



THE ALASKA CLUB

March 8, 2019

Dear Director McConnell:

We are in receipt of your letter dated February 25, 2019 (the "Letter") in the referenced matter advising that the Summit, License No. 5004, recreational site license was not renewed for the 2019-2020 renewal period by the Alcoholic Beverage Control Board at its February 19, 2019 meeting. A copy of the Letter is enclosed herewith for your convenient reference.

In accordance with the terms of the Letter and applicable law, the licensee herewith requests that an informal conference with the Board under AS 4.11.510(b)(1) be promptly scheduled to discuss the Board's action and why that Board decision, in the licensee's respectful, considered opinion and judgment, should be immediately reversed. The licensee accordingly requests that the informal conference be scheduled as soon as possible at a time mutually convenient for the parties.

Please advise the undersigned if you desire any further information, data, documentation or input from us at this juncture.

The licensee is, of course, otherwise reserving all of its rights and remedies, including without limitation its right to formally appeal the Board's decision. As is set forth in the Letter, the licensee understands, and is relying on the fact that the deadline for filing any such formal appeal and for requesting a formal hearing will be paused until the informal conference is held.

Thank you for providing us the opportunity for an informal conference with the Board.

I can be contacted at: 5201 East Tudor Road
 Anchorage, AK 99507
 907-330-0188

Very truly yours,

Robert Brewster
CEO and President
The Alaska Club, Inc. dba The Summit

AMCO
MAR 11 2019

ALASKA DEPARTMENT OF COMMERCE, COMMUNITY, AND
ECONOMIC DEVELOPMENT
ALCOHOL AND MARIJUANA CONTROL OFFICE

In the matter of:)
)
The Alaska Club, Inc.)
DBA The Summit)
11001 O'Malley Centre Drive)
Anchorage, AK 99515,)
Respondent)
_____) License #5004

NOTICE OF DEFENSE / REQUEST FOR HEARING

The Respondent, pursuant to AS 44.62.390, hereby gives Notice of Defense in this proceeding. A hearing on the matters set forth in the Decision is hereby requested.

I. Respondent Initiating Request

Date: 3/7/19 Respondent's Name (printed): ROBERT BREWSTER

Respondent's Signature: Robert Brewster

Mailing Address: 5201 EAST TUDOR ROAD

Anchorage AK 99507
City State Zip Code

Phone Number: 907 - 330 - 0188

OR

II: Attorney Representing Respondent (Note: An attorney is not required for this proceeding.)

Name of Attorney Representing Respondent: _____

Mailing Address: _____

City State Zip Code

Phone Number: _____

Date: _____ Signature: _____

NOTE: This Notice of Defense/Request for Hearing must be signed by or on behalf of Respondent, must set forth Respondent's current mailing address, and must be filed **within 15 days** after the enclosed Decision was mailed or delivered to the Respondent (time period held in abeyance for informal conference). It shall be filed accordingly:

Administrative Officer
Department of Commerce, Community, and Economic Development
Alcohol and Marijuana Control Office
550 West 7th Ave, Suite 1600
Anchorage, AK 99501

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THE STATE
of **ALASKA**
GOVERNOR MICHAEL J. DUNLEAVY

Department of Commerce, Community,
and Economic Development

ALCOHOL AND MARIJUANA CONTROL OFFICE
550 West 7th Avenue, Suite 1600
Anchorage, AK 99501
Main: 907.269.0350

February 25, 2019

The Alaska Club, Inc.
DBA The Summit
11001 O'Malley Centre Drive
Anchorage, AK 99515

Re: The Summit, License #5004

Dear The Alaska Club, Inc.:

At the February 19, 2019, meeting of the Alcoholic Beverage Control Board in Juneau, Alaska, the Board voted to deny the renewal of your recreational site license in accordance with AS 04.11.330(a)(6) which states, "*An application requesting renewal of a license shall be denied if... renewal of the license would violate the restrictions pertaining to the particular license under this title or the license has been operated in violation of a condition or restriction imposed by the board.*" The board determined that your business operations do not meet the definition of a recreational site in order to qualify for a recreational site license under AS 04.11.210.

You must immediately cease selling and serving alcoholic beverages.

Because your license renewal has been denied, you have the right to an informal conference with the director or the Board under AS 04.11.510(b)(1), which you may initiate in writing within 15 days of receiving this letter.

The Alaska Administrative Procedure Act, AS 44.62.330 et seq., provides you with a means to appeal the Board's decision. Specifically, AS 44.62.390 allows you to initiate a hearing to determine whether a right, authority, license, or privilege should be granted, issued, or renewed. If you request a formal hearing, the Office of Administrative Hearings will assign an administrative law judge to hear the matter. You may hire an attorney to represent you in such a hearing, but are not required to.

Please consider this letter as a Statement of Issues as required by AS 44.62.370. If you intend to request a formal hearing, you must notify AMCO in writing, within 15 days of receiving this notice. If you request an informal conference, the 15 days to request a formal hearing will be paused until the informal conference is held. A Notice of Defense form is enclosed in order to request a formal hearing; however, you may submit any written notice that meets the requirements of AS 44.62.390.

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The Alaska Club, Inc. DBA The Summit
February 25, 2019
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Your Notice of Defense must be sent to:

Administrative Officer
Alcohol and Marijuana Control Office
550 West 7th Ave, Suite 1600
Anchorage, AK 99501

If you do not wish to request an informal conference or to appeal the Board's decision, you may file a claim for refund of the \$800 license fee that was paid with your renewal application, by completing the three highlighted fields of the enclosed Claim for Refund form. The completed form must be sent to the address above.

You may contact me with any questions or to request additional information. However, I cannot provide you with any legal advice.

Sincerely,



Erika McConnell
Director

cc: License File
Municipality of Anchorage

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HUGHES WHITE COLBO
WILCOX & TERVOOREN, LLC
ATTORNEYS AT LAW

April 11, 2019

Direct Dial:

(907) 274-7522

E-Mail: **fodsen@hugheswhite.com**

VIA HAND DELIVERY

Ms. Erika McConnell

Director

State of Alaska, Alcohol and Marijuana Control Office

550 W. 7th Avenue, Suite 1600

Anchorage, Alaska 99501

Re: The Alaska Club, Inc. dba The Summit Recreational Site License No. 5004,
Informal Conference With the ABC Board on April 29, 2019

Dear Ms. McConnell:

We represent The Alaska Club, Inc. dba The Summit, (the "Summit Club"), holder of Recreational Site Licensee No. 5004 (the "License"). The Summit Club has asked us to submit this letter and the enclosed materials to the ABC Board in conjunction with the informal conference relating to the denial of the renewal of the License for the period of 2019 to 2020. The informal conference is scheduled to occur at the Board's meeting in Anchorage on April 29, 2019.

Enclosed herewith for the Board's reference is a copy of the decision (the "ALJ Decision") of Administrative Law Judge Cheryl Mandala of the State of Alaska, Office of Administrative Hearings (sometimes referred to as the "Judge") dated September 29, 2016 pertaining to the Board's refusal to renew the License for the period of 2016-2017. The ALJ Decision was adopted by the Board on December 12, 2016. In the ALJ Decision, as you will recall, Judge Mandala ordered the reversal of the Board's denial of the Summit Club's 2016-2017 License renewal, finding that the Board had acted in violation of the Summit Club's constitutional right to equal protection of the law. The ALJ Decision also contains a thoughtful discussion and analysis of recreational site liquor licenses in Alaska and their historical context.

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The Summit Club's position is that the Board's action at its February, 2019 meeting in denying the renewal of the License for the 2019-2020 period similarly violated the Summit Club's equal protection rights and should be reconsidered and reversed by the Board.

Recognizing the matter at this stage involves an informal conference (and without prejudice to the Summit Club's rights to a formal hearing and appeal) this letter sets forth the Summit Club's points and arguments in a fairly informal, bullet point type of format so as to hopefully facilitate a meaningful and productive discussion at the informal conference.

With those comments the Summit Club respectfully asserts the following:

The Board's Treatment of the Summit Club Is Inconsistent With Its Treatment Of Similarly Situated Activity Based Rec Site Licensees And Thus Is Violative Of The Club's Constitutional Right To Equal Protection Of The Law. The Summit Club, Unlike Other Similarly Situated Activity Based Rec Site Licensees, Did Not Receive Any Written (or Other) Notice That Its License Renewal For The 2017-2018 Period Would Be Its Last and Final Renewal. The Board's Recent Treatment of the Alaska State Fair's Recreational Site Liquor License Renewal Is Also Impermissibly Inconsistent With The Board's Treatment of the Summit Club License Renewal.

Following the ALJ Decision and the Board's adoption of it in late 2016, the minutes of the Board's meetings and related documents reveal that in numerous cases involving activity based recreational site licensees applying to renew their licenses the Board has ruled that the pertinent license would be renewed, but the renewal was conditioned on the Board and its staff providing the licensee with written notice that the renewal was the last one. Such conclusions and notices were based on the Board's conclusion that the pertinent licensee's operations did not meet the Board's current interpretation of the "event based" types of operations required by the current recreational site license statute (AS 4.11.210). A non-exhaustive sample of cases where that procedure, including written notice from the Board that the renewal of the activity based recreational site license would be the last and final renewal, was adhered to include the following:

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Board Actions at the Board Meeting of February 19-20, 2019 Based on the Written Transcript (the "Transcript") Enclosed Herewith):

a) Taku Lanes in Juneau, Recreational Site License No. 5095: Taku Lanes applied for the renewal of its Recreational Site License for 2019 to 2020 after having been given a letter from the Board dated March 23, 2017 that the License had been renewed at the Board's meeting on February 1, 2017, but that the Board had "agreed to allow this last renewal." At its February 19-20, 2019 meeting the Board denied a further renewal of the License for 2019-2020.

b) Alaska Travel Adventures in Juneau, Recreational Site License No. 4881: Alaska Travel Adventures applied for a renewal of its Recreational Site License for 2019 to 2020. The Minutes of the December 17, 2018 Board meeting indicate that Alaska Travel Adventures was the first activity based Recreational Site License to be advised by the Board that its license renewal for 2017-2018 would be the final renewal. That prior notice was also referred to by the Director, at the February, 2019 Meeting, Transcript, page 25. The licensee's application was tabled until the February, 2019 Meeting. At the February, 2019 Meeting the Board denied the renewal of the Alaska Travel Adventures Recreational Site License.

c) Denali Arts Council in Talkeetna, Recreational Site License No. 4897: Denali Arts Council, applied for a renewal of its Recreational Site License for 2019 to 2020. At the February, 2019 Meeting, the Director noted that two years ago the Board "renewed the license with the indication that this would, as it does not meet the statutory definition of a rec site license, and voted to renew the license for final time, that the 2017-2018 renewal would be the last one," Transcript at page 26. The Denali Arts Council's License was not renewed by the Board for 2019-2020.

Minutes of Board Meeting of the Board Meeting of August 14, 2018:

a) Liarsville in Skagway, Recreational Site License No. 4567: Liarsville applied for the renewal of its Recreational Site License for 2018-2019. Glenn Brady moved to approve the renewal "with the clear communication to the licensee that this license cycle is the final one that will be issued to this license." Mr. Brady's motion was also clarified to indicate that a new recreational site license would not be available based on the licensee's activities. The motion carried on a 3-2 vote.

b) Dimond Bowl in Anchorage, Recreational Site License No. 4674: Dimond Bowl applied for the renewal of its Recreational Site License for 2018-2019. Mr. Brady

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moved "to approve the renewal of this license 4674 with clear communication with the licensee that this is the final renewal." The motion carried on a 3-2 vote.

The Board's Treatment Of The Alaska State Fair Improperly Favored It Over The Summit Club (And Other Similarly Situated Activity Based Recreational Site Licensees).

In addition, as the Board is of course aware, in the case of the Alaska State Fair, the Board staff recommended in February, 2019 against the renewal of the Fair's license, Transcript at page 5, for the period of 2019-2020 (based on the Board's website listing of active licenses) because that license is fundamentally an activity based recreational site license. The Fair's alcoholic beverage sales are substantially in support of patrons' activity of attending the experience of the Fair. Notwithstanding that recommendation, the Board renewed the Fair's license for the period 2019-2020

The Board discussions indicate that the Board viewed the Fair as a special case. After a lot of discussion about the significance of the Fair, Chair Klein summarized the approval motion as follows: "I have before me a motion to approve the renewal with the stipulation that this is recognized as an unusual application of rec site and should only be granted for this one time which is two years," Transcript at page 22. The motion passed unanimously. Essentially consistent with Chair Klein's motion is an alternative potential basis for granting the Fair's renewal, as articulated by Ms. Sarah Oates of CHARR at the meeting. That basis was that, unlike other activity based Recreational Site Licensees, the Fair had not been given a written warning that its previous renewal (for 2017-2018) would be its last. As a result it would be just to renew the Fair's license but give it the written final renewal notice.

From the Summit Club's point of view, however, the point is whether the Fair's renewal was based on the uniqueness of the Fair experience or the failure to give prior notice of a final renewal, the Summit Club renewal application was not treated by the Board in an analogous fashion.

The Summit Club's position, respectfully, is that the failure to treat the Summit Club in a manner consistent with the Fair is contrary to the equal protection rights of the Summit Club under the Alaska state and federal constitutions, as articulated in the ALJ Decision adopted by the Board.

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The Board's Refusal To Renew The Summit Club License At The February, 2019 Meeting Was Based In Part On A Misplaced Concern That Allowing The Club's Renewal Would Open The Door To An Undue Expansion Of Recreational Site License Availability.

The discussion of the Summit Club License renewal is set forth at Pages 26-31 of the Transcript. There was not discussion or analysis by the Board of the fact that the Summit Club had not been given any written notice that the 2017-2018 renewal would be the last renewal of the License, even though other similarly situated licensees were given or are being given such written notice as is set forth above. In addition, Mr. Gary Sossamon, The Alaska Club controller, appeared at the February, 2019 Board Meeting on behalf of the Summit Club. He requested that the Club's License be renewed for an additional (and final if the Board were to so order) two-year period. Mr. Sossamon also argued that the Club's license is essentially historically established, and is an asset that has economic value to the Club deserving of legal protection. Protecting that existing asset would not require the Board to broaden the availability of Recreational Site Licenses generally. Mr. Sossamon also noted that during the appeal process in 2016, the Club was not allowed to operate, which unfairly prejudiced the Club.

Board member comment at the Meeting included the expression of a concern that "if we were to grant this, it would open a somewhat literal Pandora's box. It will be potentially yoga studios and, you know, that sort of thing," Transcript at page 29. The Board members also thoughtfully noted that both the Club and the Board were essentially facing challenges in properly administering the Recreational Site License statute in its current form. However, as Mr. Sossamon noted in his testimony, any new yoga studio or similar business would not have an existing license and business franchise. In addition, the Club is fundamentally asking that it be treated in the same fashion as similarly situated, existing Recreational Site Licensees in receiving a further (and final, if need be) renewal for 2019-2020.

Mr. Sossamon's cogent final argument pretty much sums up the Summit Club's requested relief at the Informal Conference: "All I'm asking for is a two-year continuation of our current license which has been offered to others, so – and at this point in time, we will gladly change business practice or there may be another opportunity for us to continue under a different method, but we just want to continue our normal business practice for the next two years," Transcript at Page 30.

Board Decisions Granting Similarly Situated Activity Based Recreational Site Licensees A Final Renewal With Written Notice That Their Licenses Would Not Be Further Renewed Are Now Legally Binding Precedent.

Former AS 4.11.537 provided as follows: “[i]n determining whether issuance, renewal, transfer, relocation, suspension, or revocation of a license is in the best interests of the public, the board need not conform to or distinguish its decision from any action it has taken in the past on applications presenting similar facts, but may instead base its decision only on the particular facts before it” (the “No Precedent Statute”). In 2018 the Alaska State Legislature repealed the No Precedent Statute in the Session Laws of Alaska, Chapter 30, Section 4, which became effective on September 27, 2018 (the No Precedent Repeal Statute”). As a result of the No Precedent Repeal Statute, prior decisions of the Board are binding legal precedent in future similar cases. Therefore, all of the Board decisions and dispositions of renewal issues with regard to activity based recreational site licenses are binding legal precedent that should have been applied to the issue of the renewal for 2019-2020 of the Summit Club License. As a result of the precedents, the Summit Club’s License should have been renewed for 2019-2020, with written notice if the Board were to so choose, that the renewal would be the final renewal of the License unless the Summit Club’s operations were to change to come within the Board’s current interpretation of proper operations under AS4.11.210, or that statute were to be modified or replaced by the Legislature.

Unlike Any Other Activity Based Rec Site Licensees Whose Licenses Were Renewed (Even With Notice That Such A Renewal Would Be The Final One), The Summit Club’s License Was Improperly Required By Board Order To Cease Operations For A Period of Numerous Months in 2016 .

