M E M O R A N D U M

TO: **ANCHORAGE ASSEMBLY COMMUNITY AND ECONOMIC DEVELOPMENT COMMITTEE**

FROM: **JASON BRANDEIS, ATTORNEY FOR TOP SHELF HERBS OF ALASKA, LLC (LICENSE #M22150)**

RE: **POTENTIAL OBJECTION TO SLUP APPLICATION (#M22150)**

DATE: **MARCH 4, 2020**

This memo is provided to the Community and Economic Development Committee in anticipation that certain objections to this SLUP application will be made by Tahnee Seccareccia, Judith Conte, or others.

As discussed in more detail below, these objections focus on whether Chism Leimbach, a potential licensee and one of the owners of Top Shelf Herbs of Alaska, LLC, is eligible to be a licensee for a State of Alaska marijuana establishment and a Municipality of Anchorage marijuana establishment.

Ms. Seccareccia and Ms. Conte have previously argued to the State of Alaska Marijuana Control Board, and are likely to argue again to the Anchorage Assembly, that the state regulations and municipal ordinances bar Mr. Leimbach from licensure due to a previous criminal misdemeanor conviction. Mr. Leimbach disagrees and contends that the objectors have misinterpreted the law, and that he is eligible to hold a marijuana establishment license because the applicable regulations and ordinances do not prohibit licensure when a prior misdemeanor conviction has been set aside via suspended imposition of sentence (SIS).

I. Factual Background

Top Shelf Herbs of Alaska, LLC ("Top Shelf") applied for a State of Alaska Retail Marijuana Store License (License #22150) and had its application deemed complete on October 23, 2019. The application was considered at the November 13, 2019 State of Alaska Marijuana Control Board (MCB) meeting and was approved with delegation.

In an unusual timing circumstance, the license received preliminary approval from the MCB before the public comment period expired. On November 21, 2019, Tahnee Seccareccia submitted a public comment objecting to this license application, alleging

that Mr. Leimbach had a prior criminal conviction that barred him from licensure, and that he lied on his application. (See Exhibit A)

On December 16, 2019 Top Shelf's attorneys responded and argued that, pursuant to the applicable regulations, Mr. Leimbach was eligible for a marijuana establishment license because his prior misdemeanor conviction was set aside via a suspended imposition of sentence (SIS) and that he did not misrepresent any information on his application. (See Exhibit B)

On December 20, 2019, Top Shelf submitted its Special Land Use Permit for Marijuana application with the Municipality of Anchorage.

On January 3, 2020, Judith Conte, an attorney representing Tahnee Seccareccia, submitted another letter to the MCB in opposition to Mr. Leimbach's state license application. This letter raised the same points as Ms. Seccareccia's previous objection. (See Exhibit C)

On January 9, 2020, the attorneys for Top Shelf responded to Ms. Conte's letter and explained that her objection ignored key language of the regulation at issue, did not consider principles of statutory construction, and mis-stated the specific intent requirement for a finding of unsworn falsification. (See Exhibit D).

On January 23, 2020 the Alaska Marijuana Control Board ("MCB") heard the objection in executive session. During this session, both sides presented their arguments and Assistant Attorney General Joan Wilson provided an informal analysis to the MCB. AAG Wilson stated that she largely agreed with Top Shelf's legal analysis and advised the Board that, based on the legal arguments presented, if they were to deny the license on these grounds, the licensee would likely prevail on appeal. Ultimately, the Board moved to rescind the previous approval with delegation and tabled the application without prejudice, pending further review by AMCO staff.

II. Brief Legal Analysis of the Applicable Ordinance

The State of Alaska and the Municipality of Anchorage have nearly-identical restrictions on criminal backgrounds and license eligibility. (See Exhibits E and F). Accordingly, the legal analysis and relevant caselaw discussed in the attached letters, which concerns the state regulations, is similarly applicable to the affected sections of the Anchorage Municipal Code.

The Anchorage Municipal Code states, in relevant part:

D. The municipality will not issue a marijuana establishment license to a person that:

1. Is prohibited under AS 17.38.200(i) from receiving a marijuana establishment license because of a conviction of a felony; if the applicant is a partnership, limited liability company, or corporation, the municipality will not issue a license if any partner holding an interest in a partnership, any member holding an ownership interest in a limited liability company, or any owner of a corporation's stock is prohibited under AS 17.38.200(i) from obtaining a license; **in this paragraph, "conviction of a felony" includes a suspended imposition of sentence;**

2. Has within the preceding five years been found guilty of:

   a. Selling alcohol without a license in violation of AS 04.11.010;

   b. Selling alcohol to an individual under 21 years of age in violation of AS 04.16.051 or AS 04.16.052; or

   c. A misdemeanor crime involving a controlled substance, violence against a person, use of a weapon, or dishonesty; or

3. Has, within two years before submitting an application been convicted of a class A misdemeanor relating to selling, furnishing, or distributing marijuana or operating an establishment where marijuana is consumed contrary to state law.

