

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

In the Matter of	)	
	)	
LED ULTRA LOUNGE & GRILL, LLC	)	OAH No. 22-0846-ABC
<hr style="width: 40%; margin-left: 0;"/>	)	Agency No. 4531 & 4551

**DECISION**

**I. INTRODUCTION**

Robert Alexander, owner of LED Ultra Lounge & Grill, LLC (“LED”), requested transfer of two alcohol dispensary licenses from his own name to LED and from the location of a former LED nightclub to a proposed new location. The Anchorage Assembly (“Assembly”) protested the transfers. The Assembly’s stated reasons for protesting were that LED did not have a necessary land use permit, local opposition, and proximity to a school. LED contends the Assembly protested because of racial discrimination.

When a local governing body like the Assembly protests an alcohol license action, the Board must deny it unless the protest is arbitrary, capricious, and unreasonable. As discussed below, one of the Assembly’s reasons for its protest is moot. One is unreasonable. But the remaining reason — significant local opposition — is a legally valid reason to protest and is grounded in fact. LED did not demonstrate otherwise, nor did it demonstrate racial discrimination in violation of equal protection or the lesser standard of arbitrary, capricious, and unreasonable. Because at least part of the protest is not arbitrary, capricious, and unreasonable, the Board must deny LED’s license transfers.

**II. BACKGROUND**

The Anchorage Assembly has considerable authority over where alcohol is sold in the city and by whom. The business *location* must have a Special Land Use Permit (“SLUP”) from the Assembly for alcohol sales.<sup>1</sup> A SLUP runs with the land as ownership or operation of the property changes hands.<sup>2</sup> A SLUP is thus a decision about use of the land, not the person using it. An alcohol-sales business also needs a beverage dispensary license from the State Alcoholic Beverage Control Board. This license authorizes a particular licensee to sell alcohol at a

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<sup>1</sup> Anchorage Municipal Code 21.03.040.

<sup>2</sup> *Id.*; Francis McLaughlin testimony; Affidavit of Christopher Constant (“Constant Aff.”) ¶ 28.

particular location.<sup>3</sup> Licenses can later be transferred to a different licensee or different location.<sup>4</sup> Local governing bodies like the Assembly can protest the issuance or transfer of a license. Unless the Board determines a protest is arbitrary, capricious, and unreasonable, the Board must deny the License.<sup>5</sup> The Assembly is thus both gatekeeper of where alcohol may be sold, through its SLUP process, and may essentially be a gatekeeper of who the State licenses to sell alcohol at a particular one of these approved locations, through protest of an alcohol license.

Robert Alexander, owner of LED, holds two alcohol dispensary licenses (“Licenses”) for a location on 6th Avenue in Anchorage where LED previously operated a nightclub.<sup>6</sup> Mr. Alexander obtained these Licenses by transfer from a different business and location.<sup>7</sup> The Assembly did not protest that transfer.<sup>8</sup> Mr. Alexander renewed his Licenses in 2016, 2018, and 2020. The Assembly did not protest those license actions either, even after receiving comments regarding public safety concerns and other issues from neighbors in 2020.<sup>9</sup>

Mr. Alexander applied to transfer both licenses to LED and to a location on 3rd Avenue to reopen the LED nightclub there.<sup>10</sup> The 3rd Avenue location had previously been operated as an all-ages nightclub, but does not have a SLUP for alcohol sales.<sup>11</sup> Thus Mr. Alexander and LED would need to both transfer the Licenses to the 3rd Avenue location and obtain a SLUP to authorize alcohol sales at this location. The 3rd Avenue location is close to residential homes and hotel businesses; it is immediately adjacent to a residential dwelling, across the street from the Anchorage Hilton and Historic Anchorage Hotel, and half a block from the Turnagain Arms Condominiums.<sup>12</sup> Several alcohol-sales businesses also operate within a one-block radius of LED’s proposed 3rd Avenue location.<sup>13</sup>

The Anchorage Assembly reviews hundreds of alcohol license actions a year and protests only a fraction of them. For example, in 2021, the Assembly considered 284 alcohol license actions and protested 54 of them.<sup>14</sup> According to Assembly member Christopher Constant, a

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<sup>3</sup> AS 04.11.090.

<sup>4</sup> AS 04.11.280; AS 04.11.290.

