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January 31, 2020

VIA Hand Delivery

St. Paul City Clerk's Office
310 City Hall
15 Kellogg Blvd, MN 55102

Re: Hearing Before the City Council on February 5, 2020 Relative to the Matter of All Licenses held by the University Club of St. Paul d/b/a The Commodore (the "**Licensee**") for the Premises Located at 79 Western Avenue North in St. Paul; License ID #00443940 (the "**Hearing**").

ATTN: Katie

Dear City Clerk:

The letter follows the phone conversation which I had with Katie this morning.

On behalf of the Licensee, we are submitting with this letter a 3-ringed binder which includes a number of documents. Those documents arose out of the proceeding which was conducted by the Office of Administrative Hearings. In that proceeding, the Licensee was sometimes referred to as the "Respondent", and accordingly the Licensee is referred to as the "Respondent" in the names and the bodies of the enclosed documents.

It is my understanding that hard copies of documents would normally be scanned by your office prior to distribution to the appropriate parties. Nevertheless, I informed Katie that we would deliver electronic versions of these documents via email, and discuss it further on Monday.

Please note that there is a Table of Contents at the front of this submission which will briefly identify/describe the various documents which are under each tab.

This submission may be supplemented next week.

Please feel free to contact me with any questions or comments.

Thank you.

Sincerely,

/s/ John Michael Miller
John Michael Miller

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**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF SAINT PAUL**

In the Matter of All Licenses Held by the
University Club of St. Paul, d/b/a The
Commodore for the premises located at
79 Western Avenue in Saint Paul

**AFFIDAVIT
OF
JOHN R. RUPP**

STATE OF MINNESOTA)
) SS
COUNTY OF RAMSEY)

John R. Rupp, being first duly sworn, states and alleges as follows:

1. I am the sole owner and President of the University Club of St. Paul, which is the Respondent in the above entitled matter (the “*Respondent*”). The above entitled matter is referred to herein as the “*Action*”.
2. This affidavit is made of my own personal knowledge, and if called to testify at a trial I could, and would, testify in accordance with what is stated in this affidavit.
3. In my capacity of owner and President of the Respondent, I am personally familiar with the underlying facts and circumstances regarding all aspects of the Action.
4. I have been involved in real estate development in St. Paul since 1971. I have been involved in dozens of development projects over the years and have become familiar with the policies and procedures of the City as they relate to matters concerning real estate development, zoning, licensing and permitting.

5. I am providing this Affidavit (the "*Rupp Affidavit*") in support of the Respondent's Motion for Summary Disposition (the "*Respondent's Motion*"). Several other documents are also provided with respect to the Respondent's Motion in addition to this Affidavit. One of those documents is the *Respondent's Transcript of Exhibits*. All of the Exhibits which are referred to in this Affidavit are all found in a 3 ringed binder which is being submitted herewith. Also, several of the Exhibits are originally 24" x 36" documents. In order to make them legible, copies of them in their original will be placed in a supplemental envelope and delivered herewith. The documents in the 3 ringed binder and supplemental envelope constitute the Respondent's Transcript of Exhibits. In addition, other Affidavits will also be referred to
6. The Action involves the fact that the Respondent does not have Certificate of Occupancy. To obtain one, the Respondent has been told to submit plans for the Project, arrange for a Fire Inspection, and obtain a SAC determination. As will be explained in greater detail elsewhere, the Respondent has filed a complete set of plans for the Project, but the Petitioner has failed to act on them. The Respondent has tried to schedule a fire inspection, but has been prevented from doing so because of the pendency of the Action. The Respondent has tried to obtain a SAC determination, but the Petitioner has failed to file and accurate affidavit to support such a determination.
7. The Action concerns certain property located at 79 Western Avenue, St. Paul, Minnesota, referred to herein as the "*Commodore Property*".
8. Within the Commodore Property, there are two areas on the first floor which are of particular relevance to the Action. Those areas are referred to herein as the "*Original Restaurant*" and the "*Western Dining Area*". These areas are adjacent to each another.

The approximate locations of the Original Restaurant and Western Dining Area are shown on *Respondent's Exhibit R- 20*.

9. The Original Restaurant was acquired in approximately 1984 and was operated as a restaurant/catering business.
10. The Western Dining Area was acquired by me in 2001, and was incorporated into the restaurant/catering business at that time.
11. In 2012, I decided to upgrade the restaurant/catering business and open the Western Dining Area for seating. The construction necessary to complete the upgrades is referred to herein as the "*Project*". I then contracted with McGuire, Courteau, Lucke Architects, Inc. ("*MCL*") to prepare the 24" x 36" sized plans to accompany the application for a building permit. MCL was chosen because I knew them to have a vast amount of experience and expertise.
12. MCL commenced to work on the Project and prepared the plans to be submitted to the City along with the application for a building permit. The initial plan was completed on February 1, 2012, and is referred to herein as the "*Original Plan*". Medium and large format copies of the Original Plan are included in the Respondent's Transcript as *Respondent Exhibit R-1* and *Respondent's Exhibit R-1 LF*.
13. I prepared a General Building Permit Application (the "*Application*") *Respondent's Exhibit R-2*). The Application and the Original Plan, were then delivered to the City by me on February 2, 2012. At the time the delivery, I spoke to John Skradski who was a plan examiner for the City. I informed him that I was aware that the Original Plan was not intended to be the final "approved" plan, and that a revision would be forthcoming which

would incorporate any comments/concerns which he may have; and, would finish the design of the Western Dining Room and make any revisions to the code analysis to take into account the seating in the Western Dining Room. Based on my experience with the City on numerous other projects, I was aware that the Application and Original Plan would also have to be approved by the zoning and licensing departments, a fact which Mr. Skradski confirmed at that time. It should be noted that on Application there is a reference to “For Office Use Only”. Everything below that line was filled out by Petitioner’s staff. The “Occupancy Group” is stated to be “A-2”. This is a reference to a certain occupancy group in the Building Code which includes restaurants.

14. After the delivery of the Original Plan and the Application, I recall making several inquiries regarding the status of the review. I recall receiving only one response from the City. Specifically, I received an inquiry in the form of an email dated March 30, 2012 (the “*March 30, 2012 Email*”). *Respondent’s Exhibit R-3*.
15. The March 30, 2012 Email addressed a number of properties which I owned in St. Paul. With respect to the Project, it included a request for additional information concerning the “future work” designations on the Original Plan. See the bullet points under the heading “79 Western Ave N.”
16. In response to the March 30, 2012 Email, and consistent with my conversation with Mr. Skradski referred to in ¶ 13, above, I had MCL prepare the first revision to the Original Plan. This document is referred to “*Plan Revision #1*”, copies of which are marked as *Respondent’s Exhibit R-24* (medium format) and *Respondent Exhibit R-24 LF* (large format). Plan Revision #1 revised the Original Plan in several ways which are noted in ¶ 19 of this Affidavit.

17. Plan Revision #1 was delivered to the City on May 17, 2012. Also delivered with Plan Revision #1 were two additional documents. The first of those documents consisted of five (5) pages and was drawings detailing some matters concerning the construction of doors between the Original Restaurant and the West Dining Area (“*Attachment #1*”), which is *Respondent’s Exhibit R-5*. The second of the documents consisted three (3) pages which were drawings detailing some matters concerning the toilet rooms (“*Attachment #2*”), which is *Respondent’s Exhibit R-6*.
18. In late August, 2012 I received notification that the building permit for the Project (the “*Building Permit*”) was ready to be picked up. I personally went to the DSI office to accomplish this. When I was there, I received from a front desk clerk the following:
 - a. A copy of Plan Revision #1, which had been “color coded”. A copy of this “color coded” version is referred to as the “*Approved Plan*”. (A large format copy of the Approved Plan is *Respondent’s Exhibit R-7 LF*; and a medium format copy of the Approved Plan is *Respondent’s Exhibit R-7*.) Note that the Approved Plan is the same as Revision 1, with the exception that during the plan review process, it had been “color coded” by the plan review staff.
 - b. A copy of a Building Permit, which indicated that it had been approved on August 28, 2012; (See *Respondent’s Exhibit # R-8*). The Building Permit consisted of a letter sized document entitled “Building Permit”; several pages from the City Code; and Attachment #2 described above.
 - c. A copy of the Attachment #1, described above was attached to the Approved Plan.
19. The following should be noted with respect to the Original Plans, the Approved Plans and the Building Permit:

- a. The Building Permit, which was prepared by the City, specifically stated that there was no change of use.
- b. The Approved Plans:
 - i. On the Original Plans (*Respondent's Exhibit R - 1*), the Western Dining Room is outside of the "Existing Area", which was the area where in the intended work was to be done; and the location of the Western Dining Area is in an area labeled "AREA OF FUTURE WORK".
 - ii. On the Approved Plan the first "Symbol Key" on the Approved Plans (lower left on the document) is entitled "SCOPE OF INTERIOR ALTERATIONS". Even a cursory review of the Approved Plans clearly shows that the Western Dining Area is designated as being within the "Scope of Interior Alterations" contemplated by the Approved Plans.
 - iii. The arrowed designation of the Western Dining Area as "Area of Future Work" on the Original Plan was removed in the Approved Plan.
 - iv. The only reference to on the Approved Plan to "Future West Dining" is in Occupancy Load calculations on the top of the page. In any event, the reference to "future west dining room" does not mean that the build out of the Western Dining Area is not part of the scope of work contemplated by the Approved Plans. The word "future" in this context is only a description of an area, and not intended to be a limitation. For instance, in 2012, the Western Dining Area was not currently "built out", but was going to be built out in the "future" pursuant to the Building Permit and Approved Plans.
 - v. The calculations of the "PLUMBING FIXTURES" in the Approved Plan was revised to reflect the use of the Western Dining Area for seating.
 - vi. Several requirements related to Lever Handles, Emergency Lighting, Handicapped Accessibility, and Panic Hardware were added in the Approved Plan.

20. Subsequent to August, 2012, Donald Jones was hired as construction manager, and sub-contracts were entered into for electrical, plumbing, and handicap lift. The construction continued until approximately late Summer, 2015 (the "Construction Period")
21. During the Construction Period, there were several inspections which were conducted by the City. The City conducted inspections during the construction period. Please refer to *Respondent's Exhibit 22*. This is a print out from "AMANDA", which is the Petitioner's file management software program. This shows that the City's records show that there were four (4) inspections which took place on the following dates:

July 26, 2013

August 24, 2015

September 22, 2015

October 27, 2015

Reference is also made to the *Affidavit of Donald Jones*, who was the construction manager for the Project. Mr. Jones' affidavit is generally consistent with the dates entered into AMANDA, except that he recalls an inspection on September 17, 2014, relative to the framing of the Western Dining Area.

22. On or about May 30, 2014, I personally dropped off at the Petitioner's plan review desk another updated plan which is referred to herein as "*Plan Revision #2*" (*See Respondent's Exhibit #R-9*). Plan Revision #2 revised the Approved Plan by the following:

- a. Added a wall to the Western Dining Area; and.
- b. Deleted the Service Bar from the Western Dining Area

After dropping off the Plan Revision #2, I did not receive any communication from the City regarding that revision. Based on my past experience in similar situations, I therefore assumed that there were no objections or concerns, and proceeding accordingly.

23. On or about March 9, 2015, I submitted another updated plan which is referred to herein as “*Plan Revision #3*” (See *Respondent’s Exhibit R-10*). Plan Revision #3 revised Plan Revision #2 by the following:

- a. Added a unisex toilet in the Original Restaurant Area
- b. Revised the Plumbing Fixture Calculations; and,
- c. Added a cooler, freezer and office in the Original Restaurant Area.

After dropping off the Plan Revision #3, I did not receive any communication from the City regarding that revision. Based on my past experience in similar situations, I therefore assumed that there were no objections or concerns, and proceeding accordingly.

24. On or about August 30, 2017, I submitted another updated plan which is referred to herein as “*Plan Revision #4*” (See *Respondent’s Exhibit R-12 and R-12 LF*). Plan Revision #4 revised the Plan Revision #3 by the following:

- a. Provided as-built furnishing layout
- b. Deleted Notes 13,14, and 15; and,
- c. Revised the Occupancy Load Table to delete “Future West Dining, and in lieu thereof, add “West Dining”.

After dropping off the Plan Revision #5, I did not receive any communication from the City regarding that revision. Based on my past experience in similar situations, I therefore assumed that there were no objections or concerns, and proceeding accordingly.

25. On or about March 27, 2018, I submitted another updated plan which is referred to herein as “*Plan Revision #5*”. Plan Revision #5 revised the Plan Revision #4 by the following:

- a. Added general notes and attached copies of the Summit Report and MSD Report.

- b. Revised designations at 106 and 108 to read Brides/Green Room.
- c. Revised Toilet 10 to read Powder 107.
- d. Revised the Plumbing Fixture calculations

After dropping off the Plan Revision #4, I did not receive any communication from the City regarding that revision. Based on my past experience in similar situations, I therefore assumed that there were no objections or concerns, and proceeding accordingly.

26. *Respondent's Exhibit R-11*, is a true and correct copy of a letter from Steve Ubl, Building Official, dated October 26, 2015 (the "*Ubl Letter*"). The Ubl Letter was essentially the first time in writing I was informed that the City had concerns regarding possible zoning and building code issues. Since the date of the Ubl Letter, there have been numerous discussions concerning the Action and the Petitioner's expectations regarding alleged actions or inactions by the Respondent with respect to a permanent Certificate of Occupancy, as well as a "punch-list" of items which the Petitioner believes need to be completed with respect to the Project. During virtually all of those discussions, the Ubl Letter has been a central focus and reference point. The Ubl Letter is fundamentally flawed in that it assumes that there was a "change in use" with respect to the Western Dining Area. There has been no "change in use" with respect to the Western Dining Area. As described in ¶ 27 and ¶ 28 below, the Western Dining Room was originally intended to be used as a restaurant, and no other use has ever been legally established.

27. *Respondent's Exhibit 4* is letter dated October 30, 2015 from Wendy Lane to me (the "*Wendy Lane Letter*"). As of the date of the Wendy Lane Letter, Ms. Lane was the Zoning Administrator. She has since retired. The Western Dining Area is located in a RM3 residential zoning district. As such, the use of the property for a restaurant, bar, and squash

club are all non-conforming uses established under the pre-1975 zoning code when hotels and accessory uses were permitted in residential zoning districts. In the Wendy Lane Letter, she noted that since the zoning classification for the area in which the Western Dining Area is located is a RME3 residential zone district, and that any nonconforming uses would be nonconforming uses under the pre-1975 zoning code when hotels and accessory uses were permitted in residential zoning districts. She also noted that the original intended use of the Western Dining Area was for a restaurant. Importantly, she also noted in the second to the last paragraph, that under the current circumstances, the it would be possible to move forward with a proceeding to obtain a “reestablishment of nonconforming use permit”.

28. *Respondent’s Exhibit R-13*, is a true and correct copy of an email from Allan Torstenson dated March 6, 2018, and attachment thereto. Mr. Torstenson is the Principal City Planner for Zoning, Planning and Economic Development. That email and attachment is the result of several meetings which I had with Mr. Torstenson and other staff members in which we discussed zoning issues that had been raised regarding the Western Dining Area. Below is a summary of the understanding which was reached concerning the zoning of the Western Dining Area.

Since the construction of the Western Dining Area, there has not been any use which has been legally established. Accordingly, it was determined that a Petition for the Reestablishment of a Nonconforming Use would be appropriate. Upon the completion of that process, the zoning of the Western Dining Area would be formally reestablished as a “permitted nonconforming use – restaurant/bar”.

This approach is entirely consistent with the Wendy Lane Letter referred to in the immediately preceding paragraph. The current Zoning director has also told me that he is in agreement with approach taken by Mr. Torstenson.

29. On October 27, 2015, I met with Michael Palm who was the Senior Building Inspector at that time. Mr. Palm had been sent to the Commodore to conduct an inspection. At that point in time, the arrangements to open the restaurant, including the Western Dining Area, within a day or two, had been made. At one point during the inspection, we discussed the Respondent's obtaining a temporary occupancy permit. During that discussion, it was agreed that the restaurant, including the Western Dining Area, could open as scheduled, and that would send a "punch-list" of items which would need to be addressed within thirty (30) days. Based on that representation, the restaurant was opened as scheduled. However, he did not send the "punch list", and I believe that meeting was the last communication which I had with Mr. Palm regarding the Project. *Further reference is made to Respondent's Exhibit R- 62*, which is a copy of pages 27 – 37 of the transcript of Mr. Palm's Deposition taken on March 5, 2015. Also, on this date I met with a Fire Safety Inspector at the site. He inspected the premises and told me that there were no violations and the premises could be occupied.
30. With respect to the "trade permits" referred to in the Ubl Letter (*Respondent's Exhibit R – 11*), it is not clear exactly what permits are being referred to. City employees have represented that this will be clarified, at which time a response can be provided. To the best of my knowledge, all have been finalized.
31. Item No. 3 on page 2 of the Ubl Letter required the Respondent to obtain a permit to install a sprinkler system per the 2015 building code in an A-2 occupancy. Steve Ubl

requested that I obtain and submit a report from a fire safety engineer which would address the necessity of a sprinkler system. In response, the Respondent obtained a report from Summit Fire Consulting, dated May 5, 2017, signed by Christopher Leaver, Fire Protection Engineer (the “Summit Report”). The Summit Report was subsequently incorporated into an Expert Witness Disclosure/Report – Christopher Leaver, dated July 31, 2017. A copy of the Leaver Expert Witness Disclosure/Report is Respondent’s *Exhibit R-14*. That Report, which correctly assumes that there was no change of use with respect to the Western Dining Area, explains that under the circumstances neither a sprinkler system nor alarm system was required to be installed. Also attached to the Summit Report is a proposal for a fire alarm system, which, according to the Report is not needed. Nevertheless, I had offered to install a fire alarm system pursuant to that proposal, but have not been permitted to do so and no comments have been received concerning the proposed design. I am no longer offering to install the fire alarm system.

32. Item No. 7 on page 2 of the Ubl Letter required the Respondent to provide a “balance report”. In response, the Respondent obtained a report from Mechanical Systems Design, LLC dated June 14, 2017, signed by Charlie Lampert, Project Manager (the “MSD Report”). The MSD report was subsequently incorporated into an Expert Witness Disclosure/Report – Robert Fischer, dated July 31, 2017. A copy of the Fischer Expert Witness Report is *Respondent’s Exhibit R-15*. The MSD Report concluded that the opening between the West Dining Area and the Original Dining Room has not impacted the pressure relationships or airflows in the Kitchen and dining rooms and the kitchen hood performance has not been affected by that modification.

33. Item 4 on page 2 of the Ubl Letter requires obtaining a “SAC determination” relative to the Western Dining Area, and pay all applicable fees. A SAC (“Sewer Access Charge”) determination is a finding by the Metropolitan Council of how much a property owner will be charged for access to the Metropolitan Sewer System. The amount of the SAC fee is generally determined on the basis of the use of property, as well as other factors. An affidavit regarding use has to be prepared by the municipality and delivered to the Met Council.

John Skraski, Plan Examiner II, and Larry Zangs conducted a search for information regarding the history of the use of the Western Dining Area on which the affidavit could be based. The search resulted in a January 25, 2016 Email from John Skradski to Steve Ubl. *Respondent’s Exhibit R-16*. That email states that the conclusion was that the “now” banquet room, i.e., the Western Dining Area was constructed in 1976 and was used as an exercise room from that time until 1987. Both Mr. Skradski and Mr. Zangs were asked about the “search” during their depositions. Two pages from Mr. Skraski’s deposition are set forth in Respondent’s *Exhibit R-60* ; and, three pages from Mr. Zangs’ deposition are set forth in Respondent’s *Exhibit R-61*. A review of those deposition extracts indicate that the basis for the conclusion that the the Western Dining Area was a “exercise room” for eleven years was not adequate. Mr. Skradski was not able to identify any specific information on which they relied. Mr. Zangs testified that he had spoken to a Mr. O’Brien and looked at some pictures from Mr. O’Brien. However, he did state that:

- e. They did not find that it was ever licensed as an exercise room;
- f. They were not able to find an occupancy permit as an exercise room;

- g. They did not specifically recall any planning commission or other zoning issues;
- h. They did not recall any permits for an exercise room;
- i. That there was no evidence that the O'Briens (who built the Western Dining Area in 1976 intended it to be an exercise room when they built it.

In short, the above demonstrates there was essentially no evidence of the alleged use as an exercise room in 1976, and there is no evidence that the purported use as an exercise room was ever legally established. Nevertheless, the affidavit, signed by Steve Ubl and James Williamette, that was sent to the the Met Council (*Respondent Ex.R-17, p. 2*) states that prior use was an exercise room, which then lead to an erroneous SAC determination (*Respondent's Ex.R-17, p. 1*). I have made requests to the City to provide a correct affidavit, but that request has not been honored.

- 34. Steve Ubl requested information regarding the design of the ceiling in the Western Dining Area. Larson Engineering, Inc. provided that information in a report/letter dated February 7, 2017 which was delivered to Mr. Ubl. *Respondent's Exhibit R – 34*.
- 35. All parties agree that the Respondent's Liquor License does cover the Western Dining Area, and accordingly there is no dispute with respect to that aspect of licensing.
- 36. During the deposition of John Skradski on March 7, 2018, I became aware that the Petitioner claimed that it had not received Plan Revisions 2 - 5. Accordingly, we prepared a "Supplemental Submission Package" which included four (4) sets of all of the Plan Revisions, a cover Memo from MCL, and copies of the Summit Report and MSD Report. See *Respondent Ex R-18*. This was delivered to the plan review desk on April 10, 2018. The purpose of delivering this to the Petitioner was to make sure that the Petitioner had

all of the plans which had been previously delivered to the Petitioner, and also comply with Requirement from the Ubl Letter which requires the “. . . a design and apply for a permit to remodel the proposed west expansion.” An acknowledgement of receipt of the Supplemental Submission Package is on the last page. A note on that also page states that plans would be forwarded to Steve Ubl for comment before they were sent out to the field. To date, no comment or other response has been received. In addition to re-submission of the Plan Revisions, the Supplemental Submission Package also constitute compliance with the requirement number one of the Ubl Letter.

37. In proceeding with the Project, I relied upon the fact that the Building Permit and Approved Plans covered the buildout of the Western Dining Area. I did not receive any notice from the Petitioner that there were alleged issues with the buildout of the Western Dining Area until the Project was essentially complete. I incurred substantial expenses in completing the Project as a result of my reliance.
38. On May 11, 2018 I sent an email requesting a fire inspection for the premises. On May 14, 2018 I received a reply which stated that an inspection could not be scheduled as a result of the commencement of the Action. *See Respondent's Exhibit R – 24.*

I DECLARE UNDER PENALTY OF PERJURY THAT EVERYTHING I HAVE STATED IN THIS DOCUMENT IS TRUE AND CORRECT.

Dated: May 21, 2018



John R. Rupp

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF SAINT PAUL**

In the Matter of All Licenses Held by the
University Club of St. Paul, d/b/a The
Commodore for the premises located at
79 Western Avenue in Saint Paul

**SECOND
AFFIDAVIT
OF
JOHN R. RUPP**

STATE OF MINNESOTA)
) SS
COUNTY OF RAMSEY)

John R. Rupp, being first duly sworn, states and alleges as follows:

1. This Second Affidavit of John R. Rupp follows the Affidavit of John R. Rupp, dated May 21, 2018 (the "*Rupp Affidavit*") which was served and filed in this matter on May 21, 2018.
2. This affidavit is made of my own personal knowledge, and if called to testify at a trial I could, and would, testify in accordance with what is stated in this affidavit.
3. I have reviewed the Petitioner's Motion for Summary Disposition, and related documents, and am familiar with the contents thereof.
4. Also provided with this affidavit *Respondent's Supplemental Transcript of Exhibits*. All of the Exhibits which are referred to in this Affidavit are found the Respondent's Transcript of Exhibits, served and filed on May 21, 2018, or in the Respondent's Supplemental Transcript of Exhibits, which is being submitted herewith.