See AMC 10.80.010 – License Restrictions (emphasis added)

Both the Municipal Code and the State Marijuana Regulations specify in paragraph (D)(1) that "'conviction of a felony' includes a suspended imposition of sentence." That is, if an individual has a felony conviction that was set aside by SIS, they still remain ineligible for a license—essentially, SIS does not matter here because in this paragraph the definition of "conviction of a felony" includes SIS. In other words, a felony conviction is a felony conviction regardless of whether it was set aside by SIS. Even if set aside, you are still deemed to have a conviction for licensing purposes.

Conversely, the subsequent paragraphs addressing prior misdemeanor offenses specifically do not absorb SIS into the definition of guilt or conviction of a misdemeanor. In those paragraphs, the definition of "conviction of a misdemeanor" does not include a conviction that was set aside by SIS. Thus, if a misdemeanor conviction was set aside by SIS, one is not considered to have a disqualifying conviction for licensing purposes. If the opposite was true—if being found guilty of a misdemeanor or having a misdemeanor conviction was intended to include a suspended imposition of sentence in those paragraphs, the ordinance would say so, just as it does in paragraph (D)(1) for a felony conviction. But since the language used in paragraphs (D)(2) and (D)(3) deviates from that used in (D)(1), it must be inferred that a suspended imposition of sentence is not included in the definitions of guilt or conviction in those paragraphs.

Accordingly, unlike with a felony conviction, in the case of a misdemeanor, SIS does matter because the legislative drafters intended for individuals with misdemeanor convictions set aside by SIS to be eligible for marijuana establishment licenses.

Several reasons support this conclusion. First, the language is clear on its face. That the condition of SIS is specifically mentioned in one paragraph, (D)(1), and not the others indicates that the drafting body only intended the condition to apply to that specific paragraph covering felony convictions—indeed the code literally says that it applies only "in this paragraph."

It makes sense that the Anchorage Municipal Code and the Alaska Marijuana Regulations would establish different standards for license eligibility based on the severity of one's criminal past. Namely, if you have a felony conviction that is set aside, you are still considered to have a conviction and are ineligible under paragraph (D)(1). But if you have a misdemeanor conviction that was set aside, you are no longer deemed to have a conviction for these purposes and you are eligible for a license under paragraphs (D)(2) or (D)(3).

Next, this interpretation is consistent with the general principles of statutory construction used in Alaska. Specifically, the principle of *expressio unius est exclusio alterius* which "establishes the inference that, where certain things are designated in a statute, 'all omissions should be understood as exclusions.'" *Ranney v. Whitewater Engineering*, 122 p.3d 214, 218 (Alaska 2005) (internal citations omitted). This has been interpreted as "the expression of one thing implies the exclusion of others." *Sonneman v. Hickel*, 836 P.2d 936, 939 (Alaska 1992).

In practice, this means that when a legislature includes particular language in one section of a statute or regulation, but omits it in another section of the same act, it is generally presumed that the legislature acted intentionally and purposely in the disparate inclusion or exclusion. *See* 2A Sutherland Statutory Construction § 47:23 (7th ed.). Here, *expression unius* establishes that the decision to specifically exclude individuals with felony convictions set aside by SIS from licensure but not to exclude individuals with misdemeanor convictions set aside by SIS was intentional and should be followed.

Finally, this interpretation tracks Alaska public policy. The applicable code section and regulations recognize the principle of reformation and the Alaska constitutional right to rehabilitation by removing some of the legal impact of a set-aside misdemeanor conviction. *See State of Alaska v. Platt*, 169 P.3d 595, 599-600 (Alaska 2007). To be clear, setting aside a conviction "does not change the fact that an individual was previously found guilty of committing a crime." *Id.* at 599. But a conviction is a legal term of art and "a conviction that has been set aside loses much of its legal importance in future legal proceedings." *Id.* Indeed this principle is what was communicated to Mr. Leimbach by his prior criminal attorney and the judge at his sentencing hearing when he agreed to plead guilty and participate in the SIS process. This is not to say that a set-aside conviction can never be considered when reviewing a licensee's criminal history, but *Platt* establishes that it is only appropriate to do so when the applicable statute or regulations allow the regulatory body such authority. In *Platt,* which dealt with a question related to a

Board of Nursing regulation, the statute did not preclude consideration of prior misdemeanors, even if they had been set aside. But in this case, the regulations and Municipal Code are specific that while an SIS felony is a bar to licensure, an SIS misdemeanor is not.

III. MCB Decision and Current Status of State License Application

The attorneys for Top Shelf disagree with the MCB decision to rescind the previous approval with delegation and to table Top Shelf's application pending further AMCO staff review. We believe that the applicable regulations clearly and specifically exclude an SIS misdemeanor from what is considered a disqualifying offense, and that Mr. Leimbach is not barred from being a licensee.

