

Minutes of the Hearings Officer meeting held on Wednesday, August 27, 2014 at 12:30 p.m. in the Murray City Municipal Council Chambers, 5025 South State Street, Murray, Utah.

Present: Jim Harland, Hearing Officer  
Jared Hall, Manager of Community Development Division  
Tim Tingey, Administrative & Development Services Director  
G.L. Critchfield, Deputy City Attorney  
Robert Spjute, Legal Counsel for iVape,  
Jennifer Heaps, Admin & Dev Services Office Administrator  
Grant Hiller, Appellant

Mr. Harland opened the meeting and welcomed those present. He reviewed the public meeting rules and procedures.

### CONFLICT OF INTEREST

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

### CASE # 1504- APPEAL – iVAPE APPEAL OF CITY’S DENIAL OF BUSINESS LICENSE RENEWAL APPLICATION – Project #14-142

Robert Spjute was the applicant present to represent this request. Tim Tingey reviewed the appeal of Murray City’s decision to deny an application for business license renewal for iVape, LLC a tobacco retailer business on property located at 6546 S. State Street. Section 17.16.010 defines “Land Use Authority” as the planning commission, the administrative and development service director or a staff member of the Community and Economic Development Division when making any order, requirement, decision or determination in the enforcement of Title 16 or 17 of the Murray Municipal Code or any other related ordinance. This application is an appeal of a decision made by the land use authority which in this case was a decision made by the Administrative and Development Services Department director. For appeals from a decision made by the Land Use Authority, Municipal Code 17.16.050 outlines the Standard of Review which states: *“The review by the Hearing Officer, as the Appeal Authority, of the appeal or request shall be limited to the record of the land use application process resulting in the decision made by the Land Use Authority which is the subject of the appeal or request including written communications, the written land use decision and the written appeal or request. The assigned Hearing Officer may not accept or consider any evidence outside the record of the Land Use Authority unless that evidence was offered to the Land Use Authority and the assigned Hearing Officer determines that it was improperly excluded.”* Based on this information, no new evidence outside of the record shall be allowed and in review of this appeal, the Hearing Officer must evaluate the decision and conditions based on the record. The record is the information presented at the time an administrative decision was made and cannot include additional information brought forward at a later time that was not part of the evidence that was used to make a decision.

In July 2013, a business license was granted to iVape for an electronic 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 which defined electronic or e-cigarettes as a tobacco product within regulations for Tobacco Specialty businesses. This law also significantly restricts the location of these facilities within 1,000 feet of a community location which includes schools, churches, public libraries, playgrounds, parks, youth centers, recreational facilities, public arcades or within 600 feet of another tobacco specialty business or property zoned or used for residential

purposes. After the license had been issued, city staff became aware of the inclusion of e-cigarettes under the State Code through a complaint from a competing tobacco retailer, and in reviewing the site at 6546 S. State, it was determined that the license was in violation of State Code that was in effect at the time of issuance. On January 30, 2014, Murray City informed the owners of iVape in writing that the license had been issued in error, and that the business was in violation of state regulations for its location. Additionally, it was communicated that the license would not be eligible for renewal in July and the owners were advised to seek a new location that could comply with city and state codes. In spite of the advice of staff that renewal of the license was not possible and would not be granted, the owners of iVape applied for business license renewal on-line, July 2, 2014. The application was denied in writing on July 7, 2014 based on Utah law regarding tobacco retailers.

The application is an appeal of the ADS director's decision to deny the business license renewal application filed on-line July 2, 2014. The appellant asserts that the city should consider iVape as a legal, non-conforming use, and that therefore the denial is inappropriate. Ultimately, they seek zoning estoppel as a remedy. Under Section 17.16.030, the Murray City Hearing Officer is empowered to "hear and decide appeals from decisions by a Land Use Authority applying the City's land use ordinances". In essence, the Hearing Officer may review the appeal of the City's decision, and uphold or overturn that decision. While the City agrees that the appeal was made in a timely manner, and that it should be processed and ruled upon, it is important to note that granting a "claim for estoppel" is outside the authority currently hearing this application; the appeal of the City's decision may simply be denied or approved.

In the document supporting the appeal, the appellant argues that Murray City should be estopped from denying the business license renewal. The arguments make a flawed assumption that the City should consider i-Vape as a legal, nonconforming use. Because the State Code regulations which define electronic cigarettes as tobacco specialty retailers existed prior to the original license application. It is impossible for the City to classify the use as legal and non-conforming and approve an application to renew – notwithstanding any error on the city's part in the review of the original license.