<sup>5</sup> AS 04.11.480(a).

<sup>6</sup> AMCO Ex. 5, 6.

<sup>7</sup> Honest Aff. ¶ 22.

<sup>8</sup> Affidavit of Miranda Honest (“Honest Aff.”) ¶¶ 21-22.

<sup>9</sup> Honest Aff. ¶ 22.

<sup>10</sup> AMCO Ex. 5, 6.

<sup>11</sup> Constant Aff. ¶ 11.

<sup>12</sup> LED Ex. 12; Mary Rohlfing testimony.

<sup>13</sup> LED Ex. 12.

<sup>14</sup> Constant Aff. ¶ 5.

primary reason the Assembly protests so few is that licensees negotiate mitigation measures or memoranda of understanding with local community councils to address local concerns.<sup>15</sup>

Anchorage has several community councils, provided for by municipal charter. These private associates of residents, property owners, business owners, and others advise the Assembly on issues of importance to that council, including alcohol license actions.<sup>16</sup>

LED's prior 6th Avenue location and proposed 3rd Avenue location are both within the purview of Anchorage's Downtown Community Council ("DCC"). Following a meeting with public testimony both for and against LED's License transfers, DCC passed a resolution opposing the action.<sup>17</sup> The resolution cited concerns with the density of residential homes and hotels near LED's proposed location, opposition from those businesses and residents, past conflicts between alcohol licensees and residents in the immediate area, and a history of complaints against LED at its prior location.<sup>18</sup> DCC also stated that the new location's entrance violated statutory requirements on proximity to schools.<sup>19</sup>

The Assembly held a public work session and hearings on LED's proposed License transfers.<sup>20</sup> Following public testimony for and against the transfers and considering the DCC resolution, the Assembly voted to protest the License transfer on March 18, 2022.<sup>21</sup> The Assembly gave three reasons for its protest: (1) that LED had applied for, but not yet received, a SLUP for the 3rd Avenue location;<sup>22</sup> (2) that DCC opposed the transfer; and (3) the Anchorage School District opposed the transfers based on its proximity to a school.<sup>23</sup> The Assembly delivered its protest to the Board along with a memo stating that the Assembly protested transfer to the 3rd Avenue location but not transfer of the Licenses from Mr. Alexander to LED.<sup>24</sup>

The Board then considered LED's License transfer in light of the Assembly's protest. At an April 12, 2022 meeting, the Board heard testimony from LED, local residents, DCC, and other members of the public.<sup>25</sup> The Board did not find that the Assembly's protest was arbitrary,

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<sup>15</sup> *Id.* ¶ 6.

<sup>16</sup> Anchorage Municipal Code 2.40.010, *et seq.*; Constant Aff. ¶ 3; Honest Aff. ¶ 20.

<sup>17</sup> Affidavit of Darrel Hess ("Hess Aff.") ¶¶ 3-8; Assembly Ex. 3.

<sup>18</sup> Assembly Ex. 3.

<sup>19</sup> *Id.* at 4.

<sup>20</sup> Honest Aff. ¶¶ 8, 11; Constant Aff. ¶ 16

<sup>21</sup> Assembly Ex. 11.

<sup>22</sup> At the time, LED's SLUP application was under review with the city's Planning Department. Assembly Ex. 11. The Assembly later, on July 12, 2022, voted to postpone action on LED's SLUP application indefinitely. Constant Aff. ¶ 33; Honest Aff. ¶ 16.

<sup>23</sup> *Id.*

<sup>24</sup> Assembly Ex. 11 at 5; Honest Aff. ¶ 12.

<sup>25</sup> AMCO Ex. 12.

capricious, and unreasonable and therefore upheld the Assembly’s protest. Rather than immediately deny the License transfers, the Board held the denial in abeyance for 180 days, during which the Assembly could withdraw its protest.<sup>26</sup> During the abeyance period the Alcohol & Marijuana Control Office (“AMCO”) determined that the entrance to LED’s 3rd Avenue location did not violate statutory requirements on proximity to schools.<sup>27</sup> LED also sought reconsideration. The Board heard testimony and argument from LED and the Assembly at its September 20, 2022 meeting and voted to end the abeyance period and deny the License transfers.<sup>28</sup>

LED requested a formal hearing. The Assembly participated as a party in these proceedings. LED and the Assembly provided pre-filed direct testimony and questioned numerous witnesses at a hearing on January 18 and 19, 2023.

