijuana at Hempfest. The provision at issue, AS 17.38.040, reads as follows:

Sec. 17.38.040. Public Consumption banned, penalty.

It is unlawful to consume marijuana in public. A person who violates this section is guilty of a violation punishable by a fine of up to \$100.

It is undisputed that there was no evidence or allegation that Ms. Raapana herself publicly consumed marijuana. It is also undisputed that there were people openly smoking marijuana in Hempfest’s over-21 area. There are therefore three underlying questions, all of

¹⁶ Testimony of Ms. Pool.

¹⁷ AR 236.

¹⁸ AR 311.

which must be answered affirmatively in order for the Board to sanction Ms. Raapana under AS 17.38.040:

- Does the Board have the legal authority to fine Ms. Raapana, a non-licensee, for violation of AS 17.38.040?
- Was Hempfest’s over-21 area “in public”?
- Can Ms. Raapana be held liable for other people smoking marijuana in that over-21 area?

Lastly, if the answers to all three of these questions is yes, the Board must determine the appropriate amount of the fine under AS 17.38.040, which allows a fine “up to \$100.”

A. Can the Board fine Ms. Raapana for a violation of AS 17.38.040?

The Board’s statutory authority provides it with authority to regulate “the cultivation, manufacture, and sale of marijuana in the state.”¹⁹ The Board’s director and staff also have the ability to exercise peace officer powers, upon “the concurrence of the commissioner of public safety”, and to enforce “criminal punishable laws and regulations relating to marijuana.”²⁰

Because Ms. Raapana is not licensed by the Board, is not engaged with “the cultivation, manufacture, and sale of marijuana,” and because a violation of AS 17.38.040 is not a criminal offense,²¹ neither of those provisions provide the Board with any authority to fine Ms. Raapana for a violation of AS 17.38.040. However, the Board’s regulations specifically provide it with the authority to impose a civil fine on a “person that the board determines has violated a provision of AS 17.38.”²² Given that regulatory authority, the Board is allowed to impose a civil fine for the violation of AS 17.38.040.

B. Was there public consumption?

Ms. Raapana argued that Hempfest was held on private property. She further argued that the over-21 area of the festival’s grounds were “private” or restricted. The answer to this question is answered by the Board’s regulations. Those regulations define “in public” as “a place to which the public or a substantial group of people has access.”²³ The regulations also

¹⁹ AS 17.38.121(a)

²⁰ AS 17.38.131.

²¹ AS 17.38.040 provides that “[a] person who violates this section is guilty of a violation punishable by a fine of up to \$100.” A “violation” is not a criminal offense. It “is a noncriminal offense punishable only by a fine.” AS 11.81.900(b)(66).

²² 3 AAC 306.840(a).

²³ 3 AAC 306.990(6)(A).

designate “places of amusement or business” as public places, but exclude places such as hotel rooms or apartments “designed for actual residence” from being public places.²⁴

The facts of this case show that the entirety of the festival grounds meet the regulation’s definition of a public place. Investigator Hamilton did not have a special invitation or even purchase a ticket to Hempfest. He was able to freely enter and access both the general area and the over-21 area without any restriction or inquiry. Ms. Pool’s testimony also showed that the over-21 area was freely accessible to the public. Regardless of how Ms. Raapana designated the festival grounds as public or private, the entirety of the festival grounds was a public place within the meaning of the Board’s regulations.

Ms. Raapana argued that the tents were private and what people did in them was their own business. Under the regulatory definition, her argument would only apply to tents used for residential purposes. There is inadequate evidence to show, by a preponderance of the evidence, that the “VIP” tent was used as a marijuana consumption locale. However, the evidence shows that the “Looking Glass” tent was used as a marijuana consumption locale and that people could enter it. Indeed, Investigator Hamilton was able to see inside it, and put his head inside the tent. In addition, Ms. Smith, while on the stage, told people that smoking marijuana was allowed in the “Looking Glass” tent. The “Looking Glass” tent was therefore open to the public during the festival for marijuana consumption purposes. And in any event the evidence also showed that marijuana consumption was occurring in the over-21 area outside of the tents.