5. I have reviewed the email referred to in *Petitioner's Undisputed Fact #23*. That email is not an acknowledgement that I understood that I did not have the right to occupy the Western Dining Area. I was merely stating that I understood I already had the right to occupy the Original Restaurant. Read in its entirety, it is clear that the email in no way suggests I believed I did not have the right to occupy the Western Dining Area for customer seating, (even though it had been used as part of the Commodore Bar, Restaurant, and catering operations since 2001 with no city complaint) after I completed the permitted improvements.
6. I have reviewed the *Second Affidavit of Patrick McGuire*, and concur in the information and statements contained therein.
7. I have reviewed ¶30 of the *Affidavit of Steve Ubl* which was served and filed by the Petitioner on May 18, 2018. The electrical permit and inspection referred to in *Ubl Aff. ¶ 30. c.* did include electrical work in the Western Dining Area. On the date of the inspection of the electrical, October 8, 2014, all of the framing was complete in the Western Dining Area and it was obvious that the construction work was being conducted in the Western Dining Area. After electrical inspection I recall construction manager Don Jones had the framing inspected with wiring in it and then had it sheet rocked. In addition, the permit issued to Westco referred to in *Ubl Affidavit ¶30. i.* was for wiring for a sound system and video projection in the Western Dining Area. The city never issues an electric permit to complete work in an area for which general building permit.
8. With respect to the Application for Building Permit (*Respondent's Exhibit R- 2*) I chose the valuation amount of \$10,000 because at the time of the Application I was aware of the fact that there were going to be several other subcontractors who would be pulling permits

for the various items of work on the Project. These included, but are not necessarily limited to, electrical, plumbing, lift, exterior stair and the future bar. I also knew that the applications for those permits would include valuations which would be the basis for the calculation of the permit fees, which permit fees would be passed along to me at the time the subcontractors would be paid.

9. With respect to City's Undisputed Fact #7, it is correct that I did not amend the Application to indicate my intent to finish off the Western Dining Area. However, the reason that was not done is because the Western Dining Area was already included in the Approved Plans. Rupp Second Affidavit.

10. My View of the Current Dispute. As noted in the *Rupp Affidavit* and *Respondent's Memorandum in Support* dated May 21, 2018, the City summarized its position on the dispute, and how to settle it, in the October 26, 2015 letter from Steve Ubl (the "*Ubl Letter*"; *Respondent's Exhibit R-11*). I do not believe have succinctly expressed my views regarding this Action and want to take the opportunity to do so now. The bottom line there have been multiple City mistakes, and now the City continues to block me from performing (while causing me to incur massive legal bills to save my business and my business is on the verge of being bankrupted by the City's action. The summary of the dispute from my perspective (45 years of development experience) and essentially all supported by undisputed facts (the few disputed facts will be noted below) follows:

a. I filed an initial building permit application (with plans and code analysis developed by MCL Architects which has been in business for over 60 years) in February of 2012 in order to obtain city comments from the Building Zoning, and Licensing

Departments before the submission of a revised plan for permitting. I have used this procedure for my entire development career to insure that all city concerns are addressed. It was the approved procedure from the City perspective also. *Rupp Affidavit* ¶¶12,13.

- b. In May, 2012 Plan Revision #1, which included code review was filed. *Rupp Affidavit* ¶¶16, 17. Plan Revision #1 incorporated suggestions from plan examiner John Skradski, and clearly clarified that the Western Dining Area was included. John Skradski, who approved the permit, under oath in 2018 testified that the Western Dining Area was not included while admitting he had “missed” the plan note showing it was included. *Respondent’ Exhibit R-65, Respondents Supplemental Transcript (Skradski Deposition Transcript, pp. 40 – 41)*. He never reconciled these two inconsistent statements. He also stated that that the new restrooms were not required by the building code to service the Western Dining Area which was simply not true, and further testified that the Western Dining Area was used for squash club use in 1976 - which was also not true. *Rupp Affidavit* ¶ 33. The kindest description of John Skradski’s statements of the facts of this case are that he is not credible.
- c. Plan Revision #1 was reviewed for over 3 months by the three city departments mentioned above and it was approved by all. *Rupp Affidavit* ¶ 18.
- d. A Building Permit (*Respondent’s Exhibit R-8*) finally issued in August, 2012 which included a zoning determination that there was no change or expansion of use, and various city notes of further requirements which I accepted. No mention of a sprinkler system as being required. The Approved Plan was also issued that date. *Rupp Affidavit* ¶18.

- e. Construction proceeded with numerous city inspection visits to the project to inspect work over three years (both pursuant to the building permit and subcontractor work) including construction in the Western Dining Area. No notices were received from the City saying there were any issues with the work or the Building Permit.
- f. Shortly before the opening of the completed project - three years later - city inspectors and fire officials inspected the project and verbally approved opening with a temporary certificate of occupancy subject to a punch list of remaining work that I was to complete after receipt of the list. *Rupp Affidavit ¶¶21, 29*. In many of my projects over the years this was the procedure.
- g. The Monday after opening I received a letter from Steve Ubl dated October 26, 2015 demanding that I close the Western Dining Area and among other demands install a sprinkler system in the entire completed renovation (the "*Ubl Letter*"; *Respondent's Exhibit R-11*.) No sprinkler system was required when I received the Building Permit.
- h. The demanded closing and installation of the sprinkler system would have required closing the restaurant, terminating the 70 plus employees that had been hired & trained and bankrupting the business at an overall cost to me of in excess of \$1,000,000 plus the potential loan acceleration by my lender.
- i. Upon receipt of the Ubl Letter, I offered to negotiate a way forward allowing me to stay open.
- j. For the first time in over 45 years of my development experience in St. Paul, rather than discussing a mutually agreeable resolution, the city chose to commence this

Action to force the effective bankruptcy of my business with no explanation as to why.

k. The open issues referred to in the Ubl Letter were relatively minor, and absent litigation could have been resolved in short order had the City not decided to mount a legal assault on my business and still could be resolved without further litigation:

- i. Confirm the temporary certificate of occupancy has been in fact approved
- ii. Confirm that there has been no change of use or change in zoning
- iii. Make sure the SAC charges will be paid if owed
- iv. Confirm now that the West Dining Room was intended by Respondent to be included in the Approved Plans and all of the plans filed by the Respondent in April, 2018. *Respondent Exhibit R-18.*
- v. Complete the building inspection punch list to get a permanent Certificate of Occupancy
- vi. Make sure the completed fire inspection does not have any open issues.
- vii. Confirm whether a sprinkler system could be legally demanded if there had been no change of use

l. So – many tens of thousands of dollars of senseless legal expense later, the business has been severely damaged by the negative publicity that this dispute generated - where are the parties today?

- i. Taking all of the evidence into consideration there is no reason why a temporary occupancy certificate cannot be formalized now.

- ii. Zoning has now been confirmed by the former and current Zoning administrators – that no change of use has occurred since the originally approved restaurant use contrary to the Ubl letter. *Rupp Affidavit ¶¶ 27, 28.*
- iii. The City is blocking me from getting an accurate the SAC determination because the SAC charge cannot be determined until the City files an accurate affidavit with the Metropolitan Council to correct a previous incorrect one. *Rupp Affidavit ¶ 33.*
- iv. If there was in fact confusion about whether the Western Dining Area was included in the Approved Plan, there has been no confusion since the fall of 2015 – nearly 3 years ago – it is included and the City knows it. What happened six years ago is largely if not completely irrelevant to this dispute now.
- v. The City Building Official – Steve Ubl - refuses to provide the promised completion punch list to allow me to complete the items (if there any – don't know) and receive a permanent Certificate of Occupancy. *Rupp Affidavit ¶36.*
- vi. The City refuses to allow a current fire inspection so I have no idea of there are any issues that need to be addressed. *Rupp Affidavit ¶38.*
- vii. Steve Ubl asked me to hire a licensed Fire Safety Engineer (at a cost of over \$5,000) to determine whether his requirement that I tear my project apart after it was remodeled to install a sprinkler system can be legally demanded by the City. The report said a sprinkler system is not required yet Steve Ubl incredibly still demands one. *Rupp Affidavit ¶ 31.*

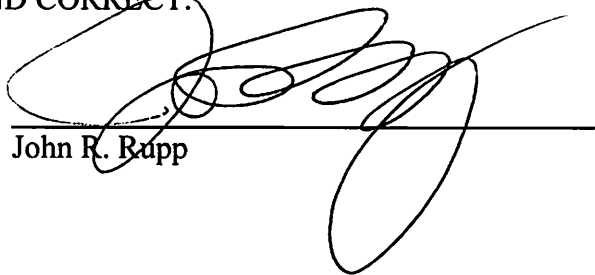
10. My View of How to Resolve the Action. I believe that there is no dispute of material fact regarding the following:

- The City SAC Affidavit is not correct
- The Building Department demand for a sprinkler system is based on a change of use, which change did not happen
- The City refuses to allow for a final inspection.

Pursuant to the above, I submit that the Court should recommend that the Petitioner be file an accurate SAC Affidavit; inspect the property and issue an issue a list of action needed to be taken to obtain a Certificate of Occupancy based on a determination that there is no change in use.

I DECLARE UNDER PENALTY OF PERJURY THAT EVERYTHING I HAVE STATED IN THIS DOCUMENT IS TRUE AND CORRECT.

Dated: June 4, 2018



John R. Rupp

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF SAINT PAUL**

In the Matter of All Licenses Held by the
University Club of St. Paul, d/b/a The
Commodore for the premises located at
79 Western Avenue in Saint Paul

**THIRD
AFFIDAVIT
OF
JOHN R. RUPP**

STATE OF MINNESOTA)
) SS
COUNTY OF RAMSEY)

John R. Rupp, being first duly sworn, states and alleges as follows:

1. This Third Affidavit of John R. Rupp follows the Affidavit of John R. Rupp, dated May 21, 2018 (the “*Rupp Affidavit*”) which was served and filed in this matter on May 21, 2018, and the Second Affidavit of John R. Rupp (the “*Rupp Second Affidavit*”)
2. This affidavit is made of my own personal knowledge, and if called to testify at a trial I could, and would, testify in accordance with what is stated in this affidavit.
3. I have reviewed the Petitioner’s *Memorandum of Law in Opposition to Respondent’s Motion for Summary Judgment*, dated June 4, 2018, and related documents, and am familiar with the contents thereof (the “*City Response Memorandum*”), as well as other documents which have been filed in this Action.
4. I have reviewed the references the transcript of the Deposition of James Bloom which are referred to in footnote 24, page 7 of the *City’s Response Memorandum*, as well as

Deposition Exhibits 130 and 131 referred to therein. As of the date of the pictures included in Exhibit 130 and 131, the Western Dining Area had in fact: a complete electrical service including all needed lighting & wall outlets; a heating, ventilating & air conditioning (HVAC) system; all exterior walls & ceiling had been painted; complete floor coverings; exterior windows; and two legal fire exits.

5. In my previous affidavit dated May 21, 2018, I noted that I had first learned during the deposition of John Skradski that the Petitioner claimed that it had not received Plan Revisions 2 – 5. *Rupp Affidavit* ¶ 36. (Note: the various Plan Revisions were mentioned and discussed in greater detail in *Respondent's Memorandum In Support*.) Since that time, I have come to realize that copies of Plan Revision #2 were included in the documents provided by the Petitioner, proving that Petitioner did, in fact, receive Plan Revision #2. Plan Revision #2 was dated May 30, 2014, and was dropped off by me on or about the same date. *Rupp Affidavit* ¶22. *Respondent's Exhibit R-67* is a copy of Plan Revision #1 (which later became the “*Approved Plan*”) that I dropped off at the same time as Plan Revision #2. That Exhibit has a hand-written annotation in the upper right hand corner which specifically notes that it “*added west dining room to scope of interior alteration work*” and “*added restrooms to scope of work*”. *Respondent's Exhibit R-68* is a clean copy of Plan Revision #2 which was dropped off. *Respondent's Exhibit R-69*, is copy of Plan Revision #2 that has been “color coded”, which indicates that it was reviewed and colored by DSI staff. *Respondent's Exhibit R-70* is a copy of Plan Revision #2 which has a hand-written annotation “*Larry has this for Licensing purposes*”. “Larry” presumably refers to Larry Zangs. By that time, there was no dispute that the Original Dining Room did not have any licensing issues, so the fact that it was being reviewed for licensing purposes is a

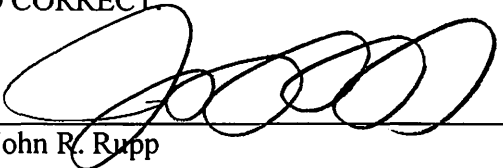
clear indication that DSI was treating the Western Dining Area as being part of the Approved Plan. After Plan Revision #2 was dropped off, I did not have any further communication with the City concerning Plan Revision #2.

6. Plan Revision #1 was dropped off on May 17, 2012. More than three (3) months later, I received notice that the Building Permit and Approved Plans were ready to be picked up. The length of time seemed excessive to me, which led me to believe that the review and analysis of the Plan Revision #1 was very thorough, and caused me to conclude that the City staff understood that the build out of the West Dining Area was included in the Approved Plans.
7. As a practical matter, even if the Approved Plan had some faulty drafting, it is somewhat irrelevant. Since 2015, the discussions between the City and the Respondent regarding the matter have been predicated on the assumption that Western Dining Area was intended to be included. After all parties agreed the Western Dining Area was included the City did nothing other than bring an action to close me down never again responding to our plan submissions.
8. [This paragraph intentionally deleted]
9. In reliance upon the wrongful conduct described above, a substantial investment was made. Restaurant related soft costs and opening expenses alone totaled well over \$150,000. Restaurant construction and related costs totaled approximately \$500,000. If the City were to prevail in this Action, the Western Dining Area would have to be closed and the Original Restaurant will have to also close, which will result in loss of going business value in excess of One Million Dollars (\$1,000,000).

10. As referred to in ¶ 10 the *Rupp Second Affidavit*, I believe that it is important that I have the opportunity to succinctly express my views in my own words. To that end, I have reviewed the *City's Response Memorandum*, and have personally typed a point-by-point response. The general format is to extract the various sections or sentences of the *City's Response Memorandum*, and type my comments/responses immediately below in underlined capital letters. That document is attached hereto as Affidavit Exhibit A.

I DECLARE UNDER PENALTY OF PERJURY THAT EVERYTHING I HAVE STATED IN THIS DOCUMENT IS TRUE AND CORRECT.

Dated: June 18, 2018



John R. Rupp

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS**

FOR THE CITY OF SAINT PAUL In the Matter
of All Licenses held by the University Club of St.
Paul, d/b/a The Commodore, for the premises located
at 79 Western Avenue North in Saint Paul, MN

**MEMORANDUM OF LAW IN
IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY DISPOSITION**

JOHN RUPP COMMENTS UNDERLINED BELOW

Introduction

The City of Saint Paul ("City"), by its Department of Safety and Inspections ("DSI") respectfully submits this Memorandum of Law in Opposition to Respondent's Motion for Summary Disposition. The facts of this case are undisputed and the sole issue before this Court is a question of law - whether the Respondent allowed occupancy of the Western Dining Area of the Commodore without a Certificate of Occupancy. The Adverse Action brought by DSI against the liquor on-sale, liquor on-sale Sunday and entertainment (B) licenses is supported by §§310.0S(m) (2) and 310.06(b) (6) (a) of the Saint Paul Legislative Code.

IN MY OPINION THE QUESTIONS BEFORE THIS COURT ARE WHETHER THE CITY AND DSI SHOULD HONOR THE BUILDING PERMIT THAT I RELIED ON AND WAS ISSUED OVER SIX YEARS AGO, HONOR THE TEMPORARY CERTIFICATE OF OCCUPANCY THAT WAS PROMISED AND MORE IMPORTANTLY FIND THAT THE CITY ILLEGALLY CONTINUES TO PREVENT RESPONDENT FROM SECURING A PERMANENT CERTIFICATE OF OCCUPANCY.

Respondent's motion should be dismissed and a recommendation supporting adverse action and the imposition of a \$700 matrix penalty and license conditions which would prevent Respondent from using the Western Dining Area until he obtains a Certificate of Occupancy for the space should be entered.

THIS COURT SHOULD RECOMMEND THAT THE RELIEF REQUESTED IN THE CITY'S MOTION FOR SUMMARY DISPOSITION BE DENIED AND THAT NO FURTHER ACTION BE TAKEN AGAINST THE LICENSES; AND, RECOMMEND THAT THE CITY: MAKE ARRANGEMENTS FOR A FINAL BUILDING INSPECTION BASED ON NO CHANGE OF USE OR CHANGE OF OCCUPANCY TO DEVELOP A LIST OF NEEDED WORK TO OBTAIN A CERTIFICATE OF OCCUPANCY, AND FOR A FIRE SAFETY INSPECTION BASED ON NO CHANGE OF USE OR CHANGE OF OCCUPANCY; RESPOND TO THE SUMMIT REPORT BASED ON NO CHANGE OF USE OR CHANGE OF OCCUPANCY; REVIEW AND APPROVE PREVIOUSLY SUBMITTED PLANS BASED ON NO CHANGE IN USE OR CHANGE OF OCCUPANCY; PROVIDE THE MET COUNCIL WITH AN ACCURATE AFFIDAVIT WHICH IS PREDICATED ON THE ASSUMPTION THAT THERE HAS BEEN NO CHANGE OF USE OR CHANGE IN OCCUPANCY.

Argument

- A. Respondent admits that he allowed occupancy of the Western Dining Area without a Certificate of Occupancy.

Respondent admits that he was not granted a Certificate of Occupancy for the Western Dining Area prior to opening the space for occupancy'. As previously asserted, under Minnesota State Building Code §1300.0220 a Certificate of Occupancy or a Temporary Certificate of Occupancy is needed before Occupancy of the Western Dining Area can be allowed. Inspector Ferrara observed both occupancy and the sale of alcohol in the Western Dining Area during his inspection on September 13, 2016. Both occupancy and the sale of alcohol are grounds for

adverse action and the City is entitled to an Order for summary disposition and entry of a recommendation in favor of the City.

OF COURSE RESPONDENT ADMITS IT WAS NOT GRANTED A CERTIFICATE OF OCCUPANCY. THERE WAS HOWEVER AN AGREEMENT WITH THE CITY THAT I WOULD BE GIVEN A TEMEPRRAY CEERTIFCATE OF OCCUANCY BEFORE I OPENED. THE CITY AND DSI HAVE IN THE PAST AND ARE CURRENTLY PREVENTING IT FROM SECURING A PERMANENT CERTIFICATE OF OCCUPANCY.

B. The City is not estopped from enforcing its Legislative code and a first time matrix penalty and conditions on Respondent's license is appropriate.

Respondent's estoppel argument fails on both the law and the facts. The standard four-factor test for estoppel against a government entity, including the "wrongfulness" factor, applies to this case. A party seeking to establish estoppel against a government entity must establish four elements:

First, there must be 'wrongful conduct' on the part of an authorized government agent. Second, the party seeking equitable relief must reasonably rely on the wrongful conduct. Third the party must incur a unique expenditure in reliance on the wrongful conduct. Finally, the balance of the equities must weigh in favor of estoppel.

THE CITIES ACTIONS MEET THE FOUR FACTOR TEST

WRONGFUL CONDUCT.

THE CITY REFUSES TO HONOR THE CONDITIONS OF THE BUILDING PERMIT IT ISSUED THAT RESPIONDENT RELIED ON FOR THREE YEARS THROUGH THE COMPLETION OF THE ENTIRE PROJECT.

THREE YEARS OF LITIGATION WHICH HAVE CAUSED RESPONDENT TO INCURE TENS OF THOUSANDS OF DOLLARS LEGAL FEES COULD HAVE BEEN RESOLVED THREE YEARS AGO THE WAY IN MY EXPERIENCE OVER 40 YEARS THEY ALWAYS ARE: CONFIRM THAT THE WEST DINING ROOM WAS IN THE PERMITTED AREA, CHECK ON ZONING. ONE – ONE HOUR MEETING. INSTEAD THE CITY BRINGS A LEGAL ACTION AND DEMANDS THAT I CLOSE MY COMPLETED AND FULLY INSPECTED DINING ROOM, BANKRUPTING MY BUSINESS. THE CITY'S ACTION WAS OUTRAGEOUS AND AVOIDABLE AND COUNTER TO WHAT I WAS TOLD WHEN PROMISED A TEMPORARY CERTIFICATE OF OCCUPANCY WITHIN 30 DAYS TO WORK OUT ANY OPEN ISSUES, WHICH IS WHAT I HAVE DONE FOR DECADES, AND TO MY KNOWLEDGE IS THE WAY THE CITY OPERATES EXCEPT FOR SOME UNKNOWN REASON IN MY CASE.

IN 2014 PLAN REVISION TWO WAS FILED INDICATING AGAIN THAT THE CITY WAS FULLY AWARE THAT WEST DINING ROOM WAS INCLUDED (SEE RESPONDENTS REPLY MEMORANDUM). THE CITY IN 2015 AGREED THAT IT UNDERSTOOD THAT THE WEST DINING ROOM WAS INTENDED TO BE INCLUDED IN THE PERMITTED WORK – BECAUSE IT WAS FULLY BUILT OUT AND SOON TO OPEN! IT CHOSE TO SPEND THREE YEARS ARGUING THAT IT DID NOT UNDERSTAND THIS IN 2012. SO WHAT! WHETHER IT KNEW IN 2012 IS IRRELEVANT THE CITY KNEW IN 2015. OF WHAT CONSEQUENCE IS THIS POINTLESS LEGAL ASSAULT ON ME TO GETTING THE CERTIFICATE OF OCCUPANCY THAT I OF COURSE WANT MORE THAN THE CITY, TO GET IT OFF MY BACK AND NO LONGER A THREAT TO MY BUSINESS.

THE CITY DEMANDS COMPLIANCE WITH REQUIREMENTS SPELLED OUT IN STEVE UBL'S LETTER THAT IT HAS NO LEGAL RIGHT TO DEMAND BECAUSE THEY ARE BASED ON FACTUALLY INCORRECT ASSUMPTIONS AND A ZONING DETERMINATION NOT SUPPORTED BY THE ZONING DEPARTMENT. STEVE STATES THERE WAS A "CHANGE OF USE" WHICH IS A ZONING ISSUE THAT THE ZONING DEPARTMENT, PED, AND ALL OF THE EVIDENCE DISAGREES WITH. STEVE UBL'S LETTER DOES NOT ARGUE THAT HIS DEMANDS ARE BASED ON A "CHANGE OF OCCUPANCY" UNDER THE MINNESOTA CONSERVATION CODE FOR EXISTING BUILDINGS, THAT HAD THOSE STANDARDS BEEN APPLIED WOULD STILL NOT SUPPORT THE CITY'S CURRENT DEMANDS. STEVE UBL HAS NO LEGAL AUTHORITY TO MAKE THE ZONING DETERMINATION THAT IS FOLLOWED BY THE CITY IN THIS CASE. THE CITY ATTORNEY IS WRONG IN IGNORING ZONING AND PED IN THIS CASE.

IN THE CURRENT DISPUTE THE CITY IGNORES THE PROVISIONS OF THE MINNESOTA CONSERVATION CODE FOR EXISTING BUILDINGS SECTION REGARDING "CHANGE OF OCCUPANCY" (AS

OPPOSED TO A ZONING CHANGE OF USE). IN ORDER FOR A "CHANGE IN THE APPLICATION OF THIS CODE" "A CHANGE IN PURPOSE OR LEVEL OF ACTIVITY MUST HAVE OCCURRED". THIS STANDARD HAS CLEARLY NOT BEEN MET YET THE CITY IS TRYING TO ENFORCE NEW PROVISIONS OF THE CONSERVATION CODE WITHOUT ONCE ARGUING UNDER THE WORDING OF THE CODE THAT IT HAS THE LEGAL RIGHT TO DO SO.

