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

In the Matter of	)	
	)	
LEEFAMILY CORPORATION	)	OAH No. 21-0055-ABC
	)	Agency No. 3219

NOTICE REGARDING PROPOSED DECISION

We are sending you the administrative law judge's proposed decision in this matter. The final decision maker will be the Alcoholic Beverage Control Board. You may file a request, called a proposal for action, that the Board take one or more of the following actions:

(1) adopt the proposed decision as the final agency decision;
(2) return the case to the administrative law judge to take additional evidence, make additional findings, or for other specific proceedings;
(3) revise the proposed enforcement action, determination of best interests, order, award, remedy, sanction, penalty, or other disposition of the case;
(4) reject, modify, or amend a factual finding; or
(5) reject, modify, or amend an interpretation or application of a statute or regulation.

You do not have to file a proposal for action, but if you do, you must do the following:

- Ensure that the Office of Administrative Hearings **receives** the proposal for action on or before **4:30 p.m. on July 6, 2021.** Late proposals will not be accepted.
- Submit your original, signed proposal to the Office of Administrative Hearings. To ensure timely receipt, please fax or email a copy of it to (907) 465-2280 or doa.oah@alaska.gov.
- Give the reasons for the action you propose. If you request action under option (4) regarding the proposed factual findings, you should identify evidence **in the record** (such as exhibits or testimony) that supports your request to change the factual finding.
- **Do not** attach **documents to the proposal for action.** If you wish to call attention to specific documents in the record, do so by referring to them in your proposal for action.
- **Do not submit additional evidence now.** Under option (2), you may request that the case be returned to take additional evidence that is not already in the record.

After the deadline for filing proposals for action has passed, we will send the proposed decision and any proposals for action that we receive to the Board. The Board will make a final decision and we will distribute a copy of that decision to you.

DATED: June 14, 2021.

I certify that on this date an exact copy of this Notice and the accompanying proposed decision were provided to the following:
LeeFamily Corporation - by email/mail
Joan Wilson, AAG – by email, Dep't of Law-by email
CC: Lt Governor – by mail
CC: ABC Board c/o Glen Klinkhart – by email
Signature Stephanie Bram Date: 6/14/2021

Stephanie Bram
Office of Administrative Hearings
PO Box 110231
Juneau, AK 99811
(907) 465-1886; (907) 465-2280 fax

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DECISION

I. Introduction

The LeeFamily Corporation (LeeFamily) dba Mom & Pops Liquor and Grocery Store (Mom & Pops) is the owner of Alaska Package Store Liquor License No. 3219. Mom & Pops is located in midtown Anchorage.

The LeeFamily applied to renew its liquor license for 2020 - 2021. The Municipality of Anchorage (MOA) protested the renewal of that license. Based upon that protest, the Alaska Alcohol Beverage Control Board (Board) denied renewal of the license. The LeeFamily requested an evidentiary hearing to challenge the denial of the license's renewal.

The evidence presented in this case demonstrates that the MOA's protest had a reasonable basis. It was not arbitrary, capricious, or unreasonable. Under the applicable statute, AS 04.11.480, because the MOA's protest was not arbitrary, not capricious, nor unreasonable, the Board was required to deny renewal of the license. The Board's initial decision to deny the renewal application is therefore affirmed.

II. Facts and Procedural History[1]

A. The 2018 License Renewal

Mom & Pops is a package liquor store and small grocery located in a strip mall in midtown Anchorage. The LeeFamily Corporation is a corporation whose principal shareholders, officers, and directors are Tseng Lee and Cheng Lee. Edward Lee is their son. The LeeFamily purchased Mom & Pops including its package store liquor license No. 3219 in 2014.

The LeeFamily license was up for renewal for 2018 – 2019. The renewal process for liquor licenses requires that the renewal be reviewed by the local governing body for its input before the license renewal comes before the Alaska Alcohol Beverage Control Board (Board). The local governing body for the LeeFamily license is the MOA Assembly.

At the time of the LeeFamily license renewal in 2018, there were community concerns about Mom & Pops' operation and the behavior of its clientele. Those concerns had been

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[1] The facts recited below were established by a preponderance of the evidence.

ongoing for years. There were two public hearings in front of the MOA Assembly in April and May of 2018. Mom & Pops is located within the boundaries of the Anchorage Midtown Community Council. Members of the Community Council and other residents in Mom & Pops vicinity testified against the license renewal during those public meetings. They complained about single serving liquor bottles ("shooters") littering the neighborhood, and the sale of those shooters to public inebriates, and that the LeeFamily had not done anything to address their concerns. Consequently, the MOA Assembly protested the renewal of the LeeFamily license. The LeeFamily was represented at the April 2018 Assembly public hearing by an attorney, and Edward Lee was present on behalf of the LeeFamily at that public hearing.[2]

The Board upheld the protest with a 90-day abeyance at its June 12, 2018 meeting, and notified the LeeFamily that "the Municipality of Anchorage must withdraw its protest of your license renewal by September 17, 2018; otherwise the renewal is denied."[3] Prior to the Board's June 12, 2018 meeting, the LeeFamily and the Community Council entered into a Memorandum of Understanding, whereby the LeeFamily agreed to the following:

1. To not sell single cans of any beer with an alcohol content equal or greater than 8% for less than $2.49 per can.
2. To not sell "shooters" (single serving size bottles that contain 50 ml/1.6 oz or less of alcohol) for less than $1.70 per bottle.
3. To limit sales of "shooters" to a maximum of two per day per customer.
4. To mark all "shooter" bottles with identification that they were being sold by Mom & Pops.
5. To mark all single beers of 16 oz. or less with identification that they were being sold by Mom & Pops.
6. To install a security camera that covered the areas directly adjacent to Mom & Pops and the alley behind the building to determine if street inebriates were sending "straw" buyers to purchase alcohol or consuming alcohol.
7. To collect the litter in a defined adjacent area, and to log any alcohol containers found that were marked as originating from Mom & Pops.
8. Maintain a daily record of refusal to sell and theft incidents, and any 311 or 911 calls to the Anchorage Police Dept.