Part of AMCO staff's review will also be to determine whether there is evidence to support a finding of unsworn falsification based on Mr. Leimbach's actions when he certified the information on the licensing forms. We believe this inquiry is unnecessary. A charge of unsworn falsification requires (1) the intent to mislead a public servant in the performance of a duty, and (2) submitting a false written statement that the person does not believe to be true. See AS 11.56.210(a). But since, as explained above, the state regulations and applicable state forms do not require disclosure of an SIS misdemeanor conviction, the information Mr. Leimbach provided was true and correct and the factual predicate for unsworn falsification is not present—there can be no intent to mislead and no submission of a false statement if the information was accurate in the first place.

However, in the interest of full cooperation, Mr. Leimbach has agreed to participate in the AMCO investigation. And the process of this investigation has revealed additional facts that support Mr. Leimbach's position that he was correct in his understanding that the regulations do not require him to disclose a conviction set aside by SIS. Specifically, we confirmed that (1) Mr. Leimbach's prior criminal attorney advised him that after completing one year of probation, his conviction would be set aside by SIS and he would be eligible for a marijuana establishment license; (2) the judge at Mr. Leimbach's change of plea hearing explained that "[I]f you complete the probation with no violation of law, the court would effectively erase your conviction"; and (3) when Mr. Leimbach was filling out the MJ-00 forms, he called his prior criminal attorney who advised him that "successfully completing an SIS meant that [his] conviction would be totally removed from [his] record and that [he] could certify that [he] was not convicted of a misdemeanor offense."

This last fact is directly relevant to this SLUP application because the SLUP application form requires applicants to list all criminal convictions, notwithstanding the form of the judgment. When filling out this form, Mr. Leimbach understood that to mean that he was required to disclose all convictions, even those that were resolved by an SIS and had been successfully set aside. Of course, Mr. Leimbach did disclose such convictions to the Municipality on the SLUP application form.

The AMCO investigation is not yet complete, but we anticipate the MCB issuing a ruling at its next meeting on April 2, 2020.

IV. CONCLUSION AND RECOMMENDATION

Top Shelf Herbs requests that this committee disregard any objections based on Mr. Leimbach's prior set-aside conviction and recommend approval of the Top Shelf SLUP to the Anchorage Assembly. Mr. Leimbach disclosed his prior misdemeanor conviction on the SLUP application form, and that prior conviction does not bar him from receiving a marijuana establishment license because it was set aside by SIS. Therefore Mr. Leimbach is eligible for a marijuana establishment license under AMC 10.80.010(D).

JMB/sm

From: Tahnee Seccareccia [mailto:tahneeseccareccia@gmail.com]
Sent: Thursday, November 21, 2019 10:41 AM
To: Marijuana Licensing (CED sponsored) <marijuana.licensing@alaska.gov>
Cc: Chismleimbach@yahoo.com
Subject: Fwd: State of AK vs Leimbach, Chism

Good Afternoon,

I am writing to formally object to the license and new marijuana application for Top Shelf Herbs of Alaska, License Number 22150. I do not believe that Mr. Chisim Leimbach, the primary owner/ operator and licensee has been honest on his application. On page 2 of 3 of the AMCO application, Mr. Leimbach initialed the first, fourth, and fifth statements. However, as you can see on the attached documents, these statements are false. According to public records on Court View, Mr. Leimbach was charged originally in 10/13/2016 with a class c felony involving misdemeanor involving a controlled substance (marijuana). This charge was amended to a class a misdemeanor, he pled guilty to this reduced charge involving a controlled substance on 4/17/2018. On 9/6/2019, that conviction was set aside after an SIS. I can't help but wonder what criminal record/history he submitted as it seems that he has omitted this very important criminal case.
However, In Alaska Board of Nursing v. Platt 169 P3d 595 (Alaska 2007), the Supreme Court gutted the idea of a suspended imposition of sentence. Alaska Statute 12.55.085 authorizes the superior court to suspend the imposition of a sentence and thereafter set aside a conviction if the defendant successfully completes a probationary period. It is not truly expunged but it was the best we had. The Court allowed the Board of Nursing to use the prior set aside convictions against her and refused to allow her to become a nurse. A set aside conviction is considered "past conviction information" per AS 12.62.900(20). When a Suspended Imposition of Sentence is set aside the disposition changes to "conviction set aside". Even though the charge was set aside, it remains on your criminal history. Additionally, though retail marijuana and cultivation is legal in Alaska, we need to remember that it is still a federally controlled substance. Please do not allow this application to move forward as this would be a clear violation of state statutes and guidelines. If you choose to approve his application, I would like for someone from AMCO to please explain to my why this was approved despite this clear violation of laws, statutes and code, and the multiple lies and misrepresentations of material fact on his AMCO application.

