

Minutes of the Hearings Officer meeting held on Wednesday, July 23, 2014 at 12:30 p.m. in the Murray City Municipal Council Chambers, 5025 South State Street, Murray, Utah.

Present: Jim Harland, Hearing Officer
Tim Tingey, Director of Administrative & Development Services
Jared Hall, Manager of Community Development Division
Ray Christensen, Senior Planner
G.L. Critchfield, Deputy City Attorney
Jonathan Call, representing appellant
Robert Spjute, representing I-Vape
Robert Bennion, applicant

Mr. Harland opened the meeting and welcomed those present. He reviewed the public meeting rules and procedures. He indicated that Case #1501, Nick Young, has been withdrawn from this agenda.

CONFLICT OF INTEREST

Mr. Harland stated that he has no conflicts of interest for this agenda.

APPEAL - CASE #1499 – SMOKE DREAMS HOOKA ACCESSORIES & GIFT WHOLESALE, LLC – 6546 South State Street – Project #14-117

Jonathan Call was the appellant present to represent this request. Tim Tingey stated the decision for this appeal is based on the record and that no additional evidence may be brought forward. He stated that this is an enforcement issue and relates to Utah State code definitions and laws related to the location and proximity of tobacco retailers. That requirement includes distance separation from uses such as 1,000 feet from residential properties, etc., and 600 feet from other tobacco retailers. The definition of tobacco retailers has been modified within the past couple years and because of that, e-cigarette retailers have been included in the state code definition. Mr. Tingey reviewed the appeal of a decision of the Administrative and Development Services Director allowing i-Vape to continue operating as a tobacco retailer business on property located at 6546 S. State Street until October 30, 2014. In July 2013, a license was granted to i-Vape for an e-cigarette boutique on property located at 6546 S. State Street in Murray. The license was reviewed and issued under Murray City codes and ordinances, and did not account for regulations which had been recently passed by the State of Utah including e-cigarettes with Tobacco Specialty Retail – a category strictly controlled as to location. After the license had been issued, city staff became aware of the inclusion of e-cigarettes under the State Code, and in reviewing the site at 6546 S. State, it was determined that the license was in violation of regulations that were in effect at the time of issuance. On January 30, 2014, Murray City informed the owners of i-Vape that because the license had been issued in error, and because it was in violation of state regulations for location, their license would not be eligible for renewal in July. The owners were advised to seek a new location that could comply with city and state codes. In response, the owners of i-Vape eventually applied for a business license at a different location in Murray City. Unfortunately, upon review it was determined that the second location was also in violation of state codes, and the license application was denied. In recognition that available, proper locations for this category of business are limited, Staff offered to allow the operation to continue at 6546 S. State location until October 30, 2014, effectively giving the owners additional time to continue the attempt to relocate.

On June 19, 2014, the owners of Smoke Dreams, located at 6657 S. State Street filed an appeal of the administrative decision allowing i-Vape to continue operations at their current location up to October 30, 2014. It is the appellant's contention that allowing additional time for the owners of i-Vape to relocate amounts to staff making a "land use

decision in derogation” of applicable standards. Indeed, it is the appellant’s basic contention that anything less than the immediate expulsion of i-Vape is unacceptable and is an inappropriate “land use” decision being taken by staff in opposition to the ordinance.

Given the statements above, it is important to note that Staff does not dispute that the license was issued in error, and has no intention of renewing the license for the improper location. However, it is Staff’s contention that after the license was issued improperly, the situation became one of zoning enforcement. Staff is often in the position of promoting or enforcing compliance with various standards and regulations from the city codes and zoning ordinances. City code allows staff to conduct enforcement when regulations are not adhered to and that process has been taking place. There is nothing in state code or city code that defines time lines mandating compliance. In this particular case, staff is attempting to work with the owners of i-Vape to vacate their business premise which is improperly located. It is customary and normal in every way to allow a reasonable amount of additional time for the owners and operators of both residential and commercial property to come into compliance with the ordinance – especially where those circumstances are unusual or particularly difficult, as they are in this case. Staff recommends that the Hearing Officer deny the appeal, based on the following findings of fact:

1. Chapter 17.172 of the Murray City Zoning Ordinance does not preclude staff’s practice or ability to set time limits within which a property or condition must be brought into compliance after notice has been given.
2. The owners of i-Vape are actively pursuing relocation to an acceptable location – warranting staff’s allowance of additional time.