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2 Ex. 1, pp. 12 – 13.
3 Ex. 39.

9. Have a representative attend regularly scheduled Midtown Community Council meetings.

Edward Lee signed the Memorandum of Understanding on behalf of the LeeFamily.[4]

The MOA Assembly adopted the conditions contained in the Memorandum of Understanding on June 12, 2018 and lifted its protest of the LeeFamily's license renewal requesting that those conditions be placed on the LeeFamily license by the Board.[5] In response, the Board renewed the LeeFamily license on August 14, 2018, subject to the following conditions:

1. No single-servicing container of beer or malt beverage may be sold or offered for sale that has an alcohol content equal to or greater than 8.0% for less than $2.49 per container.
2. Glass bottles of products shall not be sold if plastic container options for the same product are available locally.
3. No single-service of an alcoholic beverage other than beer or wine may be sold or offered for sale in a container having a capacity of approximately 50 m. or 1.6 oz, more or less, commonly known as miniatures, shooters, or airplane service size bottles, for a price less than $1.70 per container.
4. Licensee shall not sell more than two "shooters" to any one customer, per day.
5. All shooters and single-serving containers of beer or malt beverage in containers of 16 ounces or less shall be labeled with a sticker or other identifying mark to identify the location of the point of sale.
6. The conditions recommended by the Assembly herein shall only be applicable to license #3219 while it is located at 601 W 36th Ave., Suites 3 and 4, in Anchorage. If the license is transferred to a different location all conditions shall be lifted from license #3219; however this does not prevent the Anchorage Assembly from recommending the same or other conditions be imposed on the license at the time it reviews an application to transfer the location of license #3219.
7. The license shall, in good faith, execute and comply with a Memorandum of Understanding (MOU) between Midtown Community Council (MCC) and LEEFAMILY CORPORATION DBA MOM & POPS GROCER AND LIQUOR, regarding licensee's operations, practices and effect on the area. The MOU

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4 Ex. 50.

5 Ex. 38.

conditions shall have no binding effect on the Assembly or the Municipality of Anchorage.[6]

B. The 2020 Renewal

1. The Application for Renewal

The LeeFamily license was due for renewal in 2020. The LeeFamily applied with the Board to renew the license on December 30, 2019. The contact information for the LeeFamily was Lee.eddy.30@hotmail.com. Another email for an optional contact, who was not the licensee, was provided for Kjcjungam@gmail.com.[7] The LeeFamily was then notified by Alcohol and Marijuana Control Office (AMCO) staff by a January 14, 2020 email that the license renewal would be addressed at its March 2020 meeting. That email was sent to two people: lee.eddy.30@gmail.com and kjcjungam@gmail.com.[8]

2. The MOA Protest

The MOA was notified by a January 15, 2020 email that it had the opportunity to protest the LeeFamily license renewal, and that it had 60 days to submit its written protest.[9] The Midtown Community Council was also notified of the upcoming renewal by a January 15, 2020 email.[10] On February 13, 2020, the MOA notified the LeeFamily that a public hearing on its liquor license renewal would be held at the MOA Assembly February 25, 2020 meeting and that it had the opportunity to speak at the hearing.[11]

Prior to the February 25, 2020 MOA Assembly hearing, the MOA Assembly held several work sessions. There was a work session on September 4, 2019, in response to complaints that the LeeFamily was not complying with the conditions on its license. Mr. Lee attended that meeting on behalf of the LeeFamily. Mr. Lee stated that he believed the conditions placed upon his license were unfair. Mr. Lee admitted that his employees had not been in compliance with pricing and quantify limits on "shooters" and that their compliance varied based upon the identity of the purchaser. Mr. Lee stated that when he entered in the MOU and agreed to the conditions upon his license, that he thought those same conditions would be imposed upon other area liquor stores. Tim Potter, who is on the alcohol and marijuana committee of the Anchorage Midtown Community Council, spoke about his experience in dealing with Mom & Pops and Edward Lee. He provided pictures of the site and stated that the LeeFamily had not complied with the

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6 Ex. 3.
7 Ex. 5, p. 1.
8 Ex. 7.
9 Ex. 8.
10 Ex. 9.
11 Ex. 6.

conditions on their license and described the violations. He said that the Midtown Community Council had worked with other area liquor store operators, such as Safeway and Brown Jug who had voluntarily agreed to restrict some of their sales. He also spoke about issues with the closest liquor store to Mom & Pops, which is known as In & Out.[12]