Sincerely,

Tahnee Seccareccia
20 Year Spenard Resident

Birch Horton Bittner & Cherot
a professional corporation

Jason Brandeis
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December 16, 2019

VIA ELECTRONIC DELIVERY

Alcohol & Marijuana Control Office
550 W 7th Avenue, Suite 1600
Anchorage, AK 99501

RE: Top Shelf Herbs of Alaska (License #22150)
Our File No.: 508190.1

Dear Marijuana Control Board:

I am writing on behalf of my client, Top Shelf Herbs of Alaska (License #22150), in response to an objection to its license application submitted by Tahnee Seccareccia on November 21, 2019.

Ms. Seccareccia's objection is based on an allegation that Chism Leimbach, one of the members of Top Shelf Herbs of Alaska LLC, is not eligible to be a marijuana establishment licensee due to a disqualifying prior criminal conviction. Ms. Seccareccia's objection, though seemingly well-intentioned, relies on a flawed legal analysis and a mis-reading of the applicable regulations. As explained below, Mr. Leimbach is eligible for a license and did not intentionally misrepresent information on the Form MJ-00 that was submitted with his application. Accordingly, the information provided by Ms. Seccareccia should not affect the Marijuana Control Board's decision to approve this license application.

Under 3 AAC 306.010(d)(2)(C) and 3 AAC 306.010(d)(3), the Board will not issue a license to an individual who has been found guilty of a misdemeanor crime involving a controlled substance within the preceding five years, or to an individual who has been convicted of a class A misdemeanor relating to the selling, furnishing, or distributing marijuana within the past two years. Mr. Leimbach did plead guilty to a class A misdemeanor charge relating to marijuana in 2018, but Mr. Leimbach's conviction was set aside via a suspended imposition of sentence (SIS). This means that although the conviction remains a part of Mr. Leimbach's history and is in the public record, the conviction lost most of its legal effect and has limited bearing on future proceedings. *See State of Alaska v. Platt*, 169 P. 3d 595, 599 (Alaska 2007). The marijuana licensing regulations recognize this principle and that a suspended imposition of sentence indicates a "substantial showing of rehabilitation." *Id.* The regulations accordingly specifically exclude a set-aside misdemeanor conviction from being considered a disqualifying offense.

The case Ms. Seccareccia cites, *State of Alaska v. Platt*, is informative, but does not mandate the outcome she suggests. That case is not directly controlling because it involves a completely different licensing scheme and the Board of Nursing regulations considered there were much broader than those present here. The nursing regulation at issue in *Platt*, AS 08.68.270(2),

stated that the board could deny a license to a person who "has been convicted of a felony or other crime if the felony or other crime is substantially related to the qualifications, functions or duties of the licensee." The license application in *Platt* also specified that "convictions include suspended imposition of sentence." *Id.* at 595. Thus, the Alaska Board of Nursing was given wide latitude to consider *any* criminal history, regardless of whether a conviction was set aside or not. That is not the case here, as the Alaska marijuana licensing regulations were drafted with a narrower scope.

The Alaska marijuana licensing regulations require a different outcome when reviewing previous misdemeanor offenses. Similar to the nursing regulations at play in *Platt,* the marijuana regulations state that when the applicant has a conviction for a felony, that includes a suspended imposition of sentence—in other words, an applicant with an SIS for a felony is still precluded from obtaining a license. *See* 3 AAC 306.010(d)(1). But the regulations do not extend that same rule to misdemeanors. Per the plain language of the regulations, that limitation only applies to paragraph (d)(1), and thus only to felonies. Neither 3 AAC 306.010(d)(2) nor 3 AAC 306.010(d)(3), the regulations applicable to Mr. Leimbach's case, states that a conviction for a misdemeanor later set aside after SIS precludes an individual from obtaining a license. If the Marijuana Control Board's intent was for a set-aside conviction for a marijuana-related misdemeanor to still preclude licensure, the regulations would plainly state so—as they do in the case of a prior felony conviction under 3 AAC 306.010(d)(1).

Reading these regulations in concert with *Platt* it is clear that a set-aside conviction may be considered when reviewing a licensee's criminal history, but only when the applicable regulations or statute allow the regulatory body to do so. In *Platt,* the statute did not preclude such consideration. In this case, the regulations specifically exclude an SIS misdemeanor from being considered a disqualifying conviction. Mr. Leimbach is therefore not precluded from being a licensee under 3 AAC 306.010(d)(2)(C) or 3 AAC 306.010(d)(3).