Mr. Harland asked Mr. Tingey about the authority for enforcement. Mr. Tingey stated that the city code outlines the executive and administrative functions that has the authority to enforce the code and the Mayor authorizes Mr. Tingey and staff to enforce these types of situations. He clarified that there is no specificity regarding time lines for compliance. He stated that enforcement is used for residential property owners, business owners, and others, etc.

Mr. Harland asked Mr. Tingey about the possible locations for having a tobacco retailer given the limitations and separations. Mr. Tingey responded that the city did measure the distances for the current i-Vape location both using the city’s mapping system and site visits. Mr. Tingey clarified that the code requires a 1,000 foot minimum distance from a residential zone, residential use or parcel, playground, youth center, childcare facility, youth center, recreational facility, arcade, park or library, certainly limits the possible locations. Because of the separation requirements, the city was willing to work with the tobacco retailer with a time extension for finding another location. He stated at this point, i-Vape has not found another location to move to and they are actively looking for other sites.

Mr. Harland stated if the time extension is not upheld, then i-Vape would have to vacate by July 31, 2014. Mr. Tingey responded in the affirmative.

Jonathan Call stated he is with Anderson, Call & Wilkinson law firm, 995 North Washington Blvd., Ogden. He stated he is filling in for Walter Keane who is the attorney

for Smoke Dreams, the appellant. Mr. Call stated the parties agree exactly what the state ordinance requires and how it's meant to be applied. The real issue, as was stated by Mr. Tingey, is whether or not there is latitude in the state code that allows for a business to sell tobacco when it doesn't have a business license. That is the claim Smoke Dreams is making with this appeal; that state code precludes a business from selling tobacco products unless they actually have a business license from the city. He stated copies of the letters from the city are attached to the staff report which are dated January 30th, June 5th and the July 7th, and are attachments #3, 4, 5 to the staff report all of which indicate the same thing, which is the city acknowledges that they are in violation of the state code. Mr. Call stated the issue at hand is this idea of whether the city has the latitude to allow a business to sell tobacco in the city limits without complying with the state code. For that point, the city cites the city code with the Mayor's administrative powers. Mr. Call stated that he would like to submit a copy of the state code, and commented that the state code should be included in the record as the staff report refers to the state code. Mr. Harland responded that he would accept a copy of the state code for the record, which has been referenced in the staff report.

Mr. Call stated that Murray City code outlines administrative regulations and general administrative procedures to the applicable departments in the form of rules, which are not in conflict with the laws of the city, or the state. He stated it is Smoke Dreams contention that allowing a business to sell tobacco without a business license, is a violation of state law, and the Mayor does not have the authority to delegate it down the chain to other city staff. The state code is included within the staff report, as attachment #2, though the state code doesn't specifically say there is a time frame to enforce this code, what it does say under subsection 3 of the state code: "A municipality shall require an entity to be licensed as a retail tobacco specialty business to conduct business as a retail tobacco specialty business." Mr. Call stated if this appeal is not granted, then the city would be allowing a business to operate for three months without a license. He quoted state code subsection 4: "A business entity that conducts a retail tobacco specialty business in a municipality shall be licensed." He stated that the code specifically states "shall" which means a "must". The tobacco specialty business is similar to other uses like alcohol sales or other uses that are regulated heavily by the state such as banks and institutions. There is no debate that the city could allow alcohol sales within the city limits without having a license from the state, similarly with lending institutions.

Mr. Call stated that he would like to comment on an issue that was raised by the respondents, i-Vape, and that issue is qualifying as a nonconforming use. He pointed out that the state code doesn't adequately define what a nonconforming use is. He stated the state code defines a nonconforming use in Title 10-9a-103.32: "Nonconforming use means a use of land that: a) legally existed before its current land use designation; (b) has been maintained continuously since the time the land use ordinance governing the land changed; and (c) because of one or more subsequent land use ordinance changes, does not conform to the regulations that now govern the use of the land." Mr. Call stated that attachment #1 of the staff report specifically states "the business license was issued on July 23, 2013 and the state code only makes an exception for someone to qualify as a nonconforming use if they were a legally established business by May 28, 2012. He clarified that over a year after, this business license was issued inappropriately, and is not appropriate for the city to continue violating the state law by allowing the sale of tobacco when they don't have a license.

Mr. Harland opened the meeting for public comment.