The MOA Assembly also held work sessions regarding the license on January 10 and January 31, 2020.[13] Mr. Lee was ill and could not attend the January 10, 2020 work session. He attended the January 31, 2020 work session.[14] Doug Lamkim and Tim Potter participated in the January 10, 2020 work session. Doug Lamkin is the facilities manager with NeighborWorks Alaska, which operates low-income housing facilities in Anchorage. He spoke about the impact that public inebriates had on Mallory Place, Neighborworks' housing facility that is located directly behind the strip mall where Mom & Pops is located. Mallory Place has 111 units in five buildings and a playground. 46 of its 206 residents are children. Because of the problems posed by local public inebriates, the facility has had to place bars on windows, fence utility boxes to keep people from sitting on them and remove bushes from their landscaping. He stated that Mallory Place had a higher vacancy rate than other facilities that Neighborworks operates in Anchorage, and that the maintenance staff had to spend 10% of their time actively policing the property instead of maintaining the property. Tim Potter testified about his experience with Mom & Pops and purchasing alcohol there. He specifically noted that Mom & Pops employees were not marking the "shooters" or enforcing the limits of the amount of shooters that an individual could purchase. He stated that Mr. Lee is the only person at the store who asks him for his identification; Mr. Lee's father and the other employees do not.[15]

The MOA Assembly packet prepared regarding the LeeFamily license renewal contained an Anchorage Police Dept. listing of calls to the strip mall containing Mom & Pops between January 1, 2019 through December 31, 2019. Those calls included public intoxication, drug use, assault, trespass, and theft, among other disturbances.[16] The Assembly held its hearing on the license renewal on February 25, 2020. Brian Swartzentruber spoke at that hearing. He is the property manager for a commercial building located on 36th Ave., two doors down from the strip mall where Mom & Pops is located. He discussed his observations of the local inebriate

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12 Ex. 45.

13 A recording of the January 10, 2020 meeting is provided at Ex. 46; the January 31, 2020 meeting was not recorded due to technical issues.

14 Mr. Rivera's testimony.

15 Ex. 46.

16 Ex. 30, pp. 62 – 102.

population and the negative effects that they had on the neighborhood and the business tenants in his building. Mr. Potter spoke about the LeeFamily not observing the conditions on its license and the effect on the neighborhood. Edward Lee spoke about how other liquor stores in the area were not required to observe the same price limitations and that a customer could just walk across the street and buy the same item for less. The MOA Assembly did not act on the license renewal on February 25, 2020, and continued the matter to March 10, 2020.[17]

Edward Lee, Peggy Robinson, and Tim Potter testified at the March 10, 2020 MOA Assembly hearing. Ms. Robinson lives very close to Mom & Pops. She was very involved with the Midtown Community Council and interacted with Mr. Lee. She spoke about the impacts that the operation of the store had on the neighborhood. Tim Potter, the current chair of the community council's alcohol and marijuana committee, spoke. He stated that Mr. Lee did not observe the conditions place upon his license. Mr. Lee only attended Community Council meetings for several months after he entered into the Memorandum of Understanding that imposed those conditions. Mr. Potter picked up trash directly outside the store and strip mall area. While there were a fair number of alcohol containers, which would have been needed to be marked under the terms of the conditions, none of those he picked up were marked. Mr. Potter spoke about neighboring liquor store operators, Brown Jug, Safeway, and Walmart, and the voluntary efforts they made to help with the public inebriation problems in the neighborhood. Mr. Lee also spoke. He confirmed that he had stopped attending the community council meetings. He confirmed that sometimes Mom & Pops employees did not follow the limits on how many shooters a person could purchase, stating that it varied based upon the customer. He expressed his frustration about the conditions imposed upon the LeeFamily license, stating that when he agreed to the conditions on the license, that he thought those same conditions would be uniformly imposed upon neighboring liquor stores, and that he felt his family's business was being unfairly targeted. He admitted that he basically stopped observing the conditions on the license because he felt they were unfair, stating that while Mom & Pops did not sell to drunks, it would sometimes sell shooters for as low as $1.50, and that while he marks shooters and individual high alcohol beers, the employees did not.[18]

At the close of the March 10, 2020, meeting, the MOA Assembly passed Assembly Resolution No. 2020-56 which protested the renewal of the LeeFamily license. That resolution

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[17] Exs. 44A and 44B.
[18] Ex. 11.

specifically identified public safety issues, being the sale of shooters for less than the price required under the license conditions and in quantities exceeding the allowed limit, and a large number of police calls indicating that the store was a "magnet for unlawful activity." The resolution identified public health concerns due to the negative impact of the store on the neighborhood, the sale of shooters for less than the minimum price, and the impacts on neighboring properties, which were documented by photographs and testimony, and the store's sales practices "being a significant contributing factor to chronic inebriates littering, trespassing, and becoming publicly incapacitated (passing out) in the area." The resolution specifically noted that alcohol containers were not marked as required, and that Mom & Pops failed to comply with the conditions on its license, even after those conditions were placed upon the license by the Board. The resolution, in addition to protesting the renewal of the license, recommended that the Board allow the LeeFamily license be transferred to another licensee.[19]

3. The Board Meetings

This case has a complicated procedural history in front of the Board. Mr. Lee was notified by the Board that the renewal of the license would be on its agenda for its March 2020 meeting. Following the MOA protest, the Board addressed renewal of the LeeFamily license at its March 31 – April 1, 2020 meeting. Ms. Robinson emailed the Board on March 12, 2020 to protest the renewal, with a copy to Mr. Lee. In her email, she detailed that Mom & Pops was not abiding by the conditions on its license, including regarding the limits on the amounts of shooters sold and their marking. She provided photos and a copy of the receipt.[20] In addition, AMCO investigative staff issued a Notice of Violation on February 18, 2020, stating that MOA Code Enforcement notified that it had purchased a single serve flavored beer for less than the minimum price and purchased four shooters from Mom & Pops.[21] Mr. Lee responded to that notice of violation by email on March 12, 2020, essentially denying the sale of the single serve beer was for less than the required minimum and stating that the purchase of the four shooters was a judgment call. In that email, Mr. Lee again argued that the conditions on his license were unfair and that neighboring stores did not have the same conditions.[22]

The license renewal was addressed by the Board on April 1, 2020. The Board discussed the number of police calls to the location, and the violations. Three people testified. Eugene

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19 Exs. 14 and 15.
20 Ex. 16.
21 Ex. 17, p. 1.
22 Ex. 17, p. 2.