Ms. Seccareccia also accuses Mr. Leimbach of "misrepresentations of material fact on his AMCO application." Any perceived misrepresentation in this matter is likely due to confusion stemming from inconsistency between the applicable forms and the regulations, not intentional misrepresentation. The MJ-00 form asks for certification of these two items in Section 4:

> I certify that I have not been convicted of a misdemeanor crime involving a controlled substance, violence against a person, use of a weapon, or dishonesty within the five years preceding this application.
>
> I certify that I have not been convicted of a class A misdemeanor relating to selling, furnishing, or distributing marijuana or operating an establishment where marijuana is consumed within the two years preceding this application.

While setting aside a conviction "does not change the fact that an individual was previously found guilty of committing a crime" and does not equate to expungement, "a conviction that has been set aside loses much of its legal importance in future legal proceedings." *Platt,* 169 P.3d at 599. Thus, it was reasonable for Mr. Leimbach to assume that the statements on the form were

written to be consistent with the regulations, which, as explained above, make it clear that his prior conviction was not a disqualifying offense. From a licensing standpoint, Mr. Leimbach has not been convicted of a disqualifying crime, and therefore he answered the questions on the form appropriately. *Platt* is also instructive here because there the license application itself specified that "convictions" included a suspended imposition of sentence—an instruction that is notably absent from the Form MJ-00. It follows that this guidance was not included on the MJ-00 because under the regulations, convictions for such set-aside misdemeanors do not bear on a licensee's application.

There is one final piece of evidence that supports Mr. Leimbach's interpretation of the marijuana licensing regulations: Mr. Leimbach holds a marijuana handler permit, and if he had a disqualifying conviction, that permit would not have been issued. The handler permit regulation includes similar restrictions (individuals with a class A misdemeanor conviction relating to the selling, furnishing, or distributing marijuana within the preceding two years will not be issued a handler permit under 3 AAC 306.700((f)(3)), and part of the handler permit application process includes providing an Alaska Criminal History Background Check, which discloses an applicant's criminal record to AMCO. Mr. Leimbach provided this report (which includes his set aside conviction), it was reviewed, and he was still issued a handler permit.

In conclusion, we agree that individuals with disqualifying criminal histories under the Alaska marijuana licensing regulations should not be granted licenses. However, Mr. Leimbach's previous misdemeanor conviction was set aside via SIS and is therefore not considered a disqualifying previous conviction under the applicable regulations.

Thank you for your time and attention. Please let me know if you have any questions or if you need any additional information.

Sincerely,

BIRCH HORTON BITTNER & CHEROT

Jason Brandeis

JMB:sm

LAW OFFICES OF
JUDITH A. CONTE

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January 3, 2020

Alcohol & Marijuana Control Office
550 W 7th Avenue, Suite 1600
Anchorage, Ak 99501

Re: Application of Top Shelf Herbs of Alaska (License 22150)
Our file Number: 24021.4

Dear Marijuana Control Board:

I am writing on behalf of my client, Tahnee Seccareccia, who submitted a timely objection to Top Shelf Herbs of Alaska ("Top Shelf"). Her November 21, 2019 objection presented the sworn statements of Top Shelf applicant, Chism Leimbach, who misrepresented his past criminal history on Form MJ-00: Application Certifications, and said, in pertinent part:

> "I certify that I have not been convicted of a misdemeanor crime involving a controlled substance … within the five years preceding this application; and I certify that I have not been convicted of a class A misdemeanor related to selling, furnishing, or distributing marijuana … within the two years preceding this application."
>
> Form MJ-00, p. 2, October 21, 2019.

Contrary to Mr. Leimbach's notarized certifications, court records show that Mr. Leimbach pled guilty to AS11.71.050(A)(1) MICS 4, on April 17, 2018 in the criminal case of State of Alaska vs. Chism Leimbach, 2NO-17-00146CR (District Court for the State of Alaska at Nome) for manufacturing, delivering, or possessing with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one ounce containing a schedule VIA controlled substance…."

With his criminal conviction, Mr. Leimbach is not entitled to a marijuana license under 3 AAC 306.010(d)(2)(c) (*The board will not issue a marijuana establishment license to a person found guilty of a misdemeanor crime involving a controlled substance within the preceding five*

EXHIBIT C

years). See also 3 AAC 306.010(d)(3) (*The board will not issue a marijuana establishment license to a person who was convicted of a class A misdemeanor related to selling, furnishing, or distributing marijuana within two years prior to submitting an application*).

Despite clear documentation of a criminal conviction, Mr. Leimbach failed to give proper notice on his application of his criminal conviction and worse, misrepresented his criminal history to the various regulatory bodies with authority over his application including the State of Alaska, AMCO, and the local regulatory agencies with jurisdiction over his proposed licenses. In addition, Mr. Leimbach's false statements mislead the Spenard Community Council and the larger community and general public, all of whom have the statutory right to be notified of his application, review it, and comment on it. See 3 AAC 306.025 Application procedure.

