MEMORANDUM

State of Alaska
Department of Law

TO: Dana Walukiewicz, Chair
Alcoholic Beverage Control Board

THRU: Jane Sawyer, Program Coordinator
Alcohol and Marijuana Control Office

FROM: Kevin A. Higgins
Assistant Attorney General
Commercial and Fair Business Section

DATE: April 4, 2025

SUBJECT: Protests of REPL 2611 and REPL 3293 by Kodiak Island Borough and City of Kodiak

Sook C. Yun does business as Sizzler Burger and Peking Restaurant (Sizzler Burger) under restaurant eating place license 2611 (REPL 2611) and as Second Floor Restaurant (Second Floor) under restaurant eating place license 3293 (REPL 3293). The premises for each license is in a different portion of the building at 116 W Rezanof Dr. in Kodiak. Stephani Kim assists her mother, the licensee for both licenses, and has been the main point of contact for AMCO.

Before the Board are (1) the Kodiak Island Borough's protest of the continued operation of REPL 2611,[1] (2) the Borough's protest of the renewal of REPL 3293,[2] (3) the City of Kodiak's protest of the renewal of REPL 3293,[3] (4) the City's protest of the relocation and transfer of REPL 3293 to another person,[4] and (5) the Borough's protest of the relocation and transfer of REPL 3293 to another person.[5]

The Board should consider the Borough's protest of the continued operation of REPL 2611 without reliance on the Board's prior proceedings regarding the City's protest of the continued operation of REPL 2611.[6]

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[1] Attachment 1, Protest and Request for Revocation of Restaurant Eating Place License #2611, December 27, 2024

[2] Attachment 2, Protest of Renewal of Restaurant Eating Place License #3293, January 17, 2025.

[3] Attachment 3, REPL # 3293 Renewal Protest, January 30, 2025.

[4] Attachment 4, REPL License No. 3293 Transfer of Ownership/Location Application, February 25, 2025, and Protest of REPL # 3293 Transfer, March 5, 2025.

[5] Attachment 5, Protest of Transfer of Ownership and Location of Restaurant Eating Place License #3293, March 7, 2025.

[6] At its November 19, 2024 meeting, the Board initially denied the City's protest and the City requested a formal hearing with the Office of Administrative Hearings. On December 27, 2024, the Borough also protested the continued operation of REPL 2611. At its February 4,

RECENT PROCEDURAL HISTORY

With regard to REPL 2611, on December 26, 2023, Sizzler Burger submitted a renewal application for REPL 2611 for the 2024–2025 biennial cycle. [7] That was forwarded to the local governing bodies on June 11, 2024.[8] The renewal application was approved with delegation at the Board's June 25, 2024 meeting. Sizzler Burger surrendered REPL 2611 on August 2, 2024.[9] Email exchanges between Sizzler Burger and AMCO regarding the decision to surrender are attached for reference.[10]

With regard to REPL 3293, on January 4, 2024, Second Floor submitted an application to transfer REPL 3293 to Nuniaq, LLC.[11] By email on January 5, 2024, AMCO informed Second Floor that the application could not be accepted and that a renewal to application also had to be filed by the end of the day on February 28, 2024. [12] The application to transfer later was withdrawn and a new transfer application was filed on February 6, 2024 (but there still were issues with the submission).[13]

On February 27, 2024, the licensee filed an application to renew REPL 3293.[14]

2025, meeting, the Board initially denied the Borough's protest under AS 04.11.480(e), which permits each local governing body to protest "the issuance, renewal, relocation, or transfer," but not the continued operation of a license. The Borough also requested a formal hearing with OAH.

At its March 13, 2025, city council meeting, the City of Kodiak decided to withdraw its protest of the continued operation of REPL 2611. The existence of that protest was the basis upon which the Board denied the Borough's protest under AS 04.11.480(e) without considering its merits. Without the City's prior protest, there is no reason not to consider the merits of the Borough's protest. Both matters were remanded from OAH. *See* Attachment 6, Order of Remand, March 27, 2025.

[7] Attachment 7, at 4–7.

[8] *Id*, at 1–3.

[9] Attachment 8, at 1–2

[10] *Id*. at 3–6.

[11] Attachment 9, at 1–9.