### III. DISCUSSION

A local governing body may protest a license action that it finds objectionable or counter to general public policy.<sup>29</sup> For the Anchorage Assembly, it evaluates the following factors when considering a protest: (1) negative impacts on the concentration of alcohol sales and services in an area; (2) demonstrated compliance with training program requirements; (3) demonstrated compliance with operations procedures; (4) demonstrated ability to maintain order and prevent unlawful conduct within the licensed premises and adjacent areas under the licensee’s control; (5) any delinquent municipal debts or taxes; (6) any pattern or practice of violent or unlawful conduct, and if so, the applicant’s remedial plan to address this conduct; (7) security for any delinquent municipal debts or taxes; and (8) any pattern of practices injurious to public health or safety.<sup>30</sup>

To protest, a local governing body provides the Board with written reasons that should be “logical grounds for opposing” the license and “have a reasonable basis in fact.”<sup>31</sup> The Board then evaluates whether the protest is arbitrary, capricious, and unreasonable.<sup>32</sup> If it is not, the Board must honor the protest and deny the license action.<sup>33</sup> Notably the Board is tasked with

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> AMCO Ex. 17.

<sup>29</sup> 3 AAC 304.145(e).

<sup>30</sup> Anchorage Municipal Code 2.30.125.

<sup>31</sup> 3 AAC 304.145(a).

<sup>32</sup> AS 04.11.480(a).

<sup>33</sup> *Id.*

looking at the protest as a whole, not determining whether every reason a local body offered for the protest is reasonable. Thus if any one basis for the protest is acceptable, the protest as a whole is not arbitrary, capricious, and unreasonable.

Determining whether a protest was arbitrary, capricious, and unreasonable also looks at the facts at a specific point in time when the protest was issued. This hearing process allows the parties to introduce evidence that was not before the Assembly, but events that wholly occurred after the Assembly issued its protest are of limited or no relevance. For example, numerous witnesses testified at the hearing about an event held at LED's 3rd Avenue location in November 2022, eight months after the Assembly protested the License transfers. This evidence has some relevance as an illustration of the location and potential impacts of LED operating there. But the event itself and AMCO's potential actions against LED regarding the event are not pertinent to whether the Assembly was arbitrary, capricious, and unreasonable in issuing a protest many months earlier. Similarly, much of LED's arguments and evidence concern the Assembly's handling of its separate SLUP application — in particular, the Assembly's July 2022 decision to postpone action on that application indefinitely. LED has viable legal options for addressing the Assembly's handling of its SLUP application; this matter, however, is not one of them. LED's SLUP application and the Assembly's actions — or lack thereof — are not before OAH or the Board here. Nor were they before the Assembly at the time it protested LED's License transfers. Evidence of the Assembly's actions after issuing the protest are thus of limited relevance to the reasonableness of the protest itself.

LED, as the License transfer applicant, has the burden of proof.<sup>34</sup> LED contends the Assembly's protest was arbitrary, capricious, and unreasonable because (1) the Assembly denied LED a vote on its SLUP; (2) the Assembly discriminated against LED and other similarly situated businesses (characterized by LED variously as "Black and Brown-owned alcohol licensees," "Black and Brown operators," and "night clubs that operate after 2 a.m.") in violation of federal and state equal protection; and (3) the Assembly incorrectly concluded that the 3rd Avenue location violates state statute on proximity to schools.

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<sup>34</sup> *Stevens v. State, Alcoholic Beverage Control Bd.*, 257 P.3d 1154, 1159-60 (Alaska 2011) (licensee has burden of proof).

**A. The Assembly Concedes the 3rd Avenue Location Does Not Violate State Statute on Proximity to Schools.**

DCC and the Anchorage School Board both raised concerns with the distance between LED's 3rd Avenue entrance and a school, asserting that it violated state statute. The Assembly then included this as one of its reasons for protesting LED's License transfers. AMCO subsequently determined that there was no violation. The Assembly conceded this conclusion at the formal hearing stage and no longer considers it a basis for its protest.<sup>35</sup>

Because the Assembly has conceded this issue, the question of whether this basis was arbitrary, capricious, and unreasonable is moot.