The legislative history surrounding the legalization of cannabis in the State of Alaska and in the Municipality of Anchorage makes clear that accurate and honest applications are essential in order for stakeholders to properly assess whether an applicant's license is in the best interests of the public. In addition, truthful full disclosure of criteria considered in the application process is a critical factor in determining whether the application has complied with the law. Moreover, members of the public, including my client who has lived in Spenard for more than twenty years, have the right to evaluate the applicant's suitability for their neighborhood as outlined by the governing law.

When an applicant like Mr. Leimbach is dishonest on his application, the process for regulation of cannabis as established by the State and AMCO is violated and the community is left disenfranchised. Moreover, if Mr. Leimbach's misrepresentations are ignored in the application process, the community receives a clear message that the laws regulating marijuana license approval can be easily ignored. (See 3 AAC 306.025(b) *After initiating a new marijuana license or endorsement application, the applicant must give notice of the application to the public…; and (3)submitting a copy of the application on the form the board prescribes to (A) each local government with jurisdiction over the licensed premises; and (B) any community council in the area of the proposed licenses premises).*

Mr. Leimbach attempts to excuse his failure to disclose his April 17, 2018 marijuana conviction on grounds that he received an "suspended imposition of sentence" or "SIS." That reasoning is misplaced. Mr. Leimbach's subsequent suspended imposition of sentence does not change the fact that for purposes of this regulatory process, he has a criminal conviction on his record that disqualifies his application. The Alaska Supreme Court made it clear in Alaska Board of Nursing v. Platt 169 P. 3d 595 (Alaska 2007), that a licensing agency can properly deny a license to an applicant with a suspended imposition of sentence. A set aside conviction is considered "past conviction information" per AS 12.62.900(20). When a Suspended Imposition of Sentence is set aside the disposition changes to "conviction set aside". Even though the charge was set aside, it remains on his criminal history, which is confirmed by reviewing the court documents provided by the Nome Court and by looking up Mr. Leimbach's court record in Alaska Court View.

In addition, under the governing regulations, a suspended imposition of sentence is a conviction. See, for example, 3 AAC 306.010(d)(1), where conviction of a felony includes suspended imposition of sentence. Mr. Leimbach attempts to restrict the interpretation to felony convictions but there, too, he logic fails. What 3AAC 306.010(d)(1) makes clear is that an SIS is the same as a criminal conviction for purposes of evaluating cannabis applications.

When an applicant such as Mr. Leimbach makes multiple misrepresentations on his application, it is disingenuous for him to also argue he has made a "substantial showing of rehabilitation." (December 16, 2019 letter of Jason Brandeis, Esq., p.2.)

Mr. Leimbach also argues that he did not intentionally misrepresent information, intent to falsify, mislead or misrepresent is not required for an application to be denied. Instead, 3 AAC 306.020(e)(1) requires that the application be "*true, correct and complete*." Mr. Leimbach's application was not. Thus, for all of the above-stated reasons, the Application of Top Shelf Herbs of Alaska (License 22150) should be denied under 3 AAC 306.080.

Sincerely,

Judith Conte
Alaska Bar 0006018

Birch Horton Bittner & Cherot
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January 9, 2020

VIA E-MAIL
marijuana.licensing@alaska.gov

Marijuana Control Board
Alcohol & Marijuana Control Office
550 W 7th Avenue, Suite 1600
Anchorage, AK 99501

RE: Top Shelf Herbs of Alaska LLC
Our File No.: 508190.1

Dear Marijuana Control Board:

I am writing on behalf of my client, Top Shelf Herbs of Alaska (License #22150), in response to an objection to its license application submitted by Judith Conte on January 3, 2020.

To begin, we note that Ms. Conte's letter should not be accepted because it was not timely submitted. The period for public objection to this license application ended on November 22, 2019. Ms. Conte's objection was received well after that deadline. *See* 3 AAC 306.065. Ms. Conte does not cite any authority as to why this late public objection letter should be accepted as part of the record for this license application or presented to the Marijuana Control Board.

Ms. Conte is an attorney and has submitted an objection on behalf of her client, who herself previously submitted a timely objection. That her current letter follows up on her client's previous submission is unavailing. Since Ms. Conte and her client are both members of the public and are not parties to this license application, they are subject to the regulations governing public objections, which only allow written objections within 30 days of the license application being deemed complete. The regulations do not provide an opportunity for a member of the public to submit a responsive written comment. However, should the Board determine to hold another public hearing on this license application under 3 AAC 306.070, Ms. Conte and her client would presumably have an opportunity to give oral testimony pursuant to AAC 306.065. Other than that, the window for submitting objections has passed and Ms. Conte's letter should not be considered by the Board.

To the extent that the Board will still receive and review Ms. Conte's letter, we provide the following information in response.