Haberman testified about what he considered to be deficient process. Tim Potter testified, consistent with his earlier testimony in front of the MOA Assembly, about the violations of conditions, the failure of Mom & Pops to observe those conditions, and the impact that the operation of Mom & Pops had on the surrounding neighborhood. Felix Rivera, a member of the MOA Assembly, testified about his knowledge of the operation of the liquor store, the conditions imposed on the license, and the impact on the community, including there being over 139 police calls in calendar year 2019 to the strip mall where Mom & Pops is located, and that half of those calls involved Mom & Pops. Mr. Lee was not present for that meeting. Following the testimony, the Board upheld the protest, and voted to deny renewal of the license but to hold that denial in abeyance for a 180-day period.[23]

AMCO sent the LeeFamily written notice on April 22, 2020, that the Board upheld the MOA protest and that it was denying its application to renew its liquor license with a 180-day abeyance, explaining that if the MOA did not withdraw its protest by October 19, 2020, that its application would be denied. That notice was mailed to the LeeFamily's street address at the Mom & Pops location.[24] On October 23, 2020, AMCO emailed the LeeFamily that the application to renew its license was denied because the MOA did not withdraw its protest.[25]

Mr. Lee requested a hearing to challenge the denial of the renewal of the application. That case was referred to the Office of Administrative Hearings, OAH Case No. 20-0893-ABC. That case was then dismissed because there was an issue regarding whether the LeeFamily had received proper notice of the April 1, 2020 Board meeting that resulted in a denial of its renewal application.[26] As a result, the Board was vacating the prior denial of the LeeFamily's license and would be taking the issue up again at its January 5, 2021 meeting. OAH Case No. 20-0893-ABC was then dismissed without prejudice to allow the matter to be addressed at the January 5, 2021 Board meeting.

a. The January 5, 2021 Board Meeting

The LeeFamily's license was addressed at the Board's January 5, 2021 meeting. Ms. Robinson, Mr. Potter, Mr. Rivera, Brian Swartzentruber, and Mr. Lee spoke at that meeting. Ms. Robinson, Mr. Potter, and Mr. Rivera all testified that the LeeFamily had violated the conditions placed upon its license. Ms. Robinson, Mr. Potter, and Mr. Swartzentruber spoke about the

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23 Ex. 18, pp. 44 – 47.
24 Ex. 19.
25 Ex. 20
26 *See* Ex. 23.

community conditions, to wit, the refuse, the public alcohol consumption, public intoxication, behavioral issues, and the effect on the neighborhood. Mr. Swartzentruber spoke about the problems experienced by the tenants in his office building, that those problems were caused by readily available cheap liquor, and that he personally observed Mom & Pops catering to the street drinkers. Mr. Lee spoke on behalf of the LeeFamily. He expressed his concerns that the conditions were only being imposed on his family's store. Mr. Potter then spoke about the voluntary actions taken by Brown Jug and Walmart to address litter and other alcohol related concerns including the pricing and sale of shooters and fortified beers.[27] Following the public testimony, the Board denied the application to renew the LeeFamily license, and the Lee Family was notified of that denial.[28] The LeeFamily then appealed that decision, and this case ensued.

b. The Superior Court Decision on Gubernatorial Appointments

While this case was pending and scheduled for hearing beginning on April 12, 2021, the Superior Court issued a decision on February 18, 2021 stating that the governor's appointments which had not been confirmed by the legislature effectively expired effective December 15, 2020.[29] That decision as applied to this case, when, reduced to its basics, meant that there was not a valid quorum present at the January 5, 2021 Board meeting, meaning that its denial of the LeeFamily license's renewal was not valid. Following a status conference held in this administrative case on March 25, 2021, this case was not dismissed, but was rather referred back to the Board to address the license renewal issue at its March 30, 2021 hearing. The hearing in this administrative case was then rescheduled to begin on April 26, 2021, dependent upon the Board's action.

c. The March 30, 2021 Board Hearing

The Board held its hearing on March 30, 2021. Mr. Lee did not attend due to there being a death in his family. The Board heard from Mr. Rivera, Ms. Robinson, and Mr. Potter about the violation of the conditions placed upon the LeeFamily license, and the effects on the surrounding neighborhood. Following that testimony and hearing from MOA counsel that the MOA's original protest did not request an abeyance and considering the fact that the LeeFamily had already received the extension of time provided by an abeyance, the Board upheld the MOA's protest and denied the LeeFamily's application to renew its license.[30]

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27 Ex. 24, pp. 24 – 34; Ex. 42.
28 Exs. 25 and 42.
29 Ex. 48, pp. 3 – 34.
30 Ex. 43.

