IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

LED Ultra Lounge & Grill, LLC, Appellant, v. State of Alaska, Alcoholic Beverage Control Board, Appellee,	)	Case No. 3AN-23-07776CI OAH No. 22-0846-ABC

DECISION ON APPEAL

I. Introduction

This case comes before the Court on appeal from a decision of the State of Alaska, Alcoholic Beverage Control Board ("ABC Board" or "Board"). The ABC Board denied, acting on a protest by the Anchorage Assembly ("the Assembly"), LED Ultra Lounge & Grill's ("LED Ultra" or "LED") applications to transfer two beverage dispensary licenses, #4531 and #4551, from a prior location on 6th Avenue in Downtown Anchorage to a new location on 3rd Avenue. In addition to the parties' briefing, the Court heard oral arguments on June 13, 2024. For the reasons stated herein, the ABC Board's decision is AFFIRMED.

II. Background

A. Legal Background

Under AS 04.11.480, a "local governing body," such as the Assembly, "may protest the . . . relocation, or transfer to another person of a license." The ABC Board is required to hold a hearing where it receives testimony and considers the reasons for the protest.[1] The ABC Board then "shall deny the

[1] AS 04.11.480(a); *see also* AS 04.11.510(b)(2), (4).

application . . . unless the board finds that the protest is arbitrary, capricious, or unreasonable."[2]

The Alcohol and Marijuana Control Office has adopted regulations setting the procedures for a local governing body to register its protest to the transfer of an alcohol license. The Alaska Legislature has since repealed the version of the regulations in existence when the Assembly protested LED Ultra's application.[3] The effective regulation at that time, 3 AAC 304.145, required the Assembly to provide a written statement setting out the reasons for the protest.[4] The reasons must be "logical grounds for opposing the application" and must "have a reasonable basis in fact."[5] Furthermore, the local governing body "shall allow the applicant a reasonable opportunity to defend the application before a meeting of the local governing body."[6] Upon the denial of an application because of a local protest, the applicant may request a hearing at which "the local governing body must, at the board's request, appear or otherwise meaningfully participate in the hearing and must assist in or undertake the defense of its protest."[7]

The regulations also provide substantive criteria to evaluate the local protest. A local protest may be based on facts specific to the particular application, or it may be based on "general public policy."[8] If for the latter reason, then "the policy must have a reasonable basis in fact, may not be contrary to law, and may not be patently inapplicable" to the particular application.[9] Notably, the

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[2] AS 04.11.480(a).
[3] *See* Ch. 8, SLA 2022; *see also* AAC Register 248, January 2024 (repealing 3 AAC 304, and replacing it with 3 AAC 305).
[4] 3 AAC 304.145(a) (repealed January 1, 2024).
[5] *Id.*
[6] *Id.* (d); *see also* 3 AAC 304.150 (repealed January 1, 2024) (providing procedures for hearing to review protest).
[7] 3 AAC 304.145(f).
[8] *Id.* 304.145 (e).
[9] *Id.*

ABC Board cannot "substitute its judgment for that of the local governing body on matters of public policy that have reasonable factual support."[10]

The foremost case implementing the local protest provision is *Stoltz v. City of Fairbanks*.[11] Stoltz applied to transfer an alcohol license for her bar from one location in Downtown Fairbanks to another location about a block away.[12] The new location was less than half a block from a senior citizens housing complex.[13] The new location was also "near [to] a concentration of other bars."[14] The City of Fairbanks held a public hearing on Stoltz's application, and it voted unanimously to protest the transfer based on the opposition of local senior residents and the local concentration of bars in the area.[15] The ABC Board subsequently determined that the City's protest was arbitrary, capricious, and unreasonable, and it approved Stoltz's application.[16]

The City requested an administrative hearing. The hearing officer found that the City's protest was arbitrary, capricious, or unreasonable, and it affirmed the ABC Board's decision.[17] The City appealed to the superior court, which reversed the hearing officer.[18] The Alaska Supreme Court affirmed the superior court, expressing deference to the City's protest.[19] The supreme court explained that the relevant statute "makes it clear that the Board may not substitute its judgment for that of the local governing body."[20] The two reasons advanced by the City – 1) the local opposition stemming from the proximity to senior housing,

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[10] *Id.*
[11] 703 P.2d 1155 (Alaska 1985).
[12] *Id.* at 1156.
[13] *Id.*
[14] *Id.* at 1157.
[15] *Id.* at 1156.
[16] *Id.* at 1157.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

and 2) the concentration of bars – were supported by evidence at the hearing.[21] The supreme court characterized the reasons as "represent[ing] logical and traditional grounds for opposing liquor licenses."[22] Therefore, the supreme court affirmed the superior court's denial of the Stoltz's application.[23]

