Office of the Mayor and City Council
710 Mill Bay Road, Room 111, Kodiak, Alaska 99615

January 30, 2025

Hon. Dana Walukiewicz
Alcoholic Beverage Control Board
550 West 7th Avenue, Suite 1600
Anchorage, Alaska 99501

Re: REPL # 3293 Renewal Protest

Dear Board Chair Walukiewicz:

The City Council of the City of Kodiak protests the untimely renewal of REPL # 3293. This protest is submitted pursuant to 3 AAC 305.085 and KCC 5.12.030. A draft of this letter was sent to the applicant on January 24, 2025 with notice that the council would hear the matter at its January 30, 2025 meeting and that the applicant would be heard as to the matter.

REPL # 3293 BACKGROUND

Second Floor Restaurant's sales tax reports show that License No. 3293 has not been in consistent, active use for over ten years.[1] State of Alaska Business License # 1045076 for Second Floor Restaurant was issued on 11/19/2016 and expired on 12/31/2020. State of Alaska Business License # 2139779 for Second Floor Restaurant was issued on 9/17/2021 and expired on 12/31/2022. No subsequent business license has been issued for Second Floor Restaurant.

The application for renewal of REPL # 3293 for 2022 & 2023 was on the board's agenda for its April 12, 2022 meeting and was apparently approved as part of the delegated consent agenda. However, City records indicate that the license was not actively exercised for at least 240 hours during each of the two calendar years preceding that renewal application. Moreover, operation of the Second Floor Restaurant between January 1, 2021 and September 16, 2021 would have been unlawful.[2] The City is unable to determine whether the applicant disclosed the lack of active use of REPL # 3293 when applying for renewal for 2022 & 2023. As the matter of the renewal was resolved by the board's delegated consent agenda, the City is unable to determine if the board found that failure to actively exercise REPL # 3293 in 2020 and 2021 was excused on the basis that the licensed premises were under construction or could not be operated through no fault of the applicant.[3] The

[1] Kodiak City Code 3.08.220 limits the City's ability to disclose sales tax information. While disclosure is likely authorized on the basis that this protest is a proceeding of the city involving taxes due under the sales tax chapter, the City, out of caution, is presently withholding disclosure of Second Floor Restaurant's sales tax returns. The City will promptly provide copies to the board if the business owner consents. The City notes that the board could require the applicant to provide the board with copies of its City of Kodiak sales tax returns pursuant to 3 AAC 305.120.

[2] *See* AS 42.70.020.

[3] *See* AS 04.11.330(a)(3).

Telephone (907) 486-8636 / Fax (907) 486-8633
mayor@city.kodiak.ak.us

City can only assume that operation waivers for 2020 and 2021 were granted as a result of the pandemic.

However, available information indicates that REPL # 3293 could not have been actively exercised for 240 hours in the preceding years required for the license to have been renewed in 2016, 2018, and 2020. The 2020 renewal of REPL # 3293 was on the delegated consent agenda at the board's March 31, 2020 meeting. The meeting records do not indicate that the applicant sought operational waivers for 2018 or 2019, whereas the board's agenda shows that it considered waivers of minimum operating requirements for other applicants. The 2018 renewal of REPL # 3293 was on the delegated consent agenda at the board's April 3, 2018 meeting. The meeting records do not indicate that the applicant sought operational waivers for 2016 or 2017, whereas the board's agenda shows that it considered waivers of minimum operating requirements for other applicants. Finally, the City was unable to determine if the applicant sought waivers of minimum operating requirements for 2015 when it presumably applied for renewal of REPL # 3293 in 2016.