d. The Subsequent Alaska Supreme Court Order

On April 8, 2021, the Alaska Supreme Court overturned the Superior Court Order that found the gubernatorial appointments had lapsed.[31]

4. The Evidentiary Hearing

The evidentiary hearing proceeded as scheduled on April 26 and 27, 2021. Edward "Eddy" Lee was the LeeFamily's representative. Assistant Attorney General Joan Wilson represented the Alcohol & Marijuana Control Office (AMCO.) Glenn Klinkhart, the AMCO director, Carrie Craig, the AMCO records and licensing supervisor, Miranda Honest, the MOA's business licensing official, and Todd Sherwood, an assistant MOA attorney, testified. In addition, Felix Rivera, Margaret Robinson, Timothy Potter, Brian Swartzentruber, and Edward Lee testified about Mom & Pops operation and the conditions placed upon the LeeFamily license.

a. Felix Rivera's Testimony

Mr. Rivera is a member of the MOA Assembly. He represents the midtown Anchorage district. Prior to being elected to the MOA Assembly, he was the liaison for the mayor's office to the Midtown Community Council. Right after he became elected to the Assembly, he became involved on issues regarding Mom & Pops. The concerns were that Mom & Pops was catering to intoxicated persons and selling shooters and fortified beers to them at low price points, and taking no responsibility for its customers once they left the store. He walked the area with Tim Potter, the chair of the community council's alcohol and marijuana committee. On several occasions, he personally observed the shooter and fortified beer containers in the alley behind Mom & Pops and saw people walking out of Mom & Pops and going right over to the housing units and other businesses and causing negative impacts to those. While he did not observe any "parties", he saw people walking through and loitering in the alley and loitering near Mom & Pops. He received regular phone calls from his constituents complaining about people "partying" in the nearby public park. He stated that the pricing and quantity limits were placed to try and limit the availability of the alcohol. The purpose of the marking was identify the source of the alcohol because Mr. Lee stated that the shooters etc. were coming from other liquor stores. Mr. Rivera went into Mom & Pops on one occasion after the conditions on the license were imposed. He was able to buy four shooters, at a price lower than the limit, none of which were marked as originating from Mom & Pops.

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[31] Ex. 48, pp. 1 – 2.

Mr. Rivera, along with others, tried to set up a district where the liquor stores had similar types of restrictions as those placed on Mom & Pops, but the MOA Assembly was not amenable. Mr. Rivera also attends other community councils that have the same types of issues as those with Mom & Pops, where they have all worked with liquor stores to try and impose voluntary conditions similar to those placed on Mom & Pops. Some of the larger retailers such as Walmart and Carrs/Safeway have voluntarily changed their sales policies. Because liquor licenses come up for renewal every two years, that is essentially the only time that conditions can otherwise be imposed.

b. Margaret "Peggy" Robinson's testimony.

Ms. Robinson lives in a condominium complex several blocks away from Mom & Pops. She was an active member of the Midtown Community Council and part of its committee that was formed to address alcohol issues in the community. She first started talking to Mr. Lee about the problems with Mom & Pops in 2016. When the license was up for renewal in 2016, the community council made the conscious decision not to protest it, because it was the first renewal since the LeeFamily purchased the business and it was felt that the LeeFamily should have a chance to correct the problems itself. However, there was not much change and the problems with garbage and public drunkenness continued. As a result, the Midtown Community Council decided to object to the 2018 renewal of the license.

Ms. Robinson detailed that there are a lot of incidents that occur in the nearby public park, where people are publicly drinking and just throwing the empty shooters, beer cans, and other liquor containers on the street, and that there are fights and rapes that occur in the park. There are a lot of fights, which she can hear from her condominium. There are people that sleep and publicly defecate in the park. There are a lot of police calls. Children cannot use the playground located in the park because of the public inebriates.

Ms. Robinson worked with Mr. Lee on setting the conditions that he agreed to have placed on the LeeFamily license. She found him to be initially cooperative. The price and quantity limits on shooters were placed to try and limit the public drinking because so many of those empty bottles were continuously being picked up on the street. Because Mr. Lee insisted that the problems in the neighborhood were caused by the other liquor stores in the area, the condition that the shooters and fortified beers be marked was set to determine if Mom & Pops was the source of those. After Mr. Lee entered into the Memorandum of Understanding for the LeeFamily, the cooperation dropped off.

In & Out, which is the closest liquor store to Mom & Pops, was contacted and the owner was given a copy of the conditions that Mom & Pops agreed to and was told that the Midtown Community Council was planning on placing those conditions on other midtown liquor stores. The owner of In & Out was not receptive and denied contributing to the neighborhood trash problems. When that license came up for renewal, the owner had had a stroke and it was decided not to object to the renewal because of the family problems and his daughter actively operating the store.[32]

Three weeks prior to the evidentiary hearing, Ms. Robinson went into Mom & Pops to purchase some alcohol. She observed a group of people outside the store engaging in "straw buying" meaning that they were having someone come in and buy alcohol for them. In the winter of 2020, she had a friend go to Mom & Pops who purchased four shooters, which were unmarked. In January of 2021, she had another friend go into Mom & Pops. That friend was going to purchase three shooters. The clerk talked him into buying four shooters, none of which were marked. She has personally witnessed seen people leave Mom & Pops with alcohol and then go to the neighboring public park.

c. Timothy "Tim" Potter Testimony

Mr. Potter is a land use planner/development consultant with DOWL, a midtown business. He participates in the Midtown Community Council on behalf of DOWL. He is the chair on the community council's marijuana and alcohol committee. He was the chair in 2018 when the LeeFamily license was up for renewal. He met with Mr. Lee and the attorney representing the LeeFamily to negotiate the Memorandum of Understanding, which Mr. Lee signed on behalf of the LeeFamily.