**B. It is Unreasonable to Protest a License Transfer Because the Licensee Has Not Yet Obtained a SLUP.**

The Assembly protested LED's License transfers, in part, because the 3rd Avenue location did not have a SLUP and LED's separate SLUP application was still under review at the time. It was not a conditional protest contingent on LED obtaining a SLUP — the Assembly specifically rejected a conditional protest.<sup>36</sup> The Assembly protested the License transfers outright because LED had not yet completed the SLUP application process and obtained a SLUP.

As discussed above, LED needs both an alcohol license and a SLUP to serve alcohol. The license is an approval from the State for a particular business to sell alcohol at a particular location; the SLUP is an approval from Anchorage that a particular location may be used by any business to sell alcohol. With no SLUP, an alcohol license would be pointless. But that was not the situation here. Assembly had not denied a SLUP for this location, nor had LED filed to apply for one. Rather, the Assembly had barely begun its review process.

The Anchorage Municipal Code requires prospective alcohol businesses to apply for a license or license transfer *before* applying for a SLUP.<sup>37</sup> The Assembly is given notice of the license application within ten days, then has an additional 60 days to issue a protest.<sup>38</sup> When a prospective licensee submits a separate SLUP application, that application is first reviewed by the city's Planning Department, which prepares a report for the Assembly. The application is

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<sup>35</sup> Assembly Prehearing Brief at 5; Constant Aff. ¶ 22; Constant testimony.

<sup>36</sup> Assembly Ex. 15.

<sup>37</sup> Anchorage Municipal Code 21.03.040(C)(1).

<sup>38</sup> AS 04.11.520; AS 04.11.080(a).

then public noticed, the Assembly holds a public hearing, considers conditions necessary for approval, and then approves or denies the application.<sup>39</sup>

AMCO deemed LED's License transfer applications complete on January 19, 2022 and sent the applications on to the Assembly.<sup>40</sup> The Assembly then had 60 days — until March 20 — to protest. AMCO advised LED that it would need to secure any necessary approvals, such as municipal permits, before the Board would provide a final approval, but that it would move forward with reviewing its transfer application while other processes were pending.<sup>41</sup>

LED applied for a SLUP on January 26, 2022 — after applying for the License transfers, as required by the Anchorage Municipal Code.<sup>42</sup> The next step in the SLUP process is a report from the Planning Department. While that Department was still reviewing LED's SLUP, the Assembly issued its protest on March 18, 2022, just within its 60-day deadline.<sup>43</sup> The Planning Department then issued its report on LED's SLUP application on April 12, 2022 — 76 days after LED applied and nearly a month after the Assembly voted to protest the License transfer.<sup>44</sup> As of the January 2023 hearing on this matter, the Assembly had still not voted on LED's SLUP application.

As these events show, the Anchorage Municipal Code creates a procedural situation where: (1) an applicant must apply for an alcohol license before applying for a SLUP; (2) the license application then triggers a period of no more than 70 days total for the Assembly to protest; but (3) the SLUP review process — at least for LED — takes more than 70 days to complete the initial Planning Department review, let alone the Assembly's review. Under these procedures, it is not possible for an applicant to obtain a SLUP before the Assembly's deadline to protest. If the fact that a SLUP application is pending is a valid basis to protest, then any applicant for a location that is not already under a SLUP will necessarily have its license protested, and the Board will have to deny the license. So to obtain both a license and a SLUP, an applicant would have to apply for the license, then apply for the SLUP, have the license denied, eventually obtain the SLUP, then re-apply for the license. That process is not efficient or cost-effective for the applicant, the Assembly, or the Board.<sup>45</sup> Nor is it reasonable.

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<sup>39</sup> Anchorage Municipal Code 21.03.040(C).

<sup>40</sup> AMCO Ex. 1-2; LED Ex. 42-43.

<sup>41</sup> AMCO Ex. 1-2.

<sup>42</sup> LED Ex. 6 at 18.

<sup>43</sup> Assembly Ex. 11.

<sup>44</sup> LED Ex. 6.