Assuming the information available to the City regarding active exercise of REPL # 3293 is more or less accurate, the board would have had to have found that failure to actively exercise the license for each of the years preceding the 2016, 2018, and 2022 renewals was for reasons beyond the applicant's control. Based on review of the board's meeting documents, it is doubtful that the board made such findings. Moreover, it is doubtful that the board could have made such findings because the board would have to have found that factors beyond the applicant's control excused more than seven years of failing to actively exercise the license. What circumstances beyond a licensee's control that would prevent active exercise of a license *for most of a decade?*

A licensee has the burden of proving that the license was actively exercised.[4] Information available to the City indicates that REPL # 3293 has not been actively exercised as required by AS 04.11.330(a)(3) for over a decade. If the applicant represented that the license had been actively exercised as required by AS 04.11.330(a)(3) when seeking renewal in 2016, 2018, 2020, and 2022, those representations are at odds with representations the applicant made to the City.

The applicant admits that the license was not exercised in 2022 and 2023. It is clear that it was not exercised in 2024, prior to or following the license's expiration on February 28, 2024. And it is also clear that the applicant would not actively exercise the license for most, if any, of 2025 were REPL # 3293 reissued and renewed.

LEGAL PRINCIPLES

Kodiak City Code 5.12.030. License Application Review.

…

[4] 3 AAC 305.120(l).

(c) After receiving the administration report and public comment, the council, by motion, may take one of the following actions on the matter of the application:

…

(3) *Protest*. Upon determining the existence of one or more of the grounds contained in subsection (d) of this section, the council may direct the clerk to cause a protest to be filed with the Alcohol Beverage Control Board.

(d) Any application for an alcoholic beverage license may be protested for one or more of the following reasons:

…

(8) Any factor identified by state statute or regulation as an appropriate grounds for protest;

(9) Any other factor the council determines is generally relevant or is relevant to the particular application.

3 AAC 305.085. Local governing body protest.

(a) A local governing body may protest an application filed under this chapter. The protest must be in writing, filed with the board, and copied to the applicant, and must include the governing body's reason for the protest. The reasons stated by a local governing body must be logical grounds for opposing the application or continued operation of the license and have a reasonable basis in fact.

…

(e) 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.

"The board will deny an application if … if the board concludes a protest of a local governing body is not arbitrary, capricious, or unreasonable."[5]

GROUNDS FOR PROTEST

The city council protests the application for renewal of REPL # 3293 pursuant to 5.12.030(d)(8) and (9) as explained in more detail below. In summary, renewing this expired license is not in the best interest of the public owing to the former license holder's persistent failure to

[5] 3 AAC 305.110(f).

operate the license in accordance with applicable statutes and regulations and general failure to meaningfully operate under REPL # 3293 for many years.

Under Alaska Statute 04.11.540, REPL # 3293 expired on February 28, 2024. On or about March 16, 2024, one of the four REPLs authorized for issuance for a premises within the City of Kodiak became available to all interested applicants. The board's regulations do not require repeated renewal, much less reissuance, of unused licenses. Nor do the regulations allow a former license holder to squat on an unused, expired license in lieu of making the limited number of REPL licenses freely and fairly available to any qualified applicant. The City of Kodiak has previously requested that the board authorized additional REPLs for the City of Kodiak. As long as City of Kodiak REPLs are limited to four, the board should not grant the holders of expired licenses a property right in obtaining a license that is not required by the laws that govern such licenses. The City of Kodiak supports making the fourth REPL publicly available to all qualified applicants in accordance with 3 AAC 305.040.

A. Untimely renewal of REPL # 3293 is not in the public interest.

Second Floor Restaurant did not exercise REPL # 3293 at all in the preceding three years and has not actively exercised the license in a decade. Renewing a license that has not been actively exercised in years and that lacks premises from which to operate the license if renewal is not in the public interest.

1. *Renewing a license that does not meaningfully contribute to the City's tax base is bad public policy.*

Active exercise of REPLs within the City of Kodiak contributes significantly sales tax revenue to the City and is an important part of Kodiak's tourism and hospitality industry. Each year, sales taxes account for 55-70% of the City's general fund revenue.

Of the four REPLs authorized for the City of Kodiak, two were held by the instant applicant and have not been actively exercised in the past several years. Based on the preceding two years, an actively exercised REPL within the City results in an average of $85,791.52 in sales tax revenue *per license, per year*.