Consequently, AMCO has shown, by a preponderance of the evidence, that there was public consumption of marijuana during Hempfest.

C. Can Ms. Raapana be held liable for another person’s consumption of marijuana?

As provided by AS 17.38.040, it is a violation punishable by a fine of up to \$100 for a person to consume marijuana in public. While there is no evidence Ms. Raapana herself consumed marijuana at Hempfest, the evidence plainly shows that others did. AMCO argues that Ms. Raapana can be held liable for their consumption under AS 11.61.100 and AS 11.16.110, the Alaska statutes that codify accomplice liability. AS 11.61.100 provides:

[a] person is guilty of an offense if it is committed by the person’s own conduct or by conduct of another for which the person is legally accountable under AS 11.16.110, or by both.

The applicable portion of AS 11.16.110 provides:

²⁴ 3 AAC 306.990(6)(B).

A person is legally accountable for the conduct of another constituting an offense if

* * *

(2) with intent to promote or facilitate the commission of the offense, the person

(A) solicits the other to commit the offense; or

(B) aids or abets the other in planning or committing the offense;

The term “offense” contained in both AS 11.16.100 and 11.16.110 includes violations.²⁵ Even though AS 11.16.100 and 11.16.110 are contained in the criminal code, and AS 17.38.040 is not part of the criminal code, as the Alaska Court of Appeals stated, they still apply to offense not contained in the criminal code: “[h]aving reviewed the text of the applicable statutes, the commentary to the statutes, and the legislative history, we find no indication that the legislature intended to limit the application of AS 11.16.100 or AS 11.16.110 to Title 11 offenses.”²⁶

The question then arises as to whether Ms. Raapana solicited people to consume marijuana at Hempfest. Given Ms. Raapana’s actions in cancelling the planned consumption-oriented “VIP” tents and events following her discussion with Chief Hoelscher, as well as the general rules posted at the entrance to the festival grounds, the evidence does not show *solicitation* of marijuana consumption. In fact, she actively dissuaded marijuana consumption in the all-ages portion of the festival grounds. However, the evidence shows that it is more likely true than not true that marijuana consumption was allowed, even if not actively encouraged, in the over-21 area of the festival grounds. While Ms. Raapana testified that she warned everyone the entire space was considered public by AMCO and that marijuana consumption was at their own risk, her testimony even when taken at face value, is directly contradicted by the existence of the sign at the entry to the over-21 area reading, in part, “Private 420 OK!”

Because there was no solicitation, the next question for purposes of an AS 17.38.040 violation, is whether letting attendees know that marijuana consumption was allowed in the over-21 area is sufficient to establish that Ms. Raapana aided or abetted marijuana consumption.

The phrase “aid and abet” does not have a statutory definition. However, in *Andrews v. State*, the Alaska Supreme Court explained:

The term “abet” is not defined in Title 11. The drafters of AS 11.16.110 indicated, in their Commentary, that they intended this term to be understood in its common-law sense, as exemplified by existing Alaska Supreme Court cases on this subject.

²⁵ AS 11.81.900(b)(41).

²⁶ *Knutson v. State*, 736 P.3d 775, 778 (Alaska Court of Appeals 1987).

* * *

At common law, the act of “abetting” encompasses conduct such as counseling or encouraging the other person's criminal act by words or gestures- or, indeed ... by “any conduct which unmistakably [communicates] a design to encourage, incite, or approve of the crime”. Thus, “abetting” can take the form of promising a benefit if the other person will commit the crime or threatening to inflict harm or exact a penalty if the other person declines to commit the crime.