Robert Spjute, 8 East Broadway, Suite 550, Salt Lake City, stated he is legal counsel representing i-Vape, LLC. Mr. Spjute stated he would like to provide additional background about what i-Vape has to deal with. It is clear from the record that Murray City has interpreted the law in the way it has, and back in January decided that i-Vape will not have a renewed business license after their current license expires. He stated that since that time, i-Vape has been searching for a new location and it is very entailed to find a new location. He stated that there are very few places in the city that i-Vape could relocate. He stated it is one thing to have the limited areas, plus i-Vape then has the task of finding a location that has space to lease in one of those limited areas. Once a lease space is located, there are negotiations with the landlord and work with a realtor. He stated this process can last weeks just to find a location where they might possibly be able to conduct business. At that point, i-Vape has to propose the location to the city and let the city go through their process to determine if it something they want to approve. He stated that i-Vape has given various locations to the city seeking approval and at this point, none have been approved. He stated because i-Vape must go through this rigorous process and because there are so few locations where they can conduct business in Murray City, it is simply fair to allow i-Vape the extension for their business license. He commented that it is important to note that there is nothing in the Utah code, and there is nothing in the city code which specifically states that they can or cannot give an extension to a business license. He stated that Smoke Dreams has pointed out that a business must have a license. He stated the city didn't issue a new license, or a temporary license, they gave an extension of the current license. He stated he is unaware of anywhere in the city code that it states that the city cannot give an extension that has already been issued. The idea that the city is somehow acting beyond their authority, based on state code, and that the city cannot give an extension is wrong and there is no legal basis for it. There isn't a legal basis that has been pointed out that says the city cannot do exactly what it did.

Mr. Spjute stated that a point that has been missed is the factual basis for this appeal is wanting. He stated the main contention of Smoke Dreams is they are losing business because i-Vape, according to their interpretation, is unlawfully conducting business in Murray City. They have an extension to their license and are not doing anything unlawfully. He stated it is up to Smoke Dreams to marshal the evidence to determine whether or not they are actually losing business based on some "unlicensed" business as they contend. There is nothing in the record, there is nothing that they have given this body to determine whether or not they have actually had some type of harm. He stated that i-Vape and Smoke Dreams are located on State Street and there are plenty of businesses that actually want to be around each other, such as car sales, because the more alike businesses there are actually encourages peoples to come to their locations because they have more choice. Based on the evidence in this appeal, it's just as easy to say that Smoke Dreams might actually have more business because they are close to i-Vape. Mr. Spjute stated that giving i-Vape an extension is simply fair and i-Vape is doing everything they can to comply with the law, according to the interpretation of Murray City. He stated there is no legal basis that has been pointed out that shows the city cannot do exactly what they did. There is not a single fact showing that Smoke Dreams is being hurt and this is causing any problems whatsoever.

Mr. Harland stated he has read through all the documents and will make the findings based upon the information presented in the record. He asked if Mr. Call had any additional comments.

Mr. Call stated that in every letter the city has indicated that they will not renew the business license and in the letter dated July 7th, attachment #5 of the staff report, the underlying language in that letter specifically states “therefore we are writing to formally deny the business license application renewal at 6546 South State Street”. There is no discussion of an extension in that letter. He stated that the city has indicated in all three letters included in the staff report that they are not going to renew the business license and nothing is said about granting a temporary business license to operate. Mr. Harland responded that the letter dated June 5th indicates the October time extension. Mr. Call read from the letter dated June 5th which states: “Although your business license expires in July...you may have until October 30, 2014...” He questioned whether that counts as extending the business license, but the next letter dated July 7th states: “once your business license expires, you don’t get another one” and that it expires this month.

Mr. Harland asked Mr. Tingey for clarification regarding Mr. Call’s comments regarding the authority for the person to operate without a license. He asked was there no license, was it an extension of a license, or was the extension regarding the enforcement of the license issue. Mr. Tingey responded that the license is valid through July 31, 2014 and the city is allowing them to operate until October 30th until they find an alternative location.

Mr. Harland asked would i-Vape have a valid business license during the time extension period. Mr. Tingey responded that it would not constitute a valid business license during the time period extension. Mr. Harland clarified that i-Vape’s business license expires July 31st and the city has given a time period to i-Vape until October 30th considering the difficulties in finding suitable alternative locations. Mr. Tingey responded in the affirmative.