As touched on by Gary Sossamon of the Club in his February, 2019 Board testimony, the ABC Board Cease and Desist Order with regard to the previous non-renewal of the License in our files indicated it was effective as of 8:00 A.M. on 2-12-16. The Summit Club ceased all alcoholic beverage operations as of that date and time, and did not resume them until approximately 12/31/2016 (which was following the issuance of the ALJ Decision on September 29, 2016, the Board’s hearing thereon on December 5, 2016, the Board’s adoption of the ALJ Decision on December 12, 2016, and an inspection of the Summit Club premises by an enforcement officer of the Board’s prior to the reopening of the Summit Club licensed premises).

The key point is that, as is noted above, other similarly situated activity based recreational site liquor licensees have been given a written notice by the Board that the last renewal granted to them will be their final renewal and no further renewals will be granted by the Board. However, in none of those cases of which the Summit Club is aware, was the pertinent licensee ordered shut down by the Board based on a non-renewal of their respective licenses that was subsequently reversed as a result of a court order and decision. Those other licensees had the benefit of uninterrupted business operations until given a written notice that they had received a renewal of their licenses, but that no further renewals would be granted. The Summit Club did not have the significant advantage of such uninterrupted business operations and opportunities. Rather, its alcoholic beverage operations were shut down, and were not resumed until after a long, nearly 10.8 month hiatus. In those circumstances, it is just, fair and proper that the Summit Club be granted at least a final renewal of the License for 2019-2020.

As Noted In The ALJ Decision, The Board's Order Shutting Down the Summit Club's Operations During the Pendency of the Club's Previous Appeal Was Legally Improper (As Is The Board's Current Order Directed To The Summit Club To The Same Effect). The Summit Club Should Be Allowed To Immediately Resume Alcoholic Beverage Sales Operations At This Time.

Obviously, the Cease and Desist Order from 2016 ordered the Summit Club to cease all alcoholic beverage operations for an indefinite period and the Summit Club of course obeyed the order for so long as it was in effect. The letter from you to the Summit Club dated February 25, 2019 following the Board's February, 2019 Meeting contained a similar order. The boldfaced language is: "**You must immediately cease selling and serving alcoholic beverages.**" The Summit Club has, of course, also obeyed that order, and the Summit Club's alcoholic beverage operations are currently shut down.

Judge Mandala in the ALJ Decision criticized the Board for ordering the Summit Club in 2016 to shut down and cease its alcoholic beverage operations even though the Board's decision to not renew the License for 2016 and 2017 was not a final order. Rather that order and decision (like the Board's current decision in February, 2019 to not renew the License for 2019-2020) was not final and had not achieved a final and non-appealable status.

The liquor statutes in Title 4 did not and do not authorize the Board or staff to order such alcoholic beverage operations shut downs when the Board's renewal decisions are not final and non-appeal orders. Judge Mandala wrote in pertinent part as follows in the ALJ Decision at page 26, footnote 155: "Not squarely at issue here, but noteworthy, is whether the Board should be confiscating a non-renewed license at the time of its initial decision under AS 4.11.510, as opposed to waiting until that non-renewal decision becomes final under the Administrative Procedures Act. The renewal procedures statute is silent on this issue. The Board's procedure has been to implement its non-renewal decision immediately-directing the licensee to immediately stop operating the license—even though the licensee has the right to a formal hearing conducted under the APA prior to the Board's decision becoming "final." See AS 04.11.510(b)(1) (right to a hearing conducted under the APA); AS 44.62.520(a)(2) (decision on APA matter becomes final 30 days after Board action on proposed decision, unless Board orders an earlier effective date). Given the purpose of the APA hearing under the Board's regulatory scheme as described above to ensure that the Board has full information before making its final decision, and given the significance of the existing licensee's property interest (e.g. unlike that of a first-time applicant) the Board may want to consider revisiting this aspect of its procedures for non-renewals." (emphasis added)

The pertinent liquor statutes, cited by the Judge remain in full force and effect at the present time.

In light of the foregoing, and Judge Mandala's thoughtful and uncontroverted analysis and observations, in the ALJ Decision that was adopted in whole by the Board, the Summit Club respectfully requests that the Board's currently existing directive that the Summit Club cease all alcoholic beverage operations be immediately rescinded and decreed by the Board to be of no further force or effect.

The Summit Club Has Supported And Continues To Support The Title 4 Revisions (Including A Reasonable Sunsetting Period For Existing Activity Based Rec Site Licenses).

The Summit Club has long supported reasonable modifications to the Title 4 liquor statutes. Examples are as follows: The Alaska Club's President, Robert Brewster has testified at Board meetings related to recreational site license policy and of course before Judge Mandala in the 2016 appeal proceeding. The undersigned counsel participated in the Licensing Committee discussions and deliberations as a lawyer who often represented industry members, including

recreational site license holders, like the Summit Club. In all such cases, Mr. Brewster and the undersigned expressed support for the revisions to Title 4, which we generally viewed as balanced and thoughtful, including a reasonable sunset period for activity based recreational site licenses.

The Summit Club has recently engaged the services of Mr. Eldon Mulder as a lobbyist before the Alaska State Legislator with a goal of advancing the Title 4 reforms currently before the Legislature, including at least an eight- year sunset period for existing activity based Recreational Site liquor licenses.

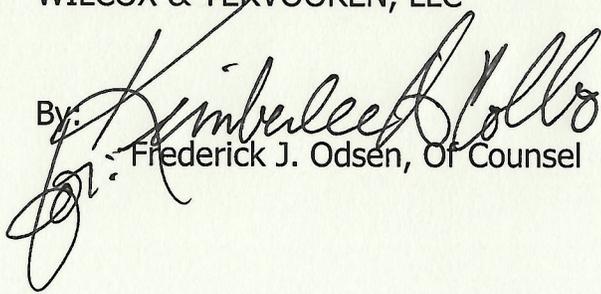
The Summit Club Has A Flawless Compliance Record And No History Whatsoever Of Any Violations Such That A Further License Renewal Is Equitable.

From the point of view of public policy and the overall equities of the matter, it is important to observe and recall that the Summit Club has a spotless regulatory and compliance record insofar as the ABC Board is concerned, with no warnings, citations, notices of violation or incidents. The Summit Club has always been, and continues to be a high quality, professional operator, reflective of the industry's best practices and procedures.

We respectfully request that you provide this letter and the enclosures to the Board members in the materials provided them for the April 29-30 Board meeting, including for the scheduled informal conference. Thank you.

Very truly yours,

HUGHES WHITE COLBOX
WILCOX & TERVOOREN, LLC

By: 
Frederick J. Odsen, Of Counsel

FJO:cah/443675

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

In the Matter of)	
)	
THE ALASKA CLUB, INC.)	OAH No. 16-0200-ABC
d/b/a THE SUMMIT)	Agency No. 16-01
_____)	

DECISION

I. Introduction

In 2010, the Alaska Club was granted a recreational site license to serve beer and wine at the Summit, its “platinum-level” athletic club. The Summit’s “Rec Site” license was granted at a time that the Alcoholic Beverage Control Board was very broadly construing the recreational site license statute to allow such licenses across a variety of settings. Thereafter, during a series of public meetings over the course of several years, the Board revisited its application of the recreational site license statute, eventually determining that it had been overly broad in construing the statute.

When the Alaska Club applied to renew the Summit’s recreational site license in 2016, the Board received a public objection arguing that the Summit did not fit the statutory definition for a “recreational site.” After a hearing on the objection, the Board denied the application to renew the Summit’s license on the basis that the Summit’s operations were outside the statutory definition of a recreational site.

The Summit now appeals, correctly noting that the Board has continued to renew other seemingly non-conforming Rec Site licenses despite its stated intention to narrowly construe the statute as to all licensees.

This decision concludes that the Board has appropriately decided to interpret the Rec Site statute consistent with a narrow reading of the statute’s terms. However, the Board’s actions in continuing to renew all other non-conforming Rec Site licenses, while denying non-renewal to the Alaska Club alone, are so arbitrary as to not withstand constitutional scrutiny. Accordingly, the Board’s decision to deny the Club’s 2016-2017 renewal application is reversed.

This decision does not preclude the Board from denying future renewal applications – either from the Alaska Club or from other existing Rec Site licensees – provided that the Board adjusts its renewal application process to apply equally to similarly situated applicants.

II. Factual and Procedural History

A. Context of alcoholic beverage licensing options and processes

The Alcoholic Beverage Control Board is responsible for controlling the manufacture, barter, possession, and sale of alcoholic beverages in Alaska.¹ In its exercise of that duty, the Board administers twenty-two different types of licenses and permits related to alcoholic beverages.² These include beverage dispensary licenses, restaurant or eating place licenses, pub licenses, golf course licenses, club licenses, special event permits, and caterer's permits, each of which is separately defined by statute.

The specific license type at issue in this appeal is the "recreational site license," defined in AS 04.11.210 as follows:

(a) The holder of a recreational site license may sell beer and wine at a recreational site during and one hour before and after a recreational event that is not a school event, for consumption on designated areas at the site.

(b) The biennial fee for a recreational site license is \$800.

(c) In this section, "recreational site" includes a location where baseball games, car races, hockey games, dog sled racing events, or curling matches are regularly held during a season.

The Board's administrative, licensing, and enforcement functions are carried out by its Director and her 16-person staff, who also bear those responsibilities for the fledgling Marijuana Control Board.³

Because this appeal specifically concerns a renewal application, the renewal application process is briefly summarized. Within the Board's four-person licensing staff, two license examiners review and process nearly 1,000 renewal applications annually.⁴ Each year, licensees whose applications are coming up for renewal are mailed application forms prior to November 1, with the completed renewal application due back by December 31.⁵ Under the Director's delegated authority, renewal licenses are issued bearing the proviso that the license renewal is "subject to Board approval within 90 days."⁶ Unless a protest or objection is received during that time, the license is deemed to be "issued" without further action by the Board.⁷

¹ AS 04.06.090(a).

² AS 04.06.080; AS 04.11.080.

³ 3 AAC 304.015; Franklin testimony.

⁴ Oates testimony.

⁵ Oates testimony; AS 04.11.270(b)(1).

⁶ Oates testimony.

⁷ Oates testimony. This process is discussed in greater detail at page 14, below.

B. Historical application of the recreational site license statute

As noted above, the Rec Site license statute allows a licensee to sell beer or wine “at a recreational site during and one hour before and after a recreational event.” The statute then describes a “recreational site” as one that “includes a location where baseball games, car races, hockey games, dog sled racing events, or curling matches are regularly held during a season.”⁸

Currently, there are 28 active Rec Site licenses, including licenses held by various baseball teams, hockey teams, and sports arenas.⁹ Almost since the statute’s inception, the Board’s issuance of recreational site licenses has extended to events outside the five sporting events identified in subsection (c) and outside the context of similar sporting events. In 1973, the Board issued a recreational site license to the Gold Creek Salmon Bake in Juneau to “provide food and beverages in conjunction with tour activities.”¹⁰ The Board issued a recreational site license to a Homer bowling alley, Kachemak Bowl, in 1984, and another to Kenai’s AlaskaLanes in 1992, both to “provide food and beverage to bowlers.”¹¹ In 2006, the Board issued a Rec Site license to a Skagway establishment, “Liarsville,” to provide food and beverage service to patrons during “gold-panning and theatre.”¹² The Board issued another Rec Site license for a bowling alley in 2007, and in 2008, issued a Rec Site license to Alaska Wild Berry Products to provide food and beverages “to theatre attendees and tour lunch groups.”¹³ In 2009, the Board issued recreational site licenses to another bowling alley, a tour company, a zipline establishment, and another theatre.¹⁴

C. The Summit Club and its 2010 application for a recreational site license

1. The Summit

The Alaska Club is an Anchorage-based corporation that has operated fitness centers in Alaska since 1986.¹⁵ The Club operates 14 fitness centers, nine of which are in Anchorage.¹⁶ This appeal concerns “the Summit,” a “platinum-level” club intended to serve as “a fitness-

⁸ When the statute was enacted in 1969, the language describing “recreational site” began, “in this section, ‘recreational site’ means. . . .” The statute was later amended to replace the term “means” with the broader term “includes.” The statute has otherwise remained unchanged since its enactment.

⁹ Ex. 4.

¹⁰ Ex. 3, p. 2.

¹¹ Ex. 3, pp. 1-2.

¹² Ex. 3, p. 2.

¹³ Ex. 3, pp. 1, 3.

¹⁴ Ex. 3, pp. 1-2.

¹⁵ R. 50.

¹⁶ Brewster testimony.

oriented country club.” As described by the Summit’s General Manager in support of the Summit’s initial recreational site license application:

This luxury 19,000 square foot facility . . . has provided a new level of variety in individual and group recreational and fitness activities. This 21 and over multipurpose club offers many regularly scheduled events, classes and sporting activities. It has been specifically constructed to maximize social interaction and has multiple lounges specifically designed for relaxation. These areas include a fireplace, large screen televisions, wireless internet and furniture arranged in a manner that allows convenient opportunities to relax after exercise, classes or sports activities.¹⁷

Alaska Club President and CEO Robert Brewster originally conceived of the Summit as “an athletic, recreational, and social center for those 21 and over.”¹⁸ According to Mr. Brewster, an “integral part” of the Club’s objective “was to have a social environment where people could enjoy themselves.”¹⁹ The Club thus designed and built the Summit facility with a greater emphasis on spaces for “social interaction and relaxation” than its other clubs. Its design reflected the plan to eventually be able to serve beer and wine – with a larger front desk to accommodate dispensing devices, as well as a larger lounge area.²⁰

2. *2010 submission of Rec Site applications by the Summit and Beluga Billiards*

The Summit initially applied for a recreational site license in late 2010 and the application was put on the agenda for the Board’s December 13, 2010 meeting.²¹ The Board considered the Summit’s application in tandem with another Rec Site applicant, Beluga Billiards. Prior to the December 13 meeting, Director Shirley Gifford prepared a memo to the Board that addressed both applications, describing “the question for the Board” as whether either of these operations “fit the definition of a recreational site.” The memo noted that neither “seem[ed] to fit within the examples given for a recreational site license” in AS 04.11.210, but also that other seemingly non-conforming recreational site licenses had been granted.²²

The Board first took up both applications on December 13, 2010.²³ The consideration of recreational site licenses at that meeting began with a discussion of the Beluga Billiards

¹⁷ R. 50.

¹⁸ Brewster testimony.

¹⁹ Brewster testimony.

²⁰ Brewster testimony; Ex. 10.

²¹ For unknown reasons, the application itself is not in the agency record. Also unclear is the reason for the delay in seeking a license after opening its doors in May 2006, although as a precursor to obtaining a Rec Site license, the Club applied for and was granted a conditional use permit from the Anchorage Assembly. R. 27, 47-49, 50.

²² R. 38.

²³ Ex. B.

application, and both licenses were discussed in the context of the Board’s overall approach to the recreational site license. There was a general concern amongst Board members that the types of licenses being issued under the Rec Site mantle might be outside the scope of the statute, but also a recognition that – at least as to Beluga Billiards – the current request was functionally indistinguishable from other recently granted requests.²⁴ The general approach being considered by the Board was to allow the two pending applications based on their similarities to prior approvals, but then “hold the line” as to any new applications.²⁵

The Board’s counsel at the time offered his opinion that the Board “has been approving [Rec Site applications] inappropriately,” noting that the statutory language suggests an intent to limit the availability of alcoholic beverages to one hour before or after a defined event, which was different, he noted, than “any time anybody is shooting pool.”²⁶ At the same time, counsel suggested the Board had discretion to approve the licenses before it, while cautioning that future applicants could be denied.²⁷ After further discussion about whether these applications met the statutory framework, and what implications would accompany either acceptance or denial of the applications, the Board tabled both applications until the following day.²⁸

When the Board reconvened on December 14, 2010, its counsel indicated that he had found no instructive legislative history to shed light on the task of interpreting the Rec Site statute.²⁹ The Board discussed its history of having “in our collective wisdom” approved Rec Site license applications for settings including not just sporting events but also bowling alleys, a salmon bake, theatres, and a zipline tour.³⁰ The Board then unanimously approved a Rec Site license for Beluga Billiards.³¹

The Board next took up the Summit’s application. The discussion did not center on the statutory definition of Rec Site licenses, but included whether any other license type was potentially available (none was) and whether the Summit met the requirements of public access (it did).³² Having satisfied itself on these issues, but without further addressing the interpretation of

²⁴ Ex. B at 3:28, 3:37.

²⁵ See Ex. B at 3:43.

²⁶ Ex. B at 3:38.

²⁷ Ex. B at 3:50.

²⁸ Ex. B at 4:10-4:28.

²⁹ Ex. C at 9:10.