[12] Attachment 10, email from AMCO to licensee re: transfer and renewal of REPL 3293, January 5, 2024.

[13] Attachment 10, letter from AMCO to licensee re: incomplete transfer application for REPL 3293, February 6, 2024.

[14] Attachment 12, at 1–3, Form AB-17: 2024/2025 General Renewal Application.

On September 27, 2024, AMCO informed Nuniaq, LLC (the transferee) that the application to transfer REPL 3293 still was incomplete.[15]

On October 3 and 14, 2024, AMCO contacted Second Floor regarding the renewal of REPL 3292 about the need to pay waiver application fees and late fees.[16]

On December 29, 2024, in support of the application to renew REPL 3293, the licensee submitted an application for a waiver of operations of REPL 3293 for 2022 and 2023.[17] An application for the waiver of operations for 2024 was filed on April 3, 2025.[18]

On January 7, 2025, the license status for REPL changed to "temporarily surrendered" due to the licensee's difficulties with the landlord.

With regard to recent waivers of operation within the boundaries of the same governing bodies, at the November 19, 2024 meeting, the Board considered and approved third and fourth waivers of minimum operating requirements for beverage dispensary license 3299, which is held by El Chicano Inc. doing business as El Chicano Mexican Restaurant.[19]

APPLICABLE LAW

Under AS 04.11.480(a), "a local governing body may protest the issuance, renewal, relocation, or transfer to another person of a license . . . . The local governing body may protest the continued operation of a license . . . . The procedures for action on a protest of continued operation of a license or endorsement are the same as the procedures for action on a protest of a renewal application. The board shall consider a protest and testimony received at a hearing . . . when it considers the application or continued operation, and the protest and the record of the hearing conducted under AS 04.11.510(b)(2) or (4) shall be kept as part of the board's permanent record of its review. <u>If an application or continued operation is protested, the board shall deny the application or continued operation unless the board finds that the protest is arbitrary, capricious, or unreasonable</u>." (emphasis added)

As the Alaska Supreme Court has observed, "[s]ection .480 provides a mechanism for public influence over liquor licenses; after a municipal protest under AS 04.11.480 the

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[15] Attachment 13, AMCO email to Nuniaq regarding incomplete application, September 27, 2024.

[16] Attachment 14, AMCO emails regarding waiver of operations and fees, October 3 and 14, 2024.

[17] Attachment 12, at 4–7.

[18] *Id*. at 8–10

[19] Attachment 15, Tab 19 from November 19, 2024 meeting of the Alcoholic Beverage Control Board.

licensee, seeking to overcome the cessation of its operations under its license, bears the burden of proof."[20] And, "[t]he statute makes it clear that the Board may not substitute its judgment for that of the local governing body."[21]

The Board's regulations further address the requirement for a local governing body's protest and the Board's process for consideration of it. Under 3 AAC 305.085(d), "[a] local governing body that protests an application shall allow the applicant a reasonable opportunity to defend the application before a meeting of the local governing body." As to the substance of the protest,

> [a] local governing body protest may be based upon facts that render the particular application objectionable to the local body or may be based upon a general public policy. If based on a general public policy, the policy must have a reasonable basis in fact, may not be contrary to law, and may not be patently inapplicable to the particular application being protested. The board will not substitute the board's judgment for that of the local governing body on a matter of public policy that has reasonable factual support."[22][23]

The Board is conducting this hearing under AS 04.11.510(b)(2) and 3 AAC 305.095 "to ascertain the reaction of the . . . local governing body to the application in question[.]"[24] At the hearing, "if the board has no indication that the protest is arbitrary, capricious, or unreasonable, it may vote to uphold the protest, and the applicant and the board will follow the procedure set in AS 04.11.510(b)(1)."[25] Or, "if the board decides to overrule the protest, the local governing body may appeal the board's decision under AS 44.62."[26]

Regarding a protest based on the nonpayment of delinquent taxes or fees, the Board's regulations provide that a local governing body may protest

> (1) renewal or transfer of a license based on nonpayment of delinquent taxes or fees, whether single or in combination, of at least $1,000 arising in whole or in part from the conduct of the licensed business; and

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[20] *Stevens v. State, Alcoholic Beverage Control Bd.*, 257 P.3d 1154, 1160 (Alaska 2011).