<sup>45</sup> Even if the Board held a denial in abeyance, as it did here, and the Assembly was able to complete its SLUP process during the abeyance period, the Board, AMCO, and the applicant would have to spend time and

It is not necessarily arbitrary, capricious, and unreasonable to protest an alcohol license for a location where no business can sell alcohol. Indeed, the Board advised LED early in the License process that the Board would not finalize the License transfers until necessary approvals like a SLUP were in place.<sup>46</sup> But it is arbitrary, capricious, and unreasonable to protest an alcohol license because a SLUP application is pending where city's own procedures make it impossible to obtain a SLUP prior to the Assembly's deadline to protest.

**C. It is Not Arbitrary, Capricious, and Unreasonable to Protest a License Transfer Because of Opposition by a Community Council Grounded in Fact.**

The Assembly further protested the License transfer because DCC opposed it.<sup>47</sup> The Board's regulations require a protest to be based on "logical grounds" and "have a reasonable basis in fact."<sup>48</sup> As discussed below, the record shows DCC's opposition, and in turn the Assembly's consideration of DCC and others' opposition, was logical and grounded in fact.

DCC provided the Assembly with a resolution opposing LED's License transfer highlighting concerns for public safety because of the density of hotels and residential homes near the 3rd Avenue location, concerns about LED's proposed hours of operation in light of past problems with noise from similar businesses in the area, and a history of complaints against LED at its prior location.<sup>49</sup> Proximity to residential buildings and opposition from its residents are "logical and traditional grounds" for protest that the Supreme Court has found not to be arbitrary, capricious, and unreasonable.<sup>50</sup>

Local concerns here were based on facts presented to DCC and the Assembly. Before DCC and the Assembly, as well as at the hearing, local residents and businesses provided testimony about past problems with nightclubs at or near LED's proposed 3rd Avenue location and raised concerns that those problems would repeat if LED was licensed for a nightclub there.<sup>51</sup> Residents and business owners testified about negative impacts from noise and unruly, even violent, behavior from people believed to be patrons leaving nightclubs.<sup>52</sup> Residents of the

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resources holdings meetings and issuing a decision on whether the protest is arbitrary, capricious, and unreasonable, when the sole cause of the protest is a process and timing issue, created by city ordinance.

<sup>46</sup> AMCO Ex. 1-2.

<sup>47</sup> Assembly Ex. 11 at 4.

<sup>48</sup> 3 AAC 304.145(a).

<sup>49</sup> Assembly Ex. 3.

<sup>50</sup> *Stoltz v. City of Fairbanks*, 703 P.2d 1155, 1157 (Alaska 1985).

<sup>51</sup> LED Ex. 12; Constant Aff. ¶¶ 9-11; Bob Neumann testimony; Russ Reno testimony; Steve Rader testimony; Mary Rohlffing testimony; Buzz Rohlffing testimony; Assembly Ex. 13, 15.

<sup>52</sup> Assembly Ex. 15.



building adjacent to the 3rd Avenue location testified that when a prior all-ages nightclub operated there, they were “constantly” disturbed late at night by noise from patrons leaving the club, including loud talking, honking, and loud music from cars, as well as noise vibrations from the club itself.<sup>53</sup> These residents also described problems with debris from club patrons and cars blocking entrance to their residence.<sup>54</sup> The general manager of the Anchorage Hilton testified that the prior nightclub negatively impacted the hotel’s business.<sup>55</sup> The owner of the Anchorage Historic Hotel described being unable to rent certain rooms when the former club held events.<sup>56</sup> That owner was also former owner of a night club around the block from LED’s proposed 3rd Avenue location and testified that the neighborhood is incompatible with a nightclub.<sup>57</sup>

The Assembly also received numerous complaints from neighboring residents and businesses about LED’s operations at its prior 6th Avenue location, including complaints about noise and unruly behavior from patrons leaving the establishment.<sup>58</sup> Witnesses at the hearing here also testified about concerns with LED’s nightclub at its prior location.<sup>59</sup> LED submitted videos of patrons leaving its prior nightclub which showed loud voices, loud music from cars, revving engines, honking, and other noise.<sup>60</sup> Security video footage from the November 2022 event at LED’s proposed 3rd Avenue location showed similar noise disturbance, and neighbors testified that this was consistent with their experiences with the prior nightclub at that location.<sup>61</sup> Mr. Alexander himself testified about his efforts to pick up trash and encourage patrons to leave at closing, but acknowledged that it was not possible to control patrons outside a nightclub or prevent them from making noise.<sup>62</sup>

Certainly not all evidence before DCC and the Assembly, and at the hearing here, weighed against LED’s License transfers. Many people testified before the Assembly about positive experiences with LED at its prior 6th Avenue location and LED offered similar

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<sup>53</sup> Mary Rohlffing testimony; Buzz Rohlffing testimony.