As the renewal application indicates, REPL # 3293 was not exercised in 2022, 2023, or 2024. Based on the applicant's admitted non-use of the REPL # 3293 in 2022 and 2023 and the business's lack of a mandatory State of Alaska business license since January 1, 2023, the board should reasonably infer that Second Floor Restaurant's sales tax remittances during for 2022, 2023, and 2024 are essentially consistent with the evidence indicating that the business has not actively operated for the past three years. If REPL # 3293 had been actively exercised in 2022, 2023, and 2024 with sales equal to the *average* Kodiak REPL that is actively exercised, the City would have collected $257,374.56 in sales tax revenue from the licensee during this period.

The application and accompanying waivers show that the applicant lacks the capacity, and seemingly the intent, to operate REPL # 3293 in the foreseeable future. The City of Kodiak has lost significant sale tax revenue as a result of the applicant's persistent failure to actively exercise # 3293. Enough is enough. Reissuing and renewing the expired REPL # 3293 so that the applicant can continue to not operate the Second Floor Restaurant (which lacks premises to license) and continue to not contribute to the City's tax base defeats sound public policy.

2. Kodiak deserves an active and bustling hospitality industry.

Tourism is a significant component of the local economy and culture. Visitors and residents alike enjoy dining out in Kodiak. The City need not explain to the board the role that beer and wine plays in the restaurant industry. At present, one-half of the REPLs authorized for the City of Kodiak are not actively exercised.

REPL # 3293 has been substantially unused for a decade, denying Kodiak's residents and visitors enjoyment of 25% of the REPLs that may be issued within the City. Numerous Kodiak entrepreneurs desire to actively operate a REPL business within the City. The applicant has not used the license for this intended purpose and is not poised to do so. The four REPLs that may be issued for premises within the City of Kodiak need to be used for their intended purpose.

That purpose is active use that enables an active, regulated hospitality industry. The purpose of licenses issued pursuant to Alaska Statute Title 4 is expressly not to establish a property interest in the license that can be held without use until the holder finds a suitable buyer to cash out the property interest.[6] Rather, a license is privilege that can be maintained so long as the licensee exercises the privilege in accordance with the title and applicable regulations.

Neither the residents and visitors to the City of Kodiak nor its eager entrepreneurs benefit from one-half of the allowable REPLs going unused. The city council has determined that the public interest and public policy are furthered by an active, lively hospitality industry, which is being stymied by unsatisfied demand for restaurants that serve beer and wine. Reinstating and renewing a license that will continue to be unused by the applicant defeats the public interest. Local entrepreneurs must be given a fair opportunity to maximize the use of the limited number of REPLs.

B. An REPL may not be reissued or renewed without a code compliant licensed premises.

For City of Kodiak water and sewer utilities, vacant properties pay one half the rate that is applicable if the property is occupied.[7] Service to 116 E. Rezanof Drive has been charged at the lower vacant rate. The owner of that real property confirmed that Second Floor Restaurant has not

[6] AS 04.11.660; *see also* AS 04.11.690(a).

[7] *See* City of Kodiak, Schedule of Fees, Charges and Tariffs, (July 1, 2024), at 14.4.1.26 and 14.5.3.25.

held a lease for any portion of it for several years. It is the City's understanding that applicant does not dispute that she does not use, control, or operate premises at 116 E. Rezanof.[8]

According to statute, "'licensed premises' means any or all designated portions of a building or structure, rooms or enclosures in the building or structure, or real estate leased, used, controlled, or operated by a licensee in the conduct of business for which the licensee is licensed by the board at the specific address for which the license or an endorsement to the license is issued[.]"[9]

For a new license, the applicant must provide "documentation that shows the applicant's right or title to, or interest in, the land and buildings at the location of the business to be licensed[.]"[10] A renewal application must identify "any change to proof of possession in the preceding two calendar years"[11] and contain "an annotated illustration of the premises designating the areas for storage, service, and consumption of alcoholic beverages.[12] It appears that the renewal application fails to satisfy these requirements for a renewal application.