³⁰ Ex. C at 9:13-9:26.

³¹ Ex. C at 9:30.

³² Ex. C at 9:31-9:44, 10:55.

the Rec Site license statute, the Board unanimously approved the Summit's Rec Site license application, granting license No. 5004.³³

D. Origin of the April 2011 "policy memo"

Later the same day, the Board returned to a broader discussion of the Rec Site license problem.³⁴ The Board's consensus was that there was a problem that needed fixing, and that the "fix" should come from the legislature. The Board tasked then-Director Shirley Gifford with developing draft language for discussion at the next meeting.³⁵

When the Board reconvened on March 24, 2011, it returned to the Rec Site license issue, considering draft statutory language prepared by its counsel.³⁶ As had been suggested at the December 14 meeting, the draft proposal identified two separate categories of recreational site licenses – one being "event-based," and the other "activity-based."³⁷

In the discussion that followed, the Board's then-counsel advised that the Board need not necessarily go through the process of proposing and then awaiting changes to the language of the statute. Instead, counsel suggested, the Board could adopt a "policy" interpreting the statute as reflecting those changes.³⁸ The Board then unanimously approved its counsel's "policy recommendations."³⁹

An April 11, 2011 memorandum from Director Gifford summarized these events, then set forth "the policy by which [the Board] will consider recreational site license applications:"

A recreational site license authorizes the licensee to sell beer and wine on licensed premises located on the recreational site. A license may be issued only if an application is approved by the local governing body and the board, and the applicant does not hold a beverage dispensary license or a restaurant or eating place license.

An event-based recreational site license will allow the licensee to sell beer and wine one hour before and one hour after an event. An event[-]based recreational site license includes the following spectator events, or other spectator sporting events having substantially similar characteristics – baseball games, softball games, football games, soccer matches, running events, skiing events, dog sled

³³ Ex. C at 10:57.

³⁴ Ex. C at 1:31-1:45.

³⁵ Ex. C at 1:40-1:45. The Board also expressed the sentiment that "in the meantime, no more" recreational site licenses should be granted. See Ex. C at 1:45.

³⁶ Ex. D at 12:04. See R. 104. The meeting recording reflects that a memorandum from the Board's then-counsel was in the Board's packet. Ex. D at 12:05. Unfortunately, however, that memorandum is not in the evidentiary record, although the later memo by Director Gifford apparently contains the language counsel had proposed. R. 104-105.

³⁷ Ex. D at 12:10; R. 104; Ex. C at 1:44.

³⁸ Ex. D at 12:13.

³⁹ Ex. D at 12:16.

races, hockey games, basketball games, curling matches, gymnastics meets, volleyball meets, car racing events, and snow machine races.

An activity-based recreational site license will allow the licensee to sell beer and wine during times the recreational activity is taking place. An activity-based recreational site license includes the following recreational activities, or other recreational activities having substantially similar characteristics – baseball, softball, football, soccer, running, skiing, dog sledding, curling, gymnastics, zip lines, volleyball, climbing, hiking, fitness activities, golf, bowling, billiards, hiking, rafting, and boating.

A recreational site license may not be issued if the licensed premise is within 200 feet of the property line for real property that is owned by, leased to, or rented to any public or private school, church, college, or university.⁴⁰

E. Fallout from the Board’s adoption of the April 2011 “policy memo”

By early 2013, significant concerns had arisen about the Board’s adoption of the policy articulated in the April 2011 memo. Several organizations and public officials wrote to the Board expressing displeasure with the Board’s adoption of the policy. Senator Hollis French suggested that the Board was “on tenuous ground operating on a 2-year-old ‘policy’ rather than properly adopted regulations,” but added that his “main concern is that these licenses not be issued in a way that increases the total number of full-time beer and wine licenses beyond the board’s population restrictions.”⁴¹

The Board of Directors of Anchorage CHARR, an industry advocacy group, submitted a letter arguing that the Board’s “policy” had the effect of “opening the qualification so broadly that just about any recreational or sports facility can qualify for a license.”⁴² The result, according to CHARR, was “more businesses applying for Recreational Licenses due to the changes made by [board counsel] accommodating almost every recreational facility to fit” the definition of recreational site.⁴³

By this time, there were 33 current recreational site licenses.⁴⁴ Some were tied to beverage service around the specific types of events listed in AS 04.11.210(c), including baseball games (Anchorage Bucs; Anchorage Glacier Pilots; Home Run Concessions; Mat-Su Miners; Peninsula Oilers), car races (AK Raceway Park; Mitchell Raceway; Northstar Speedway), and

⁴⁰ R. 104-105.

⁴¹ R. 173.

⁴² R. 174.

⁴³ R. 174.

⁴⁴ Ex. 3.

hockey games (Sullivan Arena; Kenai River Brown Bears).⁴⁵ Others were not as clear a fit with the statute's parameters, and included not just the Summit but also bowling alleys, billiards halls, a ski lodge, and various adventure and tour group activities.⁴⁶

F. Summer 2013 special meeting and development of draft regulation

The Board heard about and discussed Rec Site licenses – both broadly and specifically – during its May 2013 meeting. During the portion of the meeting reserved for public testimony on topics not otherwise on the agenda, Alaska Mental Health Trust Authority CEO Jeff Jesse expressed his concern that the Board was issuing Rec Site licenses “to licensees conducting activities not inferred in the statutory reference of recreational site licenses.”⁴⁷ Mr. Jesse also argued that the Board lacked authority to adopt the April 2011 policy championed by its former counsel.⁴⁸

During the May 2013 meeting, the Board took up another application for a recreational site license – this one from Minnesota Billiards, whose application was noted to be largely indistinguishable from the Beluga Billiards Rec Site license the Board had granted at the same time it granted the Summit's license.⁴⁹ While the Board heard and discussed concerns raised by community members, the Chair queried: “did we, as a board, go too far on recreational site licenses?”⁵⁰

Amidst concerns that the April 2011 policy had indeed “gone too far,” the Board tabled the Minnesota Billiards application, as well as two other Rec Site licenses on its agenda, in order to further “sort out” the recreational site license interpretation issue.⁵¹ The Board then scheduled a special meeting specifically to discuss recreational site licenses.

At the June 11, 2013 meeting, the Board's new counsel opined that the April 2011 policy championed by her predecessor, while “certainly well intended,” impermissibly “expands the definition of recreational site beyond what appears to have been the scope that the legislature intended when it drafted and adopted section 04.11.210.”⁵² Noting that policies which “go way beyond what's in the statute” are effectively regulations that must be promulgated and adopted in

⁴⁵ Ex. 3.

⁴⁶ Ex. 3.

⁴⁷ Ex. E at 9:22.

⁴⁸ Ex. E at 9:22.

⁴⁹ Ex. E at 11:13, 11:54.

⁵⁰ Ex. E at 11:53. This sentiment was echoed in testimony from a CHARR spokesperson, Bob Wynn, who indicated that CHARR was “not sure how this interpretation was made by Mr. Novak,” and opined that the policy was an improper administrative modification of the statute. Ex. E at 12:04.

⁵¹ Ex. E at 12:11-12:13, 4:10.

⁵² Ex. F at 3:16.

accordance with the Administrative Procedure Act, counsel advised the Board that it should not continue following the April 2011 policy without putting those changes into a regulation.⁵³

The Board also heard testimony from various license holders, including the Alaska Club, and those opposed to the Board's expansive policy, including Jeff Jessee.⁵⁴ In response to concerns raised by the Alaska Club, the Chair indicated that the Board intended to first figure out what its Rec Site license policy should be, and would then figure out how to deal with existing licenses.⁵⁵ After further discussion, the Board decided to pursue a change to its regulations to address the proper scope of Rec Site licenses.⁵⁶

G. Development of draft regulation

In July 2013, one month after the special meeting, the Director provided the Board with a draft regulation that would substantially narrow the scope of the recreational site license from the broad approach set out in the April 2011 policy memo.⁵⁷ The draft regulation limited recreational site licenses to those "based upon a competitive spectator sporting event with a designated sport season, and with a starting time and an ending time."⁵⁸ The draft regulation provided a list of activities included in this definition; the list was more extensive than the narrower list from the 1969 statute, but was limited to competitive spectator sports.⁵⁹

The Board took up the draft regulation at its meeting on July 23, 2013, and heard testimony from multiple licensees, applicants and objectors.⁶⁰ The Board discussed that, under the regulation as drafted, a number of existing licensees would not qualify.⁶¹ The Board discussed the possibility of grandfathering, and the problems that creates, but also discussed the need to first identify the license's proper parameters before making any determinations about whether to grandfather existing "activity-based" licensees.

⁵³ Ex. F at 3:16-3:20.

⁵⁴ Ex. F at 3:26-3:55.

⁵⁵ Ex. F at 3:37.

⁵⁶ Ex. F at 4:05-4:09.

⁵⁷ R. 159-160.

⁵⁸ R. 160.

⁵⁹ R. 160. ("A competitive spectator sporting event includes baseball games, softball games, football games, soccer matches, dog sled races, hockey games, basketball games, curling matches, gymnastics meets, volleyball meets, car races, boating races, snow machine races, skiing races, and leagues or tournaments that includes golf, bowling, and billiards").

⁶⁰ Ex. G.

⁶¹ Ex. G at 1:11, 1:24.

Board members opined that “the 2011 policy went way too far.”⁶² Jeff Jessee, the objector in this case, urged the Board that its “public purpose . . . isn’t to find a way for everyone with an entrepreneurial spirit who wants a license to fit into one of the categories and get one.”⁶³

After discussing both the 2011 policy and the proposed regulation, the Board rejected two new Rec Site license applications as outside the scope of the narrower interpretation the Board had been discussing.⁶⁴

H. Continued discussions of Rec Site licenses in 2013 and into 2014

The Board continued to work on the Rec Site license regulation throughout 2013.⁶⁵ The proposed regulation was put out for public comment consistent with the Administrative Procedure Act. The Board considered public comments and testimony at its December 2013 meeting.

At that meeting, Alaska Club CEO Mark Brewster testified against the narrower construction of the statute, defending the April 2011 policy and arguing that losing the Summit’s Rec Site license would be very costly for the Alaska Club.⁶⁶ The Chair again identified the need, “once we decide about the regulation,” to figure out, “what do we do with all the existing licenses?”⁶⁷

Continuing to have threshold concerns about how to appropriately construe the statute, the Board decided that a better way to proceed might be to have the existing Title 4 task force evaluate the need for possible legislative changes.⁶⁸ That task force was an effort by Title 4 stakeholders to consider and recommend changes to the overall statutory scheme. The project, a massive undertaking that had begun in 2012 and ultimately continued for more than four years, grew out of generalized concerns amongst stakeholders about the need to update Title 4 to address, *inter alia*, the significant changes to the business landscape in the decades since it was enacted. At the December 2013 meeting, Board members expressed an interest in having “the task force” work on the Rec Site license issue, and so voted unanimously to table the Board’s discussion.⁶⁹

At its next meeting, in April 2014, the Board took up a license application for a beverage dispensary tourism license that would have allowed an airport nail salon to serve alcohol to its

⁶² Ex. G at 1:30.

⁶³ Ex. G at 2:10.

⁶⁴ Ex. G at 2:14, 2:36.

⁶⁵ Ex. H at 3:04; Ex. I at 10:09-11:42.

⁶⁶ Ex. I at 10:42-51.

⁶⁷ Ex. I at 11:21.

⁶⁸ Ex. I at 11:37, 11:42.

⁶⁹ Ex. I at 11:42-11:44.

customers.⁷⁰ Beverage dispensary tourism licenses are created under AS 04.11.090; they are not Rec Site licenses and entirely different standards apply. Nonetheless, the Board's discussion of the airport nail spa application continued to reflect a concern about overreaching statutory interpretation. Board members referenced their ongoing concerns about Rec Site license statutes and the problems occasioned by the April 2011 policy, to justify a narrow reading of the beverage dispensary tourism license statute.⁷¹

I. May 2014 legislative audit

In the meantime, in May 2014, the Division of Legislative Audit completed its required sunset audit of the Board's operations.⁷² The audit "conditionally" endorsed the Board's continued operation, but identified several serious concerns, one of which related to recreational site licenses.⁷³ The audit concluded that, of 32 active recreational site licenses, 47 percent (15 businesses) "did not meet the criteria for a recreational license."⁷⁴

Ineligible businesses include bowling alleys, a sports center and pub, an exercise gym, a gift shop, theatres, and pool halls. These business types did not meet the definition of a recreational site nor were operations limited to a season. The issuance of these licenses expanded the number of establishments licensed to sell alcohol over the number allowed by statute.

The auditors reported that "[i]nquiries with [B]oard members revealed that the improper issuance of recreational site licenses was caused by an historic misunderstanding of what qualifies as a recreational event."⁷⁵ The audit recommended that "the Board should issue recreational site licenses in accordance with statutory requirements."⁷⁶

In November 2014, both the Commissioner's office and the Board submitted responses to the audit.⁷⁷ Director Franklin researched and assisted in drafting the response from the Commissioner's office. That letter, signed by Commissioner of Commerce Susan Bell, responded to the Rec Site license concern as follows:

The Department concurs with this recommendation. The ABC Board took public testimony at its July 23, 2013 board meeting regarding recreational site licenses and considered drafting regulations to clarify which types of businesses would qualify for recreational site licenses. The Board then determined that no

⁷⁰ Ex. N at 11:02-11:25.

⁷¹ Franklin testimony; Ex. N at 11:02-11:25. The airport nail spa application was denied at the April 2014 meeting, and a motion to reconsider the denial failed in July 2014. Ex. N at 11:25; Ex. O at 11:07-11:12.

⁷² Ex. L.

⁷³ Ex. L, pp. 1, 2, 11-12; Franklin testimony.

⁷⁴ Ex. L, p. 11.

⁷⁵ Ex. L, p. 12.

⁷⁶ Ex. L, pp. 2, 11.

⁷⁷ Franklin testimony. Ex. L, pp.44 - 47, 49 - 51.

regulations would be passed and the board directed the agency to return to a strict statutory interpretation of AS 4.11.210 for issuing recreational site licenses. Since July of 2013, all recreational site license applications have received strict scrutiny from the Director and the board, and the Board Chair has stated his intent that the recreational site license statute be applied as written.⁷⁸

The Board's response, signed by Board Chair Bob Klein after "conferring with members of the Board and with staff," responded to the recommendation as follows:

The Board agrees with this recommendation. The Board had been relying on advice from Attorneys General as to the latitude that could be used in granting recreational site licenses. On July 23, 2013, the Board devoted a portion of the meeting to the use and issuance of these licenses. After taking public testimony and a healthy debate, the Board decided to return to strict adherence to the Title IV definition of the Rec Site license. The Board now carefully reviews each application and issues only those licenses which adhere to the statute.⁷⁹

Both agency responses were appended to the final legislative audit report.⁸⁰

J. December 2014 presentation of the Title 4 Review

At the same time these events were unfolding, a large and diverse group of stakeholders had been working for several years on an attempt to comprehensively rewrite Title 4. In December 2014, the Title 4 review committee produced a 35-page report outlining the group's proposed legislative changes. The report set out 45 separate recommendations across four broad subjects, including 29 separate recommendations about licensing.

One of the 29 licensing recommendations concerned the recreational site license statute. The subcommittee recommended that the Board return to a strict constriction of the Rec Site license statute. Concluding that "the statute itself is sufficient and must be interpreted more narrowly when reviewing recreational site License applications," the subcommittee further recommended that the April 2011 "policy memo that broadens the intent of the statute should be nullified because it does not appear to have statutory basis."⁸¹ However, in order to minimize negative effects on existing licensees, the subcommittee also advocated that the Board "should provide a sunset provision" for existing licenses.⁸²

⁷⁸ Ex. L, p. 46.

⁷⁹ Ex. L, p. 50.

⁸⁰ See Ex. L.

⁸¹ Ex. 7, pp. 13-14.