THE CITY REFUSES TO EVEN RESPOND TO REVISED PLANS THAT IT REQUESTED TO BE FILED, WHICH MAKES IT IMPOSSIBLE FOR RESPONDENT TO KNOW WHAT IMPROVEMENTS ARE NEEDED FOR A CERTIFICATE OF OCCUPANCY. A FINAL CERTIFICATE OF OCCUPANCY IS BASED ON THE ORIGINALLY PERMITTED PLANS PLUS ALL APPROVED REVISIONS AND APPROVAL OF ALL SUBCONTRACTOR IMPROVEMENTS.

THE CITY IGNORES IT OWN ZONING DEPARTMENTS DETERMINATION THAT AT THE TIME OF THE ISSUANCE OF THE BUILDING PERMIT (RECONFIRMED RECENTLY BY THE PREVIOUS ZONING ADMINISTRATOR WENDY LANE) THAT THERE HAS BEEN NO CHANGE OR EXPANSION OF USE IN WEST DINING ROOM BECAUSE IT WAS BUILT FOR RESTAURANT USE AND THAT NO OTHER USE HAS EVER BEEN LEGALLY ESTABLISHED.

THE CITY DEMANDS THAT SUBSTANTIAL CHANGES BE MADE TO THE FULLY COMPLETED AND INSPECTED RESTAURANT THAT WERE NOT REQUIRED WHEN THE PERMIT WAS ISSUED AND HAVE NO LEGAL BASIS.

THE CITY REFUSES TO ALLOW A FIRE SAFETY INSPECTION TO BE MADE TO THE PREMISES TO DETERMINE WHAT ISSUES IF ANY PREVENT THE ISSUANCE OF A CERTIFICATE OF OCCUPANCY

THE CITY IN ITS INSPECTION BEFORE THE RESTAURANT OPENING APPROVED THE OPENING WITH THE PROMISE OF A TEMPORARY OCCUPANCY CERTIFICATE AND COMPLIANCE WITH A FINAL LIST OF REQUIRED WORK WITHIN 30 DAYS. I THOUGHT THIS ENTIRELY REASONABLE AND CONSISTENT WITH DECADES OF MY EXPERIENCE. NOW THE CITY DENIES IT APPROVED THE OPENING EVEN THOUGH THE APPROVAL IS IN THE CITY INSPECTION RECORDS AND ALSO REFUSES TO PROVIDE THE PROMISED FINAL LIST OF NEEDED IMPROVEMENTS TO SECURE THE OCCUPANCY PERMIT.

THE CITY REFUSES TO CONDUCT ITS ANNUAL CERTIFICATE OF OCCUPANCY INSPECTION TO GUIDE WHAT IF ANYTHING IS NEEDED

FOR LEGAL OCCUANCY. MY OTHER BUILDINGS ARE REGULARLY INSPECTED THIS IS THE ONLY ONE THAT IS NOT.

THE CITY REQUESTED THAT AN INDEPENDENT FIRE SAFETY ENGINEER PREPARE A REPORT AS TO WHAT IMPROVEMENTS CAN BE LEGALLY REQUIRED BY THE CITY. THE FINDINGS THAT NEITHER A FIRE SPRINKLER SYSTEM NOR ALARM SYSTEM ARE REQUIED HAVE BENN IGNORED.

THE CITY DEMANDS THAT THE WEST DINING ROOM BE CLOSED UNTIL AN OCCUPANCY PERMIT IS ISSUED, AS OPPOSED TO ALLOWING IT TO REMAIN OPEN FOR A REASONABLE TIME NEEDED TO GET ANY REQUIRED IMPROVEMENTS (WHATEVER THEY ARE BTW IF ANY) COMPLETED AS ORIGINALLY AGREED, EVEN THOUGH THE RESPONDENT HAS REPEATEDLY STATED THAT CLOSING THIS ROOM WOULD BANRUPT THE BUSINESS.

RELIANCE ON WORNGFUL CONDUCT

RESPONDENT CLOSED A PROFITABLE EVENTS BUISNESS TO OPEN A RESTARANT WITH AN EVENTS SPACE. RESPONDENT WOULD NOT HAVE CHANGED THE OPERATIONAL STATGEGY AND UNDERTAKEN THE IMPROVEMENTS COVERED BY THE PERMIT AND SUBSEQUENT PERMITS IF IT HAD BEEN TOLD THAT IN ORDER TO GET A BUILDNG PERMIT AND AN OCCUANCY CERETIFCATE A FIRE SPRINKLER SYSTEM FOR THE ENTIRE FACILTY WOULD REQUIRED. DAMAGES IN THE HUNDREDS OF TJOUDANDS OF DOLLARS

DURING THE CONSTRUCTION PERIOD ADDITIONAL SUBCONTRACTORS WERE HIRED TO WORK ON THE PROJECT IN RELIANCE ON THE OVERALL SCOPE OF WORK IN THE ORIGINAL PERMIT NOT BEING CHANGED.

ELABORATE INTERIOR FINISHES WERE COMPLETED THAT WILL NOW NEED TO BE TORN APART TO INSTALL A SPRINKLER SYSTEM, WHICH IT IS IMPORTANT TO NOTE WAS VOTED THE FINEST RESTAURANT DESIGN IN THE TWIN CITIES FOR 2016.

UNIQUE EXPENDITURES INCURRED

IN RELIANCE UPON THE WRONGFUL CONDUCT DESCRIBED ABOVE, A SUBSTANTIAL INVESTMENT WAS MADE. RESTAURANT RELATED SOFT COSTS AND OPENING EXPENSES ALONE TOTALED WELL OVER \$150,000. RESTAURANT CONSTRUCTION AND RELATED COSTS TOTALED APPROXIMATELY \$500,000. IF THE CITY

WERE TO PREVAIL IN THIS ACTION, THE WESTERN DINING AREA WOULD HAVE TO BE CLOSED AND THE ORIGINAL RESTAURANT WILL HAVE TO ALSO CLOSE, WHICH WILL RESULT IN LOSS OF GOING BUSINESS VALUE IN EXCESS OF ONE MILLION DOLLARS (\$1,000,000).

BALANCE OF EQUITIES

THERE IS NO BALANCE. I HAVE ALWAYS BEEN WILLING TO COMPLY WITH ALL LEGITIMATE REQUESTS UNDER THE PERMIT CONSISTENT WITH THE CONSERVATION CODE, THE ORIGINAL PERMIT, AND THE ZONING DEPARTMENTS DETERMINATION OF NO CHANGE OF USE. THE CITY GETS EVERYTHING IT IS LEGALLY ENTITLED TO. THE CITY WANTS MORE. IN THIS MEMORANDUM THE CITY SAYS ITS DETERMINATION THAT THERE HAS BEEN A CHANGE OF USE IS FINAL. INCREDIBLE. WHAT DETERMINATION IS IT TALKING ABOUT? CLEARLY NOT FROM THE ZONING ADMINISTRATOR. WHERE IS THE DETERMINATION COMING FROM? FROM STEVE UBL IN HIS LETTER? HE IS THE BUILDING OFFICIAL WHO IS CHARGED WITH INTERPRETING THE CONSERVATION CODE, HE HAS NO LEGAL AUTHORITY TO DETERMINE THE ZONING CHANGE OF USE ISSUE. THE CITY POSITION IS INCOHERENT. AND DEFENDS IT MEANS FOR IMPROVEMENT BEYOND WHAT IS AND THE LEGAL BASIS TO DEMAND.

City of North Oaks v. Sarpal, 797 N.W.2d 18, 25 (Minn. 2011). (citations omitted).

The undisputed facts before the Court fail to establish any wrongful conduct on the part of DSI staff.

SEE ABOVE

The City has processes and procedures in place that are meant to trigger further questions and staff review ². Respondent had a responsibility to familiarize himself with the

¹ Respondent's motion, page 13, 1, Rupp Aff., 6.

² Skradski Aff., 27-37, Exhibit 29-10, Line 19 - Exhibit 29-15, Line 6, Exhibit 29-17, Line 24-Exhibit 29-25, Exhibit 42-5, Line 24 -Exhibit 42-14, Line 10, Exhibit 42-18, Lines 2-20,

applicable Ordinances and Codes ("Those who deal with Government are expected to know the law, and may not rely on the conduct of government agents contrary to the law.")³.

I KNOW THE LAW BETTER THAN THE "GOVERNMENT" IN THIS CASE. THIS DISPUTE IRONICALLY INVOLVES RESPONDENTS FIGHT TO PREVENT THE IMPROPER "CONDUCT OF GOVERNMENT AGENTS" CONDUCT THAT IS CONTRARY TO THE LAW. THE CITY IS TRYING TO SHUT DOWN THE WEST DINING ROOM WHICH WILL BANKRUPT ITS BUSINESS, BY IGNORING ITS OWN ZONING DEPARTMENT POSTION ON ZONING. THE CITY "PROCESSES AND PROCEDURES" THAT ARE MEANT TO TRIGGER FURTHER QUESTIONS AND STAFF REVIEW WERE USED IN PART WHEN THE ZONING DEPARTMENT RECONFIRMED ITS INITIAL ZONING DETERMINATION. THE CURRENT FINAL CITY POSITION THAT THERE HAS BEEN A CHANGE OF USE RUNS COUNTER TO THE FINDING OF THE ZONING ADMINISTRATOR - WHICH PROVES THAT CITY PROCESSES OF REVIEW WERE NOT FOLLOWED. THE STANDARD IN THE MINNESOTA CONSERVATION CODE FOR EXISTING BUILDINGS THAT DEALS WITH CHANGE OF OCCUPANCY WAS NEVER ARGUED. FROM ALL OF THE CITIES SUBMISSONS IN THIS CASE IT IS CLEAR THAT I KNOW HOW TO APPLY THE CONVERSATION CODE TO THIS DISPUTE AND THE CONSEQUNCES OF THE ZONING DEPARTMENTS FINDINGS AND THE CITY DOES NOT. THE CITY HAS SHOWN LITTLE IF ANY UNDERSTANDING OF ITS OWN ORDINANCES AND CODES AS APPLIED TO FACTS OF THIS CASE.

Respondent's plans and supplementary information appear to be based on his faulty assumption that there was no change of use of the Western Dining Area⁴.

THERE WAS NO CHANGE OF USE. THIS IS NOT A FAULTY ASSUMPTION, IT IS SUPPORTED BY ALL OF THE UNDISPUTED EVEDENCE AND IS WHAT THE ZONING DEPARTMENT AND THE DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT FOUND – SEE ABOVE.

Respondent's plans were flawed and deficient ⁵.

NONSENSE. THE PLANS WERE PREPARED BY AN ARCHITECTURAL FIRM THAT HAS BEEN IN BUSINESSS FOR DECADES AND COMPLIES WITH ALL ACCEPTED STANDARDS. WHEN FILED AND PERMITTED THE CITY FOUND NO “FLAWS OR DEFICIENCIES IN 2012.

THE CITY ACCEPTED THESE PLANS AND RAISED ONLY ONE ISSUE - THREE YEARS LATER - THAT IS WAS CONFUSED ABOUT THE AREA TO BE REMOEDLED WITH JOHN SKRADSKI OFFERING THAT HE “MISSED IT” AFTER HAVIG THE PLANS THE WERE PERMITETD FOR THREE MONTHS TO REIVIEW. JOHN MISSING IT IS NOT THE ARCHITECTS FAULT IT IS JOHNS. IT IS ABSURD TO ARGUE THE THAT JOHN SKRADKSI FAILURE TO DO HIS JOB COMPETANTLY MAKES THE PLANS “FLAWED AND DEFICIENT”. HOW ABOUT THE PLANS HE APPROVED IN 2014? DID JOHN MISS THE WEST DINING ROOM AGAIN?

The information provided by Respondent prior to the issuance of the Notice of Violation does not include the necessary code analysis,

YES IT DID. IT HAD A COMPLETE CODE ANALYSIS. JOHN SKRADSKI TESTIFIED THAT IT DID NOT INCLUDE RESTROOM FOR THE WEST DINING ROOM. HE WAS WRONG IT DID. THE KINDEST DESCRIPTION OF JOHN SKRADSKI IS THAT HE IS NOT CREDIBLE.

life safety, alarm

THESE WERE NOT REQUIRED BY THE CITY WHEN THE PERMIT WAS GRANTED NOR ARE THEY REQUIRED NOW BASED ON THE ANALYSIS OF AN INDEPENDANT LECENSED FIRE SAFETY ENGINEER THAT STEVE UBL ASKED TO BE REATINED TO DETERMINE WHAT FIRE SAFETY IMPROVEMENT WERE REQUIRED.

and other necessary information that was needed to guide the construction process to ensure that a Certificate of Occupancy could be issued for the space⁶.

NONSENSE. THE PERMIT WAS APPROPRIATEELY GRANTED WITH THE FULL UNDERSTANDING THAT SUBSEQUENT SUBCONTRATOR PERMITS AND POSSIBLE REVISIONS WOULD BE NEEDED BEFORE A CERTIFICATE OF OCCUPANCY COULD BE ISSUED. THIS IS AN APPROVED PRACTICE OF THE CITY. ANTICIPATED SUBSEQUENT PERMITS WERE TO INCLUDE, BUT NOT BE LIMITED TO: ELECTRICAL, PLUMBING, HANDICAP ELEVATOR ISTALLATION, FIRE EXIT, AND BAR CONSTRUCTION - ALL OF WHICH BOTH PARTIES UNDERSTOOD AT THE TIME OF THE ISSUANCE OF THE BULDING PERMIT WOULD BE NEEDED TO "ENSURE THAT THE CERTIFICATE OF OCCUPANCY FOR THAT SPACE COULD BE ISSUED" WHEN ALL PERMITTED WORK WAS COMPLETED. EVERY PERMITTED PROJECT WITHOUT EXCEPTION THAT I HAVE DONE SINCE 1971 HAS FOLLOWED THE ABOVE PROCESS FOR PERMITTING.

Respondent failed to point to any documentation or conversation with DSI staff that would have informed them of his intention to finish off the Western Dining Area for occupancy.

NONSENSE. THE CITY WAS FULY AWARE OF THE WORK PLANNED IN THE PERMIT PLANS AND GOING ON IN THE WEST DINING ROOM, INSEPCTED IT, AND ISSUED ADDITIONAL SUBCONTRACOTR PERMITS FOR WORK WITHIN IT WHICH CITY

POLICIES AND PROCEDURES DO NOT ALLOW UNLESS THERE HAS BEEN A BUILDING PERMIT ISSUED. IN ADDITION PLAN REVISION TWO HAS NOTES ON IT INDICATING THAT MULTIPLE CITY DEPARTMENTS KNEW WHAT WAS THE PROJECTS "INTENTION".

The failure to update the \$10,000 project estimate,

THE PROJECT ESTIMATE UPDATE OCCURED AS THE MANY SUBSEQUENT SUBCONTRACOTR PERMITS WERE FILED BY A VARIETY OF CONTRACTORS AS WAS ANTICIPATED WHEN THE ORIGINAL PERMIT APPLICATION WAS FILED.

amend the Building Permit Application or fill out a new one

NONSENSE - THE PLANS WERE AMENDED A NUMBER OF TIMES, FILED WITH THE CITY, AND AS RECENTLY AS THE MOST RECENT FILING THIS YEAR HAVE BEEN IGNORED BY THE CITY THAT REFUSES TO RESPOND TO THE FILINGS BY EITHER ACCEPTING THEM, ACCEPTING THEM WITH REVISIONS, OR REJECTING THEM!

is alone serious enough grounds for a finding that the City is not estopped from enforcing its Legislative Code⁷.

THE FACT THAT THE CITY WILL NOT REPSOND TO PERMIT REVISION FILINGS IS CLEAR AND UNAMBIGUOIOUS EVEDENCE THAT THE CITY IS NOT ENFORCING ITS OWN LEGISTLATIVE CODE AND IS GUILTY OF WRONGFUL CONDUCT BY PREVENTING RESPONDENTS PERFORMANCE. THERE IS NO WAY THE RESPONDENT CAN EVER GET A CERTIFICATE OCCUPANY PERMIT IF THE CITY REFUSES TO EVEN COMMENT ON THE PLANS THAT HAVE BEEN FILED.

Two DSI staff members, Jim Bloom and John Skradski, were responsible for the review and approval of the plans Respondent submitted.⁸ Both clearly articulate that the information Respondent provided did not include information that would have led them to believe that

Respondent intended to finish off the Western Dining Area

Exhibit 42-33, Line 20 - Exhibit 42-39, Line 17, Exhibit 43-1, Line 5 -Exhibit 43-2, Line 21, Exhibit 43-3, Line 18 -Exhibit 43-3, Line 16 - Exhibit 43-5, Line 1.

³ *Brown v. Minnesota Department of Public Welfare*, 368 N.W.2d 906,912 (Minn. 1985).

⁴ Respondent Exhibit 14, Page 3, Respondent Exhibit 15, Page 3.

⁵ Skradski Aff., ,1,r's 39-44, 71-78, 81, Exhibit 29-41, Line 18 - Exhibit 29-43, Line 11, Exhibit 29-59, Line 7 -Exhibit 29-61, Line 5, Exhibit 42-39, Line 20-Exhibit 42-58, Line 20, Exhibit 43-3, Line 15 - Exhibit 43-6, Line 11, Exhibit 43-15, Line 11 - Exhibit 43-20, Line 22.

⁶ Skradski Aff., ,1,r's 45-59, 63, Exhibit 29-38, Line 22-Exhibit 29-39, Line 19, Exhibit 43, Lines 5-11, Exhibit 42-58, Line 17 -42-59, Line 1, Exhibit 43-7, Line 1 - Exhibit 43-14, Line 11.

⁷ Skradski Aff., ,1,r's 8, 82, Exhibit 43-3, Line 15 -43-5, Line 8.

⁸ Skradski Aff., ,125, Exhibit 42-30, Line 24 - Exhibit 42-31, Line 3, Exhibit 29-25, Line 4 - 29-27, Line 21, Exhibit 29-33 Lines 1-3.

for occupancy or ask further questions of Respondent or the designer of record.⁹ Both stated that they saw no triggers or indications in the plans Respondent submitted that would have led them to ask further questions of the architect of record regarding the scope of the project.¹⁰

JOHN SKRADSKI'S CREDIBILITY. HIS CLEAR ARTICULATED TESTIMONY WAS THAT HE "MISSED" THE WEST DINING – NOT THAT IT WAS NOT IN THE PLANS THAT HE PERMITTED. I MET WITH JOHN IN 2012 AND SHOWED HIM THE WEST DINING ROOM PLAN, TO SUGGEST HE EVEN MISSED IT IS NOT CREDIBLE.

In my previous affidavit dated May _____, 2018, I noted that I had learned during the deposition of John Skradski that the Petitioner claimed that it had not received plan revisions 2 – 5. *Rupp Affidavit* ¶ 36. Since that time, I have come to realize that copies of Plan Revision #2 were included in the documents provided by the Petitioner, proving that Petitioner did, in fact, receive Plan Revision #2. Plan Revision #2 was dated May 30, 2014, and was dropped off by me on or about the same date. *Rupp Affidavit* ¶22. Respondent's Exhibit R - _____ is a copy of Plan Revision #1 (which later

became the “Approved Plan and Permitted”) that I dropped off at on or about the same time as Plan Revision #2. That Exhibit has a hand-written annotation in the upper right hand corner which specifically notes that it “added west dining room to scope of interior alteration work” and “added restrooms to scope of work”. R - _____ is a clean copy of Plan Revision #2 which was dropped off. R- _____, is copy of Plan Revision #2 that has been “color coded”, which indicates that it was reviewed and colored by DSI staff. R- _____ is a copy of Plan Revision #2 which has a hand-written annotation “Larry has this for licensing purposes”. “Larry” presumably refers to Larry Zangs. Since the city has never taken the position that the West Dining Room had any licensing issues (the city has agreed that the west dining room was and has always been part of the Commodores licensed premises), so the fact that the plan was sent to the licensing department to update it records on what improvements were to be made within the licensed premises was a clear indication that DSI was treating the Western Dining Area as being part of the Approved Permitted Plan. After Plan Revision #2 was dropped off, I did not have any further communication with the City concerning Plan Revision #2 and as I have in the past assumed that it had been accepted. Additional comments regarding Mr. Skradski’s credibility are in included in my Second Affidavit. On essentially every substantive fact that bears on this case Mr. Skradski’s testimony has no basis in fact. His credibility is crucial in understanding what happened in this case, since Steve Ubl relied on him to provide the “facts” of this when he wrote his letter setting out his understanding of the status of the permit. _____

AND MOST IMPORTANTLY. THE COURT IS APPARENTLY ARE TO BLEIEVE THAT THE ENTIRE CITY STAFF (LICENSING, BUILDING, AND ZONING) ARE INCAPABLE OF UNDERSTANDING ARCHITECTURAL PLANS SINCE NOT ONE DEPARTMENT LOOKED A THEM AND ASKED ANY QUESTIONS BEFORE THE PERMIT WAS ISSUED AND HAD THEM FOR 8 MONTHS TO REVIEW BEFORE THE PERMIT WAS ISSUED

WHEN THE DISPUTE STARTED IN 2015 NO DEPARTMENT OF THE CITY HAS SINCE
LOOKED AT THE FILED PLANS AND COMMENTED ON THEM SPECIFICALLY AFTER
THEY ALL CAN NO LONGRR ARGUE THAT THE WEST DINING ROOM WAS NOT
INCLUDED.

Both stated that omissions and mistakes by the architect of record,

BOTH NEVER IDENTIFED A SINGLE SO CALLED "OMISSION OR MISTAKE" WITH
REFERENCE TO ANY VIOLATION OF ANY ACCEPTED STANDRAD FOR THE
PREPARATION OF THE PLANS NOR EXPLAINED WHY THE WERE PERMITTED IN 2012
IF THEY HAD THESE PROBLEMS. . THE ARCHITECT HAS STATED IN ITS AFFIDAVIT
THAT THE PLANS ARE FULLY IN ACCORDANCE WITH ALL ACCEPTED
STANDARDS. IF THERE HAD IN FACT BEEN OMISSIONS AND MISTAKES WHAT
POSSIBLE EXPLAIANATION IS THERE WHY THE CITY ACCEPTED THEM AND
ISSUED THE PERMIT IN THE FIRST PLACE?

the failure of Respondent to update the dollar value of the project

IT WAS UPDATED

and the failure of Respondent to amend his application

I DID MULTIPLE TIMES WITH NO REPSONSE FROM THE CITY!

led to their belief that the scope of the remodel did not include the Western Dining Area.¹¹ These items were the responsibility of the Respondent or his architect to update.

THEY WERE CLEAR AND WERE REPATEDLY "UPDATED" THE RESPONSIBILITY
WAS ON THE CITY TO REVIEW THEM.

THERE WERE NO OMISSIONS AND MISTAKES OR THE CITY WOULD HAVE CITED

THEM WHEN EACH OF THE MULTIPLE REVISIONS OF THE PLANS WERE FILED.

Finally, both were clear that GBP #12-017614 did not include the extensive remodeling work performed by Respondent in the Western Dining Area.¹²

MUCH OF THE WORK WAS COVERED BY SUBSEQUENT PERMITS THAT WERE FILED AND FULLY INSPECTED BY THE CITY .

Respondent argues that he didn't learn of the issues preventing issuance of his Certificate of Occupancy until October 27, 2015, which was a day or two before the opening of the Restaurant facility (including the Western Dining Area).

TRUE. THE CITY HAS YET TO EXPLAIN WHY IT WAITED UNTIL THEN TO RAISE CONCERNS.

He appears to argue that his reliance on the scope of work that he believed that GBP #12-017614 covered somehow estops the City from enforcing the Minnesota State Building Code, Zoning Code and other City Ordinances.

NO THAT IS NOT MY ARGUMENT. OF COURSE I ACCEPT LEGITIMATE ENFORCEMENT OF THE BUILDING CODE, ZONING CODE, AND OTHER CITY ORDINANCES. IT IS PREPOSTEROUS TO SUGGEST OTHERWISE. THERE WOULD BE NO DISPUTE IF THE CITY DID THE SAME.

Respondent's argument is not supported by the record nor is it supported by the law.