B. Case Background

Robert Alexander owns LED Ultra, a nightclub that formerly operated on 6th Avenue in Downtown Anchorage.[24] Mr. Alexander applied to transfer the two liquor licenses associated with LED Ultra from his own name to that of the corporation, and, concurrently, to a new location on 3rd Avenue.[25] The Assembly heard testimony for and against the transfer, and then voted to protest only the license location transfer based on three issues: 1) LED had not yet received a Special Land Use Permit (SLUP) for the 3rd Avenue location;[26] 2) the Anchorage Downtown Community Council ("the Council") opposed the transfer;[27] and 3) the Anchorage School District opposed the transfer because of proximity to schools.[28]

On April 22, 2022, the ABC Board heard public testimony, and subsequently upheld each element of the Assembly's protest as not arbitrary, capricious, or unreasonable, thus denying LED Ultra's license transfer

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[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] Motion to Dismiss Untimely Appeal (September 29, 2023), at Attachment A, at 3.
[25] *Id.*
[26] In order to operate, LED Ultra required both a SLUP and a beverage dispensary license. A SLUP is a permit obtained from the Assembly that runs with the land and permits alcohol sales at a specific location. *See* Anchorage Municipal Code 21.03.040. A beverage dispensary license is obtained from the Board that allows a particular licensee to sell alcohol at a specific location. *See* AS 04.11.090 (repealed by SLA 2022, Ch. 8 § 164); *see also* AS 04.09.200 (added by SLA 2022, Ch. 8, § 13).
[27] Passed and approved on March 9, 2022, the Council's Resolution argued the transfer "could create a significant impact on the use and enjoyment of adjacent properties by property owners and occupants," by increasing late-hour noise and drug and alcohol usage in the area. Exc. 185. It further alleges LED Ultra's application is inconsistent with Alaska law and Municipal code regulating the distance a nightclub may be from schools or residential property. Exc. 189.
[28] Motion to Dismiss Untimely Appeal (September 29, 2023), at Attachment A, at 4.

application.[29] LED Ultra requested a formal hearing.[30] The ABC Board referred the matter to the Office of Administrative Hearings, which assigned the matter to Administrative Law Judge Rebecca Kruse. Judge Kruse held a formal hearing on January 18 and 19, 2023. At the hearing, LED Ultra presented evidence challenging the basis for the ABC Board's protest as being arbitrary, capricious, or unreasonable. LED Ultra also argued that the Assembly's protest was due to a pattern of racial discrimination against Black-owned businesses.

Judge Kruse issued a Decision affirming the ABC Board's denial. In her Decision, Judge Kruse reviewed the Assembly's three proposed reasons for protesting the permit. She determined that the Assembly's first justification, regarding the SLUP, was unreasonable. As a matter of law, she determined that LED Ultra did not need to obtain a SLUP as a prerequisite to receiving a beverage dispensary license.[31] She also determined that the Assembly's third justification, regarding proximity to a school, was unreasonable. She held, as a matter of fact, that the proposed 3rd Avenue location was not within a restricted proximity to any schools.[32]

However, Judge Kruse agreed with the ABC Board and determined that the Assembly's second justification, regarding local opposition from the Council, was not arbitrary, capricious, or unreasonable. Judge Kruse reviewed the factual evidence of the Council's opposition to LED Ultra's proposed nightclub operations, and she determined that the local opposition supported the Assembly's decision to protest the license transfer.[33] Notably, the Council was vehemently opposed to LED Ultra's proposed nightclub based on concerns about noise, late night disturbances, and negative effects on the customers at the nearby Hilton

[29] *Id.* at Attachment A, at 3-4.
[30] *Id.* at Attachment A, at 4.
[31] *Id.* at Attachment A, at 7-9.
[32] *Id.* at Attachment A, at 7.
[33] *Id.* at Attachment A, at 9-11.

Hotel and residents at the nearby Turnagain Condos. As to LED Ultra's racial discrimination claim, Judge Kruse found no evidence that LED Ultra was treated differently than other similarly situated nightclubs, and she found no evidence of discriminatory intent on the part of the Assembly or the Council.[34]

The Board sent LED Ultra a Notice Transmitting Final Decision, which stated that it could request reconsideration within fifteen days and request judicial review by the superior court within thirty days.[35] LED filed a timely Motion for Reconsideration.[36] The State took no action, and thus the reconsideration request was deemed denied.

