

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

In the Matter of)	
)	
THE FAIRBANKS CUT, LLC)	OAH No. 19-0685-MCB
_____)	Agency No. 18187

DECISION

I. Introduction

The Fairbanks Cut, LLC, applied for an endorsement to allow onsite consumption of marijuana. The board denied the application because Fairbanks Cut is in a building that includes another tenant. This means that Fairbanks Cut is not a freestanding building as required by the board's regulation that sets the standards for eligibility for an onsite endorsement.

Fairbanks Cut appealed the denial, arguing that the term "freestanding" applies to the building housing Fairbanks Cut, not to Fairbanks Cut itself. It also argued that the "freestanding" requirement was not applicable to an outdoor smoking area.

Fairbanks Cut's arguments, however, are not correct. The laws are not ambiguous—the requirement that the establishment be "freestanding" clearly means that the licensed store itself must be a freestanding building. Being located within a freestanding building that has another tenant means that the store itself is not freestanding. Moreover, although Fairbanks Cut is correct that the state law on smoking in public would allow an outdoor consumption area without regard to whether the store is freestanding, the board's regulation governing onsite endorsements does not. The regulation requires that a retail store be freestanding in order to be eligible for an onsite consumption endorsement, whether the consumption area is indoors or outdoors. Accordingly, the denial of Fairbanks Cut's application for an onsite endorsement is affirmed.

II. Facts

The Fairbanks Cut is a licensed retail marijuana store. In June 2019, it filed an application for an endorsement that would allow onsite consumption of marijuana products for its store located at 188 Bentley Trust Road, Suite A.¹ Fairbanks Cut occupies the downstairs of the building at this address. The only other tenant of the building is the construction company that owns the building, G2 Construction. G2 Construction has its offices upstairs from the Fairbanks Cut, and stores construction equipment outdoors behind the building.²

¹ Record at 3.

² Record at 49, 99.

The building is relatively isolated. The application states that it “stands alone on an expansive strip of land” with “no other structures on either side.”³ In addition, “there is very light foot traffic (if any) in front of the building.”⁴

The onsite consumption area planned by Fairbanks Cut would not be inside the building. Instead, the consumption area would “be in a fenced-in space attached to the outside of the existing building.”⁵ The only entrance to the consumption area would be through the store via a door that exits out to the consumption area. The outdoor consumption area would be monitored by an employee who was inside the store, through a window overlooking the consumption area.⁶

On July 11, 2019, the Marijuana Control Board voted 2-2 to deny Fairbanks Cut’s application for an onsite consumption endorsement.⁷ The denial was because Fairbanks Cut’s building was not a single-occupancy building.

Fairbanks Cut filed an appeal. The appeal was referred to the Office of Administrative Hearings. The parties agreed that the issue in dispute was strictly a legal issue. No evidentiary hearing was needed. Instead, the parties submitted legal briefs. They sought an interpretation of law that would clarify whether the site had to be in a single-occupancy building in order to receive an endorsement. Their arguments are discussed below.

III. DISCUSSION

Under the board’s regulations, a “freestanding licensed retail marijuana store” may obtain “an approved onsite consumption endorsement” that authorizes it to “sell marijuana and marijuana products, excluding marijuana concentrates, to patrons for consumption on the licensed premises at the time of purchase.”⁸ The stumbling block here is the term “freestanding.” If this term is interpreted to mean a single occupancy stand-alone building, then, of course, Fairbanks Cut is not freestanding because it is in a building with two tenants. That was the interpretation of the term that led the board to vote against Fairbanks Cut’s endorsement.

Fairbanks Cut makes two arguments regarding why it does not consider the term “freestanding” to prevent it from obtaining an endorsement. First, it argues that “freestanding” does not mean “single-occupancy.” Second, it argues that the requirement of “freestanding”

³ Record at 6.

⁴ *Id.*

⁵ Record at 3.

⁶ Record at 9.

⁷ Record at 15. A tied vote means the motion failed.

⁸ 3 AAC 306.370(a).

applies only to indoor consumption sites, not outdoor consumption sites. These two arguments are addressed below.