YES IT IS - FULLY

Violations of the Building Code and Zoning Code are not waivable.¹³ Undisputed evidence exists to show that steps were taken to both notify Respondent and support him in moving forward towards gaining his Certificate of Occupancy prior to his decision to allow occupancy

of the Western Dining Area.

I RECEIVED NOFICATION AFTER I WAS TOLD TO OPEN AND AFTER I WAS IN
FACT OPEN. IT IS PREPOSDEROUS TO SAY THERE WAS ‘SUPPORT MOVING
FORWARD” I WAS THREATENED WITH BANKRUPTCY BECUASE I WAS TO TOLD
TO CLOSE MY BANQUET ROOM – NO NEGOTIATION – NO TIME TO FIGURE OUT
WHAT TO DO WITH THE CASCADE OF ECONOMIC CALAMITIES IT WOULD CAUSE.

Inspection dates taken from the permits related to the Western Dining Area show a

⁹ Skradski Aff., **1rs** 26, 39-63, 70, 82, 83, Exhibit 29-37, Line 2 - Exhibit 29-39, Line 12, Exhibit 42-86, Line 9 - Exhibit 42-92, Line 3.

¹⁰ Exhibit 29-37, Line 17 - Exhibit 29-38, Line 21, Exhibit 29-59, Lines 7-18.

¹¹ Skradski Aff., ,rs 7, 8, 18, 26-59, 63-83, Exhibit 42-65, Line 22 - Exhibit 42-75, Line 22, Exhibit 29-28, Line 5 - 29-31, Line 10, Exhibit 29-37, Line 11 -Exhibit 29-39, Line 21, Exhibit 29-53, Lines 3-10, Exhibit 29-59, Line 7 -Exhibit 29-61, Line 6.

¹² Skradski Aff., **126**, Exhibit 42-65, Line 22 - Exhibit 42-75, Line 22, Exhibit 29-53, Lines 3-10.

¹³ Ubl Aff., **1rs** 9, 10, 11, 12, Exhibits 3-1 - 3-4, 4-1 -4-5, 5-1 - 5-3, 6.

two plus year gap (from July 26, 2013 to August 24, 2015) in the time that DSI staff was at the Commodore for any type of inspection. ¹⁴ The letters which Inspector Palm created for Respondent related to the outstanding work under GBP #12-017614 and the supporting information provided in Inspector Palm's affidavit establish that as early as July 23, 2015, DSI knew there was work being done in the Western Dining Area beyond the scope of the permit that would impact the issuance of a Certificate of Occupancy. ¹⁵

SO THE CITY ADMITS THERE WAS WORK GOING ON AND NEVER CONTACTED ME THEN ABOUT THE WORK BEING OUTSIDE OF THE PERMIT – JUST LET ME CONTINUE WORKING. IS THAT CREDIBLE?.

Inspector Sutter believes that he conducted an inspection outside of the Western Dining Area on August 24, 2015 that included a wheelchair lift, the bathroom by the kitchen and the kitchen office. ¹⁶ He recalls little about the Western Dining Area other than being asked about taking out a window and putting in an exterior door. ¹⁷

ABSURD TO ARGUE THAT SUTTER DID NOT NOTICE THE WORK WHEN ASKED ABOUT THE WINDOWS AND DOORS IN THE ROOM THAT WAS BEING REMODELED..

In his September 18, 2015 email to Steve Ubl, Respondent admits he does not have the right to occupy the ballroom (which is the Western Dining Area) and states that he understands he needs a "permanent C of O". ¹⁸

OF COURSE I KNEW I NEEDED A PERMANENT CERTIFICATE OF OCCUPANCY AT SOME POINT, BUT ALSO KNEW I COULD OCCUPY IT WITH A TEMPORARY CERTIFICATE. A COMMON PRACTICE.

Inspector Palm documented a September 22, 2015 meeting at the Commodore with Respondent

and a number of other DSI staff in his notes under GBP #12-017614¹⁹. In those notes, Inspector Palm states that the purpose of this meeting was to "discuss requirements for temporary occupancy approval-building permit needed for emergency exit from dining/ballroom work that is already done" and "trades finals needed".²⁰The record shows that Respondent understood what he needed accomplish before he could allow occupancy of the Western Dining Area space prior to October 27, 2015. As evidenced by Inspector Sutter's recollection of the September 22, 2015 meeting, DSI was willing to work with Respondent to

¹⁴ Sutter Aff., i/12, Ubl Aff., i/30.

¹⁵ Exhibit 36-1, 36-2, 37-1, 37-2, Palm Aff. i/i's 19-28.

¹⁶ Sutter Aff., i12

¹⁷ Sutter Aff., i/14 - 16

¹⁸ Exhibit 24-1, 24-2, Ubl Aff., i/60

¹⁹ Palm Aff., i/14, Exhibit 35-2.

²⁰ Exhibit 35-2, Palm Aff., i/i's 14, 29, 30.

make sure he understood the steps he needed to take before a Certificate of Occupancy could be issued and occupancy could be allowed.²¹

CORRECT WITH CLARIFICATION. I WAS TOLD THAT I NEEDED TO DO A NUMBER OF THINGS FOR A TEMPORARY OCCUPANCY CERTIFICATE TO ALLOW ME TO OPEN. I DID THOSE THINGS IMMEDIATLEY AND WAS THEN TOLD I WOULD BE GIVEN A TEMEPORARY CERTIFCATE OF OCCUANCY AND WAS APPROVED TO OPEN.

Additional meetings, communications and hearings have followed those initial communications throughout the pendency of this matter.²²

CORRECT – PAINFULLY SO

Respondent further argues that the City is wrongfully impeding his efforts to comply with the issues laid out in Steve Ubl's letter of October 26, 2015. This argument is misplaced. Respondent has clearly and repeatedly been told in meetings and in writing what steps need to be taken to achieve a Certificate of Occupancy for the Western Dining Area²³. Respondent continues to assert that he will comply, but only if compliance is based on his belief that there has been no change of use relative to the Western Dining Area.

CORRECT - BECAUSE THAT IS WHAT THE ZONING AND THE PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENTS HAVE CONCLUDED. THE BUILDING OFFICIAL STEVE UBL HAS NO LEGAL AUTHORITY TO MAKE A ZONING DETERMINATION AND AS A CONSEQUENCE HIS LETTER IS BEING IGNORED BY ZONING AND PED.

Based on the record before it, the City views the Western Dining Area space as "raw space" with no use established ²⁴As

THERE IS NO CONCEPT CALLED "RAW SPACE" IN THE MINNESOTA STATE CONSERVATION CODE OR ANYWHERE ELSE I CAN FIND. GUESSING WHAT IS MEANT BY THIS I CAN SAY IT WAS IN NO WAY RAW SPACE. I HAVE USED IT AS PART OF MY RESTAURANT/OPERATIONS SINCE 2000. I have reviewed the references in the transcript of the Deposition of James Bloom which are referred to in footnote 24, page 7 of the *City Response Memorandum*, as well as Deposition Exhibits 130 and 131 referred to therein. As of the date of the pictures included in Exhibit 130 and 131 (and when I became the owner 18 years ago!) , the West Dining Room was completely finished for occupancy, it was in no way a "raw space" whatever that means. James Bloom admitted he had never visited the space. From the pictures alone he could not possibly have known that it in fact was not fully developed. The West Dining Room had in fact: a complete electrical service including all needed lighting & wall outlets;

a heating, ventilating & air conditioning system; all exterior walls & ceiling had been painted; complete floor coverings; exterior windows; and two legal fire exits. Coincidentally the west dining room, as to condition, is essentially identical to the 7th floor equipment room at the Saint Paul Athletic Club – which I own and completed its renovation at significant expense to very high quality with a city certificate of occupancy evidencing its agreement. James Bloom later in his deposition did admit that for some users it was in fact complete refuting his own statement that it was “raw space”.

any plans for remodeling the space must conform to updated Building Code requirements as well as the other issues outlined in Steve Ubl's letter of October 26, 2015.

THE PLANS FULLY COMPLY WITH THE UPDATED BUILDING CODE REQUIREMENTS IN THE MINNESOTA CONSERVATION CODE FOR EXISTING BUILDINGS. THIS PROJECT HAS NOT HAD A CHANGE OF OCCUPANCY AS DEFINED UNDER THAT CODE WHICH GUIDES THE APPLICATION OF THE CODE.

Respondent disagrees with the City's position because it is more costly than a simple remodel of a space that has not undergone a change of use²⁵.

THIS DISPUTE HAS NOTHING TO DO WITH COST. THE DISAGREEMENT IS THAT I ACCEPT THE LEGAL DETERMINATION OF NO CHANGE OF USE FROM THE ZONING DEPARTMENT BUT DO NOT ACCEPT WHAT THE BUILDING OFFICIAL DETERMINED BECAUSE HIS DETERMINATION OF CHANGE OF USE HAS NO LEGAL FOUNDATION AND HAS BEEN IGNORED BUT NOT ONLY ME BUT ALSO PED AND THE ZONING DEPARTMENT

The City's position with respect to this issue is final²⁶

THIS IS AN INTERSTING POINT. I AGREE WITH THE CITIES POSITION AND CONSIDER IT FINAL THAT NO CHANGE OF USE HAS OCCURRED BASED ON THE ZONING AND PED DEPARTMENTS POSITIONS. THE ABOVE STATMENT MAKES NO SENSE GIVEN THE REST OF THE CITIES ARGUMENTS UNLESS THE “CITY” WHATEVER THAT MEANS, IN THE CONTEXT OF THIS MEMO IMPROPERLY RELIES ON THE BULDING OFFICIAL TO DECIDE ZONING MATTERS

The City would point out that Respondent's motion is factually inaccurate as to the date of the letter that the Zoning Administrator produced, which is referred to as Respondent's Exhibit 4²⁷. This letter was sent to Respondent on October 30, 2015, long after the City had discovered the illegal work done in the Western Dining Area and was related to the zoning determination was made by the

²¹ Sutter Aff., **118** - 25.

²² Exhibits 22, 25 and 41.

²³ Exhibits 17-9, 20-1 - 20-2, 22 and 25.

²⁴ Exhibit 29-61, Line 9 - Exhibit 29-66, Line 10, Exhibit 29-69, Line 1 - Exhibit 29-70, Line 7, Exhibit 29-71, Line 18 - Exhibit 29-72, Line 20.

²⁵ Exhibit 41-36, 13, Exhibit 41-37, rs 1, 2.

²⁶ Exhibit 41-1 - 41-3.

²⁷ Respondent's Motion page 9, Respondent's Aff. 9

BZA on December 4, 2017 and codified in Council Resolution RES 18-512²⁸. The determination of the Zoning Administrator is not before this Court and as previously argued in the City's motion, reconsideration of this final determination is barred.

AGAIN - INTERSTING STATEMENT. THE BZA AND THE CITY COUNCIL DECIDED THAT THE RESTUARANT USE HAD NOT BEEN LEGALLY ESTABLISHED. I AGREE, TO BE FULLY ESTABLISEHD THE PROPERTY MUST HAVE A LICENSE CORRECT ZONING AND AN OCCUPANCY CERTFICATE FOR RESTAURANT USE. THIS DISPUTE IS ABOUT FINALINING THE WORK TO GET A RESTUARANT OCCUPANCY CERTIFCATE WHICH I HAVE BEEN TRYING FOR THREE YEARS OT GET.

The failure of Respondent to accept the guidance of the Building Official

STEV UBLE'S "GUIDANCE" ON ZONMNG HAS BEEN IGNORED BY NOT ONLY ME BUT PED AND ZONING. STEVE DEMANDS IMPROVEMENTS HE HAS NO LEGAL RIGHT TO DEMAND AND REACHES CONCLUSONS OF FACT THAT SUPPORTS HIS DEMANDS THAT ARE SUBSTANTIALLY WRONG. .

and the decisions of the Zoning Administrator,

ON THE CONTRARY I ACCEPT THE ZONING ADMINISTRATORS DECISION THAT THERE HAS BEEN NO CHANGE OF USE -- THE CITY DOES NOT!!

the Board of Zoning Appeals and the City Council that the Western Dining Area has not been legally established are the reason conditions on Respondent's license are necessary.

A LUDICROUS ARGUMENT. I ACCEPT THE BOARD OF ZONING APPEALS AND THE CITY COUNCILS DETERMINATIONS BECAUSE THE WEST DINING ROOM USE HAS NOT BEEN LEGALLY ESTABLISHED AND CAN'T BE UNTIL THE BUILDING OFFICIAL CORRECTLY APPLIES THE PROVISIONS OF THE STATE BUILDING CODE AND PROVIDES ME THE PROMISED LIST OF FURTHER NEEDED IMPROVEMENTS IF ANY.

Respondent cannot claim he relied on any wrongful conduct. Respondent has not shown proof of any unique expenditure that was made. In fact, according to Respondent the value of the work done in the Western Dining Room under GBP #12-017614 did not exceed the \$10,000 valuation.

SEE ARGUMENTS ABOVE ABOUT RELIANCE DAMAGES

Finally, the balance of equities do not weigh in favor of estoppel.

THERE ARE NO FACTS THAT THE BALANCE OF EQUITIES IS NOT IN MY FAVOR
- SEE ABOVE.

The City ought not to be compelled to license a business for any purpose when the license is used, in part, to facilitate activities that are not in compliance with rules and regulations aimed at protecting the public.

AGREED - BUT THOSE ARE NOT THE FACTS OF THIS CASE

It is important that the City be able to exercise its basic authority to regulate liquor establishments to benefit the health, safety and welfare of its citizens.

AGREED

Conclusion

The City is entitled to summary disposition as a matter of law.

AS MATTER OF LAW THE CITY LOSES

Undisputed facts establish that Respondent has allowed occupancy without a Certificate of Occupancy.

NONSENSE – I OCCUPIED THE WEST DINING ROOM WITH THE EXPRESSED APPROVAL OF THE CITY WHICH WAS WITHDRAWN AFTER I OPENED.

The estoppel argument raised by Respondent fails in large part due to his omissions and errors.

THERE WERE NO OMISSIONS AND ERRORS ON MY PART AND NUMEROUS ERRORS AND OMISSIONS ON THE CITY'S PART

The City issues liquor licenses and can't be made to be an unwilling partner to the continuation of Respondent's conduct in allowing occupancy of a space without a Certificate of Occupancy.

I HAVE DONE NOTHING WRONG – EVER. THE CITY IS ENTIRELY TO BLAME FOR THIS DISPUTE, AND IS THE ONLY ONE THAT CAN ACT TO RESOLVE IT BY COMPLYING WITH ITS OWN RULES

Respondent has attempted to expand the issues in a number of forums in an attempt to secure a favorable ruling

²⁸ Exhibit 41-1 - 41-3.

on his argument that there was no change of use relative to the Western Dining Area.

ACTUALLY WHAT HAS HAPPENED IS THAT THE "CITY" IGNORED THE ZONING DEPARTMENT SO I WENT TO THE DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPEMENT FOR HELP. PED LOOKED INTO THE MATTER AND AGREED WITH BOTH ME AND THE ZONING ADMISTRATOR THAT THERE HAS BEEN NO CHANGE OF USE. IT IS CLEAR TO ME THAT THE BUILDING OFFICIAL WITH THE SUPPORT OF THE CITY ATORNEY'S OFFICE IS REFUSING TO ACCEPT THE DETERMINATION OF THE ZONING DEPRATMENT AND PED, IN ORDER TO REQIRE MORE FROM ME THAN IT HAS THE LEGAL RIGHT TO DEMAND. OF COURSE I LOOKED FOR "ANOTHER FORUM' THAT OPERATES IN COMPLIANCE WTH THE LAW.

Because the undisputed facts establish that Respondent allowed occupancy without a Certificate of Occupancy, a first time matrix penalty and conditions are appropriate.

NONSENSE.

The arguments m Respondent's motion for summary disposition fail to establish the factual basis needed to prevail.

THE CITY HAS MADE NOT A SINGLE ARGUMENT BACKED BY THE FACTS OF THIS CASE THAT ALLOW IT TO PREVAIL.

Accordingly, the Department respectfully requests that Respondent's motion be denied in its entirety. Based on the above facts and law, DSI respectfully renews its request for Order for Summary Disposition with a recommendation supporting adverse action, the requested penalty and requested license conditions.

ACCORDINGLY I REQUEST THAT RESPONDENT MOTION BE GRANTED AND THAT IT BE AWARDED LEGAL FEES.

Dated: tD \ 1'8

Respectfully submitted,



~~THERESE A. SKARDA~~
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**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS**

FOR THE CITY OF SAINT PAUL

In the Matter of All Licenses Held by the
University Club of St. Paul, d/b/a The
Commodore for the premises located at
79 Western Avenue in Saint Paul

**AFFIDAVIT
OF
DONALD JONES**

STATE OF MINNESOTA)
)
COUNTY OF CHISAGO) SS


Donald Jones, being first duly sworn, states and alleges as follows:

1. This affidavit is made of my own personal knowledge, and if called to testify at a trial, I could, and would, testify in accordance with what is stated in this affidavit.
2. In 2012, I entered into an agreement to serve as the construction manager relative to a project which was being undertaken to remodel the main dining area and the area commonly referred to as the Western Dining Area at the Commodore, 79 Western Avenue North, St. Paul, Minnesota (the "Project"). I served in that capacity until approximately October, 2015.
3. In that capacity, I was, and still am, familiar with all the construction, permitting, and inspections with respect to the Project.
4. The principal inspector with whom I had contact was Todd Sutter.
5. During the time that I was the construction manager, I requested Mr. Sutter 3 - 4 times to inspect the progress of the construction which was being done with respect to the Project.
6. According to my records, Mr. Sutter conducted the following inspections while I was at the Project:
 - a. July 26, 2013. To the best of my recollection, this was an inspection related to the raised floor and probably for the steel in the arched opening which had been cut.
 - b. September 17, 2014. To the best of my recollection, this was an inspection of the framing for the Western Dining Area.
 - c. August 24, 2015. To the best of my recollection, this was an inspection of the back bathroom in the Original Dining Room.
 - d. October 26, 2015. This was an inspection by a fire marshal.

- e. October 27, 2015. This was an event at which numerous people from the City were present and they viewed the entire project.
7. Mr. Sutter was also there when the ceiling of the Western Dining Area was framed, and we would not have closed the ceiling without his approval.
 8. At no time did Mr. Sutter have the Project's building permit, and accompanying plans (i.e. the 24" x 36" formatted plans) with him during any of the inspections.
 9. On September 16, 2014 (one day before the September 17, 2014 inspection, I went to the City offices in order to inquire about the whereabouts of the building permit and plans. I personally went to the City offices and spoke to both John Skradski (a plan reviewer) and Jim Bloom (the building official) each of whom confirmed that the permit and plans could not be found.
 10. In addition, an electrical inspector came at least one time for an unscheduled inspection, at which time he observed construction work being done in the Western Dining Area, and made no comment about the construction work.
 11. Mr. Sutter did not challenge, question, or comment upon the fact that construction work was being done in the Western Dining Area.

I DECLARE UNDER PENALTY OF PERJURY THAT EVERYTHING I HAVE STATED IN THIS DOCUMENT IS TRUE AND CORRECT.

Dated: May 18, 2018



Donald Jones

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF SAINT PAUL**

In the Matter of All Licenses Held by the
University Club of St. Paul, d/b/a The
Commodore for the premises located at
79 Western Avenue in Saint Paul

**FOURTH
AFFIDAVIT
OF
JOHN R. RUPP**

STATE OF MINNESOTA)
) SS
COUNTY OF RAMSEY)

John R. Rupp, being first duly sworn, states and alleges as follows:

1. This Fourth Affidavit of John R. Rupp (the “*Fourth Rupp Affidavit*”) follows the Affidavit of John R. Rupp, dated May 21, 2018 (the “*Rupp Affidavit*”) which was served and filed in this matter on May 21, 2018; the Second Affidavit of John R. Rupp (the “*Rupp Second Affidavit*”) served and filed on June 4, 2018; and the Third Affidavit of John R. Rupp (the “*Rupp Third Affidavit*”), served and filed on June 18, 2018.

2. The Fourth Rupp Affidavit is offered in support of the *Respondent’s Amended Memorandum of Law in Support of Motion for Summary Disposition*, of even date herewith. The City’s claim in this action is that the Respondent allowed the occupancy of the Western Dining Area without a Certificate of Occupancy, and this Affidavit will provide the factual basis for the conclusion that there was a Certificate of Occupancy in place at all relevant times herein, and that the relief requested in the City’s Amended

Petition should be denied in its entirety.

3. The Fourth Rupp Affidavit is made of my own personal knowledge, and if called to testify at a trial I could, and would, testify in accordance with what is stated in this affidavit.
4. In this Affidavit, all references to "Exhibit(s)" means the Exhibit(s) which are attached to this Affidavit. The terms "Original Restaurant" and "Western Dining Area" have the same meaning in this Affidavit as ascribed to them in the Respondent's Previous Submissions. A diagram outlining their location, which was previously submitted as an Exhibit, is attached to this Affidavit as *Exhibit D, page 1*. The remaining pages on Exhibit D are hand-annotated site plans of the "*Commodore Complex*" (defined below) showing the locations of "areas" of the Commodore Complex referred to elsewhere in the Amended Memorandum. *Page 2* shows the location of the "Western Portion" and the "Eastern Portion" of the Commodore Complex. *Page 3* shows the location of the "Commodore Condominium Building" and the dining room which was built in the 1920's. *Page 4* shows the area of the Western Portion which was built in the 1920's, and the area which was part of the expansion project in 1976.
5. Upon the conclusion of the June 28, 2018 hearing on this matter, I determined that the focus of the Respondent's position should be directed toward establishing that there was, in fact, Certificate(s) of Occupancy for both the Original Dining Area and the Western Dining Area at all relevant times herein. To that end, a request was made to the City Attorney on June 29, 2018 to provide ". . . copies of all of the 'Fire Certificates of Occupancy' issued for the Squash Club Building, which would have included the Western Dining Area." (Exhibit A, p. 1). The Occupancy Certificates provided confirmed that the entire bar and restaurant complex including the West Dining Area currently have

Certificates of Occupancy.

6. In response to my request, on July 6, 2018 the City sent an email to which was attached “. . . *imaged copies of the Fire Certificates of Occupancy records for the primary occupancy at 79 Western.*”(Exhibit A, p. 1). Those copies are attached to this Affidavit as Exhibit B and Exhibit C, and are described in greater detail, below, in ¶ 13 and 14.
7. The reference to “79 Western” refers to the building located at 79 Western Avenue North, St. Paul, MN. In this Affidavit, that building is referred to as the “*Commodore Complex*”. The address of “79 Western” is used by several different business and residential units which are located in different areas of the Commodore Complex. These include the “Commodore Squash Club” (which includes a bar and exercise facility), the “Commodore Bar and Restaurant”, several commercial condominium offices, and approximately 50 residential condominium units. Although Commodore Complex was constructed and reconstructed in several different stages, all of the different areas are either connected by passageways or by party walls.
8. The initial construction of the Commodore Complex was completed in the 1920’s. That construction included a six (6) story hotel with a bar located on the first floor; a one story dining room built in the 1920’s; a parking garage; and, a maintenance/service room. The six (6) story portion of the Commodore Complex was converted into a mixed-use condominium in the early 1980’s which is referred to as the “*Commodore Condominium Building*”. The bar/restaurant, and two other offices on the main floor became the “commercial condominium units”, and the hotel rooms became the residential condominium units. (It may be noted that as a result of an error, the dining room built in the 1920’s was not included in the condominium, and remains a separate legally described

parcel.) The general location of the areas referred to above are shown in *Exhibit D*.

