



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Commerce, Community,
and Economic Development

Alcohol and Marijuana Control Office

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MEMORANDUM

TO: Alcoholic Beverage Control Board DATE: March 23, 2020
FROM: Jane P. Sawyer, Regulations Specialist RE: Regulations Project – When
Petition is Required by AS
04.11.460(b)

This regulations project was adopted by the board at its January 2020 meeting. Department of Law has disapproved some of the amendments because it determined that the board does not have authority to make those changes, and, accordingly, has made technical changes to the draft. No action from the board is needed; this is just an FYI.

The disapproved changes are: new subsections 3 AAC 304.115(d) and (d).

The approved changes will become effective April 11, 2020, and they are: repeal of 3 AAC 304.615, and 3 AAC 304.905(d) which just basically moves the language to 3 AAC 304.115.

Attached is a detailed explanation from Department of Law.

MEMORANDUM

State of Alaska Department of Law

To: The Honorable Kevin Meyer
Lieutenant Governor

Date: March 11, 2020

File No.: 2019104477

Thru: Susan R. Pollard *SRP*
Chief Assistant Attorney General
and Regulations Attorney
Legislation and Regulations Section

Tel. No.: 465-3600

From: Steven C. Weaver *SCW*
Senior Assistant Attorney General
Legislation and Regulations Section

Re: Alcoholic Beverage Control Board
regulations re: when a petition is
required under AS 04.11.460(a) and
(b) (3 AAC 304.115; 3 AAC
304.615; 3 AAC 304.905(d))

The Department of Law has reviewed the attached regulations of the Alcoholic Beverage Control Board against the statutory standards of the Administrative Procedure Act. Based upon our review, we have disapproved proposed 3 AAC 304.115(d) and (e). We find no legal problems with the rest of the regulations. This memorandum constitutes the written statement of approval under AS 44.62.060(b) and (c) that authorizes your office to file the rest of the attached regulations. The regulations were adopted by the Alcoholic Beverage Control Board after the close of the public comment period. Because regulations regarding petitions under AS 04.11.460 were scattered across 3 AAC 304, the Alcoholic Beverage Control Board made amendments to gather those regulations under 3 AAC 304.115, and made conforming repeals to 3 AAC 304.615 and 3 AAC 304.905(d).

The Alcoholic Beverage Control Board also proposed two entirely new subsections, 3 AAC 304.115(d) and (e), but they are not consistent with AS 04.11.460. Under specified circumstances, AS 04.11.460 (prior public approval) requires petitions with the signatures of nearby residents as a condition for approval of a new alcohol license or transfer of location of the license. The petition is required for premises outside the boundaries of a municipality, and the petition requirements vary by distance:

(a) A new license or the transfer of location of an existing license may not be approved by the board in an area outside but within 50 miles of the boundaries of a municipality unless a petition asking that the license be issued or transferred within the area containing signatures of a majority of the permanent residents residing within one mile of the proposed premises is filed with the board.

(b) A license may not be issued in an area that is 50 miles or more from the boundaries of a municipality unless a petition asking that the license be issued within the area containing the signatures of two-thirds of the permanent residents residing within a radius of five miles of the United States post office station nearest to the proposed licensed premises, is filed with the board. If there are two or more United States post office stations in the vicinity of the proposed licensed premises, the nearest to the premises constitutes the point of beginning under this subsection. If there is no United States post office station within a radius of five miles of the proposed licensed premises, the applicant must obtain the signatures of two-thirds of the permanent residents residing within a five mile radius of the proposed licensed premises. A petition is not required for the renewal of a license issued in accordance with this subsection unless specifically required by the board.

AS 04.11.460(a) and (b). The only stated exception from these requirements is the exception from AS 04.11.460(b) for renewal of a license.

Proposed 3 AAC 304.115(d) and (e) would have set out additional exceptions from AS 04.11.460(a) and (b). Under proposed 3 AAC 304.115(d), a petition for the transfer of a license's location under AS 04.11.460(a) would not be required if the new location were less than one mile from the current location, and if not more than two transfers of location had already occurred without a petition. Under proposed 3 AAC 304.115(e), a petition under AS 04.11.460(b) would not be required for the transfer of a license's ownership at all; and would not be required for a transfer of a license's location if the new location were less than one mile from the current location, and if not more than two transfers of location had already occurred without a petition.