<sup>54</sup> *Id.*

<sup>55</sup> Steve Rader testimony.

<sup>56</sup> Bob Neumann testimony.

<sup>57</sup> *Id.* (“A nightclub like Rumrunners, or LED, or any of the clubs that have come and gone—that is not a good neighborhood for that kind of an operation. And I can attest to that as having an operation like that, and then selling that operation . . . So, no, that is not a good neighborhood for a nightclub.”).

<sup>58</sup> Honest Aff. ¶ 22; Assembly Ex. 6; Constant Aff. ¶ 18.

<sup>59</sup> *See, e.g.*, Constant Aff. ¶ 18; Constant testimony; Michael Ward testimony.

<sup>60</sup> LED VEX 5, 7.

<sup>61</sup> Assembly Ex. 18; “Assembly Ex. 18-1, 18-2, and 18-3,” submitted by LED; Mary Rohlffing testimony.

<sup>62</sup> Alexander testimony; *see also* Affidavit of Krystofer Encobe ¶ 5.

testimony for the hearing here.<sup>63</sup> LED did make efforts to engage with local residents and businesses and to address concerns with noise emanating from the proposed nightclub itself.<sup>64</sup> Those efforts, however, did not assuage local concerns, resulting in DCC’s resolution against the License transfers. The Assembly was ultimately unconvinced that evidence supporting LED’s License transfers outweighed the evidence and circumstances opposing them. The fact that there was evidence supporting LED does not demonstrate that the Assembly was arbitrary, capricious, or unreasonable in protesting the License transfers. It shows that the Assembly had much to consider. The Assembly’s debate shows that it weighed evidence supporting and opposing the License transfers and the majority voted to protest.<sup>65</sup> LED’s evidence that it had some support thus does not meet its burden of showing that the Assembly was arbitrary, capricious, and unreasonable in determining that the opposition and other facts outweighed that support.

**D. LED Has Not Shown the Assembly Protested Because of Racial Discrimination.**

LED characterized this matter as an equal protection case, arguing that the Assembly protested its License transfers because Mr. Alexander identifies as “black” and the Assembly has a history of discriminating against “black and brown” licensees or operators, in violation of state and federal equal protection.<sup>66</sup> Two of the many issues LED would need to show for an equal protection claim are that the Assembly treated LED differently than other similarly situated nightclubs and that the Assembly did so because of a discriminatory intent.<sup>67</sup> LED failed to make these showings.

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<sup>63</sup> Assembly Ex. 13; Assembly Ex. 15; December 14, 2022 Affidavit of Kevin Collins; Affidavit of Susan Mary Deason; Affidavit of Krystofer Encabo; Affidavit of James Krist McPerson.

<sup>64</sup> See, e.g., Alexander testimony; Affidavit of Chris Gilpin; Mary Rohlfling testimony; Buzz Rohlfling testimony.

<sup>65</sup> Assembly Ex. 15.

<sup>66</sup> In its prehearing brief, LED contends that a categorization for equal protection need not be based on race, suggesting there could be discrimination against nightclubs. While it is true equal protection is not limited to protected classes, LED did not develop and present evidence or argument of disparate treatment of a certain class of nightclubs compared to other similarly situated nightclubs — or even adequately define such a class.

<sup>67</sup> See, e.g., *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 957 (Alaska 2005) (“Absent a discriminatory purpose, a law that is race-neutral on its face does not violate the Federal Equal Protection Clause, even if the impact is disparate.”); *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 787 (Alaska 2005) (“Absent disparate treatment of similarly situated persons, the law as applied to the aggrieved group does not violate the group’s right to equal protection. We first consider whether, as the municipality contends, there is no evidence of differential treatment, making it unnecessary to engage in a sliding-scale analysis”); *Rollins v. State, Dep’t of Revenue, Alcoholic Beverage Control Bd.*, 991 P.2d 202, 210 (Alaska 1999) (to show application of statute in violation of equal protection, need to show the Board “intended to discriminate against her based on an arbitrary or unjustifiable classification”); cf. *Luper v. City of Wasilla*, 215 P.3d 342, 348 (Alaska 2009) (“[E]ven assuming Luper’s assertions that the city did not enforce the relevant ordinances against her neighbors are true, we have held that mere failure to