Mr. Lee was initially cooperative. Mom & Pops revised the price of the shooters. Mr. Lee attended two or three community council meetings, during which he said he was picking up trash in the neighborhood and marking the shooters. The purpose of marking bottles was to see if Mom & Pops was causing the neighborhood problems. Mr. Lee maintained that because the shooters found in the outside litter were not marked that meant that they were not coming from Mom & Pops. Mr. Potter went into the store right before the MOA Assembly meeting and purchased multiple shooters, all of which were priced at $1.50. He recently went to Mom &

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[32] The MOA had protested an earlier renewal of In & Out's license, which was not upheld by the Board. *See* Mr. Klinkhart's testimony.

Pops, where his identification was checked, and he had to pay $1.70 for a shooter for the first time. However, he purchased four shooters, none of which were marked.

Mr. Potter described there being a significant population of public inebriates in the area adjacent to Mom & Pops, often in groups between 36th Ave. and the public park, sitting on the sidewalk or business stoops, eating, drinking, passing out, and throwing their debris into the landscaping, sidewalks, curbs, and gutters. The nearby housing complex, Neighborworks, had to replace their landscaping and fence a utility box to discourage loitering. He observed the alley on the back of the strip mall where Mom & Pops is located fully littered with fortified beer cans and shooter bottles. One day he picked up 103 shooter bottles in the debris, and a week later picked up over 50.

Mr. Lee has stated that he believes that the LeeFamily has been unfairly singled out, and told Mr. Potter that he wanted similar conditions placed on other liquor stores. Mr. Potter worked with several adjoining large liquor store operators, Walmart, Carrs/Safeway, and Brown Jug, all of which have adjusted their sales practices to try and lessen the neighborhood problems. In & Out made a concession in eliminating the sale of single beers on ice, but would not agree to pricing limits. Due to the owner's stroke the community council made the decision to not protest that license renewal. Mr. Potter understands that the family is trying to transfer the license. The Midtown Community Council has decided to focus on one liquor store at a time as their licenses come up for renewal.

d. Brian Swartzentruber's Testimony

Mr. Swartzentruber is the property manager for the Midtown building, which is located on 36th Ave., 200 feet to the east of the strip mall where Mom & Pops is located. The building houses professional offices. He has been managing the property for over thirty years. He has witnessed people leaving Mom & Pops with alcohol and then going down the alley, where he has seen them drink, defecate, and have sex. The situation has worsened over the past five years. The inebriates come into his building and its parking lot. They gather on the lawn of the nearby church, and make trips to Mom & Pops for alcohol. The building spends three to four thousand dollars per month to have a security guard remove the inebriate population from the building and its parking lot. The building has had to lock its bathrooms and lock the backdoors to the building. There have been a lot of complaints from the tenants, which have decreased since the building obtained security.

e. Edward "Eddy" Lee's Testimony

The LeeFamily is owned by Mr. Lee's parents. It operates Mom & Pops, where he is the manager and is the LeeFamily representative. Mr. Lee agreed to the conditions on the LeeFamily license in 2018 but stated that when he agreed to the conditions on the LeeFamily license, he believed that those same conditions would be imposed on other stores. Mom & Pops' alcohol sales dropped dramatically after the imposition of the conditions.[33] However, that decrease in sales occurred at the same time that Mom & Pops also stopped accepting Food Stamps.

He testified that he and his parents have been marking the shooters, but that his employees have not. He did not dispute those employees would sell shooters at less than the required minimum price or in excess of the two shooter quantity limit. He admitted selling three shooters on one occasion and admitted that he stopped going to community council meetings. He stated that he continued to pick up garbage in the area.

Mr. Lee provided photographs taken shortly before the evidentiary hearing that were from nearby liquor stores that showed fortified beers being sold for $2.49, and $1.50,[34] and shooters being sold for as little as $1.00 apiece.[35] He purchased shooters at the Spenard Brown Jug store for $1.50 apiece.

f. Limitations Placed on Other Licensees

The MOA has placed limitations on other licenses. Oaken Keg's Gambell St. store and West Northern Lights stores has a minimum pricing on shooters of $1.99; Captain Sparrow is required to mark its bottles.[36]

III. Discussion

Licenses issued under Title 4 are issued for two-year periods, after which the licensee must reapply.[37] A local governing body, such as the MOA, has the right to "protest the issuance, renewal, relocation, or transfer to another person of a license."[38] The Board is then required to hold a public hearing during which the protest is to be considered and the relevant statute, AS 04.11.480(a) provides that "the board shall deny the application or continued operation unless the board find that the protest is arbitrary, capricious, and unreasonable."[39]

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33 Exs. R and Q.
34 Exs. C and I.
35 Exs. E and H.
36 Rebuttal Ex. 1, pp. 40 - 41; Ms. Craig's testimony.
37 *See* AS 04.11.210(b); AS 04.11.270.
38 AS 04.11.480(a).
39 AS 04.11.480(a).