⁸² Ex. 7 pp. 13-14 ("The primary implication for returning to a strict statutory interpretation is whether existing licenses granted under a stretched definition of recreational activities should be revoked, as they were issued without proper legal basis. The subcommittee weighed the existing licensees' investment against the benefits of closing a growing loophole, and recommends that the ABC Board should not renew licenses that do not fit this definition. Instead, it should provide a sunset period to allow non-conforming licensees to depreciate their investment in the license or alter their operations to comply with AS 04.11.210. In the next renewal period for each recreational site

The Title 4 Steering Committee, the governing body of the larger stakeholders' group, presented its recommendations to the Board at the Board's December 2014 meeting. The licensing-specific recommendations were presented by licensing committee chair Jeff Jessee, who summarized the Rec Site license recommendation as follows:

We looked at this pretty carefully and basically the conclusion of the committee is the board should just apply the statute as it was written. Going back to a stricter interpretation would not only fulfill the intent of the legislature in passing the recreational site license, but also bring more predictability to folks and close what had potential at one point in time to almost exponentially increase the number of licenses available.⁸³

The related "grandfathering" recommendation was not raised during this brief overview. Earlier in his presentation, however, Mr. Jessee had noted the committee's generalized desire to avoid unduly disadvantaging existing licensees, stating, "[i]n cases where we are rolling back on some licenses, we looked for ways to ameliorate or minimize impacts on existing licensees."⁸⁴

The committee's recommendation about Rec Site licenses was one of scores of recommendations in the 35-page document presented to the Board in the Title 4 review, and was introduced as part of a lengthy presentation of the committee's entire body of recommendations on how the legislature might improve Title 4.⁸⁵ At the close of that lengthy presentation, Chair Klein asked for a motion "that we endorse this and move it forward."⁸⁶ In discussing the motion and concerns about it, the Chair clarified that "moving it forward" meant beginning the process of drafting proposed legislation that would incorporate the committee's recommendations, with such draft legislation still subject to review by stakeholders and by the Board.⁸⁷ The Board unanimously agreed to "move [the Title 4 review recommendations] forward."⁸⁸

license, the ABC Board would issue a memo explaining that all licenses of this type will be reviewed by staff and a recommendation made whether it meets the statutory definition of a recreational site. Licensees would be given four renewal periods (eight years) to submit an appeal to the ABC Board explaining how they comply with statute or which operational changes they would make (e.g. instituting a seasonal league) to come into compliance. At the end of this period, licenses that are no longer in compliance would not be renewed.").

⁸³ Ex. P at 9:47.

⁸⁴ Ex. P at 9:17.

⁸⁵ Ex. P.

⁸⁶ Ex. P at 10:37.

⁸⁷ Ex. P at 10:39.

⁸⁸ Ex. P at 10:52.

K. July 2015: Board reaffirms policy to strictly construe Rec Site license

At its July 2015 meeting, the Board reaffirmed its policy of strictly construing the Rec Site license statute.⁸⁹ The issue arose in the context of an administrative matter – closing a Department of Law file opened in 2013 when the Board was considering adopting regulations governing its interpretation of the statute.⁹⁰ Although the Board later decided to abandon the regulation project in favor of simply deciding to strictly construe the statute as written, the Department of Law “regulation file” had remained open. After a very brief discussion of the Board having “by policy decided” to “strictly follow the way Title 4 defines” the recreational site license, the Board voted to close out the regulation file.⁹¹

L. Denial of the Summit’s 2016 application to renew its recreational site license

While all of the foregoing debate had been taking place, Board staff had quietly renewed the Summit’s recreational site license for 2012-2013 and 2014-2015.⁹² During this time, renewal applications were being processed by staff in a fairly “automated” manner.⁹³ After assuming the directorship in fall 2014, Director Cynthia Franklin had aspirations about making changes to the process. Instead, however, “marijuana happened.”⁹⁴ Specifically, in the fall of 2014, Alaska voters approved Ballot Measure No. 2, which legalized the possession and use of marijuana by adults.⁹⁵ The new law took effect on February 24, 2015. The legalization of marijuana had real and significant impacts on the day to day operations of the AMCO. The attention of the Director and her staff was significantly diverted to address – initially without any additional staff members – the varied and complex legal, administrative, and procedural implications of legalization.

As a result, the automated nature of license renewals remained the status quo. The Director likened the renewal process to a very swift river through which 1,800 applications flow every two years. Because of the volume of renewals, the small number of staff members, and the significant additional burdens associated with adding marijuana to the office’s responsibilities, renewal applications are only “dipped out of the river” when a protest or objection has been made.

⁸⁹ Ex. J at 4:31-4:33.

⁹⁰ Ex. J at 4:31.

⁹¹ Ex. J at 4:32-4:33.

⁹² R. 25, 30, 32.

⁹³ Franklin testimony; Oates testimony.

⁹⁴ Franklin testimony.

⁹⁵ See AS 17.38.

“The only renewals that are brought before the board are the ones that received a protest or objection,” Director Franklin testified. “Otherwise, it’s a complete back office process.”⁹⁶

Against this backdrop, on December 24, 2015, the Alaska Club submitted its application to renew the license for 2016-2017.⁹⁷ On December 31, 2015, Board staff issued a temporary Rec Site license for 2016-2017, subject to approval by the Board.⁹⁸

On January 19, 2016, the Board received a public objection to the Club’s renewal application from Jeff Jessee. Although Mr. Jessee frequently appears before the Board in his capacity as the CEO of the Mental Health Trust, he made his objection as a private citizen (and a member of the Summit who personally disapproves of the sale of alcohol at his gym). Mr. Jessee’s objection argued that the Summit’s recreational site license “clearly does not comply with the language of the statute and was erroneously granted by the Board in the first place.”⁹⁹

The Board scheduled a hearing to consider the objection and make a decision about the renewal application. The Board held a 40-minute hearing on February 10, 2016, taking testimony from Director Franklin, Mr. Jessee, Alaska Club counsel Fred Odsen, Alaska Club CFO Mark Boright, and Alaska CHARR President CEO Dale Fox.

In his testimony, Mr. Jessee argued to the Board that it should “correct a prior decision which, in [his] opinion, needs to be reversed.”¹⁰⁰

Mr. Odsen pointed out that there were a number of “activity-based” Rec Site licenses, including six that had submitted renewal applications at the same time as the Alaska Club, and whose licenses had been renewed without protest. He urged the Board not to single the Club out for differential treatment.¹⁰¹

The Director explained that this particular renewal application had been brought before the Board because an objection had been received.¹⁰² The Director also noted the mandatory language in AS 04.11.330(a) which provides that a renewal application “shall be denied” if its renewal would violate the statutory restrictions pertaining to the particular license.¹⁰³

⁹⁶ Director Franklin expressed dissatisfaction with this state of affairs, and noted her intent to “look hard” at the license renewal process, including determining whether the process should be less automated and whether her office should be specifically identifying license renewal issues for the Board. But she indicated that the current realities of workload, staff size, and prioritizing have thus far precluded such a “hard look” from taking place.

⁹⁷ R. 12-13, 15.

⁹⁸ R. 10; Oates testimony; Franklin testimony.

⁹⁹ Ex. 2.

¹⁰⁰ Ex. K at 12:57.

¹⁰¹ Ex. K at 1:04.

¹⁰² Ex. K at 12:53, 1:16.

¹⁰³ Ex. K at 12:54.

At the close of testimony, Board member Bobby Evans moved to deny the license renewal pursuant to AS 04.11.330(a)(6). The motion carried 3-2, with members Tom Manning and Bob Klein opposing the motion.¹⁰⁴ The Club was directed to stop selling alcoholic beverages immediately.¹⁰⁵

The Alaska Club was shocked by the nonrenewal of its license. Mr. Brewster had apparently believed that the license, once granted, would continue to be renewed as long as the Club remained a “clean operator” with no violations, as it undisputedly had been.

Since the non-renewal of its Rec Site license, the Summit has lost 22% of its membership.¹⁰⁶ Mr. Brewster believes that this loss, or at least the lion’s share of it, is attributable to the loss of the Club’s recreational site license. Given what he perceives as impacts on membership, Mr. Brewster believes that the loss of the license will cost the club \$200,000-\$300,000 in revenue over the next twelve months.¹⁰⁷

M. Procedural history of appeal

On March 4, 2016, the Alaska Club, through counsel, submitted a Notice of Defense and request for hearing. An evidentiary hearing was held on August 22, 2016.¹⁰⁸ Both parties were ably represented by counsel. Testimony was taken from Director Cindy Franklin, DCCED Records and Licensing Supervisor Sarah Oates, Alaska Club President/CEO Robert Brewster, Alaska Club Vice President Mark Boright, and CHARR President/CEO Dale Fox.

All exhibits submitted by both parties were admitted by stipulation. These included ten CDs of prior ABC Board meetings at which either the Summit’s license specifically, or the construction of the Rec Site license statute generally, were discussed. Following the hearing, the Director supplemented the record with recordings of three additional ABC Board meetings, which were also admitted.¹⁰⁹ The record closed on September 9, 2016, after the parties’ submission of post-hearing briefing.

¹⁰⁴ Ex. K, at 1:36.

¹⁰⁵ Ex. 9. Staff originally issued, and Director Franklin originally signed, a notice to this effect but describing the underlying events as a “suspension.” Ex. 9. The notice was posted at the entrance to the Summit, which Club CEO Boright found “very embarrassing.” The Alaska Club counsel and Director Franklin quickly resolved the notice posting issue and replaced the notice with a letter on Club letterhead. Boright testimony.

¹⁰⁶ Brewster testimony.

¹⁰⁷ Brewster testimony.

¹⁰⁸ The evidentiary hearing was initially scheduled for early May 2016, but was postponed at the joint request of both parties.

¹⁰⁹ The CD recordings of Board meetings dated April 29, 2014; July 8, 2014; and December 22, 2014, are admitted as Exhibits N, O, and P, respectively.

III. Discussion

A. Legal framework and standard of review

Licenses issued under Title 4 are issued for two-year periods, after which the licensee must reapply.¹¹⁰ The Director issues or renews all licenses and permits at the direction of the Board.¹¹¹ The Board may delegate to the Director “any duty” under Title 4 other than its power to propose and adopt regulations.¹¹²

Just as with an initial application, the Board must provide notice of a renewal application to the relevant community council and to any nonprofit that has requested notification.¹¹³ And just as with an initial application, any person “may object to an application for . . . renewal . . . by serving upon the applicant and the board the reasons for the objection.”¹¹⁴

The Board may hold a hearing on an application to consider any objections, or on its own initiative, in order “to ascertain the reaction of the public” to an application.¹¹⁵ Just as AS 04.11.320(a) identifies ten broad circumstances under which the Board “shall” deny a new license application, AS 04.11.330(a) sets out nine broad categories under which the Board “shall” deny a license renewal application. These include that the Board “shall” deny a renewal application where renewing the license would “violate the restrictions pertaining to the particular license under [Title 4].”¹¹⁶

The Board is permitted to review a renewal application without notice or hearing.¹¹⁷ However, if the Board votes to deny a renewal of a license, as it did here, the licensee is then entitled to an administrative hearing conducted under Alaska’s Administrative Procedure Act.¹¹⁸ 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.¹¹⁹ Following the hearing, unless there is a delegation (which has not occurred here), the matter then returns to the Board for a final decision.¹²⁰

¹¹⁰ AS 04.11.210(b); AS 04.11.270, AS 04.11.680.

¹¹¹ AS 04.06.080.

¹¹² AS 04.06.080.

¹¹³ AS 04.11.310.

¹¹⁴ AS 04.11.470. Likewise, a local governing body may protest a renewal. AS 04.11.480.

¹¹⁵ AS 04.11.470; AS 04.11.510(b)(2); 3 AAC 304.150.

¹¹⁶ AS 04.11.330(a)(6).

¹¹⁷ AS 04.05.510(b).

¹¹⁸ AS 04.11.510(b)(1).

¹¹⁹ *Alaska Alcoholic Beverage Control Board v. Malcolm, Inc.*, 391 P.2d 441, 444 (Alaska 1964).

¹²⁰ Of note, the February 12, 2016 Notice of a Right to Hearing issued by the Director informed the licensee that the Board’s decision to deny renewal would become final within 15 days of that notice unless the licensee timely

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.¹²¹

The final decisionmaker in such cases – here, the Board – may defer to judgments made by agency staff, but is not required to do so.¹²²

B. Alaska Statute 04.11.210, as currently drafted, does not encompass the type of “recreational activity” occurring at the Summit.

As a threshold matter, the Alaska Club takes issue with the Board’s interpretation of AS 04.11.210, the Rec Site statute, and urges the Board to return to the broad reading espoused in the April 2011 policy memo.¹²³ But the Board’s decision to narrowly construe the statute is reasonable, appropriate, and far more consistent with the statutory language than the April 2011 policy. To review, the statute reads:

- (a) The holder of a recreational site license may sell beer and wine at a recreational site during and one hour before and after a recreational event that is not a school event, for consumption on designated areas at the site.
- (b) The biennial fee for a recreational site license is \$800.
- (c) In this section, “recreational site” includes a location where baseball games, car races, hockey games, dog sled racing events, or curling matches are regularly held during a season.

As noted in testimony before the Board and by members of the Board itself, at least three features of this definition signal limitations on the scope of recreational activities the statute is intended to include.

The first is timing – the licensee may sell beer and wine beginning an hour before “a recreational event” and continue until an hour after the “event” ends.¹²⁴ This proviso strongly suggests that the intended purpose of the statute is to allow the sale of beer and wine during identifiable “recreational events.” It further suggests that a “recreational event” is something

requested a hearing. Because a hearing was timely requested, the Board’s decision on renewal will not become final until the conclusion of proceedings under the APA. See AS 44.62.520(a)(2).

¹²¹ *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).

¹²² *Id.* at 7, citing *In re Alaska Medical Development – Fairbanks, LLC*, OAH No. 06-0744-DHS, Decision & Order at 5-6 (issued April 18, 2007; adopted by Commissioner of Health & Social Services in relevant part, Decision After Remand, Oct. 9, 2007).

¹²³ Alaska Club post-hearing brief, pp. 11-13.

¹²⁴ AS 04.11.210(a).

more specific than, say, the operating hours of a gym.¹²⁵ A recreational event is a time-limited event that people might arrive at an hour before it begins, and stay for up to an hour after it ends – an event, subsection (c) tells us, such as “baseball games, car races, hockey games, dog sled racing events, or curling matches.”

Indeed, the commonalities between the examples listed in subsection (c) – “baseball games, car races, hockey games, dog sled racing events, or curling matches” – are the second distinguishing feature of “recreational events” under the statute. While the use of the word “includes” signals an intent to not restrict Rec Site licenses to only those five events, the similarities amongst the five examples listed necessarily informs the inquiry into the overall scope of events that are included. All five have certain characteristics in common – all are competitive sporting events, all are considered “spectator sports,” all are time-limited (e.g. to the length of the game, race, or match), and all share the statute’s final distinguishing feature – they are all events that “are regularly held during a season.” Just like the timing limitation in subsection (a), and the specific, narrow list of exemplars, subsection (c)’s reference to events “regularly held during a season” is another indicator that the “recreational events” contemplated in AS 04.11.210 is something more concrete and identifiable than the “event” of relaxing after a gym workout. None of which is to criticize the Alaska Club’s vision for the Summit. But that vision is not one that fits within a commonsense reading of the Rec Site license statute as it is currently drafted.

This commonsense reading is reinforced by the legal doctrine of *ejusdem generis*, a latin phrase meaning “of the same kind.” It is a guideline of construction holding that “where general words follow an enumeration of persons or things, . . . such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.”¹²⁶ An example of an application of *ejusdem generis* would be the interpretation of the phrase “horses, cattle, sheep, goats, or any other farm animal;” the doctrine would suggest, in the absence of contrary factors, that “any other farm animal” would encompass only similarly large mammals, and would exclude chickens.¹²⁷

As has since been discussed in some detail by the Board, the 2011 “policy memo” made several leaps beyond this commonsense interpretation, essentially creating a new type of license

¹²⁵ The Alaska Club’s prehearing brief suggests that the Legislature’s use of the word “may” suggests “that beer and wine is permitted to be served during such a period, but not required to be served during those time frames.” Alaska Club Prehearing Brief, p. 15. This is simply not a reasonable reading of the word “may” in the context of this statute.

¹²⁶ Black’s Law Dict. (5th ed. 1979) at 464.

¹²⁷ The example comes from *West v. Municipality of Anchorage*, 174 P.3d 224, 228 (Alaska 2007), quoting Black’s Law Dictionary.

outside what the statute actually allows. First, the memo identified and described the category of “event-based recreational site license” for “spectator sporting events” strongly similar to the existing content of the statute, and provided that *this* type of license “will allow the licensee to sell beer and wine one hour before and one hour after an event” – precisely the window of time provided for in the statute.¹²⁸ But the memo then went on to describe a second type of Rec Site license – the “activity-based” Rec Site license, meant to cover what it identified as non-spectator “recreational events,” including “baseball, softball, football, soccer, running, skiing, dog sledding, curling, gymnastics, zip lines, volleyball, climbing, hiking, fitness activities, golf, bowling, billiards, hiking, rafting, and boating.”¹²⁹ The policy then abandoned the statute’s one-hour-before-through-one-hour-after time restriction, providing that “an activity-based recreational site license will allow the licensee to sell beer and wine during times the recreational activity is taking place.”¹³⁰ The Board was correct in subsequently identifying that this “policy” was significantly out of step with the plain language of the actual statute.