LED Ultra filed its notice of judicial appeal on August 14, 2023, approximately two weeks late. The Board moved to dismiss the late-filed appeal on September 29, 2023. LED filed is opposition on October 6, 2023. It also cross-moved to extend the filing deadline for good cause under Alaska Appellate Rule 502(b)(2), or alternatively, in the interest of justice under Alaska Appellate Rule 521.[37] On January 17, 2024, the Court denied the ABC Board's Motion to Dismiss and granted LED Ultra's cross-motion to extend the filing deadline.[38]

This appeal follows.[39]

III. Standards of Review

In administrative appeals, the superior court acts as an intermediate court of appeals. The Court thus applies the appellate "substantial evidence standard" to its review of questions of fact.[40] Under this standard, "findings will be upheld so

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[34] *Id.* at Attachment A, at 11-14.
[35] *Id.* at Attachment A, at 1.
[36] *Id.* at Attachment B, at 2.
[37] Opposition to Motion to Dismiss Untimely Appeal & Cross-Motion to Extend Deadline, at 1-2.
[38] The cross-motion was unopposed.
[39] Although the ABC Board is the named defendant, the Assembly filed the briefing in this matter pursuant to 3 AAC 305.145(f) because "[i]f [an] application is denied because of [a local governing body] protest," then the local governing body must, at the ABC Board's request, "assist in or undertake the defense of its protest."
[40] *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 788 (Alaska 2015) (quoting *Gottstein v. State, Dep't of Natural Res.*, 223 P.3d 609, 620 (Alaska 2010)).

long as there is enough relevant evidence to allow a reasonable mind to adequately support such a conclusion."[41] It is not the role of the appellate court to "reweigh evidence or choose between competing inferences reasonably drawn from evidence."[42] Instead, the Court must determine "only whether such evidence exists."[43]

"Questions of law not involving agency expertise are reviewed under the 'substitution of judgment' standard."[44] This includes questions "such as statutory interpretation and constitutional issues."[45] Under this standard, the Court is "free to substitute [its] own judgment for the agency's – even if the agency's decision had a reasonable basis in law – and will adopt rules of law most persuasive in light of reason, precedent, and policy."[46] Yet, "due deliberative weight" is given "'to what the agency has done, especially where the agency interpretation is longstanding' and 'continuous.'"[47]

Appellate courts review a trial court's admission of evidence under an abuse of discretion standard.[48] "But whether the trial court applied the correct legal rule is a question of law subject to de novo review."[49] Abuse of discretion is

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[41] *Id.* (quoting *Haar v. State, Dep't of Admin., Div. of Motor Vehicles*, 349 P.3d 173, 177 (Alaska 2015)).
[42] *Button v. Haines Borough*, 208 P.3d 194, 201 (Alaska 2009).
[43] *Squires v. Alaska Bd. of Architects, Eng'rs & Land Surveyors*, 205 P.3d 326, 332 (Alaska 2009) (quoting *Lopez v. Adm'r, Pub. Emps.' Ret. Sys.*, 20 P.3d 568, 570 (Alaska 2001)).
[44] *Lopez*, 20 P.3d at 571.
[45] *Bickford v. State, Dep't of Educ. & Early Dev.*, 155 P.3d 302, 309 (Alaska 2007), *as amended on denial of reh'g* (Apr. 11, 2007) (quoting *State, Dep't of Pub. Safety v. Shakespeare*, 4 P.3d 322, 324 (Alaska 2000)).
[46] *Id.*
[47] *Alaska Ass'n of Naturopathic Physicians v. State Dep't of Com.*, 414 P.3d 630, 634 (Alaska 2018) (first quoting *Heller v. State, Dep't of Revenue*, 314 P.3d 69, 73 (Alaska 2013); and then quoting *Premera Blue Cross v. State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Ins.*, 171 P.3d 1110, 1119 (Alaska 2007)).
[48] *Jeffries v. State*, 169 P.3d 913, 924 (Alaska 2007).
[49] *State v. Sharpe*, 435 P.3d 887, 892 (Alaska 2019).

found if, "after a review of the entire record, [the Court is] left with a definite and firm conviction that the trial court has erred in its ruling."[50]

IV. Discussion

A. The ABC Board did not err by denying LED Ultra's application to transfer the liquor licenses.

LED Ultra argues that the ABC Board's decision was arbitrary, capricious, or unreasonable in violation of its own precedent and Alaska law. It points to its operating history from its prior location as proof that it could operate in the new location in harmony with existing users. However, the ABC Board's decision was based on the Council's opposition. The local concerns about LED Ultra's proposed nightclub business were relevant and reasonable if considered in the context of LED Ultra's past operations and future plans.

a. The ABC Board's decision complied with Alaska law.