1. *The board cannot grant the application because there is no licensed premises that is a bona fide restaurant.*

Alaska Statute 04.09.120(c) provides that the "board may issue or renew a license under this section *only* if the (1) board determines that (A) the licensed premises is a bona fide restaurant as defined in AS 04.21.080(b)[.]"[13]

Because a determination that the licensed premises is a bona fide restaurant necessarily *requires a licensed premises*, the board cannot issue or renew an REPL without a licensed premises. To renew R/E No. 3293, the board would be required to determine that the licensed premises is a bona fide restaurant. Such a determination is not possible. Thus, the application must be denied.

2. *The board should not issue a license absent a code-compliant premises.*

KCC 5.12.030 authorizes the council to protest when the business operated under the license is in violation of any fire, health, or safety code.[14] When adopting this ordinance, the council assumed the board would not issue or renew an REPL when the applicant has no premises from which to operate the license. The assumption was reasonable because the regulations prohibit the board from doing so.

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[8] *See also* 3 AAC 305.050(c)(5) (requiring that a renewal application contain "any change to proof of possession in the preceding two calendar years").

[9] AS 04.21.080(b)(22).

[10] 3 AAC 305.045(c)(5).

[11] 3 AAC 305.050(c)(5).

[12] AS 04.11.270(a)(1); AS 11.260(a)(3).

[13] AS 04.09.120(c) (emphasis added).

[14] KCC 5.12.020(d)6).

A "license is issued for a specific place which is the licensed premises, and which must be clearly designated in a line drawing accompanying an application."[15] Statute requires that the "licensee shall surrender *a current license* to the board not later than 10 days after the loss or vacation of the licensed premises."[16] The City is unaware of any statute or regulation that authorizes the board to issue a REPL without a specific place which is the licensed premises.

Even if the board could issue or renew an REPL without licensed premises, it would be unreasonable to do so. Fire, building, and other life safety inspections are important components of government regulation. The City of Kodiak cannot inspect non-existent premises to ensure that they are reasonably free from hazards. The City acknowledges that the public cannot be harmed by non-existent premises, but granting a license, which requires local regulations in terms of health, public safety, and taxation, but which is based on a non-existent physical location is not in the public interest.

The City of Kodiak objects to the board issuing *any* license that requires physical premises for the license's operation when the applicant has not shown that the license will be operated from code-compliant premises.

C. REPL # 3293 expired without a timely renewal application.

An application to renew REPL # 3293 for 2024 and 2025 is presently before the board, several months into 2025. As explained below, this license expired on February 28, 2024.[17] It cannot be renewed. Only a new license may be issued to the applicant for 116 Rezanof Drive premises,[18] and all qualified persons are equally entitled to apply for any new REPL.[19]

1. A timely renewal application was not submitted; REPL # 3293 has expired.

Applicable statute and regulations are unambiguous that a complete renewal application must be submitted by the deadline.[20] Assuming the present application for renewal of REPL # 3293

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[15] 3 AAC 305.630(a).

[16] AS 04.11.580(b) (emphasis added).

[17] AS 04.11.540 ("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.").

[18] *See* AS 04.11.540 ("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.").

[19] *See* 3 AAC 305.040; *see also* Alaska Const. Art. I. § 1 ("all persons are equal and entitled to equal rights, opportunities, and protection under the law").

[20] AS 04.11.540 ("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."); 3 AAC 305.050 (a) ("an applicant for renewal of an alcoholic beverage license … must file a completed application … A complete application must be on a form prescribed by the board and include the information and documentation set out in this section, the application fee, and fees for renewal of licenses and endorsements as set out under 3 AAC 305.145.").

is a complete application, it was submitted no earlier than December 29, 2024. The notice given pursuant to AS 04.11.520 confirms that the renewal application was deemed complete on or about December 30, 2024. This is nearly a year after the deadline for submission of a completed renewal application. Because a complete renewal application was not submitted, and the required fees and penalty fees were not paid, by February 28, 2024, the license expired at 12:00 midnight February 28, 2024.[21]

2. *The applicant may not be issued a new license and REPL # 3293 cannot be reinstated.*

a. The applicant cannot be issued a new license.