9. The Westerly Portion of the Commodore Complex received zoning, licensing, and building permit approvals for construction and remodeling in 1976, was constructed/remodeled in the late 1970's. This portion consisted of the Squash Club, and the Western Dining Area. Importantly, the Western Dining Area was built to provide an area for the *expansion* of the service area of the Original Restaurant which is immediately adjacent to the Western Dining Area. The West Dining Area was *not* intended, nor approved, for any restaurant use independent of the Original Restaurant. A liquor license covered the entire Commodore Complex including, but not limited to, the Squash Club and bar, racquet ball courts, and the Western Dining Area.
10. The entire Commodore Complex suffered significant damage in a 1978 explosion. The reconstruction of the Commodore Complex commenced in the early 1980's and was completed pursuant to the 1976 plans and approvals in approximately 1982.
11. On July 8, 2018, I sent an email to Angie Wiese, who is the Fire Safety Manager of the Department of Safety & Inspections. *See Exhibit A, pp 2-3.*
12. Ms. Wiese responded to the July 8, 2018 email on August 2, 2018 noted that there are two separate fire certificates of occupancy for the "building", i.e., the Commodore Complex. A copy of her email can be found on page 6 of Exhibit A. That email, in part, states as follows:

Mr. Rupp-

*In response to your emails dated July 8, 2018:
Per your request, I went through the files and pulled our records related to the Fire Certificate of Occupancy. Our records only go back to the 1980s. Our Fire Certificates of Occupancies do not display dates so I dated the files in order to*

assist you with the timeline. I believe the following information answers your questions:

It appears that there have been 2 Fire Certificates of Occupancy on this building since its inception. One Fire Certificate of Occupancy has been for the amusement/recreation center and another for the apartment building. There is no record of a Fire Certificate of Occupancy for a restaurant. It also does not appear that either of the 2 fire Certificates of Occupancy were ever revoked.

In 2007 the city's electronic file begins to show an assembly occupancy load in the fire certificate of occupancy file however the file does not document what area the occupant load is for. I asked the inspectors who were listed on the files if they recalled anything about the space. Leanna Shaff has no recollection of anything related to 79 Western. AJ Neis does not recall inspecting what we are referring to as the future west dining room except to investigate a roof leak complaint in 2014. He said that at that time all contents were covered by heavy plastic and the space was not in use due to the continual water damage. (ANGIE-does AJ recall that the space was finished? Does he recall that it was in a raw state? Any other recollections about its condition?)

It is clear that the word “*inception*” refers to the time of the completion of the construction of the Westerly Portion in the early 1980’s, as that was mentioned in Respondent’s June 28 requests, and, as pointed out by Ms. Weise, the relevant records of the City only go back to the 1980’s.

13. The “. . . 2 *Fire Certificates of Occupancy*. . . ” referred to are further described as follows:
 - a. See Exhibit B. The first Fire Certificate of Occupancy is represented by the group of individual certificates which include the following references, and is referred to herein as “*Fire Certificate of Occupancy B*”:
 - i. “TYPE: Dwelling Units UNITS: 52” (Exhibit B, pp 1 – 3);
 - ii. “TYPE: Dwelling Units UNITS: 49” (pp 4-16);
 - iii. Residential 3+ Units 49 Dwelling Units” (p. 17);
 - iv. “48 DWELLING UNITS, OFFICE” (pp 18 -20);
 - v. “51 DWELLING UNITS” (p. 20).
 - b. See Exhibit C. The second Fire Certificate of Occupancy is represented by the group of individual certificates which include the following references, and is

referred to herein as “*Fire Certificate of Occupancy C*”:

- i. TYPE: Amusement / Recreation Center (Exhibit C, pp. 1-6)
- ii. TYPE: Amusement / Recreation Center UNITS: 0 (pp. 1-7)
- iii. Amusement/ Recreation Center Assembly (p. 18)
- iv. AMUSEMENT/RECREATION CENTER) pp. 19,20,22,23)
- v. Racquet Ball Courts (p. 21)
- vi. REC.CENTER (p.24)

14. Fire Certificate of Occupancy B covers not only the residential condominium units, but also the Original Restaurant and the commercial condominium units on the first floor. Fire Certificate C covers the Westerly Portion, including the Squash Courts, exercise room, lockers, bar in the Squash Club, and the Western Dining Area.
15. The Respondent agrees with the statement in Ms. Wiese’s email that “. . .*[t]here is no record of a Fire Certificate of Occupancy for a restaurant. . .*”. This make sense since the Western Dining Area was intended to be used to provide and expansion of the service area or the Original Restaurant, not intended to be a “stand alone” restaurant.
16. Fire Certificate of Occupancy B and Fire Certificate of Occupancy C are both still in effect, and were in effect on September 13, 2016. In this regard, it should also be noted that Ms. Wiese expressly states that it does not appear that either of the 2 Fire Certificates of Occupancy have been revoked. Also in support of this conclusion, it should be noted that I have owned the Original Restaurant since the 1980’s and the Western Dining Area since 2001, and have never received any notice of revocation of any fire certificate of occupancy which complies with the provisions of section 40.06 of Chapter 40 of the Legislative Code. That section, which deals with revocation, states in relevant part as follows:

(b) Notice of suspension, revocation or denial.

(1) When the fire code official revokes, suspends or denies a fire certificate of occupancy for safety code violations, the notice shall state:

a. The specific reason(s) for the city's suspension, revocation or denial of the fire certificate of occupancy;

b. The effective date of the revocation, suspension or denial of the fire certificate of occupancy;

c. A statement indicating that the commercial building or residential occupancy, or portion thereof, shall not again be used or occupied until such time as the said certificate is issued or renewed or suspension lifted following inspection and a determination by the fire code official that the commercial building or residential occupancy, or portion thereof, is in compliance with applicable safety codes; and

d. A statement indicating that the suspension, revocation, or denial may be appealed to the legislative hearing officer within ten (10) days of issuance.

17. As noted in Ms. Wiese's email, several of the individual Fire Certificates of Occupancy did not include the date on the face of the documents. Those dates were embedded in the digital name of the electronic version of the documents. For the purposes of this Affidavit, it should be noted that the individual certificates on pages 11 – 14 of Exhibit C were dated "2015". Accordingly, Fire Certificate of Occupancy C would clearly have been in place in September 2016.

18. In this matter, it is clear from the above that the Fire Certificate of Occupancy B and Fire Certificate of Occupancy C were in effect at all times relevant herein.

19. Section 40.01 of the Saint Paul Legislative Code states as follows:

Sec. 40.01. - Fire certificate of occupancy requirement.

(a) All existing buildings in the city are required to have and maintain a fire certificate of occupancy, issued by the department of safety and inspections. The fire certificate of occupancy shall be an indication that the building meets, at the time of inspection, all relevant codes to maintain the health, safety and welfare of the building's occupants and the general public.

Section 40.03 of the Legislative Code defines “safety codes” as follows:

Safety code or safety codes. Any building, fire, housing, health, safety, zoning or other similar code, law and ordinance, promulgated or enacted by the United States, the State of Minnesota, the County of Ramsey and the City of Saint Paul, or any lawful agency or department thereof, which are applicable to a building in such city. Safety code includes, without any limitation of the foregoing sentence as a result of this specification, the provisions of Chapters 33, 34, 43, 45, 49, 55, 56 and 58 of the Legislative Code.

The City of Saint Paul had adopted the Minnesota State Building Code pursuant to Section 33.02 of the Legislative Code. Therefore, the Minnesota Building Code, as adopted by Section 33, is a “safety code” as that term is defined by Section 40.03, and referred to in Section 40.01. The Amended Petition has alleged that the Respondent did not have a Certificate of Occupancy required by Section 1300.0220 of the Minnesota State Building Code.

Fire Certificate of Occupancy B and Fire Certificate of Occupancy C were issued for the Original Dining Room and the Western Dining Area, and as such, are evidence of compliance with the requirements of Chapter 33 of the Legislative Code pursuant to Section 40.01 of the Legislative Code.

I DECLARE UNDER PENALTY OF PERJURY THAT EVERYTHING I HAVE STATED IN THIS DOCUMENT IS TRUE AND CORRECT.

Dated: 10/25, 2018



John R. Rupp

INDEX TO EXHIBITS
Fourth Affidavit of John R. Rupp
OAH Docket No. 65-6020-34289

- A. Post Hearing Email Exchange with City.
- B. Individual certificates for Fire Certificate of Occupancy B.
- C. Individual certificates for Fire Certificates of Occupancy C.
- D. Diagrams of various areas of the Commodore Complex.

John M. Miller

From: Skarda, Therese (CI-StPaul) <therese.skarda@ci.stpaul.mn.us>
Sent: Friday, July 6, 2018 12:13 PM
To: John M. Miller
Cc: Wiese, Angie (CI-StPaul); Ubl, Stephen (CI-StPaul)
Subject: RE: The Commodore - OAH Docket No. 65-6020-34289
Attachments: 20180703122253890.pdf; 20180703115413748.pdf; 20180703115103020.pdf; 79 Western 2007 Residential CO.PDF; 79 Western 2007 Squash CO.PDF; 79 Western 2009 Residential CO.PDF; 79 Western 2009 Squash CO.PDF; 79 Western 2011 Squash CO.PDF; 79 Western 2018 Residential CO.PDF; 79 Western 2015 Squash CO.PDF; 79 Western 2018 Squash CO.PDF; 79 Western 2003 Squash CO.PDF; 79 Western 2003 Residential CO.PDF; 79 Western 2005 Squash CO.PDF; 79 Western 2005 Residential CO.PDF

Mr Miller –

Attached please find imaged copies of Fire Certificates of Occupancy records for primary occupancy at 79 Western.

Thank you - Therese



Therese Skarda
Assistant City Attorney
Office of the City Attorney
400 City Hall, 15 West Kellogg Blvd.
Saint Paul, MN 55102
P: 651 266-8755
therese.skarda@ci.stpaul.mn.us



The Most Livable City in America

Making Saint Paul the Most Livable City in America

From: John M. Miller [mailto:jmiller@pfb-pa.com]
Sent: Friday, June 29, 2018 2:33 PM
To: Skarda, Therese (CI-StPaul)
Cc: Kraus, Julie (CI-StPaul)
Subject: RE: The Commodore - OAH Docket No. 65-6020-34289

Therese,

We would like to get copies of all of the "Fire Certificate(s) of Occupancy" which have been issued for the Squash Club Building, which would have included the Western Dining Area.

Please let me know your thoughts.

Thanks.

John M. Miller
Direct Dial: 651-290-6909

Attorney/Shareholder

John M. Miller

From: John R. Rupp <JRRupp@commonwealthproperties.com>
Sent: Sunday, July 8, 2018 4:50 PM
To: angie.wiese@ci.stpaul.mn.us
Cc: Skarda, Therese (CI-StPaul); John M. Miller
Subject: Good Morning

Good Afternoon Angie

I hope you can help me.

As you may have heard I am mired in a dispute regrading my Commodore Bar and Restaurant project.

Part of that dispute involves whether or not a section of my restaurant has an occupancy certificate.

Another part of the dispute involves whether I currently have a fire certificate of occupancy on any part of my restaurant. I have requested an inspection and the city has blocked that request for unknown reasons.

The DSI office has been unable to find the history of the fire occupancy certificates for the Commodore Squash Building in general, and the history of the occupancy certificate for the section of that building that I own in particular. I was referred to you for help.

Background will help:

- The building was built in 1976
- It was built to hold squash courts on the lower floor and a section for restaurant expansion on the second floor abutting the dining room that had been built in 1920.
- No other use other than restaurant use has ever been legally established for this dining room area of the building and therefor no other use could have been legally allowed.
- I have been using this dining room since 2001 as part of my restaurant consistent with the 1976 intended use, and have understood that my restaurant fire occupancy certificate covered my entire restaurant including this room since then.
- I have received no notice that I did not have an occupancy certificate until 2015. That notice never explained why I didn't have a fire occupancy certificate BTW.
- I do recall that periodically during the last 17 years I have met inspectors for fire inspections and looked at the room in question, but do not remember the inspectors names nor specific years.
- My liquor license has covered this room since 1984.

So the questions are:

Is my understanding correct – that I have had legal occupancy of the room since 2001, and if not why not?

When did this section of the building first receive an occupancy certificate? 1976?

Was that occupancy certificate ever cancelled, and if so when, and for what reason?

What else do you know about occupancy certificate for the building and restaurant section within it?

Thank you for your help

John

John M. Miller

From: John R. Rupp <JRRupp@commonwealthproperties.com>
Sent: Sunday, July 8, 2018 7:42 PM
To: angie.wiese@ci.stpaul.mn.us
Cc: Skarda, Therese (CI-StPaul); John M. Miller
Subject: FW: Commodore Restaurant
Attachments: Commodore SAC Redetermination.pdf; Summit Proposal.pdf; Commodore Restaurant 10-26-2015.pdf

Angie

Another question

From the fire departments point of view - for purposes of a fire certificate of occupancy - if there has been no change of zoning use and no increase in occupancy under the building code do you agree with the attached Summit Fire analysis of whether I need a sprinkler system.?

Those are the facts BTW.

Please see Mr. Ubl's comments below which have no basis in fact whatsoever. There has no been a change of use, there is no "addition", and the west dining room space and has never been a legally occupied as an exercise room.

Sorry to put you in the middle.

John

From: Ubl, Stephen (CI-StPaul) [mailto:stephen.ubl@ci.stpaul.mn.us]
Sent: Wednesday, September 27, 2017 9:08 AM
To: John R. Rupp <JRRupp@commonwealthproperties.com>
Cc: Skarda, Therese (CI-StPaul) <therese.skarda@ci.stpaul.mn.us>; Skradski, John (CI-StPaul) <john.skradski@ci.stpaul.mn.us>; John M. Miller <jmiller@pfb-pa.com>
Subject: Commodore Restaurant

Good morning John,

Thank you for providing the attached document from Summit Fire (see attached) addressing their position on suppressing the Commodore restaurant at 79 Western Ave. N. Their submittal would apparently be addressing item number 3 of my letter, dated October 26, 2015 (see attached) stating a suppression system is required. Please see my comments below:

- The west wing added to the Commodore restaurant is by definition a "change in use" and an "addition" to the existing Commodore restaurant. Photos indicate the addition to the restaurant was previously used as an exercise room. Section 1102.3 of the 2015 Minnesota Conservation code states:
"Existing fire areas increased by the addition shall comply with Chapter 9 of the International Building Code"
- Section 1012.2.1 of the 2015 Minnesota State Conservation Code states:
"Where a change in occupancy classification occurs that requires an automatic fire sprinkler system to be provided based on the new occupancy in accordance with Minnesota rules, chapter 1305, such system shall be provided throughout the area where the change of occupancy occurs"

I believe the code is clear on this. Changing from an exercise room to a restaurant is a change in use. Additionally, a fire area must be completely suppressed, not partially.

One final note – could you please provide a copy of the report from your mechanical engineer that I had reviewed in our last week’s meeting.

Thank you,



Stephen Ubl
City of St. Paul Building Official

Department of Safety & Inspections
375 Jackson St
Saint Paul, MN 55101
P: 651-266-9021
F: 651-266-9099
stephen.ubl@ci.stpaul.mn.us

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John M. Miller

From: Wiese, Angie (CI-StPaul) <angie.wiese@ci.stpaul.mn.us>
Sent: Thursday, August 2, 2018 10:00 AM
To: John R. Rupp
Cc: Skarda, Therese (CI-StPaul); John M. Miller; Bistodeau, Travis (CI-StPaul); Cervantes, Ricardo (CI-StPaul); Ubl, Stephen (CI-StPaul)
Subject: RE: Good Morning
Attachments: 2015 79 Western Restaurant Inspection.pdf

Mr. Rupp –

In response to your emails dated July 8, 2018:

Per your request, I went through the files and pulled our records related to the Fire Certificate of Occupancy. Our records only go back to the 1980s. Our Fire Certificates of Occupancies do not display dates so I dated the files in order to assist you with the timeline. I believe the following information answers your questions:

It appears that there have been 2 Fire Certificates of Occupancy on this building since its inception. One Fire Certificate of Occupancy has been for the amusement/recreation center and another for the apartment building. There is no record of a Fire Certificate of Occupancy for a restaurant. It also does not appear that either of the 2 fire Certificates of Occupancy were ever revoked.

In 2007 the city's electronic file begins to show an assembly occupancy load in the fire certificate of occupancy file however the file does not document what area the occupant load is for. I asked the inspectors who were listed on the files if they recalled anything about the space. Leanna Shaff has no recollection of anything related to 79 Western. AJ Neis does not recall inspecting what we are referring to as the future west dining room except to investigate a roof leak complaint in 2014. He said that at that time all contents were covered by heavy plastic and the space was not in use due to the continual water damage. (ANGIE – does AJ recall that the space was finished? Does he recall that it was in a raw state? Any other recollections about its condition?)

The City has not blocked your request for an inspection. Jim Perucca performed a Fire Certificate of Occupancy inspection in 2015. Our records show that Jim Perucca did not issue a Fire Certificate of Occupancy or a Temporary Fire Certificate of Occupancy for either the main dining area or the future west dining room. He created the attached letter with a deficiency list on October 26, 2015 for you. Inspector Perucca identified 4 items that will need to be addressed before the spaces can be approved for occupancy. These items included obtaining zoning approval, addressing door locking mechanisms, obtaining a certificate of occupancy for the future west dining room and providing approved fire extinguishers. A Fire Certificate of Occupancy was not issued for either space and the inspection process has been stayed because of your licensing action with the city. No further Fire Certificate of Occupancy inspections will be conducted as long as this litigation is in process. This is our standard procedure for any type of appeal of a correction order or other litigation.

Angie Wiese, PE, CBO
Fire Safety Manager
Department of Safety & Inspections
375 Jackson St. Suite 220
Saint Paul, MN 55101
P: 651-266-8953
F: 651-266-8951
angie.wiese@ci.stpaul.mn.us

John M. Miller

From: Wiese, Angie (CI-StPaul) <angie.wiese@ci.stpaul.mn.us>
Sent: Thursday, August 2, 2018 10:03 AM
To: John R. Rupp
Cc: Skarda, Therese (CI-StPaul); John M. Miller; Cervantes, Ricardo (CI-StPaul); Ubl, Stephen (CI-StPaul); Bistodeau, Travis (CI-StPaul)
Subject: RE: Commodore Restaurant

In response to your email dated July 18, 2018 relating to the Summit Proposal:

The Building Official has reviewed the proposal and provided his comments. I have reviewed the proposal and his response and am in agreement



Angie Wiese, PE, CBO
Fire Safety Manager
Department of Safety & Inspections
375 Jackson St. Suite 220
Saint Paul, MN 55101
P: 651-266-8953
F: 651-266-8951
angie.wiese@ci.stpaul.mn.us

Fire is Everyone's Fight

DSI's Mission: To preserve and improve the quality of life in Saint Paul by protecting and promoting public health and safety for all.

From: John R. Rupp [mailto:JRRupp@commonwealthproperties.com]
Sent: Wednesday, July 18, 2018 2:01 PM
To: Wiese, Angie (CI-StPaul) <angie.wiese@ci.stpaul.mn.us>
Cc: Skarda, Therese (CI-StPaul) <therese.skarda@ci.stpaul.mn.us>; jmiller@pfb-pa.com
Subject: FW: Commodore Restaurant

Angie

I would add the west dining room has had liquor license since 1976 and has been part of my restaurant operation since 2001.

I am waiting on your review of the attached Summit Proposal.

John

From: John R. Rupp
Sent: Sunday, July 8, 2018 7:42 PM
To: angie.wiese@ci.stpaul.mn.us
Cc: Skarda, Therese (CI-StPaul) <therese.skarda@ci.stpaul.mn.us>; jmiller@pfb-pa.com
Subject: FW: Commodore Restaurant

Angie

CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY

Your building appears to be in compliance with the applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Dwelling Units

UNITS: 52

This certificate is issued to:

COMMODORE CONDOS %
~~NEW CONEILOR BLVD~~
ST LOUIS PARK MN
55416

Reference Number:
15384

INSPECTOR NAME:
Ricketson, Mike

This certificate shall be posted in a conspicuous location upon the certified building or premises.

CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Dwelling Units

UNITS: 52

This certificate is issued to:

COMMODORE CONDO
330 UNIVERSITY AVE SE
MPLS MN 55406-1713

Reference Number:
15384

INSPECTOR NAME:
Ricketson, Mike

This certificate shall be posted in a conspicuous location upon the certified building or premises.

CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Dwelling Units

UNITS: 52

This certificate is issued to:

COMMODORE CONDO

~~456~~ 35TH ST W

ST LOUIS PARK MN

55416- 2643

Reference Number:

15384

INSPECTOR NAME:

Ricketson, Mike

This certificate shall be posted in a conspicuous location upon the certified building or premises.

CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Dwelling Units

UNITS: 49

This certificate is issued to:

COMMODORE CONDOS %
~~NEW CONSTRUCTION~~
ST LOUIS PARK MN
55416

Reference Number:
15384

INSPECTOR NAME:
Chapdelaine, Kevin

This certificate shall be posted in a conspicuous location upon the certified building or premises.

**CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY**

Your building appears to be in compliance with the applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

**TYPE: Dwelling Units
UNITS: 49**

This certificate is issued to:

COMMODORE CONDO
330 UNIVERSITY AVE SE
MPLS MN 55406- 1713

Reference Number:
15384

INSPECTOR NAME:
Chapdelaine, Kevin

This certificate shall be posted in a conspicuous location upon the certified building or premises.

CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Dwelling Units

UNITS: 49

This certificate is issued to:

COMMODORE CONDO

~~4550~~35TH ST W

ST LOUIS PARK MN

55416- 2643

Reference Number:

15384

INSPECTOR NAME:

Chapdelaine, Kevin

This certificate shall be posted in a conspicuous location upon the certified building or premises.

**CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY**

Your building appears to be in compliance with the applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Dwelling Units

UNITS: 49

This certificate is issued to:

Commodore Condo Assoc
5707 Excelsior Blvd
Minneapolis MN 55416-
2827

Reference Number:
15384

INSPECTOR NAME:
Chapdelaine, Kevin

This certificate shall be posted in a conspicuous location upon the certified building or premises.

**CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY**

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Dwelling Units

UNITS: 49

This certificate is issued to:

Commodore Condo Assoc
5707 Excelsior Blvd
Minneapolis MN 55416-
2827

Reference Number:
15384

INSPECTOR NAME:
Shaff, Leanna

This certificate shall be posted in a conspicuous location upon the certified building or premises.

CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY

Your building appears to be in compliance with the applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Dwelling Units

UNITS: 49

This certificate is issued to:

COMMODORE CONDO
230 UNIVERSITY AVE SE
MPLS MN 55406- 1713

Reference Number:
15384

INSPECTOR NAME:
Shaff, Leanna

This certificate shall be posted in a conspicuous location upon the certified building or premises.

CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY

Your building appears to be in compliance with the applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Dwelling Units

UNITS: 49

This certificate is issued to:

COMMODORE CONDOS %

~~NEW CONEISHO%BLNE~~

ST LOUIS PARK MN

55416

Reference Number:

15384

INSPECTOR NAME:

Shaff, Leanna

This certificate shall be posted in a conspicuous location upon the certified building or premises.

CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY

Your building appears to be in compliance with the applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Dwelling Units
UNITS: 49

This certificate is issued to:

COMMODORE CONDO
~~ASSOC~~5TH ST W
ST LOUIS PARK MN
55416- 2643

Reference Number:
15384

INSPECTOR NAME:
Shaff, Leanna

This certificate shall be posted in a conspicuous location upon the certified building or premises.

CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Dwelling Units
UNITS: 49

This certificate is issued to:

Commodore Condo Assoc
1801 American Blvd #21
Bloomington MN 55425-
1230

Reference Number:
15384

INSPECTOR NAME:
Neis, Adrian

This certificate shall be posted in a conspicuous location upon the certified building or premises.

CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Dwelling Units

UNITS: 49

This certificate is issued to:

COMMODORE CONDOS %

~~NEW CONDO~~ %

ST LOUIS PARK MN

55416

Reference Number:

15384

INSPECTOR NAME:

Neis, Adrian

This certificate shall be posted in a conspicuous location upon the certified building or premises.

**CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY**

Your building appears to be in compliance with the applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Dwelling Units

UNITS: 49

This certificate is issued to:

Commodore Condo Assoc
1801 American Blvd # 21
Bloomington MN 55425-
1230

Reference Number:
15384

INSPECTOR NAME:
Neis, Adrian

This certificate shall be posted in a conspicuous location upon the certified building or premises.

CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Dwelling Units
UNITS: 49

This certificate is issued to:

COMMONWEALTH
~~BRIDGE~~ UNIT 900
ST PAUL MN 55102

Reference Number:
15384

INSPECTOR NAME:
Neis, Adrian

This certificate shall be posted in a conspicuous location upon the certified building or premises.

**CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY**

Your building appears to be in compliance with the applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Dwelling Units

UNITS: 49

This certificate is issued to:

Commodore Condo Assoc
5707 Excelsior Blvd
Minneapolis MN 55416-
2827

Reference Number:
15384

INSPECTOR NAME:
Neis, Adrian

This certificate shall be posted in a conspicuous location upon the certified building or premises.



FIRE CERTIFICATE OF OCCUPANCY

City of Saint Paul

Department of Safety and Inspections

Division of Fire Inspection



This certificate is issued in accordance with SPLC Chapter 40, and other applicable provisions of the Saint Paul Legislative Code.

79 WESTERN AVE N

This building is certified for the following occupancy or use :

Residential 3+ Units

49 Dwelling Units

Reference Number:

15384

Certificate is issued to:

**COMMODORE CONDO ASSOC C/O MARGARET CART
1801 AMERICAN BLVD # 21
BLOOMINGTON, MN 55425-1230**

This Certificate must be posted in a conspicuous location upon the certified building
Please direct questions to DSI - Fire Inspection Division 651-266-8989.

City of Saint Paul

Division of Fire Prevention

CERTIFICATE OF OCCUPANCY

THIS IS TO CERTIFY that the building or premises located at **00079 WESTERN AVE N** , is hereby authorized for the following occupancy:

48 DWELLING UNITS, OFFICE

This Certificate is issued to *COMMODORE CONDOS/% NEW CONCEPTS, 4915 35TH STREET W, 612-922-2500*, and shall remain in force and effect until otherwise revoked by the Division of Fire Prevention in accordance with the Saint Paul Legislative Code.

VALID FROM: 05/01/1998

INSPECTOR

M. Ricketson

No. 15384

City of Saint Paul
Division of Fire Prevention
CERTIFICATE OF OCCUPANCY

THIS IS TO CERTIFY that the building or premises located at 00079 WESTERN AVE N , is hereby authorized for the following occupancy:

48 DWELLING UNITS, OFFICE

This Certificate is issued to *COMMODORE CONDOS % NEW CONCEPTS % DONNA, 4915 35TH STREET W, 612-922-2500*, and shall remain in force and effect until otherwise revoked by the Division of Fire Prevention in accordance with the Saint Paul Legislative Code.

VALID FROM: 04/26/2000 INSPECTOR *M. Rieth*
No. 15384

City of Saint Paul
Division of Fire Prevention
CERTIFICATE OF OCCUPANCY

THIS IS TO CERTIFY that the building or premises located at 00079 WESTERN AVE N , is hereby authorized for the following occupancy:

48 DWELLING UNITS, OFFICE

This Certificate is issued to *COMMODORE CONDOS/TYCON CO, INC, 321 UNIVERSITY AVE SE, 612-379-7000*, and shall remain in force and effect until otherwise revoked by the Division of Fire Prevention in accordance with the Saint Paul Legislative Code.

VALID FROM: 04/10/96 INSPECTOR *Michael Beckert*
No. 15384

City of Saint Paul

Division of Fire Prevention

CERTIFICATE OF OCCUPANCY

THIS IS TO CERTIFY that the building or premises located at **00079 WESTERN AVE N** , is hereby authorized for the following occupancy:

48 DWELLING UNITS, OFFICE

This Certificate is issued to *COMMODORE CONDOS/TYCON CO, INC, 321 UNIVERISTY AVE SE, 612-379-7000*, and shall remain in force and effect until otherwise revoked by the Division of Fire Prevention in accordance with the Saint Paul Legislative Code.

Renewed: 08/31/94

INSPECTOR

Mike Richter

No. 15384

156

15e

City of Saint Paul
Division of Fire Prevention
CERTIFICATE OF OCCUPANCY

THIS IS TO CERTIFY that the building or premises located at **00079 WESTERN AVE N** is hereby authorized for the following occupancy:

REC. CENTER

This Certificate is issued to *COMMODORE SQUEASH CLUB, 79 WESTERN AVE N*, shall remain in force and effect until otherwise revoked by the Division of Fire Prevention in accordance with the Saint Paul Legislative Code.

Date of Renewal: 04/13/88
Next Renewal Due: 04/13/89

Carrie Beyea
INSPECTOR

No. 76432

City of Saint Paul
Division of Fire Prevention
CERTIFICATE OF OCCUPANCY

THIS IS TO CERTIFY that the building or premises located at **00079 WESTERN AVE N** is hereby authorized for the following occupancy:

51 DWELLING UNITS

This Certificate is issued to *COMMADORE CONDO-JGALBARITH, 79 WESTERN AVE N, 612-227-1400*, shall remain in force and effect until otherwise revoked by the Division of Fire Prevention in accordance with the Saint Paul Legislative Code.

Next Renewal Due: 04/12/90

INSPECTOR

No. 15384

CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N APT 608

This building is certified for the following occupancy:
TYPE: Amusement / Recreation Center

This certificate is issued to:

JOHN
~~OBWEN~~ ~~TRON~~ ~~WELMORE~~
SAINSPACIBMN 55102

Reference Number:
76432

INSPECTOR NAME:
Comparoni, Carl

This certificate shall be posted in a conspicuous location upon the certified building or premises.

**CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY**

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N APT 608

This building is certified for the following occupancy:
TYPE: Amusement / Recreation Center

This certificate is issued to:

Geovanna M Perrino
79 Western Ave N
St Paul MN 55102- 4601

Reference Number:
76432

INSPECTOR NAME:
Comparoni, Carl

This certificate shall be posted in a conspicuous location upon the certified building or premises.

**CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY**

Your building appears to be in compliance with the applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N APT 608

This building is certified for the following occupancy:
TYPE: Amusement / Recreation Center

This certificate is issued to:

JOHN
~~OBWEN/FRANMELNORE~~
SQUINSPACUBMN 55102

Reference Number:
76432

INSPECTOR NAME:
McCabe, Diane

This certificate shall be posted in a conspicuous location upon the certified building or premises.

**CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY**

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N APT 608

This building is certified for the following occupancy:
TYPE: Amusement / Recreation Center

This certificate is issued to:

Geovanna M Perrino
79 Western Ave N
St Paul MN 55102- 4601

Reference Number:
76432

INSPECTOR NAME:
McCabe, Diane

This certificate shall be posted in a conspicuous location upon the certified building or premises.

CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N APT 608

This building is certified for the following occupancy:
TYPE: Amusement / Recreation Center

This certificate is issued to:

JOHN
~~OBWEN/ROMA/FLNORE~~
SQUASHTOWN MN 55102

Reference Number:
76432

INSPECTOR NAME:
McCabe, Diane

This certificate shall be posted in a conspicuous location upon the certified building or premises.

**CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY**

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N APT 608

This building is certified for the following occupancy:
TYPE: Amusement / Recreation Center

This certificate is issued to:

Geovanna M Perrino
79 Western Ave N
St Paul MN 55102- 4601

Reference Number:
76432

INSPECTOR NAME:
McCabe, Diane

This certificate shall be posted in a conspicuous location upon the certified building or premises.

CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N APT 608

This building is certified for the following occupancy:

TYPE: Amusement / Recreation Center

UNITS: 0

This certificate is issued to:

Geovanna M Perrino
79 Western Ave N
St Paul MN 55102- 4601

Reference Number:
76432

INSPECTOR NAME:
McCabe, Diane

This certificate shall be posted in a conspicuous location upon the certified building or premises.

**CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY**

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N APT 608

This building is certified for the following occupancy:

TYPE: Amusement / Recreation Center

UNITS: 0

This certificate is issued to:

Geovanna M Perrino
Po Box 14423
St Paul MN 55114-0423

Reference Number:
76432

INSPECTOR NAME:
McCabe, Diane

This certificate shall be posted in a conspicuous location upon the certified building or premises.

**CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY**

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N APT 608

This building is certified for the following occupancy:

TYPE: Amusement / Recreation Center

UNITS: 0

This certificate is issued to:

Christopher E Engelmann
367 Cretin Ave S
St Paul MN 55105- 1311

Reference Number:
76432

INSPECTOR NAME:
McCabe, Diane

This certificate shall be posted in a conspicuous location upon the certified building or premises.

**CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY**

Your building appears to be in compliance with the applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N APT 608

This building is certified for the following occupancy:

TYPE: Amusement / Recreation Center

UNITS: 0

This certificate is issued to:

JOHN

~~79 WESTERN AVE N APT 608~~

~~SQUASHACUBMN 55102~~

Reference Number:

76432

INSPECTOR NAME:

McCabe, Diane

This certificate shall be posted in a conspicuous location upon the certified building or premises.

**CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY**

Your building appears to be in compliance with the applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N APT 608

This building is certified for the following occupancy:

TYPE: Amusement / Recreation Center

UNITS: 0

This certificate is issued to:

Christopher E Engelmann
367 Cretin Ave S
St Paul MN 55105- 1311

Reference Number:
76432

INSPECTOR NAME:
McCabe, Diane

This certificate shall be posted in a conspicuous location upon the certified building or premises.

CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY

Your building appears to be in compliance with the applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N APT 608

This building is certified for the following occupancy:

TYPE: Amusement / Recreation Center

UNITS: 0

This certificate is issued to:

JOHN

~~OSBORN FROM WILMORE~~

~~SQUASHA CUBMN 55102~~

Reference Number:

76432

INSPECTOR NAME:

McCabe, Diane

This certificate shall be posted in a conspicuous location upon the certified building or premises.

**CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY**

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N APT 608

This building is certified for the following occupancy:

TYPE: Amusement / Recreation Center

UNITS: 0

This certificate is issued to:

Geovanna M Perrino
Po Box 14423
St Paul MN 55114- 0423

Reference Number:
76432

INSPECTOR NAME:
McCabe, Diane

This certificate shall be posted in a conspicuous location upon the certified building or premises.

CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Amusement / Recreation Center

UNITS: 0

This certificate is issued to:

JOHN

~~79 WESTERN AVE N~~

~~SQUASH FACIL BMN 55102~~

Reference Number:

76432

INSPECTOR NAME:

Perucca, James

This certificate shall be posted in a conspicuous location upon the certified building or premises.

**CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY**

Your building appears to be in compliance with the applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Amusement / Recreation Center

UNITS: 0

This certificate is issued to:

Christopher E Engelmann

Po Box 4332

Saint Paul MN 55104-

0332

Reference Number:

76432

INSPECTOR NAME:

Perucca, James

This certificate shall be posted in a conspicuous location upon the certified building or premises.

CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Amusement / Recreation Center

UNITS: 0

This certificate is issued to:

Christopher E Engelmann
P O Box 4332
Saint Paul MN 55104-
0332

Reference Number:
76432

INSPECTOR NAME:
Perucca, James

This certificate shall be posted in a conspicuous location upon the certified building or premises.

**CITY OF SAINT PAUL
DEPARTMENT OF SAFETY AND INSPECTIONS
DIVISION OF FIRE INSPECTION
FIRE CERTIFICATE OF OCCUPANCY**

Your building appears to be in compliance with the
applicable provisions of the Saint Paul Legislative Code

79 WESTERN AVE N

This building is certified for the following occupancy:

TYPE: Amusement / Recreation Center

UNITS: 0

This certificate is issued to:

Christopher E Engelmann
367 Cretin Ave S
St Paul MN 55105- 1311

Reference Number:
76432

INSPECTOR NAME:
Perucca, James

This certificate shall be posted in a conspicuous location upon the certified building or premises.



FIRE CERTIFICATE OF OCCUPANCY

City of Saint Paul

Department of Safety and Inspections

Division of Fire Inspection



This certificate is issued in accordance with SPLC Chapter 40, and other applicable provisions of the Saint Paul Legislative Code.

79 WESTERN AVE N

This building is certified for the following occupancy or use : **Amusement / Recreation Center
Assembly**

Reference Number:

76432

Certificate is issued to:

**JOHN O'BRIEN/COMMODORE SQUASH CLB
79 WESTERN AVE N
SAINT PAUL MN 55102**

This Certificate must be posted in a conspicuous location upon the certified building
Please direct questions to DSI - Fire Inspection Division 651-266-8989.

City of Saint Paul

Division of Fire Prevention

CERTIFICATE OF OCCUPANCY

THIS IS TO CERTIFY that the building or premises located at 00079 WESTERN AVE N , is hereby authorized for the following occupancy:

AMUSEMENT/RECREATION CENTER

This Certificate is issued to *T O'BRIEN/COMMODORE SQUASH CLB, 79 WESTERN AVE N, 612-228-0501*, and shall remain in force and effect until otherwise ~~revo~~ *revo*ked by the Division of Fire Prevention in accordance with the Saint Paul Legislative Code.

VALID FROM: 05/05/1998

INSPECTOR

No. 76432

14 a

City of Saint Paul

Division of Fire Prevention

CERTIFICATE OF OCCUPANCY

THIS IS TO CERTIFY that the building or premises located at **00079 WESTERN AVE N** , is hereby authorized for the following occupancy:

AMUSEMENT/RECREATION CENTER

This Certificate is issued to *T O'BRIEN/COMMODORE SQUASH CLB, 79 WESTERN AVE N, 612-228-0501,* and shall remain in force and effect until otherwise revoked by the Division of Fire Prevention in accordance with the Saint Paul Legislative Code.


INSPECTOR

VALID FROM: 05/03/96

No. 76432

14 b

14c

Western, 79 N. Squash Courts

Cert of Occ

CITY OF SAINT PAUL A 7815
DIVISION OF HOUSING AND BUILDING CODE ENFORCEMENT

Certificate of Occupancy

79 N. Western

This is to certify that the structure located on Lot No. 17, all 18 & 19

Block No. 13 Addition Woodland Park

Property Zoned RM-3 is classified as Legal - Legal non-conforming as to zoning and the following occupancy is hereby authorized:

October 21 Racquet Ball Courts

October 21 19 01 By _____
DATE

October 21 19 02 BUILDING OFFICIAL & ZONING ADMINISTRATOR
EXPIRATION DATE

THIS CERTIFICATE MUST BE POSTED AND PERMANENTLY MAINTAINED AND IN A CONSPICUOUS PLACE AT OR CLOSE TO THE ENTRANCE OF THE BUILDING REFERRED TO ABOVE.

City of Saint Paul

Division of Fire Prevention

CERTIFICATE OF OCCUPANCY

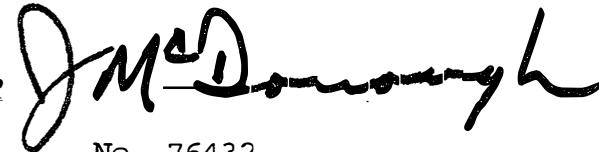
THIS IS TO CERTIFY that the building or premises located at **00079 WESTERN AVE N** , is hereby authorized for the following occupancy:

AMUSEMENT/RECREATION CENTER

This Certificate is issued to *T O'BRIEN/COMMODORE SQUASH CLB*, 79 WESTERN AVE N, 612-228-0501, and shall remain in force and effect until otherwise revoked by the Division of Fire Prevention in accordance with the Saint Paul Legislative Code.

VALID FROM: 04/28/2000

INSPECTOR



No. 76432

City of Saint Paul

Division of Fire Prevention

CERTIFICATE OF OCCUPANCY

THIS IS TO CERTIFY that the building or premises located at **00079 WESTERN AVE N** , is hereby authorized for the following occupancy:

AMUSEMENT/RECREATION CENTER

This Certificate is issued to *T O'BRIEN/COMMODORE SQUASH CLB, 79 WESTERN AVE N, 612-224-0043,* and shall remain in force and effect until otherwise revoked by the Division of Fire Prevention in accordance with the Saint Paul Legislative Code.

Renewed: 07/21/94

INSPECTOR



No. 76432

15e

City of Saint Paul
Division of Fire Prevention
CERTIFICATE OF OCCUPANCY

THIS IS TO CERTIFY that the building or premises located at **00079 WESTERN AVE N** is hereby authorized for the following occupancy:

REC. CENTER

This Certificate is issued to *COMMODORE SQUEASH CLUB, 79 WESTERN AVE N*, shall remain in force and effect until otherwise revoked by the Division of Fire Prevention in accordance with the Saint Paul Legislative Code.

Date of Renewal: 04/13/88
Next Renewal Due: 04/13/89

Carrie Beya
INSPECTOR

No. 76432

City of Saint Paul
Division of Fire Prevention
CERTIFICATE OF OCCUPANCY

THIS IS TO CERTIFY that the building or premises located at **00079 WESTERN AVE N** is hereby authorized for the following occupancy:

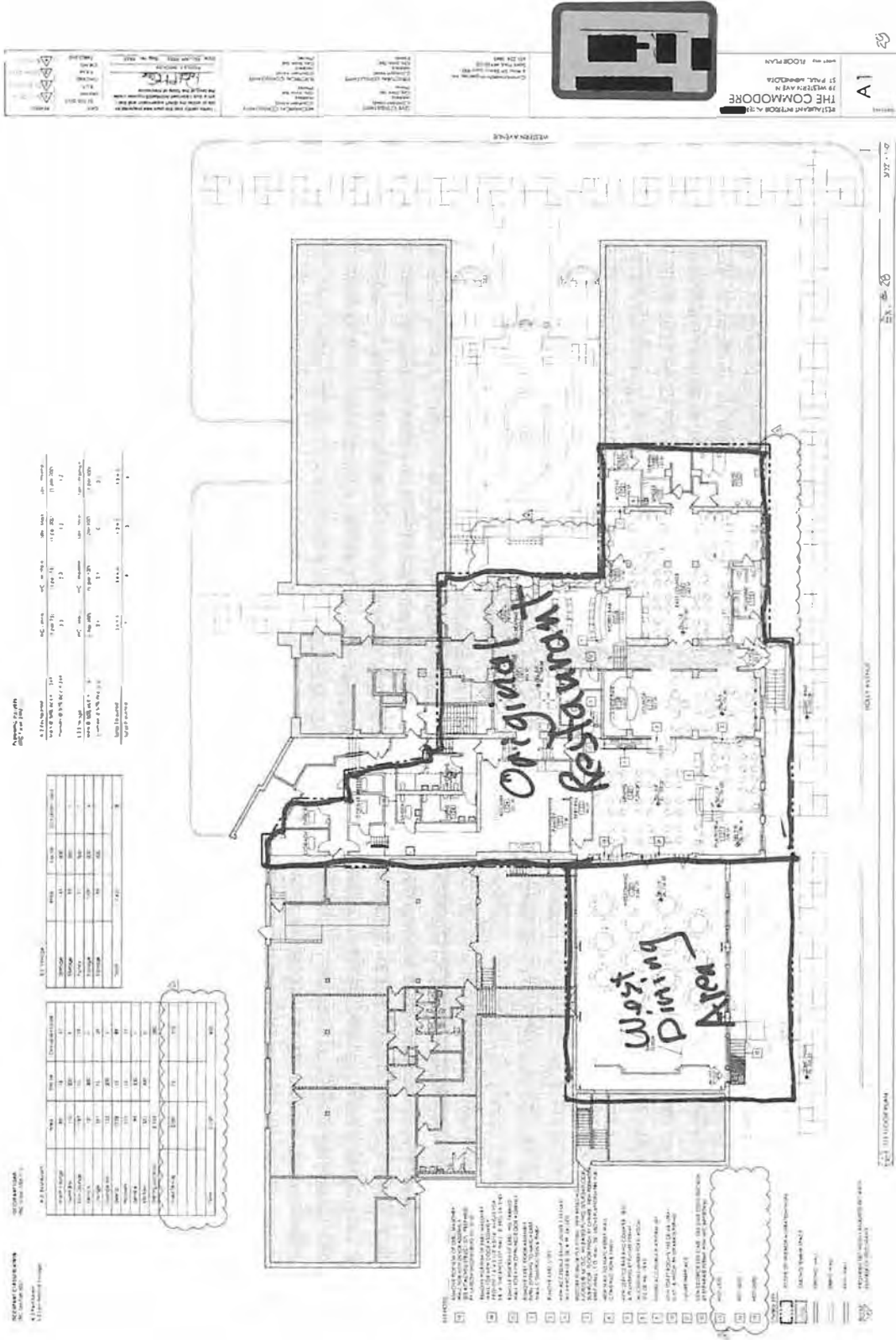
51 DWELLING UNITS

This Certificate is issued to *COMMADORE CONDO-JGALBARITH, 79 WESTERN AVE N, 612-227-1400*, shall remain in force and effect until otherwise revoked by the Division of Fire Prevention in accordance with the Saint Paul Legislative Code.