As an initial matter, LED Ultra attempts to distinguish the facts of its appeal from *Stoltz* because, unlike the Fairbanks City Council, the basis for the Assembly's protest stemmed from the Council, which is not a "local governing body" under 3 AAC 304.145. The Council issued a Resolution opposing LED Ultra's transfer application pursuant to Anchorage Municipal Code 2.40.050(e)(1). This section of code provides that the function of municipal community councils to "[r]eceive and review notices from municipal departments including notice under: Section 2.30.120.C. (alcohol beverage control board license applications)." The Council's Resolution laid out a variety of concerns, including "increasing public safety challenges," "operators control of noise," and the late hours of operation.[51] The Resolution also cited opposition from residents at the nearby

[50] *Shears v. Myers*, 280 P.3d 552, 556 (Alaska 2012) (quoting *Cook v. Cook*, 249 P.3d 1070, 1077 (Alaska 2011)).
[51] Exc. 185-89.

Turnagain Condos and opposition from the nearby Hilton Hotel. The Assembly subsequently passed its own resolution, officially protesting LED Ultra's transfer application.[52] This act represented a "local governing body" issuing a protest. Therefore, LED Ultra's first argument is without merit.

In a second attempt to distinguish its case from *Stoltz*, LED Ultra critiques the reasonableness of the supposed user conflicts caused by its proximity to Turnagain Condos and Hilton Hotel. LED Ultra points out that the Assembly did not protest another nightclub's application, called the Broken Blender, which was pending before the Assembly at around the same time. LED Ultra claims that the Broken Blender is actually closer to the Turnagain Condos and the same distance from the Hilton Hotel.[53] Therefore, LED Ultra argues that the Assembly's protest based on local user concerns was "merely a pretext" when considered in the context of all the current local uses.[54]

Thirdly, LED Ultra points to separate evidence that it argues contradicts the Assembly's evidence supporting its protest. LED Ultra argues that it operated respectably in its previous location without major incident. For example, LED Ultra argues that then Assembly member Amy Demboski called Mr. Alexander a "responsible business owner" at an Assembly meeting in 2018.[55] At the same meeting, then Assembly member Dick Traini stated that LED Ultra fulfilled its promises of abiding by local ordinances.[56] LED Ultra also points to an affidavit by a night manager from the Hotel Captain Cook that stated LED Ultra was not noisy, and that Mr. Alexander would guide patrons out of the nightclub at "bar break," when the club closed down in the early morning.[57] LED Ultra points to the affidavits of two more neighbors near LED Ultra's former location, who also

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[52] Exc. 141-48.
[53] *Id.*
[54] App. Br. 9.
[55] Exc. 82 (statement of former Assembly member Amy Demboski).
[56] Exc. 84.
[57] R. 3520-21.

said they were not disturbed by LED Ultra's operation.[58] Mr. Alexander stated in his affidavit that LED Ultra was never issued a noise violation. LED Ultra also argues that neighbors at the previous location who *did* have issues with LED Ultra did *not* engage in mediation, so they could not resolve their differences, and thus their statements opposing the transfer application should not be considered.[59]

In response to LED Ultra's second and third arguments, the ABC Board states that the Assembly's protest was based off of *both* local user opposition and LED Ultra's history of noise complaints and other issues at the prior location. LED Ultra was previously located at 3rd Avenue, close to office buildings, but also close to at least one residential home and a bed and breakfast, which both registered noise complaints with the Assembly.[60] Mr. Alexander addressed those complaints, explaining that, although he could control some negative externalities of his business (by cleaning up trash or encouraging patrons to leave at closing), he could not control the patrons outside or make them be quiet once they decided to leave the establishment.[61] The issues with noise concerns were thus a reasonable basis to protest LED Ultra's application, as its business plan included "live music, DJ possibly every nite (sic)," with potential operating hours "Monday thru (sic) Sunday: each day 11AM-5AM."[62] Additionally, there was testimony from multiple individuals who experienced disruptions from LED Ultra's previous location, describing trash, noise, and disruptive behavior that would continue even after it closed in the early morning hours.[63] The Assembly directly addressed the noise issue in its protest resolution, which incorporated the Council's resolution that expressed similar concerns.[64]

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[58] R. 3536-37 (Mr. McPherson); R. 3551-52 (Ms. Deason).
[59] Ap. R. Br. 4 (citing R. 4390).
[60] Ae. Br. 3.
[61] Exc. 10.
[62] Exc. 161, 179.
[63] Ae. Br. 18-21.
[64] Exc. 146.