Alaska Statute 04.11.540 states: "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."

First, the City of Kodiak has not been given notice of an application for a new REPL in Kodiak,[22] and it is unaware of any publishing of the notice that would be required for a new license.[23] Until a complete application for a new license has been submitted, and the City (and Kodiak Island Borough) are given notice of the application and an opportunity to protest, no new license may issue.

Second, if an application for a new REPL had been submitted for 116 Rezanof Drive premises, the applicant would need to demonstrate good cause for failure to file a timely renewal application.[24] The City is unaware of good cause that would excuse the applicant's failure to file a timely file a complete renewal application.

b. License No. 3293 cannot be reinstated.

The board's regulations allow it to consider "a written request to reinstate the license" that expired because the applicant failed to submit a complete renewal application by February 28 of the applicable year."[25] Even if the holder of the expired license satisfies the mandatory requirements for reinstatement, reinstatement, when otherwise allowed, is discretionary, not mandatory.

However, the "board will deny a request for reinstatement of a license submitted under (a) of [3 AAC 305.055] if:"

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[21] AS 04.11.540.

[22] *See* AS 04.11.520.

[23] *See* 3 AAC 305.075(a)(2).

[24] AS 04.11.540 ("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.").

[25] 3 AAC 305.055.

(1) the license became available in accordance with 3 AAC 305.040 and the license was issued to a different applicant, unless the limit of licenses under AS 04.11.400 has not been reached; or

(2) the board finds that the applicant's failure to timely file or pay was caused by

(D) any other action of the applicant, whether active or tacit, that the board finds constitutes a failure to lawfully operate the business for which the license was issued.[26]

If a written request to reinstate REPL No. 3293 has been given to the board, the City is unaware of it. And if such request has been made, the board appears to be prohibited from granting the request.

First, and explained in more detail below, the City submits that Alaska's constitution, Title 4, and the administrative regulations require that all persons be given a fair opportunity to apply for the license under the present circumstances, which has not occurred.

Second, 3 AAC 305.055(b)(2)(D) precludes discretionary renewal when the applicant's failure to timely renew the license results from the applicant's failure to lawfully operate the business for which the license was issued. That certainly seems to be what has occurred here. The Second Floor Restaurant was not lawfully operated between January 1, 2023 and the present date.[27] No other finding is possible.[28] The applicant's waiver requests demonstrate that the license was not lawfully exercised in 2022 and 2023. In addition, available information shows that the business lacks premises from which the license could be lawfully operated. If the applicant failed to surrender REPL # 3293 as required by AS 04.11.580(b), it is further evidence that the applicant has failed to lawfully operate the business.

Taken as a whole, the record creates a strong inference that the applicant failed to timely file a complete renewal application because the applicant had failed to lawfully operate the business for many years. Simply put, the applicant abandoned lawful operation of the business and for the same reason failed to timely submit a complete renewal application. It appears that the applicant completed the renewal application nearly a year after the deadline for the sole purpose of selling the license.[29]

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[26] 3 AAC 305.055.

[27] *See* AS 42.70.020.

[28] *See* State of Alaska Business License # 2139779.