A. Can a multitenant building be considered freestanding for purposes of an onsite consumption endorsement?

In general, smoking of tobacco or marijuana is not allowed indoors in public facilities.⁹ The indoor smoking ban was adopted in 2018. The broad purpose of the law was to protect the employees of businesses from the harm of second-hand smoke.¹⁰

The law banning indoor smoking contains an exception, however, for marijuana businesses that meet certain requirements for protecting the public:

Nothing in this section prohibits an individual from smoking . . . (3) in an establishment licensed under AS 17.38 that is freestanding if the smoking is in accordance with regulations adopted by the Marijuana Control Board.¹¹

(This exception applies to a retail marijuana store because AS 17.38 is the statute that allows for licensure of retail marijuana stores.)

The statute banning indoor smoking defines the term “freestanding” as follows: “a building that is not supported by another structure and does not share ventilation or internal airspace with an adjoining structure and smoke from the building cannot travel into the adjoining structure.”¹²

Fairbanks Cut argues that words in statutes should be interpreted according to their common meaning.¹³ It points out that this definition does not say that having more than one tenant within a freestanding building means that the building is no longer freestanding. Fairbanks Cut concludes that the building located at 188 Bentley Trust Road meets the definition of freestanding because it is not supported by any other structure.

⁹ AS 18.35.301(a)-(b) (“An individual may not smoke in an enclosed area in a public place”).

¹⁰ See, e.g., Exhibit B to Executive Director’s Opposition Memorandum to Respondent’s Appellee’s Brief (statement of sponsor of SB 63, legislation establishing indoor smoking ban).

¹¹ AS 18.35.301(h)(3).

¹² AS 18.35.301(i)(1).

¹³ Appellee’s Brief at 12, citing *Municipality of Anchorage v. Suzuki*, 41 P.3d 147, 150 (Alaska 2002). The operative language of *Suzuki*, however, is slightly different from the formulation cited by Fairbanks Cut: “The language of a statute is “construed in accordance with [its] common usage,” unless the word or phrase in question has “acquired a peculiar meaning, by virtue of statutory definition or judicial construction.” *Id.* (citation string omitted). The general rule is that “with a few narrow exceptions, we do not construe statutory language according to its common meaning when the legislature has provided a definition of a word or phrase, and our statutory construction cases look first to see if the word or phrase to be construed has a specific definition.” *Anderson v. Alyeska Pipeline Service Co.*, 234 P.3d 1282, 1287 (Alaska 2014). This decision will apply the statutory definition of “freestanding,” which, when put in proper context, is much the same as the common usage.

The problem with Fairbanks Cut’s reasoning, however, is that it is focusing on the wrong entity. Fairbanks Cut wants us to conclude that the word “freestanding” is setting a standard for the entire building shell, without regard to the perimeter of the individual retail establishment that is being regulated. As explained below, however, that is not the proper way to view this statute.

To explain why Fairbanks Cut’s approach is incorrect, we can substitute the definitional subsection of the statute into the regulatory subsection by replacing the term “freestanding” with its definition.¹⁴ The result is as follows:

Nothing in this section prohibits an individual from smoking . . . (3) in an establishment licensed under AS 17.38 that is a building that is not supported by another structure and does not share ventilation or internal airspace with an adjoining structure and smoke from the building cannot travel into the adjoining structure if the smoking is in accordance with regulations adopted by the Marijuana Control Board.¹⁵

This makes clear what the legislature was doing: if the establishment is a building, and the building stands alone, then the establishment may apply to the board for a permit to allow smoking in the establishment. If the establishment is not “a building” (meaning the entire building), however, the establishment is not eligible. Thus, an establishment that is only an apartment within a building is not freestanding. The statute is not ambiguous. It means that the establishment called “Fairbanks Cut” is not freestanding.

Even if there were some ambiguity in the statute, however, the board’s regulation makes clear that the term “freestanding” applies to the level of the individual “store”:

a freestanding licensed retail marijuana store with an approved onsite consumption endorsement is authorized to . . . (2) sell for consumption on the premises (A) marijuana bud or flower in quantities not to exceed one gram to any one person per day; [and] (B) edible marijuana products in quantities not to exceed 10 mg of THC to any one person per day.¹⁶

Under this regulation, the term “freestanding” modifies the noun *store*. It does not apply to the building in which the store is located. Thus, if the store is not the entire building, then the store is not freestanding. Because Fairbanks Cut is not a freestanding building, but only part of a freestanding building, the store is not freestanding under the regulation.¹⁷

¹⁴ Cf., e.g., *Oels v. Anchorage Police Dep’t Employees Ass’n*, 279 P.3d 589, 596 (Alaska 2012) (explaining that substantive law should be read “in concert with definitions”).