Mr. Harland stated that he has enough information based on the record and what has been presented in this meeting to make a decision on the appeal. Mr. Harland stated that a decision will be made and a report will be available in one week, by July 30, 2014, and will be available at the Murray City Public Works Building, 4646 South 500 West.

CASE #1500 – ROBERT & SANDRA BENNION – 5882 South 150 West – Project #14-126

Robert Bennion was the applicant present to represent this request. Ray Christensen reviewed the location and request for Hearings Officer approval to locate a detached garage accessory structure in the front yard area and a second variance to have a 17 foot setback variance for a detached garage to be located in the front yard setback at the property addressed 5882 South 150 West. Murray City Code Section 17.100.080, “Residential building lots in the R-1-8 zone shall meet a minimum 25 ft. setback depth in the front yard area” and Section 17.100.090 K, “Accessory buildings and structures are prohibited in a front yard. All accessory buildings and structures must be located in a side or rear yard”.

Mr. Christensen reviewed the definitions for determining the side yard, rear yard, and front yard. There is an existing two car garage and a carport attached to the east side of

the house. The Salt Lake County Assessor's Office records indicate the existing dwelling was constructed in 1992. The property is similar in size and shape to other properties in the area. The lot meets other general standards of the ordinance related to lot width area building height and setback. A review of the property and area shows no special circumstances relating to this property. The garage can be relocated on the lot to comply with code. Based on review and analysis of the application material, subject site and surrounding area, and applicable Murray Municipal Code sections, the Community and Economic Development Staff finds that the proposal does not meet the standards for a variance. Therefore, staff recommends denial.

Mr. Harland asked if the truck and trailer on the side of the home belongs to Mr. Bennion or to the neighbors. He asked the measurement for the side yard setback. Mr. Christensen responded that the truck and trailer belong to the neighbor and that the site plan shows a 10 foot side yard setback on this side and the minimum is 8 feet, but a total of 20 feet is required between the two side yards. He stated the main area of detached garage is within the front yard setback and a minimum of 25 feet front yard setback is required. Mr. Harland stated that the request is for a variance to have the accessory structure in the front yard and also a variance for the front yard setback for the proposed location of the accessory structure.

Robert Bennion, 5882 South 150 West, stated he had a written response and asked that he be able to submit this response. Mr. Harland accepted his written response. He took a few minutes to review the information. Mr. Harland asked Mr. Bennion about the possibility of locating the garage elsewhere on the lot. Mr. Bennion responded it is possible to locate the garage elsewhere, but it is not practical. He stated if he were to locate the garage in the rear yard, he would need a driveway longer than the street he lives on and would very inconvenient to do that. He stated that he currently has a double garage and carport.

Mr. Harland asked Mr. Bennion about the possibility of moving the proposed garage next to the home and remove the existing carport, which then would not require a variance. Mr. Bennion responded that to comply with the zoning, he would have no place to park his boat because it does not fit in the garage.

Mr. Harland asked if any neighbors have commented on this variance request. Mr. Christensen responded that he received a phone call from one neighbor residing near 5900 South inquiring about the variance, but did not voice a particular opinion regarding the variance. Mr. Harland asked Mr. Bennion if he has discussed the variance request with the neighbor to the north-east. Mr. Bennion responded that he has spoken to this neighbor who indicated that he was not opposed to the variance request and submitted a written statement in this regard, along with another statement from the neighbor to the north who also is not opposed to this request. The statements were from Mr. Jolley. at 145 West 5878 South indicating no objections and Mike Park, at 5881 South 150 West, indicating no objections.

Mr. Harland asked the proposed size for the detached garage. Mr. Bennion responded the proposed size is 20' X 22'. The garage will be primarily used to store a 1929 Model A Ford antique car he is restoring, and will not be used for his boat.

Mr. Bennion stated, in conclusion, that the people he has shown his plans to are surprised that he needs to have a variance for this proposal and they find it interesting that the garage is actually considered partly in the front yard.

Mr. Harland opened the meeting for public comment. There was no public comment made and that portion of the meeting was closed.

Mr. Harland stated that he has the information he needs to make a decision on this case. He stated that a decision will be made and a report will be available in one week, July 30, 2014, at the Murray City Public Works Building, 4646 South 500 West.

OTHER BUSINESS

There was no other business.

Meeting adjourned 1:15 p.m.

Jared Hall, Division Manager
Community and Economic Development