

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

In the Matter of)	
)	
CAFÉ DE PARIS CATERING CO., DBA)	OAH No. 23-0585-ABC
LAVELLE'S BISTRO)	Agency No. AMCO-6156
_____)	

DECISION

I. Introduction

The Café de Paris Catering (licensee) operates Lavelle’s Bistro in the Springhill Suites in Fairbanks, Alaska. Alcoholic beverages are served at the Bistro under beverage dispensary license number 727 (BDL 727). In August 2023 the licensee applied for a new BDL (BDLT 6156) - categorized as a tourism license - for the Bistro, with plans to either sell BDL 727, or transfer it to another location. The Alcoholic Beverage Control Board (Board) took up the matter at its meeting on August 22, 2023.

The Board ultimately voted to deny the application largely because it was unsure if the holder of a tourism license was legally required to own the hotel out of which the licensee operated. At the Board’s encouragement, on September 1, 2023, the licensee appealed the decision. While the appeal was being processed, Alaska laws regarding beverage licensing and regulation were rewritten, with most provisions going into effect on January 1, 2024.¹ The Board revised its regulations accordingly, also going into effect on January 1, 2024. This raised the question of whether the law to apply is the new, revised regulations, or the ones in place at the time the appeal was filed.

A formal hearing was held before the Office of Administrative Hearings on February 21, 2024. All submitted exhibits were admitted by stipulation by the parties. The Café’s co-owner and registered agent Franklin Eagle testified. The record remained open until March 8, 2024, to allow the parties to submit closing arguments. Based on the evidence presented and applying the new licensing requirements, the Café has not met its burden of proving that it is entitled to a beverage dispensary tourism license.

¹ 8 SLA 2022 (SB 9).

II. Facts

A. *The initial lease agreement*

In 2001 Lavelle’s Bistro opened in the Springhill Suites under a 20-year lease agreement between the licensee and the landlord, the hotel’s ownership group.² The lease agreement was mutually beneficial, as it provided the licensee the location to operate BDL 727, and the hotel owners a way to avoid the liability of owning and operating a restaurant.³ Over the duration of the lease, the arrangement proved successful. Springhill is a well-established hotel in Fairbanks with 140 suites, and Lavelle’s, a reputable restaurant that offers a diverse menu, including wines from its 3000-bottle cellar.⁴

When the lease approached its expiration date in 2021, Mr. Eagle contemplated retirement and the possible sale or transfer of BDL 727.⁵ A three-year extension of the lease was negotiated by the parties, but discussions regarding the tourism license stalled pending the outcome of this matter.⁶

B. *The tourism license application*

In August 2023 the Board staff received a completed application for tourism license #6156 permitting alcoholic beverages to be sold at Lavelle’s Bistro.⁷ Included were the forms providing the requisite information, including a diagram of the Bistro, proof of food service permits, and a copy of the Bistro’s menu. After review, on August 9, 2023, staff preliminarily approved the request, pending a final decision by the Board.

On August 22, 2023, the Board convened for a regularly scheduled meeting to discuss, among other things, the Bistro’s application for a tourism license.⁸ Mr. Eagle participated by Zoom. The Board reviewed the application for compliance with the Title 4 of the Alaska statutes regarding alcoholic beverages, and the corresponding regulations.

The most troubling issue for the Board was the statutory requirement that limited the renewal or transfer of a BDLT license to *operators* of the hotel/motel where the license is being operated.⁹ Mr. Eagle does not operate Springhill Suites. While mulling over the possible legislative intent behind this restriction, one member voiced concern that if BDLTs were granted

² Test. Eagle.

³ *Id.*

⁴ Record, p. 3.

⁵ Test. Eagle.

⁶ *Id.*

⁷ Exhibit 3, p. 4.

⁸ Ex. 5.

⁹ *Id.*

to all license operators who currently lease space in a hotel/motel, “the flood gates would open.”¹⁰ He and Mr. Eagle both agreed that the surge in licenses could thwart the current caps on available licenses based on population density.¹¹ The Board ultimately denied the application for failing to meet the legal licensing requirements.¹²

Mr. Eagle appealed the decision, and a hearing was held before the OAH in February 2024.