LED offered evidence about a handful businesses that did or did not elicit a protest from the Assembly. Not all of this evidence was admissible.<sup>68</sup> But even assuming these businesses are similarly situated to LED — which the Assembly disputes — they would at most provide anecdotal evidence. The Assembly considers hundreds of alcohol license actions a year and protests only a small fraction of them.<sup>69</sup> A few examples of similarly situated businesses does not show how the Assembly treated LED compared to the balance of similarly situated businesses throughout a given time period.

Even amongst the examples LED provided, it did not show these businesses were similarly situated with regard to the Assembly’s reasons for protesting. The parties focused on factors such as hours of operation or the race of a business’s owner or operator. But the issues for the Assembly were lack of a SLUP and local opposition. An alcohol license application for a location that is already permitted for alcohol sales under a SLUP is not the same as a license application for a location that is not permitted for alcohol sales. The latter adds an additional alcohol-serving business; the former merely an alcohol-serving business where one previously existed. Negative impacts from an increased concentration of alcohol-selling businesses is one of the factors the Assembly must consider.<sup>70</sup> At least two of the businesses LED compared itself to are operating under SLUPs that have been in place for those locations for many decades.<sup>71</sup> Which, if any, of the other businesses lacked a SLUP? LED did not present that evidence.

Similarly, an alcohol license for a business and location that garners significant local opposition is not the same as an application for a business and location that does not elicit such opposition. Assembly member Chris Constant explained that a primary reason license actions are not protested is because applicants and community councils work out mitigation measures, and thus avoid the council’s opposition.<sup>72</sup> Some residents and business owners might even

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enforce an ordinance against others similarly situated does not itself prove selective enforcement in the absence of evidence of discriminatory intent.”).

<sup>68</sup> For example, LED submitted an affidavit from Mr. Alexander stating that he asked the DCC president about license actions that had been protested in recent years and recounting her answers. December 15, 2022 Affidavit of Robert Alexander ¶ 3. As evidence of whether protests were made, this is hearsay. Hearsay is admissible in this type of proceeding only if it supplements or explains direct evidence. AS 44.62.460(d).

<sup>69</sup> Constant Aff. ¶ 5.

<sup>70</sup> Anchorage Municipal Code 2.30.125. To be clear, it was unreasonable for the Assembly to use the lack of SLUP as a basis to protest when it has a process under which a person cannot apply for and obtain a SLUP within the time for the Assembly to issue a protest. But the fact that a location is not under a SLUP and therefore would add to the concentration of alcohol-selling business is one of the factors set forth in the Anchorage Municipal Code and would be a reasonable consideration. *Id.*

<sup>71</sup> Constant Aff. ¶¶ 39-40.

<sup>72</sup> Constant Aff. ¶ 6.

welcome a nightclub nearby. Indeed, LED offered evidence from residents and businesses near its prior 6th Avenue location with positive or neutral experiences with LED, and the Assembly did not protest any of the license actions related to that location.<sup>73</sup> This is in sharp contrast to the local opposition to LED’s 3rd Avenue location. Which, if any of the businesses LED compares itself to were also opposed by a community council? Or opposed by local residents and businesses with a similar magnitude or volume as local opposition to LED here? LED did not offer this evidence.

Nor did LED provide evidence demonstrating a discriminatory intent by DCC or the Assembly. LED provided some evidence about the race — or perceived race — of the owners or operators of some businesses and the race of some people who opposed its License transfers. A person’s racial identity alone is not evidence of discrimination by or towards them. To support an equal protection claim, LED needs to demonstrate that the Assembly members actually *intended* to discriminate. LED did not present any evidence of racial motivations by the Assembly or even that the Assembly regularly has information on the race of owners or operators such that it could make protest decisions based on race.<sup>74</sup> Mr. Alexander and others testified before the Assembly that they perceived opposition to LED’s License transfer was racially motivated.<sup>75</sup> Perceptions of discrimination, as heartfelt as they may be, do not support an equal protection claim. LED must demonstrate the Assembly treated similarly situated persons different with an intent to discriminate. It failed to do so.