While the Alaska Club, among other licensees whose Rec Site licenses appear at odds with the statute’s actual language, may be right that the business community and the public would benefit from a broader statutory scheme allowing the sale of beer and wine in broader contexts, that ultimately is a legislative determination. The Board has correctly determined that the statute does not currently contemplate the “activity-based” license the Board and its prior counsel previously attempted to create through “policy.” The Board’s task is to interpret and implement Title 4 as it currently exists, not as entrepreneurs may wish it existed. Towards that end, the Board has engaged in considerable, thoughtful deliberation about the meaning and scope of the Rec Site license statute over longer than five years, and its decision to strictly construe AS 04.11.210 is reasonable and appropriate.

C. Whether the Board has discretion to change its interpretation of AS 04.11.210 in a way that negatively impacts existing licensees’ future eligibility for a Rec Site license.

In addition to taking issue with the specific decision to deny the Club’s renewal application, the Alaska Club more broadly takes issue with the Board’s decision to reject its

¹²⁸ R. 104 (“An event[-]based recreational site license includes the following spectator events, or other spectator sporting events having substantially similar characteristics – baseball games, softball games, football games, soccer matches, running events, skiing events, dog sled races, hockey games, basketball games, curling matches, gymnastics meets, volleyball meets, car racing events, and snow machine races.”).

¹²⁹ R. 104.

¹³⁰ R. 105.

earlier expansive reading of the Rec Site statute in favor of the current stricter interpretation, and its failure to provide notice of this change to existing licensees.

The Director argues that the Board has discretion to change its interpretation at any time, pointing to the “no binding precedent” statute, AS 04.11.537. But that statute, AS 04.11.537, specifically relates to licensing decisions that are based on a finding about whether a license “is in the best interest of the public.”¹³¹ Here, the Board’s decision was not based on a finding under AS 04.11.330(a)(1) that renewal was contrary to the public interest, but rather was based on its conclusion under AS 04.11.330(a)(6) that the Summit did not meet the statutory requirements for a Rec Site license.¹³² Because the Board’s decision is based on AS 04.11.330(a)(6), the “no binding precedent” statute does not apply.

More fundamentally, the Alaska Club’s argument raises the question whether the Board’s earlier adoption of the April 2011 policy memo obligated the Board to provide clear notice when it later abandoned that policy. There can be no serious doubt that the Board has discretion, as a policy matter, to change its approach to issues before it. The Board is vested by statute with the “powers, duties and responsibilities necessary for the control of alcoholic beverages” in Alaska.¹³³ Those powers, duties, and responsibilities necessarily include interpreting and implementing Title 4. And the Alaska Supreme Court has acknowledged the need to afford the Board broader authority in carrying out its charge.

Where the police power of the state is so vitally involved, as it is here, it becomes imperative that those who are charged with the duty of regulating the industry have a freedom of action not restricted by limitations that may be required where other types of businesses are involved.¹³⁴

The record reflects that the Board engaged in a thoughtful, deliberative process for several years as it puzzled through the best way to deal with Rec Site licenses. Its decision to abandon an overbroad approach in favor of a strict reading of the statute was within its discretion.

But was public notice required? As the Board has since recognized, the April 2011 policy memo’s addition of the entirely new category of activity-based Rec Site licenses went far beyond and was inconsistent with the plain language of the statute. The Board, acting in good faith,

¹³¹ See AS 04.11.537 (“In determining whether issuance, renewal, transfer, relocation, suspension, or revocation of a license is in the best interests of the public, the board need not conform to or distinguish its decision from any action it has taken in the past on applications presenting similar facts, but may instead base its decision only on the particular facts before it.”).

¹³² See Ex. K at 1:21-1:23 (motion expressly based on operation being inconsistent with the statutory definition).

¹³³ AS 04.06.090.

¹³⁴ *Boehl v. Sabre Jet Room*, 349 P.2d 585, 589 (Alaska 1960).

adopted this policy at the advice of its then-counsel – advice that has since been recognized as having been well-intentioned but fundamentally unsound. It is well established that the Board cannot escape its rulemaking-associated obligations under the APA by calling a regulation a “policy.”¹³⁵ The Board was thus appropriately advised by its new counsel in June 2013 that it could not continue to follow the “policy” without adopting it as a regulation, including following the various public participation requirements associated with such adoption.¹³⁶

The Board is required to promptly notify affected licensees of “major changes” to Title 4 and to regulations adopted by the Board.¹³⁷ The Board never adopted a Rec Site license regulation – neither before it granted the Alaska Club’s 2010 application, nor at the time it adopted the April 2011 “policy,” nor at any time since. At the same time, the policy itself was invalid precisely because it purported to regulate Rec Site licenses without having been properly promulgated as a regulation under the APA. For the policy to ever have been valid, the Board needed to have adopted it as a regulation. It never did so, and so stopped following the invalid policy on the advice of counsel. The Alaska Club has provided no legal authority to support its suggestion that the Board was required to provide explicit notice to licensees when it decided to stop following the policy it had imprudently adopted. Nor is the undersigned aware of such authority. Case law tells us that invalidly adopted regulations are per se invalid.¹³⁸ It would be paradoxical to conclude that an agency cannot stop following an invalid policy until it gives notice of intent to do so.

Further, under the facts of this case, the Alaska Club had ample notice that the Board had retreated from the April 2011 policy. The Board articulated its rejection of the policy in public documents (such as the response to the legislative audit) available to licensees, and at meetings attended by Club representatives. In particular, Club representatives were present at the June 2013 meeting when counsel told the Board it could not keep following the April 2011 policy without putting those changes into a regulation.¹³⁹ The Club was aware that the Board then began pursuing regulatory changes, and that the draft regulation that was produced was limited to

¹³⁵ See *Squires v. Alaska Bd. of Architects*, 205 P.3d 326, 333 (Alaska 2009).

¹³⁶ Ex. F at 3:16-3:20.

¹³⁷ AS 04.06.090(d).

¹³⁸ *Squires v. Alaska Bd. of Architects*, 205 P.3d 326, 334 (Alaska 2009); see also *Jerrel v. State*, 999 P.2d 138, 143-44 (Alaska 2000); *Wickersham v. State Commercial Fisheries Entry Comm’n*, 680 P.2d 1135, 1140 (Alaska 1984) (“When a policy is invalidly promulgated under the APA, generally the appropriate remedy is to invalidate the offending policy until the procedures required by the APA are observed.”).

¹³⁹ Ex. F at 3:16-3:20.

competitive spectator sports.¹⁴⁰ By the time the Board abandoned the draft regulation project in lieu of having the Rec Site issue addressed as part of the Title 4 review process, the Board had already declared its intention to abandon its ill-advised April 2011 policy on the advice of counsel. The Club was present at the meetings in which these key events took place, and has not demonstrated that it was entitled to further notice of either the Board's abandonment of the wrongly-adopted April 2011 policy, or of its evolving views as to Rec Site licenses generally.

D. The Board's initial grant of the Summit's Rec Site license does not estop it from now denying the Club's renewal application.

To the extent that the Alaska Club contends that the Board is estopped from denying its renewal application, or must grandfather its license for some period of time because the Club has relied on past action by the Board, this argument fails.

Mr. Brewster testified that he had been under the impression that the Club could not lose its license for reasons beyond its control, and that, absent the Club "performing some misdeed," the Club would continue to possess the license. Mr. Brewster opined that the Club had been treated unfairly, given its good behavior and "the representations made by" the Board and its staff. When pressed, Mr. Brewster indicated his belief that the conduct by the Board and its staff in granting the license initially amounted to a "misrepresentation," if the Board did not intend to allow the Club to keep the license in perpetuity. Mr. Brewster and Mr. Fox both also suggested that the Board's endorsement of the Title 4 report amount to a "promise" to grandfather existing licensees.

A claim that one is bound by prior promises, as Mr. Brewster and Mr. Fox have suggested, sounds in promissory estoppel, requiring a showing that:

- (1) the action induced amounts to a substantial change of position;
- (2) it was either actually foreseen or reasonably foreseeable by the promisor;
- (3) an actual promise was made and itself induced the action or forbearance in reliance thereon; and
- (4) enforcement is necessary in the interest of justice.¹⁴¹

Here, neither the Board nor its staff made the Club any promises vis-à-vis some continued right to possess a Rec Site license in perpetuity.

The Alaska Supreme Court rejected a similar claim in *Ross v. Dept. of Revenue*, holding that the eligibility requirements in place at one time do not "amount to an enforceable promise"

¹⁴⁰ Ex. G, I.

¹⁴¹ *Simpson v. Murkowski*, 129 P.3d 435, 440, n. 18 (Alaska 2006); *Ross v. State, Dep't of Revenue*, 292 P.3d 906, 914-915 (Alaska 2012).

that those requirements will never change.¹⁴² The Alaska Club “cannot rely on an extant law as a promise that that law continue to have the same effect in perpetuity.”¹⁴³

Mr. Brewster also expressed his expectation that the February 2016 hearing on Mr. Jessee’s protest of the renewal application would be “pro forma” because the Club had not had any prior problems with its license. Mr. Brewster’s professed expectations are inconsistent with the most basic provisions of Title 4, including the requirement that licenses be renewed every two years. “To make out a claim for promissory estoppel, one must show that ‘an actual promise was made.’”¹⁴⁴ There is no evidence in the record of any promise that the Club would be exempted from the process of renewal application review.¹⁴⁵

To the extent the Alaska Club contends that the Board is bound by the recommendations of the Title 4 report, this argument also fails. Mr. Brewster also testified that he believed the Board would implement an 8-year sunset if it decided the license should not be renewed. Mr. Fox likewise testified that he viewed the Board as having “promised” a lengthy sunset to nonconforming Rec Site licensees. However, the evidentiary record does not bear out this view. The Title 4 report contains scores of recommendations for what a revised statutory scheme might look like. The Board’s endorsement was an agreement that these proposals should be put to the legislature for consideration and action. The Board did not, by the Chair’s single-sentence motion, adopt into policy each separate proposal set out in the 35-page report.¹⁴⁶ The Board’s aspirational endorsement of the Title 4 report and vote to move it towards legislative action cannot reasonably be interpreted to bind the Board to the contents of that report. While the Board’s roll call vote on the Title 4 report may be a learning opportunity about the benefits of clearly worded motions, the vote “approving” the report – as a set of recommendations to propose for future legislative action – did not change its policies in place vis-à-vis Rec Site licenses, nor constitute an enforceable promise to grandfather in existing licensees.

Mr. Brewster’s testimony suggested a significant degree of misunderstanding of both the licensing process specifically and the scope and extent of the Board’s authority generally. The

¹⁴² *Id.*, at 915.

¹⁴³ *Id.*, at 915.

¹⁴⁴ *Simpson v. Murkowski*, 129 P.3d at 442 (quoting *Brady v. State*, 965 P.2d 1, 10 & n. 20 (Alaska 1998)).

¹⁴⁵ Nor is there evidence of any reliance on any alleged “promises.” The testimony established that the Club’s investments related to the ability to serve beer and wine came at the front of end of the design and construction process – years before the Club even submitted its initial application for the Rec Site license. Even if there were otherwise evidence of some “promise” – which, to be clear, there is not – the estoppel claim would still fail.

¹⁴⁶ Indeed, as the Club’s post-hearing brief notes, the presentations about the report did not even cover each recommended change. It is unreasonable to construe the Board as having done anything more than agree that the recommendations should be promoted in the legislature.

Club's misunderstanding about the renewal application process does not entitle it to legal relief, however.

E. The Summit received adequate due process before and after the denial of its Rec Site license renewal application.

The Alaska Club also contends that the denial of its renewal application violated its right to both procedural and substantive due process.¹⁴⁷ Procedural due process requires that before property rights can be taken directly or infringed upon by governmental action, there must be notice and an opportunity to be heard in a meaningful, impartial hearing.¹⁴⁸ The Alaska Supreme Court has recognized that liquor licenses are property rights to which constitutional protections attach.¹⁴⁹ Accordingly, “[b]efore this property interest can be taken, due process requires that [a licensee] be provided with notice and an opportunity to be heard in a meaningful, impartial manner.”¹⁵⁰ Additionally, case law recognizes that licensees have no vested interest in renewal of a liquor license, which remains subject to Board approval.¹⁵¹

The Alaska Supreme Court has rejected procedural due process challenges where the challenger “received all the process she was due.”¹⁵² Thus, in *Gates v. City of Tenakee Springs*, a permit holder’s due process challenge failed where the permit holder “received advance notice of the city’s intent to order removal of her encroachment, and . . . had a chance to appeal the city’s decision.”¹⁵³ Here, the “process that is due” is determined by Title 4. The Alaska Club received all of the process that Title 4 requires, and more.¹⁵⁴ The Club had notice of the objection raised. The Board held a hearing to consider the objection. The Club received advance notice of that hearing, and was permitted to present testimony as well as the arguments of counsel. And the Club has now received an additional hearing under the Administrative Procedure Act, where it was permitted to call witnesses, cross-examine witnesses, present evidence, rebut opposing

¹⁴⁷ Alaska Club Pre-hearing brief, p. 20.

¹⁴⁸ *Rollins v. State, Dep’t of Revenue*, 991 P.2d 202 (Alaska 1999); *Frontier Saloon, Inc. v. Alcoholic Beverage Control Bd.*, 524 P.2d 657, 659 (Alaska 1974).

¹⁴⁹ *Rollins*, 991 P.2d at 211; *Godfrey v. State, Dept. of Community and Economic Development*, 175 P.3d 1198, 1203 (Alaska 2007); *Frontier Saloon v. Alcoholic Beverage Control Board*, 524 P.2d 657 (Alaska 1974).

¹⁵⁰ *Rollins*, 991 P.2d at 211.

¹⁵¹ *Rollins v. Alcoholic Beverage Control Board*, 991 P.2d 202, 207 (Alaska 1999).

¹⁵² *Gates v. City of Tenakee Springs*, 822 P.2d 455, 462 (Alaska 1991).

¹⁵³ *Id.*, 822 P.2d at 462.

¹⁵⁴ To the extent that the Alaska Club contends that it should have received notice that the Board had changed its interpretation on recreational site licenses, Club representatives were present at Board meetings where the Board’s evolving views of the Rec Site statute were discussed. The Club cites no legal authority to support its claim that it was entitled to further notice of the Board’s evolving views, and has not established that the lack of formal notice constitutes a denial of procedural due process.

evidence, and present the oral and written arguments of counsel.¹⁵⁵ The Alaska Club has not shown it was denied procedural due process.

The Club also argues it was denied substantive due process. Substantive due process requires that governmental actions be reasonable and not arbitrary. However, “[t]he standard for establishing a substantive due process violation is rigorous. A due process claim will only stand if the state’s actions ‘are so irrational or arbitrary, or so lacking in fairness, as to shock the universal sense of justice.’”¹⁵⁶ The Alaska Club contends that the Board’s changed interpretation of the Rec Site license statute violates its right to substantive due process, arguing that “rights should not be eliminated by governmental action where to do so is unreasonable or unfair.”¹⁵⁷ The Board’s evolving interpretation of the Rec Site license statute does not amount to a due process violation. Plainly, interpreting the statutes it is charged with implementing is a legitimate purpose of the Board, as is remedying its own previous errors in the interpretation of those statutes. The Alaska Club has not shown that the Board’s evolved interpretation of the Rec Site license statute has violated its right to substantive due process.

To the extent that the Alaska Club argues against the Board’s strict interpretation of AS 04.11.210 being only applied to the Alaska Club’s renewal applications, and not to any other existing recreational site licensees’ renewal applications, this argument implicates equal protection issues, not substantive due process issues, so is addressed below.

F. Does the Board’s selective enforcement of the recreational site license statute – in such a way that only the Summit’s non-conforming license was rejected for renewal – violate the Club’s right to equal protection of the laws?

The Alaska Club also contends that the Board’s selective enforcement of the Rec Site statute – denying the Club’s renewal application based on the decision to strictly construe the

¹⁵⁵ Not squarely at issue here, but noteworthy, is whether the Board should be confiscating a non-renewed license at the time of its initial decision under AS 04.11.510, as opposed to waiting until that non-renewal decision becomes final under the Administrative Procedure Act. The renewal procedure statute is silent on this issue. The Board’s practice has been to implement its non-renewal decision immediately – directing the licensee to immediately stop operating the license – even though the licensee then has the opportunity for a formal hearing conducted under the APA prior to the Board’s decision becoming “final.” See AS 04.11.510(b)(1) (right to a hearing conducted under the APA); AS 44.62.520(a)(2) (decision on APA matter becomes final 30 days after Board action on proposed decision, unless Board orders earlier effective date). Given the purpose of the APA hearing under the Board’s regulatory scheme – as described above – to ensure that the Board has full information before making its final decision, and given the significance of the existing licensee’s property interest (e.g. unlike that of a first-time applicant), the Board may want to consider revisiting this aspect of its procedures for non-renewals. However, this particular issue is one neither squarely raised in this case, nor for which any remedy would exist at this time. Accordingly, it is not necessary to specifically decide whether the Board’s enforcement of its February 2016 decision before that decision became final under the APA implicates procedural due process concerns.