C. The hearing

Mr. Eagle candidly testified that he is 70 years old and is anxious to retire. He acknowledged that while Lavelle’s Bistro currently serves alcohol under BDL 727, when he learned of the licensing option based on tourism, he immediately applied for BDTL 6156, as well.¹³ If granted, he would then have two licenses to sell, transfer, or use as leverage in negotiations with potential buyers.¹⁴ He acknowledged discussing the sale of BDL 727 with others, including the landlords of Springhill Suites, and being offered \$250,000.¹⁵ However, the talks with his landlords stalled, as Mr. Eagle balked at the negative tax consequences of a sale based on the restaurant’s tangible assets and not the Bistro “brand.”¹⁶ Mr. Eagle opted to pursue this appeal to explore additional licensing options.

When asked about how the issuance of the tourism license would result in improvements to the hotel, Mr. Eagle explained that the general maintenance of a restaurant requires constant updating of chairs, floors, equipment – all “capital improvements that are depreciable on your federal taxes on a daily basis.”¹⁷ Conversely, he stated that if he is not granted BDLT 6156 and does not sell BDL 727 to the hotel, he might take the Bistro out of Springhill Suites, along with all the restaurant’s inventory.¹⁸ This, he asserted, would result in a depreciation of the hotel’s value.¹⁹

¹⁰ *Id.*
¹¹ *Id.*
¹² Ex. 4, 6.
¹³ Test. Eagle.
¹⁴ *Id.*
¹⁵ *Id.*
¹⁶ *Id.*
¹⁷ *Id.*
¹⁸ *Id.*
¹⁹ *Id.*

III. Discussion

A. *Burden of proof*

The Licensee bears the burden of proof by a preponderance of the evidence, as he is seeking to change the *status quo*.²⁰ At the close of its meeting in 2023, the Board denied Mr. Eagle’s application for BDTL 6156.²¹ He seeks to change the status quo by appealing this determination and asking this tribunal to decide that he is, in fact, entitled to a BDLT.²²

B. *Which version of the law to apply*

The alcohol laws in effect when Mr. Eagle’s BDLT was reviewed by the Board in 2023 were modified by the passage of Senate Bill 9, which largely did not go into effect until January 2024.²³ The Board revised its regulations in response to this statutory changing, also going into effect January 2024. The hearing before OAH regarding Mr. Eagle’s appeal was held in February, 2024, raising the question of whether to apply the laws that were current when Mr. Eagle applied for a BDLT, or those in effect when his appeal was considered.

Both the original and revised Title 4 statutes regarding a “beverage dispensary tourism license” state that the Board may approve a new BDLT if it “appears the license will encourage the tourist trade by promoting the construction or improvement of a hotel [.]”²⁴ The corresponding regulation as expressed after the rewrite, however, includes new language. Determining which version of a regulation controls predominantly depends on whether the regulation is interpretive or legislative and whether it is being applied to past or future actions.

A regulation that interprets a statute can apply retroactively under certain circumstances; a regulation that establishes rules may not.²⁵ The current, rewritten version of the regulation adds the directive that a BDLT application “must include a description of *how* the requisite promotion of construction or improvement will be accomplished.”²⁶ This additional instruction offers greater clarity regarding the BDLT application process.²⁷ The new regulation, therefore, is

²⁰ *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

²¹ Ex. 5.

²² AS 44.62.460(e)(2).

²³ 8 SLA 2022. The 2022 passage of Senate Bill 9 resulted in the rewrite of many of the statutes under Title 4, which govern the Alcoholic Beverage Control Board.

²⁴ AS 04.11.400(d)(d), AS 04.09.350(c)(1).

²⁵ AS 44.62.240.

²⁶ 3 AAC 305.325(a).

²⁷ See *Kelly v. Zamarello*, 486 P.2d 906, 909, 910. (Alaska 1971). See also *Whaley v. State*, 438 P.2d 718 (Alaska 1968). The Board’s authority to manage alcohol licensing is provided under AS 04.06.090.

legislative, as it creates a rule, it does not interpret statutory language. Accordingly, the new regulation would not apply retroactively.