[29] On January 8, 2025, the City receive notice of an application to transfer REPL #3293 to Nuniaq, LLC. Nuniaq Cafe & Deli opened relatively recently and has been an excellent addition to the dining options in downtown Kodiak. The business has sales tax delinquencies, but it has been working with the city to cure those and would likely be a good candidate for an REPL when those issues are resolved. While the City will ultimately be please to see more of the issued but unused Kodiak REPLs put into active use by restaurants such as Nuniaq Cafe & Deli, it would be improper for the board to issue a

3. All interested persons should be given fair opportunity to apply for the available REPL.

As the board is aware, demand for restaurant and eating place licenses for Kodiak significantly exceeds the four licenses authorized. With limited exception, the board must deny application when there are not licenses available.[30]

A license becomes available "30 days after a notice of expiration has been sent to a licensee due to non-renewal of the license and not later than April 15 where the license becomes available based upon the count of the relevant population[.]" Alaska Statute 04.11.550 states:

> On or before February 15, the director shall mail a notice of expiration to each licensee who has not either (1) filed an application to renew a license, along with any applicable affidavits and all fees due, or (2) notified the director of an intent not to do so. Failure of the director to mail this notice of expiration does not waive the requirement that the application for renewal be filed by February 28.

It would be inequitable to deny interested persons a reasonably opportunity to apply for the Kodiak REPL that became available by March 16, 2024.[31]

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license for Second Floor Restaurant solely so that its owner can sell the license. Notably, the transfer application would also relocate the premises. This is not the acquisition of a restaurant that holds a license, but the purchase of an REPL license. Second Floor Restaurant has not actively exercised REPL #3293 in years and has no premises from which to exercise it.

Waiving years of failure to actively exercise its license and issuing a license to Second Floor Restaurant solely so that Second Floor can sell that license would blatantly defeat the statutory directive that a license issued under Title 4 "is a personal privilege, not a property interest." The holder of expired REPL #3293 did not exercise the privilege granted and does not intend to. The present application has been made so that a license may be sold. The sole reason to issue Second Floor Restaurant an REPL (and the only plausible argument that it will return to active use) is so that REPL may sell the license. This would purely be a property interest as the applicant does not intent to enjoy the "personal privilege" granted by the license, but to sell the license to another. Granting this application would be granting Second Floor Restaurant a property interest, no more, no less.

Aside from turning a personal privilege into a marketable property interest in contravention of AS 04.11.660, issuing Second Floor Restaurant an REPL so that it can convey the license to Nuniaq, LLC unfairly denies other local entrepreneurs an opportunity to apply for the available REPL license. Assuming Nuniaq, LLC resolves its sales tax delinquencies, as it likely will, it would be a good candidate to apply for a new REPL. Nuniaq, LLC and other local restaurateurs should be given equal opportunity to apply for that license.

[30] 3 AAC 305.040.

[31] 3 AAC 305.040(2). The City assumes that the AMCO director sent the expiration notice on or before February 15, 2024 as required by AS 04.11.550.

AMCO publishes a list that identifies the number of allowed license types for each community as well as the number of licenses issued.[32] It identifies that four REPLs are authorized for Kodiak and that four were issued. This information was accurate as of January 16, 2024. However, an REPL was available in Kodiak no later than March 16, 2024.[33] Insofar as the City has been able to determine, no public notice of the availability of an REPL was given.

"A license issued under [AS Title 4] is a personal privilege, not a property right."[34] In accord with constitutional mandates of equal protection and equal opportunities,[35] the regulatory regime manifests an intent that this privilege is equally available to all qualified persons,[36] and to avoid monopolies.[37]

However, it appears that the current applicant is the only person who had notice that an REPL was available. All other interested persons would reasonably rely upon the license availability list published by AMCO and would have no reason to believe that a license had become available subsequent to publication of the list. As far as the City can determine, the only mechanism by which an interested party other than the holder of the expired license could have learned that REPL # 329 had expired, and therefore a license was available, is by periodically inquiring with AMCO. Yet the holder of the expired license is given written notice that the license has expired and is therefore on notice that a license is available.[38]

There is no sound reason why the holder of an expired license, who by definition failed to act to retain the privilege granted by the license, should have an advantage over all other persons by receiving notice that a license is available when no other interested parties are given such notice. This is particularly inequitable where published records suggest that no REPL for Kodiak is available.