Nothing in AS 04.11.460(a) provides the Alcoholic Beverage Control Board authority to establish additional exceptions by regulation. Moreover, even if authority existed, the exceptions appear to rely on unfounded assumptions, particularly about population densities. The exception from AS 04.11.460(a) seems to assume that a one-mile change of location would not change significantly the number of permanent residents living within the area and eligible to sign a petition. The assumption could easily be false. For instance, were the new location a block away from the licensee's current location, the new location may take in residents within a one-mile radius who nonetheless did not weigh in on the initial petition for the license, because those residents were outside of the original location's one-mile radius. That the licensee could change locations twice without a petition simply compounds the problem.

Similarly, AS 04.11.460(b) does not give the Alcoholic Beverage Control Board authority to establish additional exceptions by regulation. Though the express terms of AS 04.11.460(b) require a petition for "a license," and an argument perhaps exists that a transfer of ownership or location is not a license, the argument is weak in the face of the statute as a whole. The statute already gives the one exception explicitly, and that exception is for a license

renewal only. Because a transfer of ownership is not the same as a renewal of a license, the text of AS 04.11.460(b) does not sustain a blanket exception for transfers of ownership. Additionally, making an exception for certain transfers of location raises the same issues under AS 04.11.460(b) that it does for AS 04.11.460(a): without sufficient basis, the exception assumes that the a one-mile change of location would not significantly change the number of residents within the five-mile radii described in AS 04.11.460(b).

Accordingly, because the petition process in AS 04.11.460 does not sustain the exceptions that the Alcoholic Beverage Control Board proposes in its regulations, we have disapproved the proposed exceptions. We have marked the disapprovals on the attached copy of the regulation and re-lettered the remaining subsections accordingly.

The November 24, 2019 public notice and the January 30, 2020 certification of adoption order both state that this action is not expected to require an increased appropriation. Therefore, a fiscal note under AS 44.62.195 is not required.

We have made some technical corrections to conform the regulations in accordance with AS 44.62.125. The corrections are shown on the attached copy of the regulations.

SCW

Glen Klinkhart, Interim Director
Alcoholic Beverage Control Board

Amy Demboski, Assistant Commissioner and Regulations Contact
Department of Commerce, Community, and Economic Development

Jane Preston Sawyer, Regulations Specialist
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Department of Commerce, Community, and Economic Development

Joan M. Wilson, Assistant Attorney General
Commercial, Fair Business, and Child Support Section

Re Publisher: Existing 3 AAC 304.115(a) and (b) are unchanged.)))

by adding new subsections

3 AAC 304.115 is amended to read:

~~(a) If required by statute or regulation, a petition is a necessary part of an application for a new license, and for renewal, transfer, or relocation of an existing license. An application submitted without the required petition is incomplete. All petitions must be on forms prescribed by the board. Petition signatures must be obtained within the 90-day period immediately preceding the submission of the application. After an application has been filed, no additional signatures may be added to the petition, and no signatures may be withdrawn.~~

~~(b) A person signing a petition relating to a license must be 21 years of age or older and must be a permanent resident of the geographical area relevant to the petition. A person may have only one permanent residence.~~

3 AAC 304.115(c) is okay. XCT 3/11/2020

(c) Municipal boundaries shall be disregarded when gathering petition signatures.

~~**(d) For purposes of AS 04.11.460(a), a petition is not required for transfer of location of a license when the new location is less than one mile from the current location, except that only two transfers of the location of the license are allowed without filing a petition.**~~

(e) For purposes of AS 04.11.460(b), a petition is not required for

(1) transfer of ownership of a license;

(2) transfer of location of a license when the new location is less than one mile

from the current location, except that only two transfers of the location of the license are allowed without filing a petition.

Disaffirmed. XCT 3/11/2020

to boldface and underlining necessary.)))

(d) When submitting a petition under AS 04.11.460, an applicant shall assist in the determination of population by submitting the following information with the application:

Handwritten note: "surface and underlining unnecessary" with a bracket pointing to the underlined text below.

(1) a graphic designation on a United States Geodetic Survey map with a scale of at least one inch to the mile showing the population within a circle of the applicable radius, and showing where petition signatures were obtained; and

(2) the population within the applicable area and a narrative of how the population was determined. (Eff. 11/29/81, Register 80; am 10/24/87, Register 104; am ___/___/___, Register ___)

Authority: AS 04.06.100 AS 04.11.460

3 AAC 304.615 is repealed

3 AAC 304.615. Petitions. Repealed. (Eff. 11/29/81, Register 80; repealed ___/___/___, Register ___)

3 AAC 304.905(d) is repealed

(d) Repealed ___/___/___ (Eff. 4/28/84, Register 90; am 10/24/87, Register 104; am ___/___/___, Register ___)

Authority: AS 04.06.080 AS 04.06.100 AS 04.11.460
AS 04.06.090