But whether an application is retroactive depends on whether it is being applied to past or future action. A statute or regulation “will be considered retroactive insofar as it ‘gives to pre-enactment conduct a different legal effect from that which it would have had without passage of the statute.’”²⁸ A “different legal effect” arises if a new statute or regulation “would impair rights a party had when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”²⁹ Here, the Café has applied for a new license. Until a license is issued, the applicant does not have a legal right to it. Courts have long held that when reviewing a license or permit for future actions, agencies should apply the law in effect at the time of the decision, not the law in effect at the time of the application.³⁰ Thus it is 3 AAC 305.325(a), the current version of the regulation in effect as of January 1, 2024, that applies to this review of his appeal.

C. Interpreting the applicable regulation

Understanding and interpreting the revised BDLT regulation regarding the tourism license requires a closer look at how it was modified in response to Senate Bill 9.

In relevant part, Senate Bill 9 repealed the tourism license provision in [AS 04.11.400\(d\)](#) and adopted in AS 04.09.350 instead. The new statute has substantially similar language, with the addition of a license fee.

The Board then revised its regulations, including its tourism license regulation.

The original regulation reads as follows:

3 AAC 304.325. License issued to encourage tourism.

(a) The board will, in its discretion, approve the issuance or transfer of location of a beverage dispensary or restaurant or eating place license under [AS 04.11.400\(d\)](#) only upon a showing that

- (1) the approval will encourage the construction or improvement of a tourist facility which would not be financially feasible without a liquor license; and

²⁸ *Rush v. State, Dep't of Nat. Res.*, 98 P.3d 551, 555 (Alaska 2004).

²⁹ *Id.*

³⁰ *See, e.g., Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 848 (1990), Scalia, J., concurring (administrative agency required “to apply current law (rather than the law in effect at the time of filing of the permit application) in determining whether the applicant was qualified to obtain a permit for future operations”); *Ortiz v. I.N.S.*, 179 F.3d 1148, 1156 (9th Cir. 1999) (appeal tribunal correctly applied law at time of decision, even though different from law at time of application, because “it is settled that when the law is changed before a decision is handed down by an administrative agency, the agency must apply the new law”).

(2) construction or improvement of the tourist facility will encourage tourism, and tourist business will constitute a substantial portion of the business of the tourist facility.

□

(f) In this section, "improvement" means expenditure of labor and capital which increases the value of the premises, and which can be depreciated for federal income tax purposes.

While this is the current, updated version:

3 AAC 305.325. Beverage dispensary tourism licenses.

(a) For the purposes of AS 04.09.350(c)(1), an applicant for the issuance, transfer of location, or renewal of a beverage dispensary tourism license shall include a description of how the requested license encourages the tourist trade by promoting the construction or improvement of a hotel..[.]

Gone is the language defining “improvement” as the “expenditure of labor and capital which increases the value of the premises, and which can be depreciated for federal income tax purposes.”³¹ The parties have not provided any regulatory history explaining this omission. The word “improvement” appears in AS 04.09.350, but unfortunately, a thorough search of the minutes from the legislative committees that met and that discussed the revisions of Senate Bill 9 reveals no insights into the intentions behind this language. However, when a word is not statutorily defined and there is no helpful legislative history suggesting an interpretation, the US Supreme Court has said it can be given its ordinary dictionary meaning.³²

Turning, then, to Black’s Law Dictionary, the word “improvement” is defined as, “An addition to property, usu. real estate, whether permanent or not; esp., one that increases its value or utility or that enhances its appearance.”³³ The entry specifically distinguishes the word from “maintenance,” which is, “The care and work put into property to keep it operating and productive; general repair and upkeep.”³⁴

D. The law as applied to the facts

1. Encouraging tourism through improvements

It is undisputed that Lavelle’s Bistro is a highly regarded restaurant in the Fairbanks area and maintaining it as a clean, reputable, well-run business is costly. Mr. Eagle described constantly updating the Bistro’s equipment and furniture. He asserts that the regular maintenance

¹⁴ 3 AAC 304.325(a)(1), repealed Jan. 1, 2004.