¹⁵ AS 18.35.301(b)(3) with the definition of the term “freestanding” found in AS 18.35.301(i)(1) inserted in place of the term “freestanding”; inserted material is underlined, emphasis (italics) added.

¹⁶ 3 AAC 306.370(a) (emphasis added).

¹⁷ The board’s regulation is determinative. Even if the legislature intended for the term “freestanding” to apply at the outer structure level rather than the store level (which it did not), the board may adopt a more restrictive regulation than the minimal requirement set out in statute AS 18.35.301: “Nothing in this section prohibits an

Moreover, Fairbanks Cut's argument about the legislative definition is not persuasive for several additional reasons. First, under a simple application of common sense, if "freestanding" applied to the outer shell of the building, then the focus of the statute would be on the physical engineering of the structural support, not the exposure of the public to second-hand smoke. Under this reading, almost all multitenant buildings would be eligible. The only exclusion would be for a building that shared a support wall with another structure. This might make some sense if the focus of the regulatory body was on weight-bearing roof loads, but it makes no sense for the concern about smoke. If, however, the term freestanding is applied to the individual store, the requirement of physical separation between stores makes sense because that way the smoke is only in the store that has the compliant and properly ventilated onsite smoking area.

Second, the legislative history supports the conclusion that the legislature did not intend for the term "freestanding" to allow for smoking in multitenant buildings. The Executive Director's briefing in this case included a significant volume of the legislative history of SB 63, the bill that adopted AS 18.35.301.¹⁸ That history demonstrates that the intent of the legislature was to prevent exposure of individuals to smoke while inside a public building.¹⁹ Nothing in the history provides support for Fairbanks Cut's argument that "freestanding" should be applied to the outer shell of the structure housing the retail establishment, rather than to the retail establishment itself. Indeed, much of the discussion in the legislature was over how to accommodate two buildings with abutting exterior walls, such as are frequently found in downtown Juneau.²⁰ For those buildings, the legislature added additional provisions to its definition of "freestanding," requiring that in addition to not having structural support provided by a building that was not the entire store, a freestanding building could "not share ventilation or internal airspace with an adjoining structure" and "smoke from the building cannot travel into the adjoining structure."²¹ It would be incongruous for the legislature to have been concerned about smoke from an adjoining building, but not be concerned about smoke from a tenant in the same building. It follows that the legislature intended that multitenant buildings would be ineligible for

individual from smoking . . . (3) in an establishment licensed under AS 17.38 that is freestanding if the smoking is in accordance with regulations adopted by the Marijuana Control Board." AS 18.35.301(h)(3).

¹⁸ See Exhibit F to Opposition.

¹⁹ *Id.*

²⁰ For an example of this discussion, see Exhibit F to Opposition at 3 (minutes of House Community and Regional Affairs Com. (April 27, 2017).

²¹ AS 18.35.301(i)(1).

an onsite smoking area because the retail establishment would then not be “a building that is not supported by another structure.”²²

Third, the statute includes an additional exception that allows onsite smoking for “e-cigarettes.” Under this exception, the smoking of e-cigarettes can occur “at a retail tobacco or e-cigarette store” that is “in a building that (A) is freestanding.”²³ This is very different from the marijuana exception, which limits the onsite indoor smoking to “an establishment” that is “freestanding.” For the e-cigarette exception, the store can be *in* a freestanding building. For the marijuana exception, however, the store must *be* an establishment that is freestanding. Here, Fairbanks Cut is trying to convince us that the legislature meant that its store could be in a building that is freestanding. Yet, if that is the result the legislature intended, the legislature knew how to achieve it. That it did not do so is evidence that it did not intend to allow a multitenant exception to the ban on indoor smoking for marijuana establishments.

B. Does the requirement of “freestanding” apply only to indoor consumption sites, not outdoor consumption sites?

Fairbanks Cut makes a second argument regarding the term “freestanding.” Fairbanks Cut notes that the indoor smoking ban adopted in AS 18.35.301 only applies to smoking indoors. Although the statute regulates outdoor smoking that is close to entrances or ventilation systems of buildings where smoking is prohibited, the statute does not prohibit smoking outdoors.

Here, Fairbanks Cut’s interpretation of the state statute is absolutely correct. AS 18.35.301 does limit where Fairbanks Cut can locate its outdoor smoking area, requiring reasonable setbacks from doors and other openings. The statute would not, however, prevent the board from approving Fairbanks Cut’s application for an onsite endorsement for an outdoor consumption area, if the application met the requirements found in the board’s regulations (and the outdoor smoking site met the setback requirements in AS 18.35.301(c)).