¹⁵⁶ *Church v. State, Dep’t of Revenue*, 973 P.2d 1125, 1130 (Alaska 1999) (quoting *Application of Obermeyer*, 717 P.2d 382, 386–87 (Alaska 1986)).

¹⁵⁷ Alaska Club prehearing brief, p. 21.

statute, while continuing to grant other non-conforming license-holders' renewal applications – violates its right to equal protection of the law.

I. Equal protection overview

The Equal Protection Clause of the Alaska Constitution guarantees “that all persons are equal and entitled to equal rights, opportunities, and protection” under the law and administration of the State.¹⁵⁸ In situations involving economic rights, the constitutional guarantee of equal protection generally requires equal treatment of persons “similarly situated.”¹⁵⁹ While differently situated parties may be treated differently from one another, “provided that such treatment is rationally related to legitimate [governmental] objectives,” the constitutional guarantee of equal protection forbids irrational and arbitrary classification.¹⁶⁰ “In order for a classification to be valid under Alaska’s equal protection test, it must be reasonable, not arbitrary, and must bear a fair and substantial relation to a legitimate governmental objective.”¹⁶¹

The specific equal protection claim raised in this case is the Board’s selective enforcement of the Rec Site statute. Selective enforcement of a statute or regulation runs afoul of the constitutional guarantee of equal protection where an agency purposefully discriminates based on an arbitrary or otherwise improper classification.¹⁶² The Alaska Club argues that the Board’s selective enforcement of the statute to deny its renewal application based on non-conformity with the statute, while continuing to grant renewals to comparably non-conforming licensees, violates its right to equal protection. In cases alleging that the Board’s nonrenewal decision violated an applicant’s right to equal protection by selective enforcement, the Alaska Supreme Court has held that “in order to make a prima facie case that the Board selectively enforced [a statutory] requirement, [an applicant] would have to show that the Board intended to discriminate against [the applicant] based on an arbitrary or unjustifiable classification.”¹⁶³ The party alleging the

¹⁵⁸ ALASKA CONST. art. I, § 1; *see also* ALASKA CONST. art. I, § 7 (due process guarantee). Likewise, the Fourteenth Amendment to the United States Constitution mandates that no state “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. Amend. XIV, § 1. This requires that “all persons similarly circumstanced [...] be treated alike” by any state action. *F.S. Royster Guano Co. v. Va.*, 253 U.S. 412, 415 (1920).

¹⁵⁹ *State, Dep’t of Nat. Res. v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1219 (Alaska 2010).

¹⁶⁰ *See generally, Mathis v. Sauser*, 942 P.2d 1117, 1123-1124 (Alaska 1997); *State v. Anthony*, 810 P.2d 155 (Alaska 1991); *Wilson v. Municipality of Anchorage*, 669 P.2d 569, 572 (Alaska 1983).

¹⁶¹ *Wilson v. Municipality of Anchorage*, 669 P.2d 569, 572 (Alaska 1983).

¹⁶² *Rollins v. State, Dept. of Revenue, Alcoholic Beverage Control Board*, 991 P.2d 202, 210 (Alaska 1999); *Rollins v. State, Dept. of Public Safety*, 312 P.3d 1091, 1999 (Alaska 2013) (quoting same).

¹⁶³ *Rollins v. State, Dept. of Revenue, Alcoholic Beverage Control Board*, 991 P.2d 202, 210 (Alaska 1999); *Rollins v. State, Dept. of Public Safety*, 312 P.3d 1091, 1999 (Alaska 2013) (quoting same).

equal protection violation “has the initial burden of producing evidence demonstrating discriminatory intent.”¹⁶⁴

2. *Evidence of selective enforcement*

The Director’s prehearing brief argued that the Board’s action was constitutionally permissible because the Board had properly chosen to “exercise its authority to deny renewal of outstanding non-traditional recreational site licenses, including the Summit’s, based on its best interpretation of the statute and the legislative audit[.]”¹⁶⁵ Regrettably, however, the evidence at hearing clearly demonstrated that the Board – through its staff – has not been “denying renewal of outstanding non-traditional recreational site licenses . . . based on its best interpretation of the statute.” Rather, the Board’s staff has continued to renew those licenses without any analysis or review.

Even while the Board was rejecting new Rec Site licenses as inconsistent with the new stricter reading of the statute, license renewals by the Summit and other licensees continued to be granted. This was so, apparently, because the Board staff was not bringing any renewal applications to the Board’s attention unless a protest or an objection was received.¹⁶⁶ Thus, although the Board’s November 2014 audit response letter stated that “the Board now carefully reviews each [Rec Site license] application and issues only those licenses which adhere to the [Rec Site license] statute,” that was and is not the practice being followed for *renewal* applications.¹⁶⁷ Absent a protest or objection, staff do not bring renewal applications before the Board – even in the case of renewal applications for the type of activity-based Rec Site licenses the Board had decided and declared that it did not want to issue.¹⁶⁸

Of the small, well-known, easily identifiable group of licensees that fit the Director’s description – “outstanding non-traditional recreational site licensees” – the Board’s staff has made no attempt to deny renewal of these licenses. It is only in the case of the Alaska Club that staff has brought the renewal application before the Board. Once the Alaska Club’s application was before the Board, of course, the Board did “exercise its authority to deny renewal” of the Summit’s “non-traditional recreational site license . . . based on its best interpretation of the

¹⁶⁴ *Barber v. Municipality of Anchorage*, 776 P.2d 1035, 1040 (Alaska 1989); *State v. Reefer King Co.*, 559 P.2d 56, 64-65 (Alaska 1976), modified on reh’g, 562 P.2d 702 (Alaska 1977).

¹⁶⁵ Director’s prehearing brief, p. 15.

¹⁶⁶ Franklin testimony.

¹⁶⁷ Franklin testimony.

¹⁶⁸ Franklin testimony; Oates testimony.

statute.” Of all the previously-issued “non-traditional recreational site licenses,” however, *only* the Summit’s license has been subjected to this analysis.

The Summit was not the only activity-based recreational site license up for renewal in 2016. Also up for renewal were the Rec Site licenses held by Beluga Billiards, Diamond Bowl, and Arctic Valley Ski Area. The Summit was the only Rec Site license reviewed by the Board, the only Rec Site renewal application to which the strict interpretation of the statute was applied, and the only Rec Site renewal application denied by the Board. Of note, while Director Franklin observed that the Summit had been “specifically called out by the legislative audit” as an improperly-granted Rec Site license, other licensees similarly “called out” as outside the statute’s scope – such as bowling alleys and billiard halls – were renewed without review by the Board. Further complicating this analysis is that there is no evidence or suggestion that staff are selectively reviewing Rec Site license renewals at the Board’s direction, or even that the Board is specifically aware of the continued renewals by staff of other “non-traditional recreational site licenses” in a manner that appears completely contradictory to the Board’s stated intent to curtail such licenses.

3. *Equal protection analysis*

The question, then, is whether this selective enforcement of the statutory requirements violates the Alaska Club’s right to equal protection. The Alaska Supreme Court has long held that “laxity in the enforcement of [a law] in other cases . . . would not constitute a denial of equal protection” against the law’s enforcement in a particular case.¹⁶⁹ Thus, even if a City only enforces an ordinance against one resident, while failing to enforce it against similarly-situated neighbors, the Court has not found unconstitutional selective enforcement “in the absence of evidence of discriminatory intent.”¹⁷⁰ “An agency need not – indeed, often cannot – apply a statute simultaneously to all similarly situated parties to avoid violating the equal protection clause so long as it is not intentionally discriminating against any party.”¹⁷¹

The Director relies on this body of case law to defend the rejection of the Alaska Club’s renewal application for nonconformity with the narrowly construed statute while, indisputably, no other Rec Site renewal application was similarly reviewed. The Director relies in particular on

¹⁶⁹ *Nelson v. State*, 387 P.2d 933, 935 (Alaska 1964).

¹⁷⁰ *Luper v. City of Wasilla*, 215 P.3d 342, 348 (Alaska 2009) (citing *Rollins*, 991 P.2d at 210) (“[E]ven assuming Luper’s assertions that the city did not enforce the relevant ordinances against her neighbors are true, we have held that mere failure to enforce an ordinance against others similarly situated does not itself prove selective enforcement in the absence of evidence of discriminatory intent.”).

¹⁷¹ *State, Dept. of Natural Resources v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1220 (Alaska 2010).

the Alaska Supreme Court's two *Rollins* decisions, both of which involved this Board. But the *Rollins* cases are distinguishable in several key respects.

Ms. Rollins held a beverage dispensary license but was unable to secure a location from which to operate it. After granting her several waivers of the operating requirement, the Board denied her request for another waiver and then revoked the license. Ms. Rollins appealed, ultimately leading to the first *Rollins* decision, in 1999. In *Rollins I*, the Supreme Court rejected Ms. Rollins' equal protection argument based on selective enforcement, finding there was no "evidence to show that Ms. Rollins was treated differently than other license holders who had violated the 30-day operating requirement."¹⁷²

Here, of course, there is precisely such evidence. The evidence is undisputed that the Alaska Club has been treated differently from other Rec Site license holders whose licenses fall outside the strict statutory interpretation espoused by the Board. This, the Club contends, makes it a "class of one" for purposes of an equal protection analysis.

Further, in *Rollins I*, the Alaska Supreme Court remanded the matter for consideration of relief from judgment in light of contradictions between the Board's averments in Superior Court (that other licensees had similarly lost their licenses after previously being granted waivers) and the Director's statement in another context (that Ms. Rollins was "the first to be affected" by the Board's decision to begin a stricter enforcement of its consecutive waiver policy). On remand to the Superior Court in *Rollins I*, Ms. Rollins appears to have ultimately prevailed in Superior Court on her selective enforcement claim.¹⁷³

The United States Supreme Court has "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."¹⁷⁴ Where a party is purposefully subjected to differential treatment of a kind that is "irrational and wholly arbitrary," the Court has held that an equal protection claim may lie, separate and apart from whether or not the differential treatment arises from some "subjective ill will."¹⁷⁵

¹⁷² *Rollins v. State, Dept of Revenue, Alcoholic Beverage Control Board*, 991 P.2d 202, 210 (Alaska 1999).

¹⁷³ See *Rollins II*, 312 P.3d at 1093 ("On remand, the superior court granted Rollins relief from its earlier judgment and reversed the Board's denial of the waiver application.")

¹⁷⁴ *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (citing *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), and *Alleghany Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 366 (1989)).

¹⁷⁵ *Olech*, 528 U.S. at 565.

Under the selective enforcement test articulated in *Rollins I*, the Club must show that the licensing action intentionally discriminated against it based on an “arbitrary or unjustifiable classification.” What the “class of one” analysis clarifies is that the “discrimination” need not be based on a protected classification (e.g., discrimination based on race); rather, the inquiry is whether the intentional distinction singling out this licensee from others similarly situated is based on a classification that is “wholly arbitrary” or otherwise unjustifiable.

The Alaska Club argues that its right to equal protection has been violated by being treated as a “class of one,” in that there is a group of equally non-conforming licensees whose renewal applications have not been subjected to the same strict statutory interpretation the Board has applied to *only* the Alaska Club’s renewal application. The Alaska Club argues that this differential treatment is arbitrary and capricious. While not discounting the incredible pressures under which the Director and her staff have been working in the aftermath of marijuana legalization, it is hard to disagree. It is undoubtedly true that the staff has been overwhelmed by the crush of work created by the legalization of marijuana. But the approach being followed with regard to Rec Site license renewals is so wildly inconsistent with the Board’s stated intent to strictly construe the statute as to be “wholly arbitrary.”

The staff has chosen to bring to the Board’s attention only those renewal applications as to which protests or objections are received. This would be a reasonable approach to liquor license renewals generally. Broadly construed, there is a “fair and substantial relationship” between the classification – whether or not an application has been objected to – and the legitimate governmental objectives – ensuring that the Board carries out its duties under Title 4, but also streamlining the process where it is feasible to do so. As a general matter, differentiating between those renewal applications to which an objection has or has not been received bears a fair and substantial relationship to the Board’s interests.

The inquiry, however, does not end there. In the specific case of Rec Site licenses, the Board has repeatedly stated over the course of several years that it rejects its previous broad reading of the Rec Site license statute, and intends to strictly construe the statute moving forward.¹⁷⁶ In light of the Board’s stated intent to strictly construe the Rec Site statute, and particularly given the very small number of Rec Site licenses, it is irrational for Board staff not to

¹⁷⁶ Somewhat troublingly, both the Board and the Commissioner responded to legislative audit concerns by reporting that *all* Rec Site license applications were being subjected to strict scrutiny, yet the evidence presented at hearing shows this is not the case.

be pulling all activity-based Rec Site licenses out of the “renewal river” for review by the Board. Under the facts of this case, the classification being employed is irrational.

The Director contends that the Alaska Club is not a “class of one” because no other Rec Site license holder is exactly like the Alaska Club, and because only the Alaska Club license renewal application received an objection. Neither of these facts change the class of one analysis under the unique facts presented here. Federal courts have emphasized the need for “class of one” claimants to “show an extremely high degree of similarity between themselves and the persons to whom they compare themselves.”¹⁷⁷ The Seventh Circuit Court of Appeals requires a “class of one” challenger to be “identical in all relevant respects or directly comparable in all material respects” to his comparators.¹⁷⁸ The reason for this stringent similarity requirement is to avoid reading a constitutional claim into “almost every executive and administrative decision.”

Here, the stated basis for nonrenewal is that the Summit’s Rec Site license does not comply with the strict construction of the statute. On its face, this is a perfectly acceptable reason for non-renewal of a license. However, the evidence in the record suggests that the Club is directly comparable in this respect with other nonconforming licenses that not only were not denied, but that were not even reviewed. While the Club, as a “class of one” claimant, must show a very high degree of similarity with those to whom it compares itself, that burden is met here.¹⁷⁹ There is considerable evidence in the record that Board members, auditors, and objectors have all identified a group of similarly non-conforming Rec Site licenses, all of which are viewed as being outside the scope of the statute. The stated basis for the objection and for the non-renewal of the Club’s license is the Club’s nonconformity with the statute, in a way that is indistinguishable on this record from other Rec Site licensees who originally obtained their Rec Site licenses while the statute was more broadly construed.

That alleged nonconformity with the strictly construed statute is the “material respect” for purpose of evaluating the similarity between the Alaska Club and other licensees whose renewal applications were approved without review. Of all the nonconforming Rec Site licensees – identified, for example, in the legislative audit – only the Alaska Club has been singled out for nonrenewal based on that nonconformity. Under the narrow and unique facts of this case, this

¹⁷⁷ *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006).

¹⁷⁸ *U.S. v. Moore*, 543 F.3d 891, 896 (7th Cir. 2008).

¹⁷⁹ What is not required, as the Director suggests, is to so narrowly construe the similarity requirement as to make it meaningless – requiring, for example, that the Club show that other “fitness centers” had and were allowed to keep Rec Site licenses. It would be unfair to read the requirement so narrowly as to automatically place the Alaska Club in its own category.

differential treatment – singling out the Alaska Club while leaving untouched and unexamined all other equally non-conforming Rec Site licenses – is so arbitrary as to violate the Club’s right to equal protection.

This decision is, of course, a Board decision. In finding that the preliminary decision earlier this year to single out the Alaska Club was a violation of equal protection, the Board undoes that violation and restores the level playing field for Rec Site licensees. Going forward, the Board can apply its new, more correct interpretation of AS 04.11.210 to all future renewal applications, treating applicants the same.

IV. Conclusion

The facts of this case are troubling, in that the evidence shows that the staff is treating renewal license applications in a manner that is inconsistent with the Board’s clearly stated objectives on Rec Site licenses. At the same time, the narrow question of whether the Alaska Club would otherwise be legally entitled to renewal of its license appears to clearly favor nonrenewal. But the Board cannot so selectively enforce the statute as to create a “class of one,” which, in the narrow and unique facts of this case, it appears to have done.

While the Board is within its authority to decide it will narrowly construe the Rec Site statute, and to deny non-conforming renewal applications accordingly, it cannot apply the statute in that manner only as to this licensee, while ignoring precisely the same issue as to the remaining “activity-based” licensees. However, nothing in this decision should be read to endorse the broad view of the Rec Site license statute promoted in the April 2011 policy memo, nor the Board’s adoption of that policy in the absence of an APA rulemaking process. Nor should this decision be read to suggest that the Board erred in answering the legal question whether license No. 5004 is outside the scope of AS 04.11.210. Nonetheless, because the Board, in evaluating the Club’s renewal application, failed to afford the Club equal protection of the laws, the denial of its renewal application for 2016-2017 must be reversed.