D. Waiver of operation applications for 2022, 2023, and 2024 should be denied.

On December 29, 2024, the applicant filed requests for waiver of the requirement that the license be exercised for at least 240 hours for 2022 and for 2023. In summary, the applicant argues that the license could not be actively exercised during these years because the building in which the licensed premises were located changed ownership and the applicant had difficulties with the new landlord.

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[32] https://www.commerce.alaska.gov/web/Portals/9/pub/ABC/OtherAlcoholResources/PopLicCountChart1.16.24.pdf

[33] *See* 3 AAC 305.040(2). The City presumes that the AMCO director mailed the notice required by AS 04.11.540.

[34] AS 04.11.660(a).

[35] Alaska Const. Art. I. § 1 ("all persons are equal and entitled to equal rights, opportunities, and protection under the law").

[36] *See* 3 AAC 305.100-.105.

[37] AS 04.11.690.

[38] AS 04.11.540.

"Under AS 04.11.330(a)(3), 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."[39] The board cannot reasonably find that the expired license was not actively exercised for reasons beyond the applicant's control.

First, failure to actively exercise REPL # 3293 for the past decade cannot be explained by transfer of the real property in the summer of 2021.[40] The applicant's difficulties with her former landlord in 2022 and 2023 cannot reasonably be said to be the reason the license was not actively exercised when failure to actively exercise the license in 2022 and was the continuation of a failure to actively exercise the license since 2014.

Second, the applicant has not shown why the difficulties with the former landlord prevented active exercise of the license *for over two years*. The applicant has not shown that she used reasonable diligence to actively exercise the license despite the difficulties with the landlord. "A breach of the covenant of quiet enjoyment 'whether the covenant is expressed or implied, occurs if the lessee's enjoyment of the leased land is disturbed in a substantial manner either by the lessor or by the owner of a title paramount.'"[41] The conduct alleged of the landlord would violate such covenant and, based on the facts presented by the applicant, appears to be tortious. The applicant fails to identify what efforts she made to remedy the complained of conduct and it appears that judicial redress was not sought.[42] Nor has the applicant shown that she made diligent efforts to obtain alternative premises from which to operate the license.

Failure to actively exercise the license for some period of time as a result of the landlord's alleged interference is reasonable and beyond the applicant's control. Assuming that the landlord's interference initially prevented active exercise of REPL # 3293 and assuming that it would have been exercised but for this interference (an assumption belied by the record), the applicant could have and should have sought to remedy that interference. The applicant has not shown what, if any, efforts were made to ensure that the license was actively exercised despite the complained of interference.

E. The board cannot grant a third, much less a tenth, waiver.

The applicant submitted waiver requests for not operating the license for the time required under AS 04.11.330(a)(3) or (d) in 2022 and 2023. But as shown above, the license was not operated for the time required under AS 04.11.330(a)(3) for several of the preceding calendar years, likely

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[39] 3 AAC 305.120(b).

[40] *See* Statutory Warranty Deed, recorded as Document No. 2021-001557-0, Records of the Kodiak Recording District, Third Judicial District, State of Alaska.

[41] *Berrey v. Jeffcoat*, 785 P. 2d 20. 23 (Alaska 1990).

[42] CourtView does not show any suit involving the property owner, Second Floor Restaurant, or Sook Yun, nor any case involving Sung W. Kim in the past decade.

eight. Additionally, were the expired license reinstated, the applicant would need to request a waiver for 2024 as the license was not actively exercised in 2024.