LED Ultra counters that noise concerns were known to the Assembly before LED Ultra filed its transfer application, but the Assembly did not protest LED Ultra's liquor license *renewals* in 2016, 2018, or 2020. LED Ultra believes that the Assembly thus acted in an arbitrary, capricious, or unreasonable manner by not protesting the renewals, but protesting the transfer. However, this argument cuts both ways. Specifically, at issue in this appeal is the Assembly's decision to protest *the transfer*, which was based on local community concerns about the effects of a nightclub at the new 3rd Avenue location. The Council's resolution accurately described LED Ultra's plan to operate a nightclub and to possibly play dance music every night until as late as 5AM. It is not arbitrary, capricious, or unreasonable that concerns regarding incompatible uses could arise from a transfer of a nightclub to a new location. In reviewing a transfer application, the Assembly was permitted to contemplate whether the transfer to the 3rd Avenue location presented new grounds for protest that were not previously relevant for the purposes of a renewal application, thus making the protest of the transfer application valid. Like in *Stoltz*, the Assembly's concerns about a new location, including noise and safety, are "traditional grounds" for denying a license.[65] Furthermore, the ABC Board could not substitute its judgement for the Assembly's valid reasons for its protest.

Finally, LED Ultra argues that its proposed nightclub operation was essentially identical to current and former businesses in the area, including F Street Station, the Woodshed, Brown Bag Lunch Company, the Broken Blender, Rumrunners, Bear Paw, Hard Rock Café, Whisky and Ramen, Tequila 61, the Avenue Bar, and the Panhandle Bar. Yet, this appears to be untrue as a matter of fact. Before the Assembly, and then again at the OAH hearing, evidence was presented showing that the Assembly's protest was based on the environmental impacts at the new location, the incompatibility with users in the new location, and

[65] *Stoltz*, 703 P.2d at 1157.

vehement opposition by local residents.[66] It was not arbitrary, capricious, or unreasonable for the ABC Board to determine that these objections and incompatibilities were reasonable grounds to uphold the local governing protest, despite the presence of former and existing bars and restaurants in the same general vicinity – particularly when no evidence was provided that any of these establishments had a similar business model, size, and proposed hours. The Assembly's reasons for protesting LED Ultra's application thus have a "reasonable basis in fact," and it was not arbitrary, capricious, or unreasonable for the ABC Board's to deny LED Ultra's application on the basis of local opposition.[67]

b. The ABC Board's decision followed existing precedent.

LED Ultra also argues that the ABC Board's decision to deny its application is inconsistent with its own precedent. First, LED Ultra cites to *In Re Patrick Peterson.*[68] In *Peterson*, the ABC Board found that the City and Borough of Juneau's protest against an alcohol license was not arbitrary and capricious because the applicant had not timely paid taxes.[69] LED Ultra points out that it has always paid its taxes, and thus failure to pay taxes cannot be an "undeniable basis in fact" for the Board's decision, like it was in *Peterson.*[70]

The ABC Board correctly notes that failure to pay taxes is not the *only* possible basis for a local governing body protest. Furthermore, neither the Assembly nor the ABC Board identified failure to pay taxes as a reason for denying LED Ultra's application in this case. Simply put, *Peterson* is not on point.

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[66] Ae. Br. 9-10.
[67] 3 AAC 304.145(a) (repealed January 1, 2024); AS 04.11.480(a).
[68] OAH No. 12-0392-ABC (May 30, 2013).
[69] *Id.* at 3-4.
[70] App. Br. 11.

Second, LED Ultra contrasts from ABC Board precedent denying applications on the basis of "well-documented violation of the local adult entertainment and noise ordinances."[71] For example in *Stevens v. State*, the Alaska Supreme Court upheld the superior court's decision affirming the Board's denial of an alcohol license to a bar, which "drew excessive noise complaints from neighbors."[72] This resulted in the local governing body issuing two *violations*.[73] The owner of the bar in *Stevens* also did not get the required permits for adult cabaret performances.[74] The supreme court determined that the historical issues with the venue's compliance with laws and permits provided grounds for the denial of the application.[75]

There is no dispute that the noise complaints levied against LED Ultra at its previous location did not rise to the level of the Assembly issuing a violation. Additionally, there is no evidence indicating that LED Ultra had operated without the required permits and licenses in the past or had plans to do so in the future. However, an actual violation of law or regulation is not required for a local governing body to issue a protest. At the time of the Assembly's protest of LED Ultra's application, the Assembly merely had to provide "logical grounds for opposing the application or continued operation of the license and have a reasonable basis in fact."[76] For the reasons explained above, the Assembly's reasons were reasonable and based in fact.