Next Renewal Due: 04/12/90

INSPECTOR

No. 15384



COMMODORE CONDOMINIUM COMPLEX

COMMODORE CONDOMINIUM COMPLEX
 1920 DINING ROOM PORCEL
 COMMODORE CONDOMINIUM BUILDING
 1920 BOR AND RESTAURANT # 55
 WESTERN AVENUE
 THE COMMODORE
 27 WESTERN AVENUE
 ST. PAUL, MINNESOTA
 A1
 1ST FLOOR PLAN
 3/12/10

OCCUPANT CLASSIFICATION
 IFC 104.1(1) 201
 2.1 (See Table 104.1)

Area	Code	Occupancy
Exercise Area	A-2.1	1
Locker Room	A-2.1	1
Reception	A-2.1	1
Squash Courts	A-2.1	1
Bar	A-2.1	1
Gallery	A-2.1	1
Restroom	A-2.1	1
1920 Dining	A-2.1	1
1920 Bar	A-2.1	1
1920 Restaurant	A-2.1	1
1920 Crap	A-2.1	1

8.3 TABLE
 AREA
 11 232
 15 232
 77 232
 109 232
 171 232
 234 232

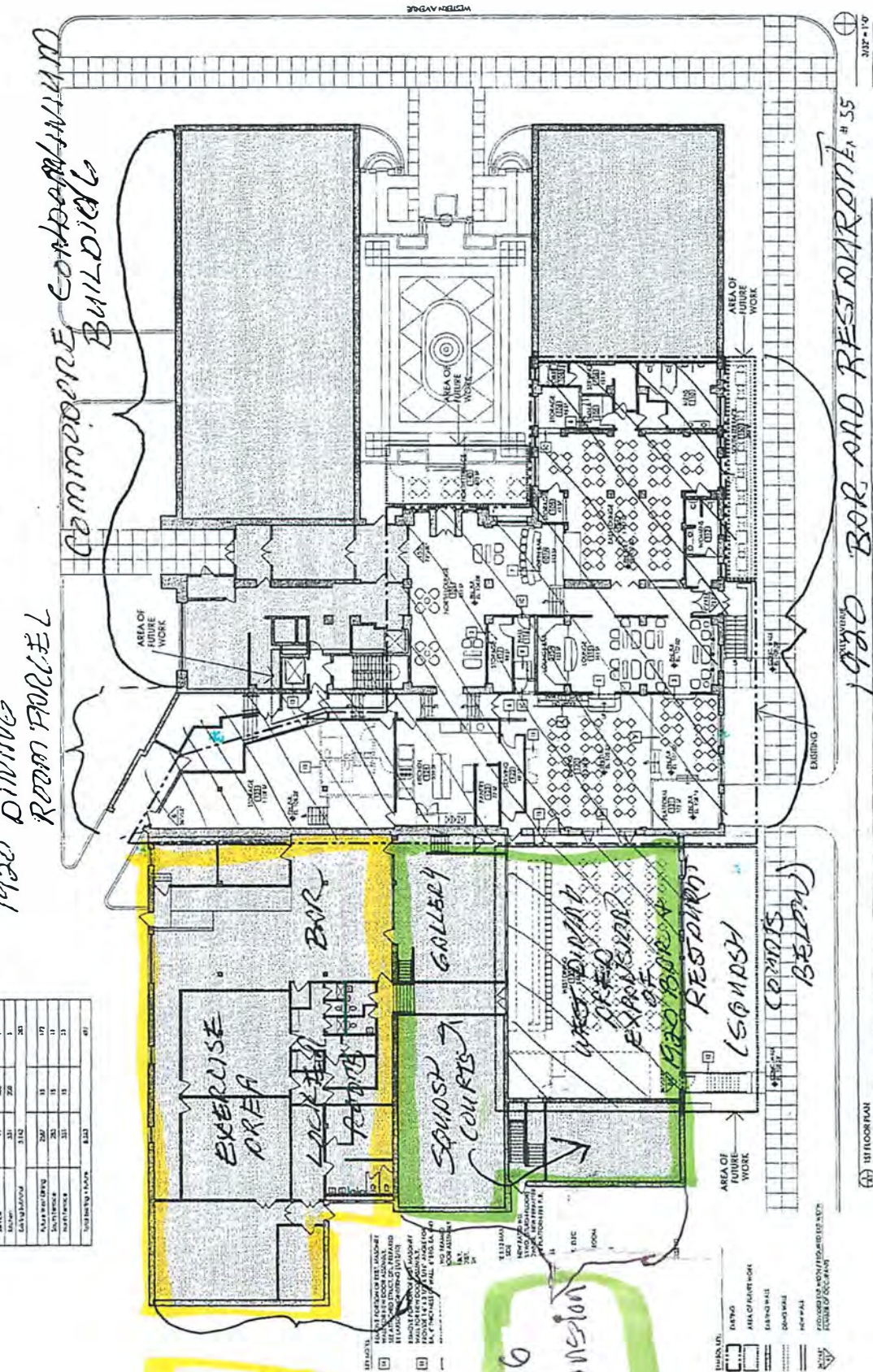
8.2 TABLE
 AREA
 11 232
 15 232
 77 232
 109 232
 171 232
 234 232

OCCUPANT CLASSIFICATION
 IFC 104.1(1) 201
 2.1 (See Table 104.1)

Area	Code	Occupancy
Exercise Area	A-2.1	1
Locker Room	A-2.1	1
Reception	A-2.1	1
Squash Courts	A-2.1	1
Bar	A-2.1	1
Gallery	A-2.1	1
Restroom	A-2.1	1
1920 Dining	A-2.1	1
1920 Bar	A-2.1	1
1920 Restaurant	A-2.1	1
1920 Crap	A-2.1	1

OCCUPANT CLASSIFICATION
 IFC 104.1(1) 201
 2.1 (See Table 104.1)

Area	Code	Occupancy
Exercise Area	A-2.1	1
Locker Room	A-2.1	1
Reception	A-2.1	1
Squash Courts	A-2.1	1
Bar	A-2.1	1
Gallery	A-2.1	1
Restroom	A-2.1	1
1920 Dining	A-2.1	1
1920 Bar	A-2.1	1
1920 Restaurant	A-2.1	1
1920 Crap	A-2.1	1



Built in 1920

1976 Expansion

EXHIBIT D

Petition should be denied in its entirety.

3. The Fourth Rupp Affidavit is made of my own personal knowledge, and if called to testify at a trial I could, and would, testify in accordance with what is stated in this affidavit.
4. In this Affidavit, all references to "Exhibit(s)" means the Exhibit(s) which are attached to this Affidavit. The terms "Original Restaurant" and "Western Dining Area" have the same meaning in this Affidavit as ascribed to them in the Respondent's Previous Submissions. A diagram outlining their location, which was previously submitted as an Exhibit, is attached to this Affidavit as *Exhibit D, page 1*. The remaining pages on Exhibit D are hand-annotated site plans of the "*Commodore Complex*" (defined below) showing the locations of "areas" of the Commodore Complex referred to elsewhere in the Amended Memorandum. *Page 2* shows the location of the "Western Portion" and the "Eastern Portion" of the Commodore Complex. *Page 3* shows the location of the "Commodore Condominium Building" and the dining room which was built in the 1920's. *Page 4* shows the area of the Western Portion which was built in the 1920's, and the area which was part of the expansion project in 1976.
5. Upon the conclusion of the June 28, 2018 hearing on this matter, I determined that the focus of the Respondent's position should be directed toward establishing that there was, in fact, Certificate(s) of Occupancy for both the Original Dining Area and the Western Dining Area at all relevant times herein. To that end, a request was made to the City Attorney on June 29, 2018 to provide ". . . copies of all of the 'Fire Certificates of Occupancy' issued for the Squash Club Building, which would have included the Western Dining Area." (Exhibit A, p. 1). The Occupancy Certificates provided confirmed that the entire bar and restaurant complex including the West Dining Area currently have

Certificates of Occupancy.

6. In response to my request, on July 6, 2018 the City sent an email to which was attached “. . . *imaged copies of the Fire Certificates of Occupancy records for the primary occupancy at 79 Western.*”(Exhibit A, p. 1). Those copies are attached to this Affidavit as Exhibit B and Exhibit C, and are described in greater detail, below, in ¶ 13 and 14.
7. The reference to “79 Western” refers to the building located at 79 Western Avenue North, St. Paul, MN. In this Affidavit, that building is referred to as the “*Commodore Complex*”. The address of “79 Western” is used by several different business and residential units which are located in different areas of the Commodore Complex. These include the “Commodore Squash Club” (which includes a bar and exercise facility), the “Commodore Bar and Restaurant”, several commercial condominium offices, and approximately 50 residential condominium units. Although Commodore Complex was constructed and reconstructed in several different stages, all of the different areas are either connected by passageways or by party walls.
8. The initial construction of the Commodore Complex was completed in the 1920’s. That construction included a six (6) story hotel with a bar located on the first floor; a one story dining room built in the 1920’s; a parking garage; and, a maintenance/service room. The six (6) story portion of the Commodore Complex was converted into a mixed-use condominium in the early 1980’s which is referred to as the “*Commodore Condominium Building*”. The bar/restaurant, and two other offices on the main floor became the “commercial condominium units”, and the hotel rooms became the residential condominium units. (It may be noted that as a result of an error, the dining room built in the 1920’s was not included in the condominium, and remains a separate legally described

parcel.) The general location of the areas referred to above are shown in *Exhibit D*.

9. The Westerly Portion of the Commodore Complex received zoning, licensing, and building permit approvals for construction and remodeling in 1976, was constructed/remodeled in the late 1970's. This portion consisted of the Squash Club, and the Western Dining Area. Importantly, the Western Dining Area was built to provide an area for the *expansion* of the service area of the Original Restaurant which is immediately adjacent to the Western Dining Area. The West Dining Area was *not* intended, nor approved, for any restaurant use independent of the Original Restaurant. A liquor license covered the entire Commodore Complex including, but not limited to, the Squash Club and bar, racquet ball courts, and the Western Dining Area.
10. The entire Commodore Complex suffered significant damage in a 1978 explosion. The reconstruction of the Commodore Complex commenced in the early 1980's and was completed pursuant to the 1976 plans and approvals in approximately 1982.
11. On July 8, 2018, I sent an email to Angie Wiese, who is the Fire Safety Manager of the Department of Safety & Inspections. *See Exhibit A, pp 2-3.*
12. Ms. Wiese responded to the July 8, 2018 email on August 2, 2018 noted that there are two separate fire certificates of occupancy for the "building", i.e., the Commodore Complex. A copy of her email can be found on page 6 of Exhibit A. That email, in part, states as follows:

Mr. Rupp-

*In response to your emails dated July 8, 2018:
Per your request, I went through the files and pulled our records related to the Fire Certificate of Occupancy. Our records only go back to the 1980s. Our Fire Certificates of Occupancies do not display dates so I dated the files in order to*

assist you with the timeline. I believe the following information answers your questions:

It appears that there have been 2 Fire Certificates of Occupancy on this building since its inception. One Fire Certificate of Occupancy has been for the amusement/recreation center and another for the apartment building. There is no record of a Fire Certificate of Occupancy for a restaurant. It also does not appear that either of the 2 fire Certificates of Occupancy were ever revoked.

In 2007 the city's electronic file begins to show an assembly occupancy load in the fire certificate of occupancy file however the file does not document what area the occupant load is for. I asked the inspectors who were listed on the files if they recalled anything about the space. Leanna Shaff has no recollection of anything related to 79 Western. AJ Neis does not recall inspecting what we are referring to as the future west dining room except to investigate a roof leak complaint in 2014. He said that at that time all contents were covered by heavy plastic and the space was not in use due to the continual water damage. (ANGIE-does AJ recall that the space was finished? Does he recall that it was in a raw state? Any other recollections about its condition?)

It is clear that the word “*inception*” refers to the time of the completion of the construction of the Westerly Portion in the early 1980’s, as that was mentioned in Respondent’s June 28 requests, and, as pointed out by Ms. Weise, the relevant records of the City only go back to the 1980’s.

13. The “. . . 2 *Fire Certificates of Occupancy*. . . ” referred to are further described as follows:
 - a. See Exhibit B. The first Fire Certificate of Occupancy is represented by the group of individual certificates which include the following references, and is referred to herein as “*Fire Certificate of Occupancy B*”:
 - i. “TYPE: Dwelling Units UNITS: 52” (Exhibit B, pp 1 – 3);
 - ii. “TYPE: Dwelling Units UNITS: 49” (pp 4-16);
 - iii. Residential 3+ Units 49 Dwelling Units” (p. 17);
 - iv. “48 DWELLING UNITS, OFFICE” (pp 18 -20);
 - v. “51 DWELLING UNITS” (p. 20).
 - b. See Exhibit C. The second Fire Certificate of Occupancy is represented by the group of individual certificates which include the following references, and is

referred to herein as “*Fire Certificate of Occupancy C*”:

- i. TYPE: Amusement / Recreation Center (Exhibit C, pp. 1-6)
- ii. TYPE: Amusement / Recreation Center UNITS: 0 (pp. 1-7)
- iii. Amusement/ Recreation Center Assembly (p. 18)
- iv. AMUSEMENT/RECREATION CENTER) pp. 19,20,22,23)
- v. Racquet Ball Courts (p. 21)
- vi. REC.CENTER (p.24)

14. Fire Certificate of Occupancy B covers not only the residential condominium units, but also the Original Restaurant and the commercial condominium units on the first floor. Fire Certificate C covers the Westerly Portion, including the Squash Courts, exercise room, lockers, bar in the Squash Club, and the Western Dining Area.
15. The Respondent agrees with the statement in Ms. Wiese’s email that “. . .*[t]here is no record of a Fire Certificate of Occupancy for a restaurant. . .*”. This make sense since the Western Dining Area was intended to be used to provide and expansion of the service area or the Original Restaurant, not intended to be a “stand alone” restaurant.
16. Fire Certificate of Occupancy B and Fire Certificate of Occupancy C are both still in effect, and were in effect on September 13, 2016. In this regard, it should also be noted that Ms. Wiese expressly states that it does not appear that either of the 2 Fire Certificates of Occupancy have been revoked. Also in support of this conclusion, it should be noted that I have owned the Original Restaurant since the 1980’s and the Western Dining Area since 2001, and have never received any notice of revocation of any fire certificate of occupancy which complies with the provisions of section 40.06 of Chapter 40 of the Legislative Code. That section, which deals with revocation, states in relevant part as follows:

(b) Notice of suspension, revocation or denial.

(1) When the fire code official revokes, suspends or denies a fire certificate of occupancy for safety code violations, the notice shall state:

a. The specific reason(s) for the city's suspension, revocation or denial of the fire certificate of occupancy;

b. The effective date of the revocation, suspension or denial of the fire certificate of occupancy;

c. A statement indicating that the commercial building or residential occupancy, or portion thereof, shall not again be used or occupied until such time as the said certificate is issued or renewed or suspension lifted following inspection and a determination by the fire code official that the commercial building or residential occupancy, or portion thereof, is in compliance with applicable safety codes; and

d. A statement indicating that the suspension, revocation, or denial may be appealed to the legislative hearing officer within ten (10) days of issuance.

17. As noted in Ms. Wiese's email, several of the individual Fire Certificates of Occupancy did not include the date on the face of the documents. Those dates were embedded in the digital name of the electronic version of the documents. For the purposes of this Affidavit, it should be noted that the individual certificates on pages 11 – 14 of Exhibit C were dated "2015". Accordingly, Fire Certificate of Occupancy C would clearly have been in place in September 2016.

18. In this matter, it is clear from the above that the Fire Certificate of Occupancy B and Fire Certificate of Occupancy C were in effect at all times relevant herein.

19. Section 40.01 of the Saint Paul Legislative Code states as follows:

Sec. 40.01. - Fire certificate of occupancy requirement.

(a) All existing buildings in the city are required to have and maintain a fire certificate of occupancy, issued by the department of safety and inspections. The fire certificate of occupancy shall be an indication that the building meets, at the time of inspection, all relevant codes to maintain the health, safety and welfare of the building's occupants and the general public.

Section 40.03 of the Legislative Code defines “safety codes” as follows:

Safety code or safety codes. Any building, fire, housing, health, safety, zoning or other similar code, law and ordinance, promulgated or enacted by the United States, the State of Minnesota, the County of Ramsey and the City of Saint Paul, or any lawful agency or department thereof, which are applicable to a building in such city. Safety code includes, without any limitation of the foregoing sentence as a result of this specification, the provisions of Chapters 33, 34, 43, 45, 49, 55, 56 and 58 of the Legislative Code.

The City of Saint Paul had adopted the Minnesota State Building Code pursuant to Section 33.02 of the Legislative Code. Therefore, the Minnesota Building Code, as adopted by Section 33, is a “safety code” as that term is defined by Section 40.03, and referred to in Section 40.01. The Amended Petition has alleged that the Respondent did not have a Certificate of Occupancy required by Section 1300.0220 of the Minnesota State Building Code.

Fire Certificate of Occupancy B and Fire Certificate of Occupancy C were issued for the Original Dining Room and the Western Dining Area, and as such, are evidence of compliance with the requirements of Chapter 33 of the Legislative Code pursuant to Section 40.01 of the Legislative Code.

I DECLARE UNDER PENALTY OF PERJURY THAT EVERYTHING I HAVE STATED IN THIS DOCUMENT IS TRUE AND CORRECT.

Dated: 10/25, 2018



John R. Rupp

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of all licenses held by the
University Club of St. Paul, d/b/a The
Commodore for the premises Located at 79
Western Avenue in Saint Paul

**RESPONDENT'S MEMORANDUM IN
SUPPORT OF MOTION
SUMMARY DISPOSITION**

This Memorandum (the "*Respondent's Memorandum*") is offered in support of the Respondent's Motion For Summary Disposition of even date herewith (the "*Respondent's Motion*")

INTRODUCTION AND PROCEDURAL POSTURE

In April 2017, the Department of Safety and Inspections, City of St. Paul (the "*Petitioner*") commenced the this matter (the "*Action*") by the service and filing of a "Notice and Order for Prehearing Conference.

The Prehearing Conference took place on May 23, 2017. On May 31, 2017, the Petitioner served and filed its Amended Notice and Order for Prehearing Conference (the "*Amended Notice*"). There were no further amendments, and accordingly at all times relevant to the Action, the Amended Notice has been the operative pleading/charging document. The Respondent was, and still is, the holder of Liquor and Entertainment Licenses at the address referred to in the caption, i.e. 79 Western Avenue North, St. Paul (the "*Commodore*"). The purpose of the Action is to determine whether or not to impose a \$700 matrix penalty and/or two (2) license conditions against all licenses held by the University Club of St Paul d/b/a the Commodore (the

“Respondent”) located at 79 Western Avenue in Saint Paul. Specifically, the Amended Notice states that

. . . . [the Petitioner] is seeking a \$700 penalty and is seeking the following additional license conditions:

The licensee will apply for a permit and wall off the western dining area to ensure that occupancy will not continue until a certificate of occupancy is issued by the Building Official or will work with the Building Official to come up with an alternative plan and timetable for occupancy. Any alternative plan must be signed off by the Building Official and must be filed in both the licensing and building files.

Use of any unapproved space, including but not limited to the western dining expansion, the courtyard and the roof will immediately cease until approved by the proper city departments including but not limited to the Building Official, Zoning, Plan Review and Public Works. *Amended Notice, p. 9.*

Throughout this Memorandum, there are numerous references to “Respondent’s Exhibit(s)”. The Respondent’s Exhibits are all included in the Respondent’s Transcript of Exhibits, which is also submitted herewith. All of the Exhibits which are referred to in this Memorandum are found in a 3 ringed binder which is being submitted herewith. Also, several of the Exhibits are originally 24” x 36” documents. In order to make them legible, copies of them in their original format will be placed in a supplemental envelope and delivered herewith. The documents in the 3 ringed binder and supplemental envelope constitute the “Respondent’s Transcript of Exhibits”. The Respondent’s Exhibits are authenticated by Affidavits of John R. Rupp (the “*Rupp Affidavit*”) and the undersigned (the “*Miller Affidavit*”) which are also submitted herewith.

I. FACTUAL BACKGROUND

The subject matter of the Action has a rather long history. Accordingly, in order to help manage the presentation of the factual background, the chronology in this section of the Memorandum will be broken generally into three different parts. Part One will describe events

through August, 2012; Part Two will describe events from September, 2012 until the Summer of 2015; and Part Three will describe events from the Summer of 2015 through the present. There will, of necessity, be some overlap between and among the various sections.

In addition, the subject matter of the Action involves construction at the Commodore. As will be described in greater detail, there are two areas of the Commodore which are of particular interest. They are referred to herein as the “*Original Restaurant*” and the “*Western Dining Area*”. In order to get an idea of the general location of those areas, please see *Respondent’s Exhibit 20*.

I. Chronology.

A. Part One.

The Original Restaurant was acquired in approximately 1984 and was operated as a restaurant/catering business. *Rupp Affidavit* ¶ 9. The Western Dining Area was acquired by John Rupp in 2001 and was added to the restaurant/catering business at that time. *Rupp Affidavit* ¶ 10. John Rupp is also the sole shareholder and President of the Respondent. Thereafter, in 2012, Rupp decided to that he would upgrade the restaurant/catering business and open the Western Dining Area seating. He then contracted with MCL Architects (“*MCL*”) to prepare the necessary plans to accompany an application for a building permit. *Rupp Affidavit* ¶11. MCL was chosen because Rupp knew them to have a vast amount of experience and expertise. *Id.*

MCL worked on the Project and the preparation of the plans to be submitted to the City along with the application for a building permit. *Rupp Affidavit* ¶ 12. The initial plan was completed on February 1, 2012, and is referred to herein as the “*Original Plan*”. *Id.* Medium and large format copies of the Original Plan are included in the Respondent’s Transcript as *Respondent Exhibit R-1* and *Respondent Exhibit R-1 LF*.

The Original Plan, together with an application for building permit (the “*Application*”). (*Respondent Exhibit R-2*), were delivered to the City by Rupp on February 2, 2012. *Rupp Affidavit* ¶ 13. The Application was also prepared by Rupp. At the time the Original Plan was delivered, Rupp spoke to John Skradski who was a plan examiner for the City. *Rupp Affidavit* ¶ 13. Rupp informed Mr. Skradski that he was aware that the Original Plan was not going to be the final “approved” plan. He then stated that a revision would be forthcoming which would incorporate any comments/concerns which Mr. Skradski may have; and would finish the design of the Western Dining Room and make any revisions to the code analysis to take into account the seating in the Western Dining Room. Based on Rupp’s experience with the City on numerous other projects, he was aware that the Application and plans would also have to be approved by the zoning and licensing departments, a fact which Mr. Skradski confirmed. *Id.*

After the delivery of the Original Plan and the Application, Rupp made several inquiries regarding the status of the review. *Rupp Affidavit* ¶ 14. He recalls receiving only one response from the City. Specifically, he received an inquiry in the form of an email dated March 30, 2012 (the “*March 30, 2012 Email*”) *Rupp Affidavit* ¶ 14. *Respondent Exhibit R-3*. The March 30, 2012 Email addressed a number of properties which Rupp owned in St. Paul. With respect to the Project, it only included a request for additional information concerning the “future work” designations on the Original Plan. *Rupp Affidavit* ¶ 14. In response to the March 30, 2012 Email, and consistent with his conversation with Mr. Skradski referred to above, *Rupp Affidavit* ¶ 14. Rupp had MCL prepare the first revision to the Original Plan. *Rupp Affidavit* ¶ 14. This document is referred to “*Plan Revision #1*”, copies of which are marked as *Respondent Exhibit R-4* (medium format) and *Respondent Exhibit R-4 LF* (large format). Plan Revision #1 revised the Original Plan in several ways, which include the following:

- The Western Dining Area, which was not in the “Existing” in the Original Plan, and was now included within the area referred to as the “Scope of Interior Alteration Work”.
- The arrowed designation of the Western Dining Area as “Area of Future Work” was removed in the Approved Plan.
- Various Key Notes were added or modified
- The calculations of the “PLUMBING FIXTURES” was revised to reflect the use of the Western Dining Area for seating.
- Several requirements related to Lever Handles, Emergency Lighting, Handicapped Accessibility, and Panic Hardware were added

Plan Revision #1 was delivered to the City on May 17, 2012. *Rupp Affidavit* ¶ 17. Also delivered with Plan Revision #1 were two additional documents. *Rupp Affidavit* ¶ 17. The first of those documents consisted of five (5) pages and was drawings detailing some matters concerning the construction of doors between the Main Restaurant and the West Dining Area (“Attachment #1), which is Respondent’s *Exhibit R-5*. *Rupp Affidavit* ¶ 17. The second of the documents consisted three (3) pages which were drawings detailing some matters concerning the toilet rooms (“Attachment #2), which is Respondent’s *Exhibit R-6*. *Rupp Affidavit* ¶ 17. The additional toilet rooms were a code requirement to allow the West Dining Room to be occupied for seating. Both sets of plans were prepared in accordance with professional standards. *McGuire Affidavit* ¶5

In late August, 2012, Rupp received notification that the building permit for the Project (the “*Building Permit*”) was ready to be picked up. *Rupp Affidavit* ¶ 1. He personally went to the Petitioner’s office to accomplish this. When he was there, he received from a front desk clerk the following:

- A copy of Plan Revision #2, which had been “color coded”. A copy of this “color coded” version is referred to as the “*Approved Plan*”. (A large format copy of the Approved Plan is *Respondent’s Exhibit R-7 LF*; and a medium sized copy of the Approved Plan is *Respondent’s Exhibit R-7*.) Note that

the Approved Plan is the same as Revision 1, with the exception that during the plan review process, it had been “color coded” by the plan review staff.

- A copy of a Building Permit, which indicated that it had been approved on August 28, 2012; (See *Respondent's Exhibit # R-8*). The Building Permit consisted of a letter sized document entitled “Building Permit”; several pages from the City Code; and Attachment #2 described above.
- A copy of the Attachment #1, described above which were attached to the Approved Plan.

B. Part Two.

After the Building Permit was issued, Don Jones was hired as a construction manager and the construction process commenced and was essentially completed in the late Summer of 2015 (the “*Construction Period*”). During the Construction Period, there were a number of inspections of the Project. According to the Petitioner’s records (*Respondent's Exhibit 22*), the date and general purpose of the inspections were as follows:

- | | |
|----------|---|
| 7/26/13 | Major remodel of the bar/restaurant area floor joists in the raised floor area; add additional for beams carrying joists. |
| 8/24/15 | metal stud framing at wheel chair lift and bathrooms in the Original Restaurant |
| 9/22/15 | This was inspection involving many individuals from the City |
| 10/27/15 | Final inspection of entire premises. |

The Jones Affidavit generally agrees with the above, but also lists an inspection on September 17, 2014, which was for the framing of the West Dining Area. *Jones Aff.* ¶6.b.