The appellant asserts that "Murray City is estopped from denying iVape's business license renewal application because iVape has incurred substantial expenses to establish its business at its current location based on its obtaining a business license from Murray City." This principle and the cases cited to support it all depend broadly on assuring that the city adheres to the standards and regulations that were in place at the time a permit or approval was granted, and "estopping" the city from reinterpreting or applying more recently passed provisions – and this has simply not been the case. Murray City did err in issuing the original license, but State Codes were clearly in place and cannot be circumvented using the principle of estoppel.

It should also be noted that the applicant's reliance on Murray City's erroneous issuance of the license does not excuse the applicant from knowing or abiding by other regulations and codes related to their professional occupation. As related to the owners of iVape in Mr. Wilkinson's letter of January 30, 2014 it states *"Although the City makes every effort to verify that businesses meet all state and federal laws, it is ultimately the responsibility of the licensee to comply with all city, state and federal laws and provisions in order to be issued and operate with a Murray City Business License."*

Simply stated, for a use to be considered legal non-conforming, it must have been legal at inception. Because the license was issued contrary to Utah State law, the assertion that iVape is somehow legal non-conforming must fail. The applicant stresses that Murray City made changes to their own regulations thereby including electronic cigarettes with tobacco retail after the issuance of a license to iVape. The City does not dispute that fact; however, we do contend that establishing legal non-conformity to Murray's ordinance does not eliminate the requirement to comply with State Codes, codes to which the application cannot be considered legal non-conforming. Furthermore, the fact that the renewal application was denied based on Utah State codes was made clear again in the denial letter issued on July 7, 2014 it states "*As we have communicated in multiple letters and in conversations with you, the site does not meet the distance requirements outlined in 10-8-41.6 of the Utah Municipal Code.*"

Murray City denied iVape's application for business license renewal based on Utah State codes which should have prohibited the issuance of the original license, thus iVape is not a legal, non-conforming business and cannot be considered as such. It follows that the business license cannot legally be renewed at the present location and that the denial should be upheld.

Based on the information provided, staff concludes the following:

1. iVape's application to renew the license at 6546 South State Street was denied because that location does not meet the distance requirements identified in 10-8-41.6 of the Utah State Code; and
2. Murray City's error in issuing the original license can in no way be construed to require that iVape be considered legal non-conforming to the State Law; and
3. Murray City is required to enforce the regulations and codes of the State of Utah which apply to the requested use and property, and acted appropriately in denying the renewal application.

Mr. Tingey stated that based on review and analysis of the record presented, Administrative and Development Services staff recommends denial of the appeal.

A decision of a Hearing Officer takes effect on the date when the Hearing Officer issues a written decision. (Murray City Municipal Code Section 17.16.060(A). An appeal of the decision by the Hearing Officer may be made to the Utah District Court in compliance with Section 10-9a-801 of the Utah Code.

Robert Spjute, 8 East Broadway, Suite 550, Salt Lake City, stated he is the legal counsel for the appellant, stated in July 2013, a business license was granted to iVape for an electronic cigarette business. After the license had been issued, city staff became aware of the inclusion of e-cigarettes under the State Code through a complaint from a competing tobacco retailer. City staff determined that the license was in violation of State Code that was in effect at the time of issuance. In January of 2014, iVape was notified by the city through a letter that their business license would not be renewed. He stated there was a lag between the issuance of a business license and the actual notification that the license was issued in error. He stated that the city did this erroneously, the city made a mistake. He asked Mr. Harland if he had any questions of him.

Mr. Harland stated he has reviewed the entire brief and attachments. He asked Mr. Spjute if his client was aware that the distance requirements were not met when he applied or attempted to renew his business license online. Mr. Spjute responded that his client was aware of this when he renewed online. Mr. Harland asked if the applicant knew he did not meet the distance requirements, why he tried to renew the business license online. Mr. Spjute responded that they feel they do meet the requirements, based on the idea of estoppel. He stated estoppel does apply in this situation and when it comes down to it, the city is not correctly applying Utah law. He stated the estoppel concept is Utah law and it is incorrect to say that estoppel doesn't apply in this case.

Mr. Harland stated that the original claim was that the reason the license is valid is because of the nonconforming issue, and that they had qualified as a nonconforming use. Mr. Spjute responded that is not necessarily the case. Mr. Spjute explained that the brief does state the idea of estoppel based on what the city did, the act of actually issuing the license, puts iVape in a position where estoppel applies. He stated because of the error the city made and the reliance placed on the error in issuing the license originally, put them in a position where they, through estoppel should not be prevented from getting a license again i.e., simply renewing the license. He stated that because of what the city has done, the city has put iVape in a position where they are actually trying to prevent iVape from getting a license and is contrary to state law. Through estoppel they are grandfathered in as potentially a nonconforming use. Estoppel does not require it to be a nonconforming use, estoppel simply is that they relied on the city; the city committed an affirmative act and then tried to change that position later on after they had substantially relied on the city in good faith. Mr. Spjute stated whether the use is nonconforming is irrelevant, what is relevant is that under Utah law they are preventing them from renewing their license.