If the Board votes to deny a renewal of a license, as it did here,[40] the licensee is then entitled to an administrative hearing conducted under Alaska's Administrative Procedure Act.[41] Because such a hearing concerns the denial of a renewal of a license, it is treated as the equivalent of taking away a license and the Director bears the burden of proof.[42] Following the hearing, unless there is a delegation (which has not occurred here), the matter then returns to the Board for a final decision.

> The decision at the end of the second round will be a more rigorously tested version of the first decision. If it differs from the first, the difference may not stem from any 'errors' in the initial round. Instead, it is simply a new decision made with a different and more complete body of evidence. The task is to make the best decision possible at the executive branch level.[43]

Applying the law in this case, the issue is whether the MOA protest of the LeeFamily license is arbitrary, capricious, and unreasonable. If it is not, then the Board is required to deny renewal of the LeeFamily license.

The essential facts in this case, which were supported by testimony in the MOA public hearings and the evidentiary hearing in this case, are:

- When the LeeFamily license came up for renewal in 2018, there were substantial concerns about street inebriates and their behavior, which impacted the neighboring properties. Those included disturbing the neighbors, both residential and commercial by littering, which included liquor containers, public drinking and inebriation, and other disturbances. The concern was that Mom & Pops catered to a street inebriate clientele, and therefore helped to create the problem.
- The LeeFamily was faced with a MOA protest to the renewal of its license in 2018. The Board upheld the protest and gave the LeeFamily a 90-day grace period within which the MOA could withdraw its protest. If the protest was withdrawn within those 90 days, the renewal would be approved. If it did not, the renewal would be denied.

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40 It should be noted that the Board's initial action under review is the one taken during its January 5, 2021 meeting. The uncertainty caused by the Superior Court order that found that the gubernatorial licenses had lapsed resulting in the March 30, 2021 rehearing in front of the Board. However, the Supreme Court order issued on April 8, 2021 made it clear that the gubernatorial appointments did not lapse. As such, the Board had a quorum at its January 5, 2021 meeting, which meant that the Board's actions during that meeting were not void. Regardless, the Board's action at the March 30, 2021 meeting had the same result as the result reached at the January 5, 2021 meeting: the renewal of the LeeFamily license was denied.

41 AS 04.11.510(b)(1).

42 *Alaska Alcoholic Beverage Control Board v. Malcolm, Inc.*, 391 P.2d 441, 444 (Alaska 1964).

43 *See In re Palmer,* OAH No. 09-0133-INS (Director of Insurance 2009), at pp. 6-7 (describing this decision-making paradigm in the context of professional licensing cases).

- The LeeFamily, which was represented by an attorney at the time, entered into a Memorandum of Understanding with the Midtown Community Council which placed limits on Mom & Pops' sales and prices of certain types of alcohol, required them to mark certain types of alcohol sold to identify them as coming from Mom & Pops, and additionally required the LeeFamily to clean up litter in a specified area and attend the Midtown Community Council meetings. The purpose behind the marking was to try and identify the sales source for the litter in the area. The purpose of limiting the sales and prices of certain types of alcohol was to limit the availability of low-priced alcohol to the street inebriate community.
- The MOA withdrew its protest to the 2018 LeeFamily license renewal based upon the conditions contained in the Memorandum of Understanding, which were then placed on the license by the Board.
- The LeeFamily, however, admittedly has not complied with the conditions on its license: it stopped going to Midtown Community Council meetings after a few months; its compliance with pricing and amount restrictions on the sale of shooters depends upon the salesperson operating the store at the time and their perception of the customer; its employees are not marking the shooters and fortified alcohol containers to show that those were sold by Mom & Pops. It is not consistently, if at all, cleaning up the litter in the adjoining areas.
- The violation of the conditions, specifically the marking and the price and quantity limits on shooters were continuing in late 2020 and early 2021.
- None of the empty shooters, etc., bottles found in the litter contain markers identifying them as being sold by Mom & Pops.
- The manager of an adjacent commercial property has personally seen people leave Mom & Pops and then go drink in the alley behind the strip mall and observed them publicly defecating and having sex. Groups of people will hang out on a neighboring church's lawn and then go walk to Mom & Pops and buy alcohol. They have had to hire security to monitor the property and escort unwanted people from the building, lock the doors in the back of the building, and lock up the building bathrooms.

- Neighboring residential properties have had to increase fencing and modify landscaping to address the loitering and other issues on their properties caused by the inebriate population.
- The Midtown Community Council has actively worked with other neighborhood alcohol vendors to address the issues, which has resulted in some of them voluntarily changing their sales and pricing practices.
- The LeeFamily has not sought to modify the conditions on its license.

The evidence in this case therefore shows that Mr. Lee, the representative for the LeeFamily, who has participated in this process beginning with his agreement to the conditions placed upon the LeeFamily license during the 2018 renewal, did not dispute that Mom & Pops had violated the conditions on the LeeFamily license. Instead, his position was that Mom & Pops was not the sole source of the problems in the neighborhood, and that there were a number of package liquor stores within walking distance of Mom & Pops that were directly contributing to the problem by their low prices on shooters and single can fortified beers. He admitted that Mom & Pops was not fully complying with the conditions on its license, including the pricing and quantity limits on shooters and marking, attending community council meetings, and cleaning up litter. He objected to those conditions because he felt Mom & Pops had been singled out and that when he, on behalf of the LeeFamily, agreed to the conditions on his license, he thought those same conditions would be also placed on neighboring package liquor stores. It should be noted that Mr. Lee was not a wholly credible witness. If he, and his parents, as he testified, had been marking shooters, then some of those marked bottles would have been present in the litter observed in the area.