DATED: September 29th, 2016.

By:



Cheryl Mandala
Administrative Law Judge

Adoption

The Alcoholic Beverage Control Board adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of distribution of this decision.

DATED this 12 day of DECEMBER 2016.

By: 
Signature
ROBERT KLEIN
Name
CHAIR
Title

AMCO
APR 11 2019

Alcoholic Beverage Control Board

Meeting Minutes

December 17, 2018

Track 152631

1 P R O C E E D I N G S

2 (On record)

3 MR. KLEIN: I don't think it's necessary --
4 again, it's a renewal application, so like we do with
5 the major renewals, I don't think it's necessary that
6 we read each individually into the record. Suffice it
7 to say the chosen licenses are the Tab 3 through 82 and
8 I need a motion to approval the renewals on these.

9 MR. SPEAKER: (Indiscernible) There's a tab --
10 apologies -- Tab 36, starting there?

11 MR. KLEIN: Okay.

12 MR. SPEAKER: Okay. Not 3. Okay. So Tab 36.

13 MR. KLEIN: 36 through 82.

14 MR. SPEAKER: 82.

15 MR. KLEIN: All the and licenses and that's
16 the reason they have come up.

17 MR. SPEAKER: Okay. And is there any
18 delegation requirement?

19 MR. KLEIN: They're all just renewals.

20 MR. SPEAKER: Okay. So a motion.....

21 MS. SPEAKER: All about 50 delegated.

22 MR. SPEAKER: Okay. So a motion to approve
23 renewals Tab 36 through.....

24 MR. KLEIN: 82.

25 MR. SPEAKER:82 with delegation.

1 MR. KLEIN: Thank you. Is there a second?

2 MS. SPEAKER: I second.

3 MR. KLEIN: Thank you. Any more discussion?
4 Any more oppose? It's carried. Okay. Now we come to
5 the sticky one, Rec. Site Renewals. And the reason
6 it's sticky is a whole bunch of reasons. So -- yeah.
7 I've been advised to be nice.

8 Let's start with 39, Alaska State Fair. This
9 is Tab 83. It's a rec. site license in Palmer and this
10 is for rec. site renewal.

11 Director.

12 MS. McCONNELL: Thank you, Mr. Chair. The
13 Board saw this renewal at the December meeting and
14 tabled action to this meeting. As you know, the
15 current statutory definition of a rec. site license
16 says the holder of a recreational site license may sell
17 beer and wine at a recreational site during and one
18 hour before and after a recreational event that is not
19 a school event for consumption on designated areas at
20 the site. There's a fee and in the section,
21 recreational site includes a location where baseball
22 games, car races, hockey games, dog sled racing events,
23 or curling matches are regularly held during a season.

24 In the last two audits -- legislative audits of
25 the ABC Board, the Board was called out for improperly

1 applying the statute and issuing rec. site licenses to
2 businesses that did not qualify under the definition of
3 recreational site and the statute at 04.11.210. The
4 Board has started reviewing all of the particular rec.
5 site licenses to ensure that they are compliant with
6 the statute.

7 The Alaska State Fair has held a rec. site
8 license since 1981 and they have -- one, two, three,
9 four, five, six, seven, eight, nine, ten, eleven --
10 different locations of alcohol service. You may recall
11 that the Board worked on and ultimately adopted a
12 regulations project last year to authorize recreational
13 site licenses to serve alcohol at multiple locations
14 rather than having one licensed premises, and the
15 majority of these locations do not have recreational
16 events and so do not qualify under this statute.

17 It's been noted that the state fair was not
18 called out specifically in either the 2014 or 2017
19 legislative audits and that is true. However, the 2014
20 audit gives some examples of noncompliant businesses.
21 It doesn't give a comprehensive list and in the 2017
22 audit, the auditors only looked at ten actual rec. site
23 licenses and the state fair was not one of those.

24 So the fact that neither audit specifically
25 mentions the state fair doesn't provide evidence either

1 way of what the auditors felt about the state fair. I
2 should also note that in the rec. site statements that
3 have been provided by the state fair both in 2016 and
4 more recently, you know, they talk about the way they
5 serve in compliance with the statute, but the places
6 where they serve that are not -- that don't meet the
7 definition of rec. site license are not mentioned.

8 SB-16, which I had to step away for this
9 afternoon, is a bill that's been introduced by Senator
10 Micciche and it does create a fair license which would
11 be a fix for the state fair. That bill did pass out of
12 the Senate Labor and Commerce Committee today. So that
13 was a positive step in moving forward.

14 With that, because the state fair license in my
15 assessment does not meet the qualifications for a
16 recreational site license, my recommendation to the
17 Board is to deny the renewal and I would note that Mr.
18 Jerome Hertel from the state fair is present. I expect
19 he would like to address the Board.

20 MR. KLEIN: I'm sure too we have some folks on
21 the phone, but please. For the record, introduce
22 yourself, please.

23 MS. McCONNELL: If you could hit the middle
24 button so the red light goes on. Thank you.

25 MR. HERTEL: Good afternoon. Jerome Hertel

1 with the Alaska State Fair. Mr. Chairman, members of
2 the Board, thank you for giving me the opportunity to
3 speak in support of renewal of the Alaska State Fair
4 recreational permit license.

5 The Alaska State Fair, you know, has been
6 educating, entertaining, and supporting Alaskans for
7 over 80 years, and for over 37 years, having a glass of
8 wine or a beer at the fair has been a part of that fair
9 experience. For over 37 years, the Alaska State Fair
10 has been approved as a recreational site license and to
11 deny the fair a new license would put the fair at risk
12 of losing beverage sales, concert sales, attendance,
13 and the eventual sustainability of the Alaska State
14 Fair.

15 I feel it's very important that you renew our
16 recreational site license based mainly on precedent,
17 that for the past 37 years, our applications have been
18 evaluated and approved and it's been determined that
19 we've met that qualification. More recently as of
20 December 5th of 2016 was the last time that our license
21 came up for renewal and it was determined that we met
22 those qualifications. And based on the fact that the
23 Legislature passed House Bill 299 that implies that the
24 Board should take into account that precedent in
25 repealing Alaska Statute 04.11.537.

1 The Alaska State Fair we feel meets this
2 definition of a recreational site. The statute does
3 not state it is specific to or limited to locations or
4 events and we also base our renewal on the fact that it
5 should not be based on legislation that has not
6 occurred.

7 Senate Bill 16 is a solution to an
8 interpretation problem for this license category, an
9 interpretation with a history of renewal and precedent.
10 Senate Bill 16 will fix the problem, but the Alaska
11 State Fair needs assurance that the fair can continue
12 to operate as it has in the past. It would be
13 detrimental to our operation, to the fair, to the
14 sustainability of the fair if we were not able to
15 operate as we have in the past.

16 So I would ask and request that we renew our
17 recreational site license and would be happy to answer
18 any questions that you might have.

19 MR. KLEIN: Go ahead.

20 MS. SPEAKER: So this recreational site
21 license section in Title 4 is so vague, but one of the
22 things I was thinking of and which is kind of out of
23 the box thinking, but, you know, you have a lot of
24 events at the fair. So the grandstand concerts, right,
25 and so that kind of qualifies as a place that you could

1 sell beer and wine an hour before and after the event.
2 Correct -- am I correct in that? Is that what you kind
3 of said.

4 Through the Chairman to Erickson, concerts
5 doesn't meet the definition. These are all -- all of
6 the examples are sporting events.

7 MS. McCONNELL: Oh, well, it says include.
8 See, that's the thing. It says includes a location
9 where. So when there's a list such as that after the
10 word includes, the way that -- what has to happen is
11 you have to look at the commonalities that are in the
12 list and in order to determine what else gets to be
13 included based on that list, you have to see what makes
14 -- what do those things in the list have in common. So
15 if you had an example of.....

16 MS. SPEAKER: Right. I remember this
17 discussion.

18 MS. McCONNELL: Okay.

19 MS. SPEAKER: So the other qualifying license
20 would be an event license? Is that -- what do concerts
21 use when they have.....

22 MS. McCONNELL: Generally, if there's going to
23 be alcohol served at concerts, they would do a permit.

24 MS. SPEAKER: A permit. So there's lots of
25 these kind of things happening at the fair all summer

1 every day. There's the logging thing, you know, where
2 you have your loggers come and do their little show. I
3 mean there's all these kind of shows. You know, you
4 have -- what -- I mean could we help them find the
5 right license. I mean is there anything -- any other
6 option for them is what I'm wondering.

7 MR. KLEIN: The way to do this is SB-16.

8 MS. SPEAKER: No, I know, but.....

9 MR. KLEIN: I know, but right now.....

10 MS. SPEAKER: Right.

11 MR. KLEIN:the way that we could -- the
12 easiest way to do this would be to approve the rec site
13 license for another period until SB-16 gets
14 (indiscernible). That would be the easiest, most
15 effective way to do this.

16 MR. SPEAKER: And to the Chair -- or through
17 the Chair, to also address your question. Another
18 option would be to, as Erika pointed out, to use a
19 beverage dispensary, restaurant, (indiscernible) place
20 carrying permit.

21 MR. KLEIN: But those have number limits.

22 MR. SPEAKER: You have a whole host -- you have
23 to have.....

24 MR. KLEIN: He hasn't exceeded that in.....

25 MS. SPEAKER: Caterers permits don't have

1 limits. Special events permits have limits.

2 MR. KLEIN: Special events and so.....

3 MS. SPEAKER: So the fair as a nonprofit can
4 get special events permits or they can partner with a
5 beverage dispensary license and use caterers permits.

6 MR. KLEIN: Right.

7 MR. SPEAKER: So to answer your question, there
8 are alternative venues admittedly much more onerous and
9 complicated.

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1 Track 163449

2 MR. SPEAKER: Mr. Chairman, if I may yes.
3 There is another option, but I guess I would argue
4 against that. We utilize those special events permits
5 throughout the year and we're limited to five. Our
6 goal is to keep the fairground as busy as we possibly
7 can and we've relied tremendously on that off season
8 revenue to get us through the year, and any time we
9 have to use those type of permits for something else,
10 you know, in reference to using it for the fair really
11 limits our ability to generate additional revenues for
12 the fair. Thank you.

13 MR. KLEIN: Is there anyone on line who wishes
14 to testify? I thought you would have brought legions.
15 No? Okay. Bobby, you had a comment.

16 MR. EVANS: Yes, sir. Thank you, Mr. Chairman.
17 I'm looking at the memo by the Director dated February
18 19, 2019, that's in our packet, Tab 83, and staff
19 recommendation is to deny the renewal and if you go
20 further through the memo, it talks about that there's
21 only one location at the fair, the grandstand -- I
22 guess that must be a section -- is the only one that
23 meets the definition of recreational site license. So
24 if the fair would like to just utilize the one
25 location, I would be in favor of passing the

1 recreational license that meets the statute and the
2 fair can utilize these caterer permits and these other
3 types of permits. That's also allowable through
4 different venues and statutes.

5 So, you know, it's not that we're taking it
6 away from the fair. I think we're trying to follow the
7 statute and the fair just has to do some more work to
8 maintain the alcohol sales that they wish.

9 MR. KLEIN: Thank you, Bobby. Just a comment
10 on that. The Director is -- and staff is making the
11 recommendation that they have to make which is here's
12 what the law says. Given that, here's what we
13 recommend. This Board is supposed to think beyond that
14 and really determine what it is the public needs, what
15 is in the public interest. I can't see where it's in
16 the public interest for us to put a halt to a 40-year
17 tradition while we wait for the Legislature to pass
18 what they've already identified as a problem and
19 already on their way to solving.

20 I don't know why we're playing this game. I
21 think it's within our purview to grant this. We ought
22 to grant it.

23 MR. EVANS: So I'll make a motion to grant the
24 renewal with the statement that this is an exceptional,
25 unique situation that would not set precedent and that

1 pending -- you know, I wouldn't want to have the
2 operations as described and that clearly are
3 demonstrably in the public interest get caught in what
4 will be a legislative fight, but with the greatest hope
5 that they'll get it sorted out and resolved this
6 because it is a fairly unique situation. So motion to
7 grant the renewal with that statement.

8 MR. KLEIN: Is there a second?

9 MS. McCONNELL: Yeah. I just wanted to clarify
10 on that. So are we saying that you want to give them
11 this renewal? Anything about Senate Bill 16, did you
12 want to -- because you had said something.....

13 MR. KLEIN: No. We're just going to grant it.

14 MS. McCONNELL: Just grant it. And how long is
15 the license good for?

16 MR. KLEIN: Two years.

17 MS. McCONNELL: Two years.

18 MR. KLEIN: The justification for us granting
19 this -- we as Glenn just indicated, this is so far out
20 of the norm.....

21 MS. McCONNELL: Right.

22 MR. KLEIN:and the justification is the
23 Legislature who wrote Title 4 (indiscernible) has
24 recognized the shortcomings and is working on the fix.

25

1 MS. McCONNELL: I'll second that motion.

2 MR. KLEIN: Thank you.

3 MS. SPEAKER: Mr. Chair, if I may say something
4 for the record. I've put this on the record in the
5 past and I think the Board understands this, but you do
6 have the authority always to act in the broad public
7 interest and we've discussed before how that authority
8 is really very, very broad, but what you don't have the
9 authority to do, respectfully, is to make a decision
10 based on pending or aspirational legislation. It's not
11 good practice and as long as you keep the language of
12 your motion clear of that, I think that would be
13 advisable. Thank you.

14 MR. KLEIN: Thank you. Yeah. I'm almost sorry
15 I brought up 16. It was just affirmation that
16 everybody's looking at the problem. Sarah.

17 MS. ERICKSON: I (indiscernible) the second, so
18 now we can kind of talk about this. I totally agree
19 with you, Chairman Klein, on this. I mean, you know,
20 we gave Arctic Ski Valley their renewal based on the
21 fact that we kind of agree it was good for the area
22 and, you know, this is good for the state and I would
23 hate to see them suffer over this just ridiculous stuff
24 that's just been sitting in the Legislature forever. I
25 mean this should just absolutely be renewed no question

1 as far as I'm concerned and I hate the fact that the
2 state fair has had to spend so much effort and money
3 sending this sweet man to all these meetings and us
4 just constantly deferring it.

5 So I definitely am going to vote for them to
6 have this license and wish this discussion could just
7 be over.

8 MR. KLEIN: Go ahead.

9 MR. LEATH: Through the Chair. A couple things
10 I'd like to point out. First of all, this topic has
11 definitely taken a mind of its own. This topic is not
12 about whether or not we support the fair having
13 alcohol, but that's clearly all I'm hearing. And I
14 think especially with the level heads in the room, so
15 to speak, the adults in the room really need to focus
16 on what this topic is about.

17 This is about a definition of a regulation.
18 This is not about whether or not we support the fair
19 having alcohol. But even from the applicant, I'm
20 hearing that. That is not what this is about and we
21 need to make sure you know what this is about so you
22 could help find a solution to it.

23 I know SB-16 is out there. It's a whole nother
24 topic. This is about interpretation of a regulation
25 and whether or not your venue meets the definition of

1 that. We've been petitioned by the Legislature to make
2 sure we sure we abide by the regulations that are out
3 there. So we have a definition in front of us and we
4 have to -- we're trying really hard to abide by that
5 definition. To have this taken into whether or not we
6 support the state fair or we support the people or we
7 support, you know, the fair's existence, that's a
8 completely out of context topic.

9 This is strictly about a definition. The
10 dangerous road we go down by making an exception
11 because it affects the whole state fair, there are some
12 individuals who have businesses in Alaska. It's their
13 sole livelihood, in the middle of nowhere. They maybe
14 sell a little bit of alcohol and we make decisions all
15 the time to abide by regulations that impact their 100
16 percent livelihood. And so I think as a Board we need
17 to keep that in mind.

18 Here we are, you know, making a decision
19 potentially to allow this. I think we need to take
20 into consideration. Whether it's a multimillion dollar
21 venue or \$150 venue every year, we're saying that
22 because it means something to someone we're going to
23 make a little bit of a variance. I just want to make
24 sure we keep that in mind.

25 I am not against the state fair. I am not

1 against the people of Alaska. I've given my entire
2 career to them and we need the quorum in the room to
3 understand that this is not about us being against the
4 state fair or for it. This is about just interpreting
5 a definition. So I wanted to get that on the record.

6 MR. KLEIN: Thank you. Go ahead.

7 MR. LEATH: And then lastly when we look at the
8 definition of what a recreational site license is,
9 we're giving a two-year waiver but hopefully not in the
10 mindset that SB-16's out there and we need to keep that
11 in mind with the next one that pops up. If someone has
12 a situation where they have been approved in the past
13 because we just talked about this recently at the last
14 couple meetings, about not approving these at times
15 because people didn't meet the definition, even though
16 we approved them in the past.