[21] *Stoltz v. City of Fairbanks*, 703 P.2d 1155, 1157 (Alaska 1985) (reversing Board denial of protest, which was supported by a "logical and traditional grounds for opposing liquor licenses," namely to concentration of bars in the area and proximity to residential center for seniors).

[22] *Id*.

[23] 3 AAC 305.085(e).

[24] 3 AAC 305.095(a)(2).

[25] *Id*.

[26] *Id*.

> (2) transfer of a license if the local governing body has adopted an ordinance under which the local governing body may estimate the amount of taxes due in the tax year of the proposed transfer and arising in whole or in part from the conduct of the licensed business, and requires the licensee to pay the estimated amount; and
> (3) the licensee fails to pay that amount or give security under AS 04.11.360.[27]

If a "local governing body indicates that the protest is subject to rescission and that it will be withdrawn if the applicant meets conditions set by the local governing body," the Board may uphold a protest "with an initial abeyance period of not more than 180 days . . ." to give time for the applicant to satisfy the condition and persuade the local governing body to rescind its protest.[28]

Under 3 AAC 305.110(e), "[a] local governing body may use the factors [for consideration of an application] . . . to properly protest an alcoholic beverage application under AS 04.11.480 and 3 AAC 305.085," including

> (3) whether the applicant or the applicant's affiliates are untrustworthy, unfit to conduct a licensed business, or a potential source of harm to the public;
> . . .
> (5) whether the application is not complete as required by an applicable provision of AS 04 and 3 AAC 305.101 - 3 AAC 305.165 or contains a false or misleading statement;
> (6) whether the license or endorsement would violate any requirement of the license or endorsement under AS 04 or this chapter;
> . . .
> (9) whether a protest by the local governing body is not arbitrary, capricious, or unreasonable;
> . . .
> (11) all other factors the board determines relevant to the public interest.[29]

Regarding the surrender of a license, under AS 04.11.580, a licensee is required to surrender a license "not later than 10 days after the loss or vacation of the licensed premises."[30] Under 3 AAC 305.605, "if a licensee ceases to conduct business upon the licensed premises for a period expected to continue for one month or more, the licensee shall

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27 3 AAC 305.085(g)(1)–(3).

28 3 AAC 305.085(h).

29 3 AAC 305.110(a)(3), (5)–(6), (9), (11).

30 AS 04.11.580(b).

inform the board and surrender the license to the director. The license will be reissued upon request when the conduct of business is resumed or upon transfer of the license."

Regarding the expiration of a license, under AS 04.11.540, "an application for renewal of a license . . . issued for the two calendar years ending December 31 . . . may be submitted up until the next February 28. If a complete application for renewal has not been filed by February 28 or the required fees and the penalty fees have not been paid by that date, the license, endorsement, or conditional contractor's permit expires at 12:00 midnight February 28. A new license may not be issued to the holder of an expired license for the same premises except on proof satisfactory to the board of good cause for the failure to file and pay."

Regarding consideration of an application to renew a license, under AS 04.11.330, the application "shall be denied if . . .

> (1) the board finds, after review of all relevant information, that renewal of the license or endorsement would not be in the best interests of the public;
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> . . .
>
> (3) the applicant has not operated the licensed premises for at least 240 hours during each of the two preceding calendar years, unless the board determines that the licensed premises are under construction or cannot be operated through no fault of the applicant;
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> . . .
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> (5) the requirements of AS 04.11.420--04.11.450 relating to zoning, ownership of the license, and financing of the licensee have not been met;
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> . . . . or
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> (8) the application has not been completed in accordance with AS 04.09.370 or AS 04.11.270.[31]

Further, a renewal application "may be denied if the applicant is delinquent in the payment of taxes, fees, or penalties due to the state or a local government if the tax liability or fees or penalties assessed arise in whole or in part out of the licensed business."[32]

An applicant for renewal must establish that it has "operated the licensed premises for at least 240 hours during each of the two preceding calendar years, unless the board determines that the licensed premises are under construction or cannot be operated through no fault of the applicant[.]"[33] If the applicant for renewal requests a waiver of the minimum operating requirement, "the board will determine whether, through no fault of the licensee or because the premises are under construction, the licensed premises could not be operated for the required time during the preceding calendar year."