Mr. Harland asked Mr. Spjute when iVape originally applied for their business license, were they aware of state law? He commented that there is some responsibility on his client's part to research this issue because it is a unique type of business with restrictions and requirements. Mr. Spjute responded, to his knowledge, iVape was not aware of state law in 2013 when they originally applied for a business license. Mr. Spjute stated the situation is that iVape came to the city for a license, and it is up to the city to decide whether or not the applications for licenses conform with state law or not. He stated that iVape wasn't trying to hide what they were doing and the business license itself says "e-cigarettes". He stated that iVape wasn't trying to get away with anything and were simply applying for a business license and the city granted it. At that point is when things changed. He stated he agrees with the city that it is the individual's responsibility to know the law and make sure they are complying with state law, but once the city gave them their business license the onus goes back to the city. That is the point of estoppel. He stated that the city can't just say "oops, sorry we made a mistake and you've invested thousands of dollars but we're going to have to make you move". He argued it is the city's responsibility to research that issue and make sure the action they're taking is appropriate. Once the business license was issued, it is the error of the city and not the error of iVape, which is why the issue of estoppel has been raised.

Mr. Harland asked Mr. Spjute how this client settled on Murray City as a location and did they look at other localities in the area. Mr. Spjute stated that it would be best to have his client answer the questions.

Grant Hiller, 6546 South State Street, stated he is the owner of iVape. He stated the reason he picked Murray City to locate his business is because his family's business is Buehner Concrete located across the street from city hall. He stated some landlords will deny the business simply because of the nature of the business. He stated a lot of work goes into finding a location as they've learned in the last few months trying to work with the "map" given to him from the city for which they submitted two locations, but were denied those two locations within the last three months. Helping find a location is exactly opposite of what the city has done and they have wasted about 40-60 man hours of his personal time with the "maps" given to him. Mr. Hiller stated regarding what he knew about state law at the time he applied for a business license was that in June of 2013 he started seeking a location for his business, the landlord approved him for his current location and they then submitted for a business license. At that time the business was himself and his mother. He stated on June 4, 2013, he and his mother dealt with a woman named Sherrie in the business license office who clearly told him that on June 5<sup>th</sup> the City Council was having a meeting and the e-cigarette topic was to be discussed and if they wanted to assure a safe business they would need to have it done by 5 p.m. In regards to the knowingness of the law, he stated he was unaware at that time of the license process. He stated he was aware of the tobacco retailer distance at the time of the renewal, however, he submitted a business license renewal for the e-cigarettes license which is what he had from day one. He stated the city is denying the tobacco retailer license, but he was issued an e-cigarette license and that is what he renewed for online. He did not renew for a tobacco license. He stated his attorney, Mr. Spjute, was given the license in July of 2013 to open business and the license states "e-cigarettes". He stated there are multiple vape shops in the area that are operating under a mixed retail license, but he did not want to do that because it is illegal, which is why he submitted a license as an e-cigarette business. Mr. Hiller stated when he went to get the license, it was for the e-cigarette license, which at the time there were no regulations. He stated he was specifically told by Sherrie in the business license office that there were no regulations for e-cigarettes, it's not considered a tobacco product in Murray City and the city was going to give him his license, but that on the following day, June 5, 2013, that could change depending on what the city council does at the meeting. It wasn't until the following January of 2014, that they were notified of this change. He stated it is difficult to locate a place to have this type of business and find a landlord willing to lease to them, in addition to the city and state distance regulations.

Mr. Harland asked for clarification regarding the city staff providing locations for Mr. Hiller to look at, but that the locations did not meet the requirements. Mr. Hiller responded he and his attorney met with city representatives on two occasions. The first meeting the city refused to give them a map of possible locations. He asked the city for a map indicating possible locations for him to research. Mr. Spjute stated their brief includes a map given to them. He stated the map given to them does show areas that are white, and the city specifically told Mr. Hiller that if they could find a location in the "white" area, that would comply with all state and local regulations. He stated that the map the city had given them wasn't correct.

Mr. Tingey clarified that this appeal is regarding the denial on this specific site and the information being discussed regarding the map are irrelevant, and discussions with regards to other locations is not the item to be discussed for this appeal.