> (e) The board may deny a third or subsequent, consecutive application for waiver
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> (1) unless the licensee clearly shows that the licensed premises were not operated, because the premises were condemned or substantially destroyed by any cause;
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> …
>
> (f) Absent circumstances to the contrary, the board will deny a third or subsequent, consecutive application for waiver in the event of condemnation or destruction of the premises if the premises identified on an applicant's license are not leased or owned by the licensee. Additionally, a third or subsequent consecutive application for waiver that does not identify a licensed premises location will be denied.[43]

Whether or not the applicant sought and the board approved applications for waiver for any of 2014, 2015, 2016, 2017, 2018, 2019, 2020, or 2021, the record shows that the applicant had not satisfied AS 04.11.330(a)(3) prior to seeking earlier renewals of REPL # 3293. The applicant should not now benefit from earlier failures to comply with the licensing requirements. Unless the applicant satisfied the burden of showing that REPL # 3293 was actively exercised in 2014, 2015, 2016, 2017, 2018, 2019, 2020, and 2021, the board should treat the requests for waiver for 2022 and 2023 as the ninth and tenth requests for waiver respectively.[44]

Even if the board disregards the lengthy history of failure to actively exercise the license as required by Alaska statute, it cannot disregard that the license was not actively exercised in 2024 based on the fact that the applicant did not submit a timely renewal application. The applicant, at a minimum, must demonstrate that she satisfies the requirements for a third consecutive waiver — waiver of the failure to actively exercise the license in 2024.

The applicant cannot demonstrate that she satisfies the requirements for a third waiver. First, the applicant cannot show that the premises were condemned or substantially destroyed. Even if it were otherwise, the board would be required to deny a third waiver based on condemnation or destruction because the premises identified on an applicant's license are not leased or owned by the licensee.[45]

Finally, "a third or subsequent consecutive application for waiver that does not identify a licensed premises location <u>will be denied</u>."[46] The waiver applications dated December 29, 2024

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[43] 3 AAC 305.120.

[44] Even if waivers for 2020 and 2021 are not "counted" toward the total as a result of the pandemic, the present waiver requests would need to be the seventh and eighth requests.

[45] *See* 3 AAC 305.120(f).

[46] 3 AAC 305.120(f) (emphasis added).

nominally identify the premises address as 116 Rezanof Drive. However, 3 AAC 305.120(f) must be interpreted to mean that that the application identifies (i) actual existing premises that (ii) are under the control of the applicant. In addition to other provisions,[47] the statutory definition of "licensed premises" demands as much.[48] If an applicant could satisfy 3 AAC 305.120(f) by simply identifying *any* premises, the requirement that the applicant identify a licensed premises location would serve no purpose.

The owner of the 116 Rezanof Drive property has informed the City that the applicant does not have a lease to premises at that property. The applicant's waiver applications tend to confirm as much. As the applicant's right to possess the identified premises is doubtful, the applicant should be made to produce evidence showing that the applicant has the right to possess the premises. Absent reasonable proof of the right to possess as 116 Rezanof Drive, the waiver applications should be denied because they do not identify a premises that the applicant has the right to possess. And if the Board were to reissue REPL # 3293, the applicant would necessarily need to immediately request waiver for 2024, which would indisputably be at least the third consecutive waiver, and 305.120(f) mandates that it "will be denied."

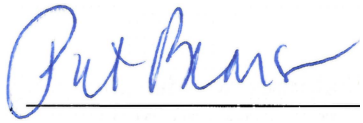
CONCLUSION

The holder of expired REPL #3293 failed to timely submit a complete renewal application, and for good reason: The license has not been actively exercised in many years. Putting aside the many technical defects that preclude the board from reissuing REPL #3293, the spirit of the laws and public policy also militate against reissuing the license. A license issued under Title 4 is not a property interest. It is a privilege that must be actively exercised for the benefit of the public. This has not been true of REPL #3293 for many years and the applicant fails to show that the license would be so exercised were it reissued.

REPL #3293 expired. AMCO should give public notice that an REPL for a location in the City of Kodiak is available, providing all local entrepreneurs equal opportunity to obtain the privilege of operating the license. The board can then, in accordance with 3 AAC 305.105, select among the mutually exclusive and competing applications.

Sincerely,

CITY OF KODIAK



[47] *E.g.*, AS 04.11.580; AAC 305.045(c)(5); 3 AAC 305.050(c)(5).
[48] AS 04.21.080(b)(22).