Ms. Conte does not provide any new information regarding Mr. Leimbach's eligibility to hold a marijuana establishment license in the State of Alaska. Her letter mostly re-states the same flawed legal analysis relied on in Ms. Seccareccia's November 21, 2019 letter. And, most tellingly, Ms. Conte's letter largely ignores the critical matter of the precise plain language the Board

adopted for its regulations—specifically that different standards apply to an applicant's criminal history depending on whether a prior conviction was for a misdemeanor or a felony. It is, however, understandable that she downplays this point as it only serves to defeat her argument.

To summarize the argument from our previous letter, the applicable regulations intentionally *exclude* a conviction set-aside by suspended imposition of sentence (SIS) from the definition of a misdemeanor conviction. Conversely, the regulations specify *include* SIS in the definition of a felony conviction. See 3 AAC 306.010(d)(1). The result is that an SIS for a felony does not remove the legal impact of the conviction with respect to a marijuana license application, and an applicant with such a felony record is ineligible for a license. On the other hand, the regulations recognize the principle of reformation and the Alaska constitutional right to rehabilitation and do remove the legal impact of a set-aside misdemeanor conviction. *See State of Alaska v. Platt*, 169 P.3d 595, 599-600 (Alaska 2007).

This conclusion is supported by the plain language of the regulations. 3 AAC 306.010(d)(1) mandates that SIS related to a felony is a disqualifying conviction. But language to that effect is not repeated in either 3 AAC 306.010(d)(2) or 3 AAC 306.010(d)(3), which address prior misdemeanor convictions. In fact, section (d)(1) states on its face that including SIS in the meaning of "conviction of a felony" is limited to "this paragraph." Yet Ms. Conte ignores this and incorrectly concludes that because conviction of a felony includes SIS under (d)(1), then that same standard also applies to misdemeanors. Our disagreement with this analysis is not Mr. Leimbach's "attempt to restrict the interpretation" of the regulation, rather it is just a literal reading of the regulations themselves.

In short, if the Marijuana Control Board's intent was for a set-aside conviction for a marijuana-related misdemeanor to disqualify an applicant, the regulations would plainly state so, as they do with respect to a prior felony conviction. Any argument to the contrary is without basis.

Mr. Leimbach does not hide the existence of his prior conviction. As the Alaska Supreme Court wrote in *Platt*, setting aside a conviction "does not change the fact that an individual was previously found guilty of committing a crime." 169 P.3d at 599. But a conviction is a legal term of art and "a conviction that has been set aside loses much of its legal importance in future legal proceedings." *Id.*

Again, the existence of the prior conviction is not in dispute. What is at issue is its impact—whether the conviction is a technicality that does not affect Mr. Leimbach's eligibility to hold a marijuana establishment license, or whether it precludes licensure. In addition to the points raised above, it is worth reiterating that if Mr. Leimbach had a disqualifying conviction, AMCO would not have issued him a marijuana handler permit, since that application has essentially the same restrictions and requires an Alaska Criminal History Background Check. *See* 3 AAC 306.700(f); https://www.commerce.alaska.gov/web/amco/MarijuanaHandlerPermit.aspx. Mr. Leimbach's prior conviction, and its set-aside status, were disclosed to AMCO as part of the handler permit application process.

But even in the event that a disqualifying prior conviction could have "slipped through" the handler permit application process, there is another backstop preventing a disqualified individual from obtaining a license: 3 AAC 306.055 requires an applicant to submit fingerprints, which are then sent to the Department of Public Safety to obtain a report of criminal justice information. The Board will then use that information to determine if an applicant is qualified for a marijuana establishment license. *See* 3 AAC 306.055(b).

Ms. Conte also alleges that Mr. Leimbach "failed to give proper notice on his application of his criminal conviction" and "misrepresented his criminal history to the various regulatory bodies with authority over his application." That allegation is based on Ms. Conte's initial incorrect interpretation of the regulations, which presumes identical weight for set-aside felony and misdemeanor convictions. But as explained above, the two are treated very differently. That difference is seen not just in the plain language of the regulations themselves, but also through a full review of the statements on Form MJ-00.

The certifying statements on the form track the language in the regulations. Specifically, the certification regarding felonies states:

> -I certify that I have not been convicted of a felony in any state or the United States, *including a suspended imposition of sentence*, for which less than five years have elapsed from the time of the conviction to the date of this application. (emphasis added)

This statement directly instructs the applicant that if they have an SIS related to a felony, they cannot certify this statement. That instruction is not present in the certifying statements regarding misdemeanor convictions. Those statements, which exclude any reference to SIS, are found farther down on the page:

> -I certify that I have not been convicted of a misdemeanor crime involving a controlled substance, violence against a person, use of a weapon, or dishonesty within the five years preceding this application.
>
> -I certify that I have not been convicted of a class A misdemeanor relating to selling, furnishing, or distributing marijuana or operating an establishment where marijuana is consumed within the two years preceding this application.

Clearly, if the Board had intended SIS to be included in the definition of conviction for such misdemeanors, that would have been specified and directed on the form, as it is for a felony conviction.