Finally, LED distinguishes its case from *In re Lee Family Corporation.* In *Lee Family*, locals expressed concerns about a liquor store that was selling to intoxicated people, who were then littering the neighborhood with plastic bottles

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[71] App. Br. 11.
[72] *Stevens v. State, Alcoholic Beverage Control Bd.*, 257 P.3d 1154, 1155 (Alaska 2011).
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] 3 AAC 304.145(a) (repealed, January 1, 2024).

from single-shot "shooters."[77] The liquor store entered into a memorandum of understanding (MOU) with the Municipality of Anchorage to control the price and number of shooters that it sold.[78] However, the store was non-compliant with the MOU.[79] The Assembly protested the store's license application for failing to abide by the agree-upon terms.[80] The ABC Board determined that "[t]he fact that the Lee Family consciously chose to ignore its voluntarily agreed to conditions, which were placed upon its operation both by the MOA and by the [ABC] Board, demonstrate a reasonable basis for the MOA protest and further demonstrate that the MOA protest is neither arbitrary nor capricious."[81]

LED Ultra claims that it did not violate a MOU, unlike in *Lee Family*. It asserts that it was never even provided with an opportunity to enter into an MOU with either the Council or the Assembly, although a similar establishment in the area was provided such an opportunity.[82] But, again, the reasons advanced by the Council and the Assembly related directly to LED Ultra's proposed use, *i.e.*, a nightclub with extended hours, and its history operating such an establishment at a different location. The ABC Board could not substitute its judgment on these issues, and thus there was no error in its decision.

B. The ABC Board did not violate Alaska's Equal Protection Clause.

The "Equal Protection Clause"[83] of the Alaska Constitution provides that "all persons are equal and entitled to equal rights, opportunities, and protection

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[77] OAH No. 21-0055-ABC (August 24, 2021).
[78] *Id.* at 2-3.
[79] *Id.*
[80] *Id.* at 17-18.
[81] *Id.* at 18.
[82] The record suggests that the Broken Blender has an MOU with the Council regarding its noise and hours. Exc. 130-33. However, a written copy of the MOU does not exist in the record. *Id.*
[83] The Alaska Supreme Court holds that the Alaska Constitution provides greater protection than the U.S. Constitution. *Watson v. State*, 487 P.3d 568, 570 (Alaska 2021) ("The guarantee of equal protection under the Alaska Constitution is more robust than that under the United States

under the law."[84] Challenges brought under the Equal Protection Clause are evaluated under three steps. First, the court decides "which classes must be compared."[85] Second, the court must determine whether similarly situated classes are being treated differently.[86] This requires showing a discriminatory intent.[87] Third, the court must:

> apply "a flexible three-step sliding-scale" analysis that considers the individual interest at stake, the government interest served by the challenged classification, and the means-ends nexus between the classification and the government interest. The sliding-scale analysis "places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interest at stake." When an important individual right is implicated, we require a close relationship between the challenged classification and an important government interest in the classification.[88]

LED Ultra argues that the Assembly treated its application differently than that of an allegedly similarly situated downtown nightclub, the Broken Blender. Specifically, LED Ultra asserts that the Assembly protested its application because of Mr. Alexander's race. LED Ultra asserts that Mr. Alexander identifies as Black, and that the owners of the Broken Blender are white. LED Ultra thus argues that the ABC Board's decision to adopt the Assembly's protest violated the Alaska Constitution's Equal Protection Clause.

LED Ultra points to similarities between its proposed nightclub and the Broken Blender. Both venues applied for alcohol license *transfers*, and both

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Constitution and so 'affords greater protection to individual rights than' its federal counterpart." (quoting *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 787 (Alaska 2005))).

[84] Alaska Const. art. I, § 1.

[85] *Watson*, 487 P.3d at 570 (quoting *Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122, 1135 (Alaska 2016)).

[86] *Id.*

[87] *See Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 960 (Alaska 2005) ("Intent to discriminate may be proved by circumstantial evidence.").

[88] *Watson*, 487 P.3d at 571 (footnotes omitted) (first quoting *Planned Parenthood*, 375 P.3d at 1137; and then quoting *State v. Schmidt*, 323 P.3d 647, 662 (Alaska 2014)).

applications were pending at the same time. Additionally, both venues are located downtown, but LED Ultra points out that the Broken Blender is actually located closer to the "areas of public concern" identified in the Judge Kruse's Decision, including the Hilton and the Turnagain Condos. LED Ultra further argues that it provides substantially similar entertainment and hours. For example, the Broken Blender's application for a "Restaurant Designation Permit" indicated that it provides "live music, comedy shows, jazz events, trivia nights, and burlesque" between the hours from 5:00 PM and 2:00 AM every day of the week.[89] LED Ultra acknowledges that there was testimony at the administrative hearing indicating that the Broken Blender had a MOU with the Council that it would not stay open past midnight, but the MOU was never produced.[90]

LED Ultra also alleges that the Assembly and the Council have a history of discrimination towards Black-owned businesses. At the same location before the Broken Blender, there was the Brown Bag, and before it, there was the Woodshed. The Assembly and the Council protested the Brown Bag, which was operated by a Black person, but it ultimately received approval. The Assembly did not protest the Woodshed, which was owned by a white person.