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[31] AS 04.11.330(a)(1), (3), (5), (8); *accord* 3 AAC 305.110(b).

[32] AS 04.11.330(b).

[33] AS 04.11.330(a)(3).

When the Board receives "a third or subsequent, consecutive application for waiver," the Board may deny it, "(1) unless the licensee clearly shows that the licensed premises were not operated, because the premises were condemned or substantially destroyed by any cause; or (2) the licensee holds a common carrier dispensary license and is a boat weighing over 1,000 tons."[34]

Regarding consideration of an application to transfer a license to another person, under AS 04.11.360 the application "shall be denied if . . .

> (1) the board finds, after review of all relevant information, that transfer of a license to another person would not be in the best interests of the public;
> (2) the application has not been completed in accordance with AS 04.11.280;
> (3) the application contains false statements of material fact; [or]
> (4) the transferor has not paid all debts or taxes arising from the conduct of the business licensed under this title unless (A) the transferor gives security for the payment of the debts or taxes satisfactory to the creditor or taxing authority; or (B) the transfer is under a promise given as collateral by the transferor to the transferee in the course of an earlier transfer of the license under which promise the transferor is obliged to transfer the license back to the transferee in the event of default in payment for property conveyed as part of the earlier transfer of the license[.]"[35]

Regarding consideration of an application to relocate, under AS 04.11.340, "the relocation of the licensed premises shall be denied if

> (1) the board finds, after review of all relevant information, that relocation of the license would not be in the best interests of the public;
> . . .
> (4) transfer of ownership is to be made concurrently with the relocation of the licensed premises and a ground for denial of the transfer of ownership under AS 04.11.360 is presented;
> (5) the application has not been completed in accordance with AS 04.11.290;
> (6) relocation of the license would result in violation of a local zoning regulation or ordinance; [or]

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[34] 3 AAC 305.120(e).

[35] AS 04.11.360; *accord* 3 AAC 305.110(c).

(7) relocation of the license would violate the restrictions pertaining to the particular license imposed by this title[.][36]

PROCEDURAL CONSIDERATIONS

The Board may proceed in any manner it wishes, provide that it gives each party an opportunity to be heard. Both local governing bodies are represented by counsel, who will appear at the Board's special meeting on April 8, 2025. Representatives for Sizzler Burger and Second Floor will also be present. Because there are five protests (or seven if considering the relocation and transfer to another person separately) brought by overlapping local governing bodies, it will be important to address each protest filed, particularly to the extent that the any protests may rest on a separate basis.

As a recommendation, the Board should first hear from the Borough on its protest of the continued operation of REPL 2611. The Board should then give Sizzler Burger the chance to be heard that the protest is arbitrary, capricious, or unreasonable. The Board may wish to invite further rebuttal or seek information from staff.

Second the Board should hear from the Borough regarding any separate bases for its protest of Second Floor's renewal of REPL 3293. The Board should then hear from Second Floor about these separate issues raised. The Board may wish to invite further rebuttal or seek information from staff.

Third, the Board should hear from City regarding its protest of Second Floor's renewal of REPL 3293. The Board should then hear from Second Floor about any new issue raised by the City. The Board may wish to invite further rebuttal or seek information from staff.

Fourth, the Board should hear from the City regarding its protest of the relocation and transfer of REPL 3293 to another person, with a specific focus on any separate basis on which this protest rests. The Board should then hear from Second Floor on this new information, and to the extent it may desire it, from representative of Nuniaq, LLC. The Board may wish to invite further rebuttal or seek information from staff.

Finally, the Board should hear from the Borough regarding its protest of Second Floor's protest of the relocation and transfer of REPL 3293 to another person, with a specific focus on any separate basis on which this protest rests. The Board should then hear from Sizzler Burger, and to the extent it may desire it, from representative of Nuniaq, LLC. The Board may wish to invite further rebuttal.

Cc: Kodiak Island Borough, c/o counsel Scott Brandt-Erichsen
City of Kodiak, c/o counsel Charles Cacciola
Suk C. Yoon and Stephani Kim

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[36] AS 04.11.340; *accord* 3 AAC 305.110(d).