Ms. Conte is correct that the form does require the applicant to certify that all information is "true, accurate, and correct" under the potential penalty of unsworn falsification. But in this case Mr. Leimbach has not committed the crime of unsworn falsification. Mr. Leimbach certified the statements on the form appropriately, as his prior conviction was set aside and a set-aside conviction is not included in the relevant definition of a misdemeanor. But even if Ms. Conte's analysis was correct, Mr. Leimbach's conduct does not rise to the level of unsworn falsification.

The Alaska Supreme Court has left no doubt that, unless otherwise specified by statute or regulation, a set-aside conviction loses most of its legal importance. *See Platt,* 169 P.3d at 599. Therefore, in a case like this, where the regulations facially reveal that SIS is not included in the definition of a misdemeanor conviction, it is certainly reasonable for an applicant to believe that it would not be considered. Additionally, unsworn falsification has an intent requirement, which is not met here. Under AS 11.56.210(a), "A person commits the crime of unsworn falsification in the second degree if, with the intent to mislead a public servant in the performance of a duty, the person submits a false written or recorded statement that the person does not believe to be true." In this case there is no evidence of intent. Any perceived misrepresentation in this matter is due to confusion stemming from interpretation of the applicable forms and the regulations, not intentional misstatement of facts.

For all of the foregoing reasons, as well as those stated in our letter of December 16, 2019, Mr. Leimbach is eligible to be a marijuana establishment licensee and the Board should not deny this license application on those grounds.

Thank you for your time and attention. Please let us know if you have any questions or if you need any additional information.

Sincerely,

BIRCH HORTON BITTNER & CHEROT

Jason Brandeis

JMB:sm

3 AAC 306.010

3 AAC 306.010. License restrictions.

(d) The board will not issue a marijuana establishment license to a person that

(1) is prohibited under AS 17.38.200(i) from receiving a marijuana establishment license because of a conviction of a felony; if the applicant is a partnership, limited liability company, or corporation, the board will not issue a license if any person named in 3 AAC 306.020(b)(2) is prohibited under AS 17.38.200(i) from obtaining a license; in this paragraph, “conviction of a felony” includes a suspended imposition of sentence;

(2) has been found guilty of

(A) selling alcohol without a license in violation of AS 04.11.010;

(B) selling alcohol to an individual under 21 years of age in violation of AS 04.16.051 or 04.16.052; or

(C) a misdemeanor crime involving a controlled substance, violence against a person, use of a weapon, or dishonesty within the preceding five years; or

(3) has, within two years before submitting an application, been convicted of a class A misdemeanor relating to selling, furnishing, or distributing marijuana or operating an establishment where marijuana is consumed contrary to state law.

Credits

(Eff. 2/21/2016, Register 217; am 2/21/2019, Register 229)

EXHIBIT E

10.80.010 - License restrictions.

A. Reserved.

B. The municipality will not issue a marijuana establishment license if the licensed premises will be located in a liquor license premises.

C. The municipality will not issue a marijuana establishment license to an applicant proposing to license a premises located in a zone in which Title 21 of the Anchorage Municipal Code does not permit the marijuana establishment to be located.

D. The municipality will not issue a marijuana establishment license to a person that:

1. Is prohibited under AS 17.38.200(i) from receiving a marijuana establishment license because of a conviction of a felony; if the applicant is a partnership, limited liability company, or corporation, the municipality will not issue a license if any partner holding an interest in a partnership, any member holding an ownership interest in a limited liability company, or any owner of a corporation's stock is prohibited under AS 17.38.200(i) from obtaining a license; in this paragraph, "conviction of a felony" includes a suspended imposition of sentence;

2. Has within the preceding five years been found guilty of:

a. Selling alcohol without a license in violation of AS 04.11.010;

b. Selling alcohol to an individual under 21 years of age in violation of AS 04.16.051 or AS 04.16.052; or

c. A misdemeanor crime involving a controlled substance, violence against a person, use of a weapon, or dishonesty; or

3. Has, within two years before submitting an application been convicted of a class A misdemeanor relating to selling, furnishing, or distributing marijuana or operating an establishment where marijuana is consumed contrary to state law.

E. A municipal marijuana establishment license is not transferable from the specific location for which it is issued to a different location. The holder of a municipal marijuana establishment license that permanently ceases to operate the business at the location for which it is issued shall surrender the license to the municipal clerk within ten days.

F. A licensed marijuana retail establishment may not allow on-site consumption unless it has a current and valid municipal on-site consumption endorsement.

(AO No. 2016-16(S), § 1, 2-9-16 ; AO No. 2017-71(S) , § 1, 4-25-17; AO No. 2017-95(S) , § 1, 5-1-17; AO No. 2018-96(S) , § 1, 11-7-18; AO No. 2019-66 , § 1, 6-18-19)