As additional support for its claims, LED Ultra points to allegedly discriminatory statements made by the Assembly. LED Ultra quotes a statement by Assembly Member Forrest Dunbar that the Assembly's protest was an unconditional protest, and thus it was different than "99 percent [of the protests] that come to [the Assembly]."[91] While taking testimony on the application, Assembly Member Felix Rivera also directly addressed LED Ultra's argument that it was being discriminated against based on Mr. Alexander's race. Mr. Rivera stated that:

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[89] Exc. 36.
[90] Exc. 130-33.
[91] Exc. 92.

> The elephant in the room, I guess, is this conversation that we've been skirting around regarding race. You know, a lot of times you will hear me and others talk about systemic issues and systemic racism, and it's clear to me that there is a trend. Right? A trend is a trend is a trend. So to go from ten to zero is a trend.[92]

The "trend" that Mr. Rivera refers to is in the number of Black-owned alcohol licenses around Downtown Anchorage. He goes on to state that "it doesn't mean that someone is out there *intentionally* trying to perpetuate a systemically racist system, but the results appear to be that there is a part of our community that is being shut out of operating from downtown."[93]

The ABC Board counters that the Broken Blender and LED Ultra are substantively different establishments, and thus LED Ultra's claim fails at step one because it cannot point to a "similarly situated" establishment. Notably, LED Ultra's proposed hours are much later than the Broken Blender's hours. Additionally, the Broken Blender allegedly entered into an MOU with the residents of the Turnagain Condos, thus obviating the local opposition at the root of the Assembly's protest. As Judge Kruse pointed out in her Decision, LED Ultra could provide no evidence of an alcohol license transfer applicant receiving an equivalent level of opposition from the Council and local residents.[94] Finally, the ABC Board contrasts from the Broken Blender because LED Ultra's proposed new 3rd Avenue location did not have SLUP for serving alcohol.[95] LED Ultra applied for an alcohol license in a new location that was not previously a bar, restaurant, or night club. This circumstance is different from the Broken Blender,

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[92] Exc. 95.
[93] *Id.* (Emphasis added.)
[94] Exc. 12.
[95] Judge Kruse's Decision did not consider the SLUP as an independent basis for upholding the protest. Instead, the absence of a SLUP factors into LED Ultra's Equal Protection Clause claim because it is evidence of different circumstances compared to the Broken Blender. LED Ultra's transfer application would essentially have created a new alcohol-serving establishment on 3rd Avenue, whereas the Broken Blender's application merely swapped out an older alcohol-serving establishment for a newer one.

which was previously the location of a bar, albeit with a different name and owner. Thus, LED Ultra's claim fails because it cannot show that the ABC Board treated a similarly situated class of applicants differently from itself.

Even assuming that the Broken Blender was a similarly situated applicant (which the Court does not find), the ABC Board also argues that LED Ultra did not provide evidence that the Assembly's allegedly discriminatory protest was made *intentionally*. The ABC Board asserts that race is never considered during the license application or protest process. It argues that there is no evidence establishing how the Assembly could even have gone about learning an applicant's race or evidence establishing that the Broken Blender's owner is even white. Additionally, when LED Ultra was at its former 6th Avenue location, the ABC Board renewed its alcohol license three times, suggesting that the Assembly was not motivated by a discriminatory intent.

The ABC Board also argues that Assembly members' statements are not reliable evidence of intentional discrimination. The ABC Board argues that Mr. Rivera's statement raising concern about the *possibility* of Black-owned businesses being discriminated against "was actually expressive of an intent *not* to racially discriminate."[96] The Court agrees that Mr. Rivera's statements indicate that the Assembly was aware of a decrease in the number of Black-owned downtown businesses, but that it was in no way *intentional*, and instead, likely a broader systematic issue.[97] The ABC Board further notes that Mr. Dunbar's statement reflected that the DCC's protest was different than 99% of normal protests considered by the Assembly because it was an unconditional protest, not because it was directed at a Black-owned business. Considering the strong local opposition towards LED Ultra's application and the unconditional protest, Mr. Dunbar's statement does not show the Assembly's discriminatory intent, but rather

[96] Ap. Br. 29 (Emphasis in original.).

the Council's resolute opposition towards LED Ultra's nightclub plans. When questioned about the race of the owner of the Broken Blender, Assembly Member Chris Constant testified that he did not know their race and refused to make assumptions based on their outward appearance.[98] Because there is no evidence of intentional discrimination, the Court upholds the finding that LED Ultra's Equal Protection Clause Claim fails as a matter of law and fact.