Mr. Harland commented that Mr. Hiller has been in violation, and that he did not technically have a valid business license since July 23, 2013 and never did have a valid

license. He stated the city did admit that they made a mistake and were not aware of the change in state law. Once the city discovered that state law had changed, the city notified Mr. Hiller that his license was invalid and that he has never had a legal license and does not meet the nonconforming issue because the use must be "legal" conforming and has to be legal before the change in state law. In this case it was the city's ordinance that was passed. He stated that iVape is not a legal nonconforming use. Mr. Spjute responded that is the reasoning for an estoppel. The whole basis of what Mr. Harland is saying, is that it was never legal. If that were the case, if a business is issued a business license and later the city declares the license was never legal, why did the city offer it in the first place? The fact that the city made this mistake; it's their mistake, not iVape's mistake. By denying the license the city is essentially saying "sorry, we screwed up but it's your fault". Mr. Spjute clarified that under Utah law, it's not the city's fault because iVape took an affirmative act upon which they relied upon in good faith only to their detriment.

Mr. Harland clarified that the appeal is based upon denial of the business license renewal. Mr. Spjute responded in the affirmative. Mr. Spjute stated that the brief points out that because of what the city did, they issued a license and based upon that license, they got for example a three year lease. While it may be a lease, and they don't have title to the property, it is still a property right that the city is essentially making iVape give up. Mr. Spjute stated that iVape now has to get out of the lease contract if they can or they have to pay for two years lease that they can't use. He stated their position is that the city denied the renewal of the business license, but based upon that reliance they have a three year lease. The way to fix that, under estoppel, is to allow them to continue to operate there for at least the three year lease.

The meeting was open for public comment. No comments were made by the public and the public comment portion was closed.

Mr. Harland asked Mr. Tingey about the location issue. He asked what type of research went into finding locations and giving Mr. Hiller a map. Mr. Tingey responded the city did not have a map that provided where these types of businesses may be located. The city did not have a map when Mr. Hiller originally came in to get a business license. He stated the city has capability of looking at distance requirements with the GIS software program, which was done. The city did not take into account uses outside of the city limits, and there were some locations thought to be possible locations, but there were distance issues related to properties in the county and the city did not have that data on properties located in the county. The bottom line is, the city tried to be customer friendly and provide information to Mr. Hiller and assist in that, but there was no specific map that was designated but was simply the city running distance requirements with using the GIS software program.

Mr. Harland stated one of the letters referred to a location on 900 East, near Ivy Place, that was a possible location. Mr. Tingey responded that location did not meet the location due to the proximity to the residential area in the county. Mr. Tingey stated typically the applicant needs to research the possible locations on their own, and the city does not typically do the distance requirements for applicants. He stated the city tried to help Mr. Hiller find possible locations because of the error the city made, but it is up to the applicant to find suitable locations.

Mr. Harland asked Mr. Hiller when he tried to renew the license at the end of June of 2014; he knew he could not legally renew his license so why would he try to renew the license. Mr. Hiller stated he received an email telling him to go online and renew his existing license and not specifically renew the tobacco retailer license. Mr. Hiller stated the city did give him a specific map, in fact on the top of the map, it clearly says "anything in the white area iVape can move in to". Mr. Hiller stated he found two addresses on his own, in addition to the address on 900 East. He submitted three locations prior to him receiving the map from the city, once he received the map he found two additional locations, which were denied by the city. He reiterated that he was attempting to renew his e-cigarette license online in June of this year, and not specifically a tobacco retailer license.

Mr. Harland asked Mr. Hiller if he has two licenses or one license. Mr. Hiller responded that his business license states specifically "e-cigarettes" and does not state "tobacco retailer" which was what he was trying to renew online in June of this year. Mr. Spjute clarified that iVape does not sell other tobacco products, but only sell e-cigarettes and accessories for e-cigarettes.

Mr. Harland clarified that the original license Mr. Hiller applied for in July 23, 2013 was for e-cigarettes. He asked Mr. Hiller if he knew that use was not allowed. Mr. Hiller responded he was unaware in June of 2013. Mr. Hiller explained that he knew that in July of 2014 with regards to tobacco retailers but he is licensed as an e-cigarette business. Mr. Hiller stated he simply responded to the email he received to renew his business license.

No other comments were made. Mr. Harland indicated that his questions have been answered and he has the information necessary to make a decision. He stated the decision is based upon the record and any new materials that have been raised today cannot be considered as part of his decision and he will base his decision on the written record. The decision will be available next Wednesday, September 3rd at noon.

Meeting adjourned 1:30 p.m.

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Jared Hall, Division Manager  
Community and Economic Development