³² In the absence of a statutory definition, "we construe a statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

³³ *Black’s Law Dictionary* (11th ed. 2019), available at Westlaw.

³⁴ *Id.*

of the Bistro requires ongoing capital expenditures which inherently increases the property value of Springhill Suites, a hotel that largely caters to tourists. He points out that having the Bistro on premises is of great economic benefit to the hotel owners.

However, the difference between improvements and maintenance is that the former increases property value, the latter represents the general upkeep of a premises. Everything that Mr. Eagle testified about – the replacement of the carpets, chairs, equipment – keeps the Bistro looking sharp and operating smoothly. As he explained and common sense confirms, things necessarily “wear out” over time and need to be replaced. But these changes simply ensure that the Bistro remains in consistent working order. Mr. Eagle’s plans as articulated in his application do not include any “additions,” like expanding the dining area, building a new bar, adding on a solarium – anything that would represent a change beyond a standard repair. If any of these changes happened the hotel owners could accommodate more customers or lease the improved space to another restaurant owner for a higher amount of rent. Such a construction project would increase the property value of Springhill Suites and encourage tourism.

The repairs and maintenance that Mr. Eagle provides the Bistro, however, fall short of improving the value, utility, or appearance of the hotel.”³⁵ While Mr. Eagle is correct that the hotel is a more appealing lodging option for tourists with the Bistro on site, the regulation requires more than just maintaining a nice restaurant. The regulation requires that a BDLT applicant show how granting the license will result in encouragement of tourism through hotel improvement. Mr. Eagle has only shown plans to maintain the Bistro just as he has the previous 20+ years of the lease.

2. Plans to sell the license

Secondly, Mr. Eagle also imagined various scenarios eventually unfolding depending on the outcome of this appeal, but all involved selling any license he owns or acquires. He speculated that if his application for a tourism license is granted, giving him two licenses for the same premises, he might sell the hotel BDLT 6156, freeing up BDL 727 for the sale or transfer to another entity. Alternatively, if his application is denied he might offer the hotel BDL 727, or perhaps vacate the Suites entirely and remove all the Bistro’s equipment and furniture.

Understandably – and very prudently – Mr. Eagle acknowledged pursuing this appeal largely to determine his optimal financial options (with the least amount of tax liability) as he exits the restaurant business and prepares for retirement. While any license holder is free to

³⁵ *Black’s Law Dictionary* (11th ed. 2019), available at Westlaw.

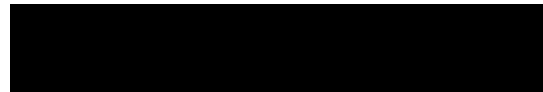
pursue sale or transfer possibilities, the plain language of the tourism license is to promote hotel developments and improvements that contribute to the tourism industry. The issuance of BDLT 6156 may result in changes that increase the property value of the Suites at some point in the future, depending on who purchases the license. In the immediacy, however, Mr. Eagle’s improvement plans are restricted to the general upkeep of his restaurant, making the primary goal of his application to negotiate a lucrative licensing sale. This does not further the very specific intent of the statute to “encourage the tourist trade by promoting the construction or improvement of a hotel.”

IV. Conclusion

The licensee has not met his burden of establishing by a preponderance of the evidence that granting his application for BDLT 6156 would encourage the tourist trade by promoting the construction or improvement of a hotel. The proffered plans articulate mere repairs and maintenance, which do not qualify as improvements. The only certain result of the issuance of this tourism license is a lucrative windfall for the licensee, who plans to sell the asset and leave the business. As this does not represent an appropriate reason for approving a beverage dispensary tourism license, the licensee application for BDLT 6156 should be denied.

DATED: April 8, 2024.

By:



Administrative Law Judge

Adoption

The ALCOHOLIC 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 distribution of this decision.

DATED this _____ day of 7/1/2024, 2024.

By: _____
Signature **Dana Walukiewicz**
DocuSigned by:
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Dana Walukiewicz

Name **Chairman**

Title