Finally, LED Ultra argues that the Assembly selectively enforced its protest criteria, making LED Ultra a "class of one" for the purpose of its Equal Protection Clause claim.[99] It again compares its position to that of the Broken Blender, which was granted a liquor license even though it was in closer proximity to the Hilton and Turnagain Condos.

A plaintiff bringing a "class of one" claim asserts they have been "irrationally singled out."[100] For such claims, the plaintiff need not "allege membership in a class or group."[101] But the allegations must show that the discriminatory action was "irrational and wholly arbitrary."[102] Some courts have also required a showing of "subjective ill will."[103] A "class of one" claim nonetheless requires intentional discriminatory treatment, but the class of similarly situated persons need not be comparable to a class of which the plaintiff is a member. Because the plaintiff lacks an identifiable class, the standard is always rational basis.[104]

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[97] Again, Mr. Rivera specifically states that "it doesn't mean that someone is out there *intentionally* trying to perpetuate a systemically racist system." Exc. 95 (Emphasis added.).
[98] Exc. 257.
[99] *See Planned Parenthood of The Great Nw. v. State*, 375 P.3d 1122, 1136 (Alaska 2016).
[100] *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 601 (2008).
[101] *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).
[102] *Id.* at 565 (holding that demand of thirty-foot easement as condition for connecting homeowner to municipal water supply was "irrational and wholly arbitrary" because other similarly situated homeowners were required to provide only fifteen-foot easements).
[103] *See id.* at 565-66 (Breyer, J., concurring).
[104] *Id.* at 564 ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no *rational basis* for the difference in treatment.").

The ABC Board argues that LED Ultra did not raise this specific argument below, which, from the Court's review, is true. Although LED Ultra asserted a discrimination claim before Judge Kruse, it was purely a constitutional claim, and not an arbitrary treatment claim based on selective application of the law. This is reason enough to reject such a claim.

The Court also rejects LED Ultra's "class of one" claim on substantive grounds. The class of one test, requiring "irrational and wholly arbitrary"[105] discrimination, echoes the "arbitrary, capricious, or unreasonable" standard applied to review of the Assembly's protest. LED Ultra alleges that it was singled out, but the facts do not support such a claim. For the reasons explained above, the Council expressed specific concerns about LED Ultra's nightclub plans. The Council voiced its opposition in its resolution, which prompted the Assembly to adopt~~ing~~ its unconditional protest. The Court finds that nothing about this process, or its end result, was irrational or arbitrary.

Furthermore, even if LED Ultra's "class of one" claim avoids the necessity of establishing a protected class, it nonetheless fails because there is still no evidence of intentional discrimination. Regarding the intentionality requirement, the Alaska Supreme Court cited favorably to the Second Circuit decision in *Harlen Assocs. v. Inc. Vill. of Mineola.*[106] In that case, the Second Circuit considered whether a zoning board had legitimate reasons for denying an application for a convenience store permit based on its proximity to a school because the only access from said school was by an "extremely dangerous crosswalk."[107] The appellate court explained that:

> [t]o prevail on a claim of selective enforcement, plaintiffs ... traditionally have been required to show both (1) that they were treated differently from other similarly situated individuals, and (2) that such differential treatment was based on "impermissible

[105] *Id.* at 565.
[106] 273 F.3d 494, 499 (2d Cir. 2001).
[107] *Id.* at 500.

considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person."[108]

The court applied the "personal animus" or "ill will" test,[109] ultimately determining that that a zoning board had legitimate reasons for denying a convenience store's permit application based on the potential dangers of the convenience store enticing children to cross a "heavily trafficked" turnpike.[110]

The instant appeal presents no facts showing ill will or malice on the part of the Assembly. Although the Council was clearly worried about noise and safety, these were genuine concerns with a rational basis. The Assembly's protest was thus not intentionally discriminatory and motivated by the requisite intent to cause injury. For this reason, the ABC Board did not err by denying LED Ultra's discrimination claim.

V. Conclusion

For the reasons stated herein, the ABC Board's decision is AFFIRMED.

IT IS SO ORDERED.

DATED this 24 day of September, 2024, at Anchorage, Alaska.

[redacted]

Christina Rankin
Superior Court Judge

I certify that on 9/24/24
a copy of the above was emailed
via Case Parties (unless noted otherwise below)

[108] *Id.* (quoting *LaTrieste Rest. & Cabaret v. Village of Port Chester*, 40 F.3d 587, 590 (2d Cir.1994)).
[109] This test asks whether the allegedly discriminatory decision was "motivated by an 'intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" *Id.* at 502 (quoting *LaTrieste Rest. & Cabaret*, 40 F.3d at 590).
[110] *Id.* at 500.

to each of the following at their address of record:

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