But ... “much less will meet the legal requirement [of abetting]”—as, for example, “where [the defendant, as] a bystander[,] merely embolden[s] the perpetrator to [commit the crime]”, or where the defendant “merely stand[s] by for the purpose of giving aid to the perpetrator if necessary, provided the latter is aware of [the defendant's] purpose.”²⁷

It is true that AMCO presented no evidence that Raapana expressly urged or incited anyone to consume marijuana in public. But although accomplice liability requires proof of something more than mere presence at the scene of the underlying act, or mere acquiescence in that act, it does not necessarily require proof of a direct act of incitement or encouragement. “Rather, an accomplice's acts of encouragement can take subtler forms.”²⁸ If there are “facts and circumstances surrounding the defendant's presence and the defendant's conduct [at the scene]’ which support a reasonable inference ‘that the defendant's presence did in fact encourage someone else to commit the crime’—and that, if the defendant had the intent to promote or facilitate the crime, ‘guilt may be inferred’”.²⁹ “Thus, ‘[even if] the defendant's conduct does not [openly] demonstrate a design to encourage, incite, aid, abet, or assist in the crime, the factfinder may [nevertheless] consider the defendant's failure to oppose the commission of the crime, along with other circumstances, and conclude that the defendant assented to, approved of, or encouraged the commission of the crime’—thereby establishing the defendant's vicarious liability for the crime as an abettor.”³⁰

Ms. Raapana’s conduct satisfies this test. Although she took active steps to dissuade festival attendees from consuming marijuana in the all-ages area, and testified that she advised attendees that the entire space was considered public by AMCO, she, nonetheless provided a forum for people to consume marijuana in the over-21 area, *i.e.*, she allowed and approved of

²⁷ *Andrews v. Stage*, 737 P.3d, 1027, 1044 (Alaska 2010) (internal citations omitted, bracketed materials in the original).

²⁸ *Andrews* at 1045. (internal citations omitted, bracketed materials in the original).

²⁹ *Andrews* at 1045, citing *State v. Ly*, 85 P.3d 1200 (Kan. 2004). (bracketed materials in the original).

³⁰ *Id.* (internal citations omitted, bracketed materials in the original).

their conduct and gave them a place to commit it, as shown by the sign at the entry to the over-21 area that read, in part, “Private 420 OK!”

Ms. Raapana also argued that she was complying with the law forbidding public consumption because the over-21 area was restricted, as discussed above. However, the over-21 area was public as defined by law. AS 17.38.040, like a traffic ticket, is a quasi-criminal, strict liability violation meaning the offender need not intend to break the law to be found in violation.³¹ Consequently, despite Ms. Raapana’s personal belief that the over-21 area was not a public place, she legally abetted public consumption.

D. Sanction

A violation of AS 17.38.040 is punishable by a civil fine of up to \$100.00. Given the nature of the underlying conduct, the intentional provision of a public place within which marijuana consumption was allowed, regardless of any good faith belief on Ms. Raapana’s part that the over-21 area was not a public place, justifies the imposition of the maximum fine of \$100.00.

IV. Conclusion

Ms. Raapana communicated to Hempfest attendees that marijuana consumption could occur in the over-21 area of the festival. Because the over-21 area, despite Ms. Raapana’s belief that it was private, was open to the public, persons consuming marijuana in that area violated AS 17.38.040’s prohibition of marijuana consumption in public. Because Ms. Raapana provided Hempfest’s attendees a public area within which to consume marijuana, she is legally liable for that consumption under AS 11.16.100 – 110. The Board is therefore allowed to fine her up to \$100, the maximum fine allowable, for a violation of AS 17.38.040. Given the broad scope of the violation, the maximum fine is advisable, and should be upheld.

Dated: June 3, 2019.



Lawrence A. Pederson
Administrative Law Judge

³¹ *E.g. Clayton v. State*, 584 P.2d 1111 (Alaska 1978) (The legislature has the authority to treat certain offenses where jail service is not a potential punishment as quasi-criminal).

Adoption

The MARIJUANA CONTROL BOARD adopts this decision as final under the authority of AS 44.64.060(c)(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 distribution of this decision.

DATED this 11 day of JULY, 2019.

By: 

Signature

Mark Edward Springer


Name

CHAIR, ALASKA MARIJUANA

Title

CONTROL BOARD

The undersigned certifies that this is a true and correct copy of the original and that on this date an exact copy of the foregoing was provided to the following individuals:

Harriet Muls - certified mail/email
Nikki Kaapana - email
cc: E. Monahan; Lt Governor - mail
 8/19/19

Signature

Date