The problem for Fairbanks Cut, however, is, as described above, the board’s regulation. The regulation limits eligibility for an onsite endorsement to “a freestanding licensed retail marijuana store.”²⁴ Fairbanks Cut is not a freestanding licensed retail marijuana store. Therefore, unless the regulation contains an exception, it cannot apply for an endorsement.

²² *Id.* Although Fairbanks Cut suggests that the requirement of ventilation in the definition of “freestanding” allows multitenant buildings to be eligible, that is incorrect. The statute requires both that the establishment be a building that is not supported by another structure *and*, if adjoining another building, that “it not share ventilation or internal airspace with an adjoining structure.” This provision does not open the door to multitenant buildings. Moreover, Fairbanks Cut has not shown that it would meet the ventilation requirement even if it were applicable.

²³ AS 18.35.301(d). Note that this exception includes other restrictions that are not relevant here.

²⁴ 3 AAC 306.370(a).

Fairbanks Cut would ask us to read into this language an implied exception. Because the term “freestanding” applies to the building, Fairbanks Cut would read the limitation of “freestanding” to apply only to onsite smoking areas that are inside a building. The “freestanding” limitation, in its view, would not be relevant to outdoor consumption areas.

This argument is consistent with common sense. Outdoor consumption areas must meet several additional criteria to ensure that the smoke does not bother the neighbors.²⁵ Thus, it would make sense that only outdoor criteria would apply to evaluation of Fairbanks Cut’s application. Fairbanks Cut is essentially asking that the regulation be read to mean that “if the onsite endorsement is in a building, then the building must be freestanding.”

That is not, however, what the regulation says. As the Acting Executive Director points out, the term “freestanding” in the regulation is a requirement for receiving an endorsement. It is what is called a “condition precedent,” without which the establishment cannot be given an endorsement. That is true even if the onsite consumption is to take place outdoors.

Moreover, having a requirement that the building housing the store be freestanding, even if the consumption is to take place outdoors, is also consistent with common sense. The board may well have determined that for almost all multitenant buildings, having outdoor consumption of marijuana adjacent to the building would be inappropriate. That Fairbanks Cut may be an exception to this general rule does not mean that the regulation is arbitrary or cannot be enforced against Fairbanks Cut.²⁶

²⁵ 3 AAC 306.370(c) states:

c) A marijuana consumption area shall have the following characteristics:

...
(4) if outdoors, be found by the board to be compatible with uses in the surrounding area through evaluation of

(A) neighboring uses;

(B) the location of air intake vents on neighboring buildings;

(C) a sight-obscuring wall or fence around the outdoor marijuana consumption area;

(D) objections of property owners, residents, and occupants within 250 linear feet or the notification distance required by the local government, whichever is greater; and

(E) any other information the board finds relevant.

²⁶ Fairbanks Cut has made good arguments that it is well-suited for approval of an outdoor onsite consumption. It cites its location and isolation, and that its building has only one additional tenant. The tenant does not object to the onsite consumption. Further, Fairbanks Cut would only allow consumption during hours when the other tenant is not open for business. Under the regulations as currently written, however, Fairbanks Cut is not eligible.

An administrative agency must follow its own regulations.²⁷ Failure to do so would be arbitrary and capricious. Because the regulation prohibits Fairbanks Cut from qualifying for an onsite endorsement, the board's denial of its application is affirmed.

IV. Conclusion

Under 3 AAC 306.370(a), the board may issue an endorsement for an onsite consumption area only to a freestanding licensed retail marijuana store. Fairbanks Cut is not a freestanding store because it is not a building—it is a store within a building. Therefore, the denial of Fairbanks Cut's application for an onsite consumption endorsement is affirmed.

DATED: January 7, 2020.

By: 

Stephen Slotnick
Administrative Law Judge

²⁷ See, e.g., *Garner v. State Dep't of Health & Soc. Servs., Div. of Med. Assistance*, 63 P.3d 264, 269 (Alaska 2003) (“We have held it to be legal error for an agency to fail to apply exceptions found in its own regulation”).

Adoption

The Marijuana 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 distribution of this decision.

DATED this 10th day of APRIL, 2020.

By: 

Signature

Loren P. Jones

Name

CHAIR, MARIJUANA CONTROL
BOARD

Title

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:

Joan Wilson (by email)

Terry Aglietti (by email)

Dept of Law central email (by email)

4-10-20

Signature 

Date