The MOA Assembly's resolution that protested the renewal of the LeeFamily license resolution specifically identified public safety issues, being the sale of shooters for less than the price required under the license conditions and in quantities exceeding the allowed limit, and a large number of police calls indicating that the store was a "magnet for unlawful activity." The resolution identified public health concerns due to the negative impact of the store on the neighborhood, the sale of shooters for less than the minimum price, and the impacts on neighboring properties, which were documented by photographs and testimony, and the store's contributing to chronic inebriates "littering, trespassing and becoming publicly incapacitated (passing out) in the area." The resolution specifically noted that alcohol containers were not marked as required, and that Mom & Pops failed to comply with the conditions on its license,

even after those conditions were placed upon the license by the Board. The resolution, in addition to protesting the renewal of the license, recommended that the Board allow the LeeFamily license be transferred to another licensee.[44]

The facts, as recited above, provide a reasonable basis for the factual findings in the MOA protest. The fact that the LeeFamily consciously chose to ignore its voluntarily agreed to conditions, which were placed upon its operation both by the MOA and by the Board, demonstrate a reasonable basis for the MOA protest and further demonstrate that the MOA protest is neither arbitrary nor capricious. The LeeFamily argument that the conditions were unfairly placed upon its business ignores the fact that they were voluntarily agreed to. In addition, the Memorandum of Understanding nowhere contains a statement that the conditions were only effective if placed on other neighboring liquor stores. In short, the LeeFamily could not unilaterally decide which conditions it would comply with or when it would comply with those conditions. Further, the MOA has placed some conditions on other licensees, and as the testimonies of Mr. Rivera and Mr. Potter demonstrate, some of the liquor store owners in the area have voluntarily modified their sales practices to address the same concerns that gave rise to the conditions on the LeeFamily license.

The facts therefore show that there is substantial evidence in this case demonstrating that the MOA's protest is not unreasonable, not arbitrary, and not capricious. Under AS 04.11.480(a), the Board is required to deny the renewal of the LeeFamily license.

The inquiry, however, is not complete. The MOA Assembly's protest requested that the Board provide an opportunity for the LeeFamily to transfer its license. In its original action, which is not technically under review because it was vacated due to a lack of proper notice, the Board granted the protest, which meant a denial of the renewal, but went beyond that, granting the LeeFamily an abeyance of 180 days within which the MOA could withdraw its protest, meaning that if the protest was lifted within a 180-day period, the license renewal would be approved. If the protest was not withdrawn, the renewal would be denied.[45]

The question then arises as to whether the Board should now grant the LeeFamily a similar abeyance to the one provided in April 2020. The Board's regulations specifically provide that the Board may grant an abeyance "if the local governing body indicates that the protest is subject to rescission and that it will be withdrawn if the applicant meets conditions set by the local

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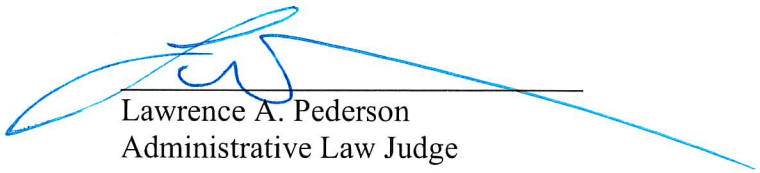
44 Ex. 15.
45 Ex. 19.

governing body."[46] However, the MOA's protest does not indicate that its protest is subject to rescission. Consequently, this Board lacks the discretion to provide the LeeFamily with an abeyance in this case.

IV. Conclusion

The MOA's protest of the renewal of the LeeFamily license is supported by substantial evidence that the LeeFamily has unilaterally chosen to not follow the conditions imposed upon its license, by its voluntary and binding agreement with the MOA. There is substantial evidence in this case demonstrating that Mom & Pops' operation has endangered public health and safety. As such, there is substantial evidence that the MOA's protest is reasonable, not arbitrary, and not capricious. The Board is therefore required to uphold the MOA's protest and deny renewal of the LeeFamily license. Consequently, its denial of the renewal of the LeeFamily license is affirmed.

Dated: June 14, 2021.



Lawrence A. Pederson
Administrative Law Judge

[46] 3 AAC 304.145(h).

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 _____, 2021.

By: _____
Signature

_____
Name

_____
Title

Non-Adoption Options

A. The ALCOHOLIC BEVERAGE CONTROL BOARD, in accordance with AS 44.64.060, declines to adopt this decision, and instead orders under AS 44.64.060(e)(2) that the case be returned to the administrative law judge to:

take additional evidence about _____;

make additional findings about _____;

conduct the following specific proceedings: _____.

DATED this _____ day of _____, 2021.

By: _____
Signature

_____
Name

_____
Title

B. The ALCOHOLIC BEVERAGE CONTROL BOARD, in accordance with AS 44.64.060(e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows:

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 _____, 2021.

By: _____
Signature

_____
Name

_____
Title

C. The ALCOHOLIC BEVERAGE CONTROL BOARD, in accordance with AS 44.64.060(e)(4), rejects, modifies or amends one or more factual findings as follows, based on the specific evidence in the record described below:

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 _____, 2021.

By: _____
Signature

_____
Name

_____
Title

D. The ALCOHOLIC BEVERAGE CONTROL BOARD, in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for these reasons:

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 _____, 2021.

By: _____
Signature

_____
Name

_____
Title