17 So I just want to make sure we're consistent.
18 I'm not a fan of being wishy-washy or flipflop, so I
19 just put a cautionary note out there. If we decide to
20 approve this, it's probably going to create some
21 questions in the public as to what side of this issue
22 we stand on. But just something to think about.

23 MR. SPEAKER: Yes, and through the Chair. I
24 think that was -- I hope I encapsulated that intent
25 somewhat in my qualifying statement regarding my

1 motion, but I completely your statements and everything
2 you've said in the points and this is a unique and very
3 challenging situation. So -- and that's why I don't
4 want to hamstring future Boards with respect to
5 precedent. This is a very -- I'm trying to thread a
6 very fine needle here, so -- but great comments
7 and.....

8 MS. SPEAKER: Just to add to that and just to
9 what Rex said, now the difference -- we're not giving
10 them a waiver. We're just renewing them. So they
11 haven't asked for a waiver. They've done nothing
12 wrong, you know, in this process. You know, they
13 haven't missed the timeline. They haven't not -- you
14 know, filled out the application wrong. I mean these
15 people that we've been giving waivers to we go, okay,
16 fine, you made a mistake, we'll give you time, time,
17 time, time.

18 The state fair has never done anything wrong
19 and we granted the Arctic Ski Valley people their
20 renewal license based kind of on the same thing. Does
21 it add value to the (indiscernible). Does it add value
22 to the state and now is not the time to be taking money
23 -- revenue from the state. We need to do everything we
24 can possibly to build it and I'm not going to be the
25 one to say, oh, no, you didn't -- you know, sorry, our

1 State Legislature's complete wacked and we don't know
2 what they're doing. So sorry, until they rewrite this,
3 you're screwed. No, I'm not going to do that.

4 So it is to me about the state being able to
5 sell alcohol because it's about revenue and it's about
6 building this state which we are in desperate times and
7 so, you know, the other thing's the waivers that we
8 grant to people because their livelihoods are on the
9 line, I mean that's a whole different deal, and I don't
10 want to confuse that with what the state fair is doing.
11 You know, they haven't asked for a waiver. They just
12 asked for renewal of the license and to me, that's a
13 separate thing. So, you know, I'm voting yes
14 (indiscernible), by the way.

15 MR. KLEIN: Okay. Any more comments or can we
16 vote?

17 MS. BLASSITAR: Mr. Chair, may I make a quick
18 comment, please?

19 MR. KLEIN: Oh, I didn't know you were out
20 there. Go ahead.

21 MS. BLASSITAR: Sorry. I had a screaming
22 toddler in the background and didn't want to scare you.
23 This is Sarah Oats Blassitar (ph) for the record. If
24 you completely disregard that SB-16 is out there and
25 completely disregard the fact that (indiscernible) was

1 licensed and how attorneys were in fact (indiscernible)
2 and only look at whether the sale qualifies for the
3 license and only consider applications (indiscernible),
4 the Board really should renew this license.

5 So this license was the first license to be
6 considered (indiscernible) legislative audit
7 independently on whether it met the qualification for a
8 recreational site. On December 5th (indiscernible)
9 which I wrote in a written public comment and I advised
10 (indiscernible), but on December 5th we seen the ABC
11 Board review the written statement (indiscernible)
12 state fair about how it's (indiscernible) rec. site
13 license, and on that date, (indiscernible) qualified
14 the fair (indiscernible) without (indiscernible).

15 Since then, the fair has added (indiscernible)
16 events which (indiscernible) the other events that have
17 already (indiscernible) the Board said, oh, you're
18 qualified. So application assessment has to be applied
19 here because the Board already evaluated
20 (indiscernible) met the qualifications as a
21 recreational site. But secondly, if the Board is kind
22 of (indiscernible) on that prior determination since
23 the Board has changed (indiscernible), then there's a
24 second precedent that's been set in that other rec.
25 site licenses that may or may not have met the

1 requirements or have been kind of unclear or ambiguous,
2 the Board gave them a two-year (indiscernible) saying
3 that this (indiscernible) and that in two years, that's
4 it.

5 State fair never got that two years. So at
6 minimum the Board needs to renew this license, should
7 renew this license with a two-year this is your last
8 (indiscernible) warning. But again, I would urge the
9 Board to find that the fair does qualify for a rec.
10 site license (indiscernible) and game, rodeo events
11 (indiscernible), but (indiscernible). It's appropriate
12 and very (indiscernible) of events that are
13 (indiscernible) that qualify for (indiscernible).
14 Thanks for your consideration.

15 MR. KLEIN: Thank you, Sarah.

16 MR. SPEAKER: Mr. Chair.

17 MR. KLEIN: Yes.

18 MR. SPEAKER: Thank you, Mr. Chairman. That
19 being said, does the fair sell beer and wine one hour
20 before and one hour after designated times or -- I see
21 it's a ten-day fair. So if the doors open at 8:00, do
22 they wait an hour later and if the doors close at 9:00,
23 one hour before, or are they at least following
24 that.....

25 MR. SPEAKER: It's the other way around.

1 MR. SPEAKER: I'm just -- you know, I mean is
2 that -- that's my question. Are they following at
3 least some of the rules of the recreational site
4 requirement?

5 MR. KLEIN: Overall, I would guess having been
6 to the fair and having watched that if there is one
7 that follows those exact rules, it's by accident.

8 MS. SPEAKER: (Indiscernible)

9 MR. KLEIN: Yeah. Well, here's.....

10 MS. SPEAKER: Yeah. If we look at the whole
11 fair and events.

12 MR. KLEIN: I have before me a motion to
13 approve the renewal with the stipulation that this is
14 recognized as an unusual application of rec. site and
15 therefore should only be granted for this one time
16 which is two years. Yeah.

17 MS. SPEAKER: (Indiscernible)

18 MR. KLEIN: No. We have -- that's the motion.
19 I'm just restating it because we've traveled so far.
20 If there is no more discussion, I think it's time to
21 vote.

22 MS. SPEAKER: Well, the problem with that
23 motion is that -- so let's say two years and the state
24 hasn't budged -- done anything with (indiscernible).

25 MR. KLEIN: Well, we can only rescind what we --

AMCO

1 we change it. As Harriet likes to point out to me, we
2 are omnipotent. Okay. Seriously, this is the motion.
3 It is one which indicates our action is only good for
4 two years, which means should SB-16 fall apart or the
5 state come into money or whatever change occurs, we can
6 look at it again in two years. But we're not going to
7 let this run forever. It's only for two years.

8 So because of the importance of this and
9 because I know some of us are going to run for election
10 in a year or two or three and want this on the record,
11 how do you vote, Bobby?

12 MR. EVANS: I support the fair. Since this is
13 a situational event, I'll vote yes.

14 MR. SPEAKER: Yes.

15 MR. KLEIN: Sarah.

16 MS. ERICKSON: Yes.

17 MR. SPEAKER: Yes.

18 MR. KLEIN: And I'll vote yes. Okay. We have
19 it. Thank you and I won't say sorry to put you through
20 this because we have bent over backwards for you guys
21 for 40 years now, so let's solve it at the Legislature.

22

23 MR. SPEAKER: May I (indiscernible).

24 MR. KLEIN: Please.

25 MR. HERTEL: Yes. I would just like to comment

1 on the record. I know it's -- it isn't the Board's
2 intention to shut down the fair and I appreciate your
3 efforts and the I applaud your efforts to find a
4 solution for this problem. So thank you and thanks
5 again for renewing our license.

6 MR. KLEIN: Thank you. Thank you for coming.
7 Okay. We have other rec. site renewals and I would
8 like to take these as two groups, the first group,
9 things like the Peninsula Oilers and Kenai Brown Bears
10 and the Anchorage Bucs fit the absolute letter of the
11 definition of a rec. site license, and I would like to
12 treat those renewals as a group, if that's all right.

13 MR. SPEAKER: So that's Tab 84 through.....

14 MR. KLEIN: I was just about to read them.

15 MR. SPEAKER: Oh, I see.

16 MR. KLEIN: Go ahead.

17 MR. SPEAKER: So Tab 84 through 88?

18 MR. KLEIN: Plus 92.

19 MR. SPEAKER: Okay. Plus 92, okay. Motion to
20 approve renewal of Tabs 84 through 88 and Tab 92.

21 MR. KLEIN: With delegation, of course.

22 MR. SPEAKER: With delegation.

23 MR. KLEIN: Yes. Any questions? Is there a
24 second?

25 MS. SPEAKER: I'll second.

1 MR. KLEIN: Thank you. Any discussions? Any
2 questions? Let's vote. Anyone opposed? Motion is
3 carried. Okay. Now we have those that are as they say
4 outside the box and first one is 4881 Alaska Travel
5 Adventures, rec. site license here in Juneau. I'm
6 looking around to see if anyone wants to speak to it.
7 Director?

8 MS. McCONNELL: Thank you, Mr. Chair. So this
9 is a business that gives rafting trips and when guests
10 disembark the raft, they enjoy a snack and a beverage
11 prior to transfer back to their cruise ship. This does
12 not appear to meet the statutory definition for rec.
13 site license and two years ago, the Board voted to give
14 them a final renewal to say this was the last time this
15 license will be renewed and a letter was sent to the
16 licensee to indicate that. This was before you in the
17 December meeting and you tabled action to the current
18 meeting. Thank you.

19 MR. KLEIN: Pleasure of the Board.

20 MR. SPEAKER: Motion to deny renewal.

21 MR. KLEIN: Is there a second?

22 MS. SPEAKER: I'll second.

23 MR. KLEIN: Thank you. Discussion? Let's
24 vote. Anyone opposed? Hearing none is good enough.
25 Denali Arts Council, this is a rec. site license in

1 Talkeetna. Director?

2 MS. MCCONNELL: Mr. Chair, this is a theater.
3 They hold sporadic events including music concerts,
4 drama production, musical, visual arts receptions, and
5 film festivals and two years ago, you renewed the
6 license with the indication that this would, as it does
7 not meet the statutory definition of a rec. site
8 license and voted to renew the license for final time,
9 that the 2017-2018 renewal would be the last one.
10 Thank you.

11 MR. KLEIN: Thank you. Pleasure of the Board?

12 MR. SPEAKER: Motion to deny.

13 MR. KLEIN: Thank you. Is there a second?

14 MS. SPEAKER: Second.

15 MR. KLEIN: Discussion? Let's vote. Motion is
16 to deny. Anyone opposed? Motion is carried. And The
17 Summit, this is the Alaska Club recreational site in
18 Anchorage, Tab 91. Director? Okay. Come on up, but
19 let the Director first speak.

20 MS. McCONNELL: Thank you, Mr. Chair. So after
21 the 2014 legislative audit, the staff was still
22 administratively renewing licenses and there was an
23 objection to this rec. site license and this would have
24 been 2015 or so -- 2014, 2015, and the Board denied
25 this rec. site license the licensee appealed and it

1 went to hearing before an Administrative Law Judge and
2 the Law Judge concluded that while the Board did not
3 err in determining that The Summit did not meet the
4 requirements of the rec. site statute, the Board did
5 err in examining and denying only one rec. site license
6 at that time which did not afford equal protection to
7 the licensee. Thus, the Judge's recommendation for
8 final Board action was to give the license back to The
9 Summit which the Board agreed to and thus The Summit
10 was renewed for the 2017-2018 licensing period.

11 However, now that we are in a situation where
12 all rec. site licenses are being specifically examined
13 by the Board, my recommendation is to deny this renewal
14 as this is a health club and does not appear to meet
15 the statutory definition of a rec. site license. Thank
16 you.

17 MR. KLEIN: Thank you. Would you introduce
18 yourself.

19 MR. SAWSMITH: Thanks, Chairman Klein. My name
20 is Gary Sawsmith (ph) and I am the controller for The
21 Alaska Club. I was part of the group that applied for
22 the original license when we opened the South Club (ph)
23 in 2006 and was with the recommendation of the current
24 ABC Board at that time, a couple members helped us walk
25 through that process. While it's hard to stand on

1 precedent, it is the foundation that we'll ask for our
2 renewal for this two-year period. It has been renewed.
3 We went through the appeal process. It was given back
4 to us.

5 During that two-year period that it should have
6 been valid, we missed part the time frame where we
7 weren't able to operate because our license was in
8 denial status. It is hard to argue that it is -- that
9 it clearly meets the definition of a recreational site
10 license. However, I would like to invite you to come
11 down and take a Zumba class and work up a thirst and I
12 think you would feel like you'd gone through a
13 recreational event. They are regularly scheduled
14 classes that we originally based this application
15 process on and it is a recreational and social private
16 setting. We do not advertise to the public and it is
17 not a major income source as a bar business, but it is
18 a valuable part to the reputation of our adult-oriented
19 club. So I would appreciate any consideration and ask
20 for a two-year renewal with the understanding that
21 until legislation is passed and clarifies a
22 circumstance for us to apply under that you would give
23 us a two more year continuation. Thank you.

24 MR. KLEIN: Gary, are you aware of some
25 legislation that's coming down which covers The Alaska

1 Club?

2 MR. SAWSMITH: Not specifically to the club,
3 just potentially rewrites that may clarify some of the
4 muddy water that's there right now.

5 MR. KLEIN: Thank you. Questions? Okay.

6 MS. SPEAKER: I have a question. So The
7 Summit's a pretty exclusive club. I mean it's
8 expensive to join.

9 MR. SAWSMITH: I mean to some, yes.

10 MS. SPEAKER: So you don't have a huge base. I
11 mean you just said yourself it's not a big money maker.
12 You'd just like to be able the option of offering beer
13 to your members?

14 MS. SAWSMITH: Yes, ma'am.

15 MR. KLEIN: Pleasure of the Board.

16 MR. SPEAKER: Motion to deny.

17 MS. SPEAKER: Second.

18 MR. KLEIN: Further discussion? Go ahead.

19 MR. SPEAKER: To address the applicant's
20 comments, I think -- I mean while I appreciate your
21 situation and the spot you've been put in with respect
22 to this challenge that we're all struggling with, if we
23 were to grant this, it would open a somewhat literal
24 Pandora's box. It will be potentially yoga studios
25 and, you know, any sort of thing. So I mean -- and I

1 hope you appreciate the situation we're in and again,
2 as was previously stated, this isn't anything personal
3 towards your business. It's a difficult challenge
4 we're faced with as regulators. So -- but I'm going to
5 vote no -- or in favor of denial, but understanding
6 that this is a difficult spot, but we've come to the
7 end, so.....

8 MR. SAWSMITH: Mr. Chair, may I reply to.....

9 MR. KLEIN: Please.

10 MR. SAWSMITH: I appreciate that comment and in
11 no way am I asking for special privileges or -- what I
12 am asking for is to look at the fact that we have been
13 approved for a number of years. A new studio or a new
14 health club or somebody like that, that would come
15 before the Board would have no precedent to stand on
16 and it would be clearly defined because they're not
17 compliant with the statute. All I'm asking for is a
18 two-year continuation of our current license which has
19 been offered to others, so -- and at that point in
20 time, we will gladly change business practice or there
21 may be another opportunity for us to continue under a
22 different method, but we just want to continue our
23 normal business practice for the next two years.

24 MR. KLEIN: More discussion? Time to vote.

25 Motion is to deny. Anyone opposed or abstentions?

1 Seeing none, motion is carried. Sorry, Gary. Thank
2 you for coming. And the last one of these is 5095 Taku
3 Lanes. This is a rec. site license in Juneau.
4 Director? Tab 93.

5 MS. McCONNELL: Thank you, Mr. Chair. This is
6 a bowling alley and it does not appear to meet the
7 statutory requirements for a rec. site license at
8 AS04.11.210. Two years ago, the Board recognized that
9 this license did not qualify and voted to renew the
10 license for a final time indicating that that was the
11 final renewal. Thank you.

12 MR. KLEIN: Pleasure of the Board?

13 MR. SPEAKER: Motion to deny.

14 MR. KLEIN: Thank you. Is there a second?

15 MR. SPEAKER: Second.

16 MR. KLEIN: Thank you. Discussion? Let's
17 vote. Anyone opposed? Seeing none, motion is carried.
18 Okay.

19 (Off record)

20 (END OF PROCEEDINGS)

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C E R T I F I C A T E

UNITED STATES OF AMERICA)
) ss
STATE OF ALASKA)

I, Salena A. Hile, Notary Public in and for the
state of Alaska, residing in Anchorage in said state,
do hereby certify that the foregoing matter was
transcribed to the best of our ability from an audio
provided by KIMBERLEE COLBO;

IN WITNESS WHEREOF I have hereunto set my hand
and affixed my seal this 6th day of April 2019.

Salena A. Hile
Notary Public, State of Alaska
My Commission Expires: 09/16/2022