To the contrary, Mr. Alexander’s own history before the Assembly undercuts his claims of racial discrimination or even discrimination against nightclubs in downtown Anchorage. When Mr. Alexander — who identifies as “black” — first sought the Licenses for a downtown nightclub in 2015, the Assembly did not protest.<sup>76</sup> Nor did the Assembly protest Mr. Alexander’s License renewals for his downtown nightclub in 2016, 2018, or 2020, even after receiving comments about public safety and other concerns.<sup>77</sup> It was only when Mr. Alexander sought transfer to a different downtown location — one that had not previously been approved for alcohol sales with a SLUP and one that garnered significant local opposition — that the Assembly protested. Both locations are downtown. LED’s business for both locations is a

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<sup>73</sup> Honest Aff. ¶¶ 21-22; Affidavit of Krystofer Encabo; Affidavit of James Krist McPherson; *see also* Assembly Ex. 13, 15.

<sup>74</sup> *See* Honest testimony (Assembly does not collect information on race of applicants).

<sup>75</sup> Assembly Ex. 15.

<sup>76</sup> Affidavit of Robert Alexander, December 15, 2022 ¶ 2-3; Honest Aff. ¶ 22.

<sup>77</sup> Honest Aff. ¶ 22.

nightclub. And Mr. Alexander's racial background obviously has not changed over time. The Assembly's four non-protests contradict Mr. Alexander's claims that the Assembly protested the License transfers here to discriminate against "black and brown" owners or operators of downtown nightclubs.

Notably, it is LED that raised equal protection here. Equal protection is a much higher bar than the arbitrary, capricious, and unreasonable standard that the Board is charged with applying. But even under the lesser standard, LED failed to meet its burden based on racial discrimination.

Is it arbitrary, capricious, and unreasonable to protest a license transfer to a location where local residents and business owners oppose a nightclub, based on negative impacts from prior nightclubs in the area and negative impacts from the licensee's nightclub at a different location? No. Now, would it be arbitrary, capricious, and unreasonable to protest a license transfer because of local opposition that was based solely on the race of the owner? It is hard to imagine circumstances where the answer would anything but yes. But has LED demonstrated either that the Assembly protested because of Mr. Alexander's race or that DCC opposed the license transfers because of his race? No.

Could it be arbitrary, capricious, and unreasonable to protest a license transfer based on subconscious racial bias, demonstrated by a pattern among otherwise similar businesses of only businesses with owners of a certain race receiving protests? Perhaps. LED, however, has not provided sufficient evidence to determine whether there is such a pattern here. As stated above, the Assembly considers hundreds of alcohol license actions a year. The record does not include evidence on a pool of license actions for any given time period sufficient to determine whether there is a pattern, let alone sufficient evidence to conclude that a pattern rises to the level of being arbitrary, capricious, and unreasonable. The smattering of examples LED offered does not a pattern make.

#### **IV. CONCLUSION**

LED did not meet its burden to show that the Assembly's protest of its License transfers is arbitrary, capricious, and unreasonable. Of the Assembly's three reasons to protest, one has been resolved. Another — that LED's separate SLUP application was still under review — is unreasonable in light of the city's procedures making it impossible to complete the SLUP process prior to the Assembly's deadline to protest a license action. But the Assembly's

remaining reason to protest — opposition from DCC — is the type of rationale that the Supreme Court has held is appropriate for a protest. And it is well supported by facts. LED’s evidence shows there was also support for its License transfers, but that does not mean that the Assembly was arbitrary, capricious, or unreasonable in weighing that support against the opposition and ultimately voting to protest the transfer. LED also offered some examples of other businesses that the Assembly did or did not protest, but this evidence is insufficient to support an equal protection claim or show that the Assembly’s protest was arbitrary, capricious, and unreasonable based on racial discrimination. Because the Assembly’s protest is not arbitrary, capricious, and unreasonable, the Board must deny LED’s License transfers to the 3rd Avenue location.

Dated: February 10, 2023



Rebecca Kruse  
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 30<sup>th</sup> day of May, 2023.

By: \_\_\_\_\_

Signature

Dana Walukiewicz

Name

Chair

Title