Importantly, however, the Jones Affidavit also notes that the Todd Sutter, the principal inspector did not have the Building Permit or the Approved Plans with him at any of the inspections. *Jones Aff.* ¶8. Upon further inquiry, he was told by both the Plan Reviewer and the Building Official, that the neither the Building Permit, nor the Approved Plans could be found. *Id.* ¶9.

In addition, two (2) plan revisions were prepared and delivered during Part 2, which revisions are described below. *Rupp Affidavit* ¶ 20.

First, on or about May 30, 2014, Rupp personally dropped off at the plan review desk another updated plan which is referred to herein as “*Plan Revision #2*” (See Respondent’s Exhibit #R-9). *Rupp Affidavit* ¶ 22. Plan Revision #2 revised the Approved Plan by the following:

- Added a wall to the Western Dining Area; and.
- Deleted the Service Bar from the Western Dining Area

After dropping off the Plan Revision #2, Rupp did not receive any communication from the City regarding that revision. Based on his past experience in similar situations, he assumed that there were no objections or concerns, and proceeding accordingly. *Rupp Affidavit* ¶ 22.

Second, on or about March 9, 2015, he submitted another updated plan which is referred to herein as “*Plan Revision #3*” (See Respondent’s Exhibit R-10). *Rupp Affidavit* ¶ 23. Plan Revision #3 revised the Plan Revision #2 by the following:

- Added a unisex toilet in the Original Restaurant Area
- Revised the Plumbing Fixture Calculations which covered the entire facility including the West Dining Room ; and,
- Added a cooler, freezer and office in the Original Restaurant Area.

After dropping off the Plan Revision #3, he did not receive any communication from the City regarding that revision. Based on his past experience in similar situations, he therefore assumed that there were no objections or concerns, and proceeding accordingly. *Rupp Affidavit* ¶ 23.

C. Part Three.

On or about March 9, 2015, Mr. Rupp submitted another updated plan which is referred to herein as “*Plan Revision #3*” (See Respondent’s Exhibit R-10). Plan Revision #3 revised Plan Revision #2 by the following:

- a. Added a unisex toilet in the Original Restaurant Area
- b. Revised the Plumbing Fixture Calculations; and,
- c. Added a cooler, freezer and office in the Original Restaurant Area.

After dropping off the Plan Revision #3, he did not receive any communication from the City regarding that revision. Based on my past experience in similar situations, he therefore assumed that there were no objections or concerns, and proceeding accordingly. *See Rupp Affidavit ¶ 23*

Steve Ubl requested information regarding the design of the ceiling in the Western Dining Area. Larson Engineering, Inc. provided that information in a report/letter dated February 7, 2017 *See Rupp Affidavit ¶ 37.*

On or about August 30, 2017, Rupp submitted another updated plan which is referred to herein as “*Plan Revision #4*” (See *Respondent’s Exhibit R-12 and R-12 LF*). Plan Revision #4 revised the Plan Revision #3 by the following:

- a. Provided as-built furnishing layout
- b. Deleted Notes 13,14, and 15; and,
- c. Revised the Occupancy Load Table to delete “Future West Dining, and in lieu thereof, add “West Dining”.

After dropping off the Plan Revision #4, he did not receive any communication from the City regarding that revision. Based on his past experience in similar situations, he therefore assumed that there were no objections or concerns, and proceeding accordingly. *Rupp Affidavit ¶24.*

On or about March 27, 2018, Rupp submitted another updated plan which is referred to herein as “*Plan Revision #5*”. Plan Revision #5 revised the Plan Revision #4 by the following:

- a. Added general notes and attached copies of the Summit Report and MSD Report.

- b. Revised designations at 106 and 108 to read Brides/Green Room.
- c. Revised Toilet 10 to read Powder 107.
- d. Revised the Plumbing Fixture calculations

After dropping off the Plan Revision #4, he did not receive any communication from the City regarding that revision. Based on my past experience in similar situations, he therefore assumed that there were no objections or concerns, and proceeding accordingly. *Rupp Aff.* ¶ 24

Respondent's Exhibit R-11, is a true and correct copy of a letter from Steve Ubl, Building Official, dated October 26, 2015 (the "*Ubl Letter*"). The Ubl Letter was essentially the first time in writing Rupp was informed that the City had concerns regarding possible zoning and building code issues.

Respondent's Exhibit 4 is letter dated October 30, 2015 from Wendy Lane to Rupp (the "*Wendy Lane Letter*"). As of the date of the Wendy Lane Letter, Ms. Lane was the Zoning Administrator. She has since retired. The Western Dining Area is located in a RM3 residential zoning district. As such, the use of the property for a restaurant, bar, and squash club are all non-conforming uses established under the pre-1975 zoning code when hotels and accessory uses were permitted in residential zoning districts. In the Wendy Lane Letter, she noted that since the zoning classification for the area in which the Western Dining Area is located is a RM3 residential zone district, and that any nonconforming uses would be nonconforming uses under the pre-1975 zoning code when hotels and accessory uses were permitted in residential zoning districts. She also noted that the original intended use of the Western Dining Area was for a restaurant. Importantly, she also noted in the second to the last paragraph, that under the current circumstances, it would be possible to move forward with a proceeding to obtain a "reestablishment of nonconforming use permit". *Rupp Affidavit* ¶27

Respondent's Exhibit R-13, is a true and correct copy of an email from Allan Torstenson dated March 6, 2018, and attachment thereto. Mr. Torstenson is the Principal City Planner for Zoning, Planning and Economic Development. That email and attachment is the result of several meetings which Rupp had with Mr. Torstenson and other staff members in which we discussed zoning issues that had been raised regarding the Western Dining Area. Below is a summary of the understanding which was reached concerning the zoning of the Western Dining Area.

Since the construction of the Western Dining Area, there has not been any use which has been legally established. Accordingly, it was determined that a Petition for the Reestablishment of a Nonconforming Use would be appropriate. Upon the completion of that process, the zoning of the Western Dining Area would be formally reestablished as a "permitted nonconforming use – restaurant/bar". See *Rupp Affidavit* ¶28.

On October 27, 2015, Rupp met with Michael Palm who was the Senior Building Inspector at that time. Mr. Palm had been sent to the Commodore to conduct an inspection. At that point in time, the arrangements to open the restaurant, including the Western Dining Area, within a day or two, had been made. At one point during the inspection, Rupp and Palm discussed the Respondent's obtaining a temporary occupancy permit. During that discussion, it was agreed that the restaurant, including the Western Dining Area, could open as scheduled, and that would send a "punch-list" of items which would need to be addressed within thirty (30) days. Based on that representation, the restaurant was opened as scheduled. However, he did not send the "punch list", and Rupp believes that meeting was the last communication which he had with Mr. Palm regarding the Project. Further reference is made to *Respondent's Exhibit R- 62*, which is a copy of pages 27 – 37 of the transcript of Mr. Palm's Deposition taken on March 5, 2015. See *Rupp Affidavit* ¶29.

Rupp provided the report from a fire safety engineer required by the Ubl letter in May, 2017. *See Rupp Affidavit ¶31.*

Rupp provided the “balance report” required by the Ubl letter in June, 2017. *See Rupp Affidavit ¶32.*

II. ARGUMENT

A. Summary Disposition –Description of Standard and Application Thereof.

Minn. Rule 1400.5500. K. provides that an Administrative Law Judge may recommend a summary disposition of a case or any part thereof where there is no genuine issue as to any material fact. Summary disposition is the administrative equivalent to summary judgment motion. *Minnesota Administrative Procedure; Section 7.4.1, George A. Beck, Mitchell Hamline School of Law.* The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters. *Id; Rule 1400.6600.* Accordingly, pursuant to the above, and this Courts Prehearing Order of April 2, 2018, the Respondent’s Motion Documents will generally follow the requirements of General Rules of Practice, Rule 115, subject to the requirements of any applicable scheduling order.

Minnesota Rules of Civil Procedure Rule §56.03 states: “judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law.” Minn. R. Civ. P. §56.03 (2015). The adverse party may not rest on the mere averments or denials of its pleadings, but must present specific facts showing there is genuine issue for trial. *Id.* “A material fact issue is one which will affect the

result or outcome of the case depending on its resolution.” *Northwestern Nat’l Cas. Co. v. Khosa, Inc.*, 520 N.W.2d 711, 773 (Minn. Ct. App. 1994).

In addition, the Court must view the record in the light most favorable to the party opposing the motion and all factual inferences must be drawn against the movant for summary judgment. *Sauter v. Sauter*, 244 Minn. 482, 484-485, 70 N.W.2d 351, 353 (1955). Even when a movant’s documents are uncontradicted, they in themselves may be insufficient to sustain the movant’s burden of proof. *Id.* However, although the burden of proof rests on the moving party to show there is no issue of material fact and they are entitled to judgment as a matter of law, *Id.*, the non-moving party must also bring forward demonstrable evidence establishing that specific facts are in dispute creating a genuine issue for trial. *Erickson v. Gen. United Life Ins. Co.*, 256 N.W.2d 255, 259 (Minn. 1977). A “mere scintilla” of evidence is not sufficient to overcome summary judgment; there must be enough evidence or material facts that would permit a jury to find for the non-moving party. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). This Court must decide whether Sealock has provided any facts that affect the outcome of this case and if Demvi is entitled to judgment as a matter of law.

The Court should also consider the motion of summary judgment within the context of its purpose to “secure a just, speedy and inexpensive disposition.” See *Vieths v. Thorp Fin. Co.*, 305 Minn. 522, 524, 232 N.W.2d 776, 778 (1975). The motion for summary judgment may not be used to replace a trial where the issues of material fact should be decided. *Id.* However, when no issues of material fact are present, even the United States Supreme Court has recognized motions for summary judgment as an integral part of our rules as a whole and not a disfavored procedural shortcut. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

B. Framework for Respondent’s Argument.

The Amended Notice alleges certain action which Respondent has taken, or not taken, with respect to the occupancy of the Western Dining Area. As a result of that alleged action, or inaction, the Respondent was not issued a formal Certificate of Occupancy before opening for business in October, 2015. The non-issuance of the Certificate of Occupancy is the reason the Action was commenced.

Throughout the course of the Action, there have been various itemizations of what action Respondent is required to take in order to have a formal Certificate of Occupancy issued. The most prominent of those itemizations is contained in a letter dated October 26, 2015 to the Respondent from Steve Ubl, the current Building Official (the “Ubl Letter”). *Respondent’s Exhibit 11*. Since the date of Ubl Letter, there have been numerous discussions between the parties regarding the Action, during which discussions, the itemization contained in the Ubl Letter has been focus. Accordingly, the Ubl Letter will be used provide the framework for the Respondent’s argument that the relief requested in the Amended Notice. Before addressing the Ubl Letter, however, other issues, will be discussed.

C. There Has Been No Change in the Use of the Western Dining Area.

The issue of whether or not the Western Dining Area underwent a “change of use” is a critical issue in this Action. It is the Respondent’s position that there has been no change of use. Both the previous & current Zoning Administrators, PED staff, and all evidence presented confirm that West Dining room was originally constructed in 1976 for restaurant use, no other use has ever been legally established, and therefore agree with Respondent that there has been no legal change of use. *See ¶¶ 27 and 28 of the Rupp Affidavit.*

According the testimony in the deposition of John Skradski and Lawrence Zangs, while there is some evidence that the Western Dining Area was used as an exercise facility at some point more than seventeen (17) years ago, there is no evidence that use was legally permitted by the City or ever legally established which requires all three of the following steps – none of which occurred: by a zoning action approved by the Planning Commission to change the originally intended use from restaurant use to health club use; by the issuance of a building permit and associated certificate of occupancy approving that all required improvements for health club occupancy have been completed; and by receiving a health club license to allow it to be operated.

Rupp on the other hand used the West Dining Room as part of his restaurant/catering operations from 2001 continuously until now with a liquor license and no objections from the City until the commencement of this Action. *Rupp Affidavit ¶ 33, and other Exhibits referred to therein.*

Respondent agrees with both the current and past Zoning Administrators who, along with Planning and Economic Development staff have all determined that a restaurant use has never been fully legally established in the Western Dining Area, after the original zoning approval for restaurant use in 1976. Although the Western Dining Area was covered by a liquor license it was never built out as a restaurant seating area, with required associated restrooms, until Respondent filed a permit application to do so in 2012. Zoning regulations require that if a non-conforming use is established for zoning purposes, there is limited period of time that the permitted non-conforming use allows construction to take place, and the use to be fully legally established. *See Respondent's Exhibit 4 (Wendy Lane Letter).* In this case the required construction to fully legally establish the legal non-conforming restaurant use in the Western Dining Area did not start until 2012, approximately 36 years after the 1976 zoning approval. As a consequence, because of the passage of time, the re-establishment of the non-conforming restaurant use must be approved by the planning Commission, a requirement that was not enforced by the Zoning Department when the Permit was issued in 2012 for unknown reasons.

In short, it appears that there has never been any specific use fully legally established for the Western Dining Area after the initial zoning approval for restaurant use in 1976. However, the zoning has also determined that even though it is located in residential zone, it was grandfathered in as a non-conforming use in that zone. *Respondent's Exhibit 4 (Wendy Lane Letter).* Because of the passage of time the Respondent is following the advice of the past and current Zoning Administrators and the Department of Planning and Economic Development to take steps to reestablish the nonconforming use, so that the actual use of the Western Dining Area will be consistent with its initially approved zoning. Respondent is in the process of doing so now. *Rupp Affidavit ¶¶26 and 27.*

D. The Western Dining Area Was Included in the Building Permit and Approved Plans.

The Amended Notice alleges that the build out of the Western Dining Area is not included in the Building Permit and Approved Plans. The following items show that the build out of the Western Dining Area is included in the Building Permit and Approved Plans:

- a. The Building Permit, which was prepared by the City, specifically stated that there was no change/expansion of use. *Respondent's Exhibit R-8*.
- b. The Approved Plans (See, generally, *Rupp Affidavit ¶ 19; and, Respondent's Exhibit 1 and Exhibit 7*):
 - i. On the Original Plans (*Respondent's Exhibit R - 1*), the Western Dining Room is outside of the "Existing Area", which was the area where in the intended work was to be done; and the location of the Western Dining Area is in an area labeled "AREA OF FUTURE WORK".
 - ii. On the Approved Plan the first "Symbol Key" on the Approved Plans (lower left on the document) is entitled "SCOPE OF INTERIOR ALTERATIONS". Even a cursory review of the Approved Plans clearly shows that the Western Dining Area is designated as being within the "Scope of Interior Alterations" contemplated by the Approved Plans.
 - iii. The arrowed designation of the Western Dining Area as "Area of Future Work" on the Original Plan was removed in the Approved Plan.
 - iv. The only reference to on the Approved Plan to "Future West Dining" is in Occupancy Load calculations on the top of the page. In any event, the reference to "future west dining room" does not mean that the build out of the Western Dining Area is not part of the scope of work contemplated by the Approved Plans. The word "future" in this context is only a description of an area, and not intended to be a limitation. For instance, in 2012, the Western Dining Area was not currently "built out", but was going to be built out in the "future" pursuant to the Building Permit and Approved Plans.

- v. The calculations of the “PLUMBING FIXTURES” in the Approved Plan was revised to reflect the use of the Western Dining Area for seating.

E. Review and Comment on the Ubl Letter.

Below is the point-by-point comments on the Ubl Letter as referred to in section II. B, above. The type in italics is a quote from the Ubl Letter, and the Respondent’s responses follow.

“In addition to the above concerns, other key issues are outstanding that need to be resolved prior to occupancy of the proposed west space expansion and the primary restaurant use. The Fire Certificate of Occupancy for the primary restaurant space has been revoked because of the extended time the facility has not been in use.”

RESPONSE: Before Western Dining Area was opened in 2015 it was inspected by the fire officials and approved for occupancy. *Rupp Affidavit ¶ 29*. The Original Restaurant was also approved for occupancy, which had not be out of use for “an extended period of time”. A request to inspect the Original Restaurant was rejected because of the current litigation. *Rupp Affidavit, ¶38*.

“ A re-inspection of the entire facility (primary and proposed west expansion) will be needed prior to the re-instatement of the Fire Certificate of Occupancy of the primary restraint space”.

RESPONSE: A request to conduct such an inspection was requested, but was not allowed because of the Action. *Rupp Affidavit ¶ 38*.

“Records indicate that the proposed west expansion of the primary A-2 use not has it ever been part of the allowed A-2 restaurant space”

RESPONSE: Records indicate that this area was built in 1976 for restaurant use and that no other use was ever legally established. Both the past and current Zoning Administrators and the staff of the Department of Planning and Economic Development agree. *Rupp Affidavit ¶¶ 26 and 27*.

“Additionally, records from our office, as well as records provide by Met Council, show no SAC determination for an A-2 use in the proposed west expansion space to the west of the primary restaurant facility.”

RESPONSE: The above does not change the fact that SAC was presumably paid in 1976 for construction of a restaurant use in the space as the issuance of a building permit for the Western Dining Area would have been contingent upon receiving a SAC determination. The lack of records proves nothing, and the presumption that SAC was paid for restaurant use should control until evidence is produced otherwise.

“You will need to complete the following items to be allowed occupancy in the primary restaurant space at 79 Western Ave. N:

“1.) Obtain final inspections for all open permits reflective of the A-2 Space

RESPONSE: Respondent believes there are no open permits except the permit that is the subject of the current litigation, on which the city refuses to inform Respondent of all open issues, if any beyond the Ubl letter, that need to be addressed. *Rupp Affidavit ¶ 36.*

“2.) The fire Certificate of Occupancy has been revoked. Coordinate an inspection form the Fire Inspection Division to perform a walk-through of the facility to remove the Fire Certificate of Occupancy revocation and pay any outstanding fees associated with a Fire Certificate of Occupancy.

RESPONSE: The inspection was completed in 2015. *Rupp Affidavit ¶29.* Another was requested on May 14, 2018, but it was refused because of the commencement of the Action. *Rupp Affidavit ¶ 38.*

“You will need to complete the following items in order to be allowed to occupy the proposed west expansion space addition at 79 Western Ave. N.:”

“1.) Provide a design and apply for a permit to remodel the proposed west expansion

RESPONSE: Reference is made to ¶ 36 of the Rupp Affidavit. As a result of the failure of

the City to acknowledge the receipt of the subsequent Plan Revisions 2 through 5 as they were delivered, on April 10, 2018, the Respondent dropped off at the plan review desk the Supplemental Submission Package. That Package constitutes application for a permit referred to in this item. The receipt received states that the plans would be sent to Steve Ubl for comment. To date, the Respondent has not received any response.

“2.) Provide a design and apply of a permit to an install an alarm system per the current 2015 building code in an A-2 Occupancy

RESPONSE: Reference is made to ¶ 31 of the Rupp Affidavit. A proposal for an alarm system was attached to the Summit Report. The Respondent was at one time willing to install an alarm system at the beginning of the litigation as set forth in that proposal, but to date the Petitioner has refused to consider it even though Respondents Fire Safety Engineer found that an alarm system is not required

“3.) Provide a design and apply and apply of a permit to install a sprinkler system per the current 2015 building code in an A-2 occupancy”.

RESPONSE: Reference is made to ¶ 31 of the Rupp Affidavit. Respondent’s Fire Safety Engineer found that no sprinkler system is required. The City Building Official Steve Ubl asked Respondent to hire this engineer to make a determination of whether a sprinkler and alarm systems are required. That determination was made and delivered to Mr. Ubl.

“4.) Obtain a SAC determination of the proposed west space expansion for a restaurant. Paid all required fees.”

RESPONSE: Reference is made to ¶33 of the Rupp Affidavit. The Respondent has attempted to obtain a correct SAC determination. However, the City filed an affidavit with incorrect information that the Western Dining Area had been previously used as an exercise area, which resulted in a SAC fee which was not owed. In order to obtain a correct SAC determination, the Petitioner will have to prepare and sent to the Metropolitan Counsel a

corrected affidavit stating that there has been no change in use in the Western Dining Area to date the Petitioner has refused to do so.

“5.) Provide accessibility to the proposed west expansion space”.

RESPONSE: This requirement has been completed.

“6.) Provide evidence that establishes all prior uses of the restaurant expansion space. Secure any necessary zoning approvals.”

RESPONSE: Evidence for prior intended uses has been provided and accepted by the zoning. Specifically, the Western Dining Area was intended to be a dining room. Rupp Aff ¶ 27. The Respondent, at the suggestion and support of the Principal City Planner and the part and current Zoning Administrators has initiated a proceeding to formally reestablish the restaurant use. Rupp Aff. ¶28.

“7.) A balance report of the A-2 occupancy space from a licensed contractor or a design professional.”

RESPONSE: This task has been completed. Rupp Affidavit ¶ 32.

F. The Doctrine of Estoppel Prohibits Granting the Relief Requested in the Amended Notice

“Equitable estoppel” is defined as the effect of voluntary conduct of a party whereby that party is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract or of remedy. *Moberg v. Commercial Credit Corporation, 42 N.W 2d 54 (Minn. 1950)*

In the present case, Mr. Rupp relied upon the Western Dining Area being covered by the Building Permit. That reliance was reasonable and in good faith, and he changed his position in reliance thereon.

When Mr. Rupp dropped off the Original Plans in February, 2012, he told the plan examiner John Skradski that a revised plan would be provided which would expressly include the Western Dining Area and have a code analysis based on that inclusion. *Rupp Affidavit* ¶ 13. In response to the March 30, 2012 Email, and consistent with his comments to Mr. Skradski, the Plan Revision #1 was dropped off on May 17, 2015. *Rupp Affidavit* ¶ 17. Those plans eventually became the Approved Plans.

The Building Permit which was issued stated that there was no change of use. *Rupp Affidavit* ¶19. During the Construction Period, there were several inspections during which the work on the West Dining Room was inspected, or otherwise obviously being worked on. Despite the above, there were no notices of any nature whatsoever from the City that the Western Dining Area were given for approximately three (3) years, during which time the Project was inspected. By the time the Petitioner gave notice that there zoning and building permit issues, the Project was nearly complete, and an inspector even stated that a temporary occupancy permit would be issued. *Rupp Affidavit* ¶ 29. The reliance upon the Building Permit covering the buildout of the Western Dining Area, was reasonable and in good faith at all times. Also, during the time period, a very substantial investment was made. *Rupp Affidavit* ¶ 37. Accordingly, equitable estoppel applies, and is grounds to deny the Petitioner's request for relief.

IV. Rule 115(d) INFORMATION

Although the information required by Rule 115(d) of the General Rules of Practice is interspersed throughout this Memorandum, below is a summary of that information.

1. **Respondent’s Statement of the Issues Involved Which Are The Grounds for the Motion for Summary Judgment.**

The Respondent maintains that based on the undisputed facts it has complied, or will comply with all of the requirements of the Ubl Letter under the condition that the City Building Official evaluate the permit application, as revised, assuming that there has not been a change of use for zoning purposes.

2. **The Documents Which Comprise the Record on Which the Motion for Summary Judgment is Made.**

The documents which comprise the record on which the Summary Judgment Motion is made are as follows:

- a. The Amended Notice;
- b. The Affidavit of John R. Rupp;
- c. The Affidavit of John M. Miller;
- d. The Affidavit of Donald Jones;
- e. The Affidavit of Patrick McGuire; and,
- f. Documents which are included in the Respondent’s Transcript of Exhibits.

2. **Respondent’s Recital of Material Facts as to Which There is No Genuine Dispute, Together With The Specific Citation to Each Part of the Record Supporting Such Fact.**

For the purposes of the Respondent’s Motion for Summary Determination,, the undisputed facts are as follows:

- a. The Building Permit, including the Approved Plans included the Western Dining Area was issued in August, 2012. Rupp Affidavit ¶ 18. Revisions to

the Approve Plan were thereafter and to date the Building Official has refuses to respond to the filing, thus preventing the Respondent from complying with the Ubl Letter. *Rupp Affidavit* ¶ 36

- b. There has been no legally established change of use for zoning purposes for the West Dining Area which has taken place after the original approved zoning classification in 1976 as a restaurant use. *Rupp Affidavit* 27
- c. Respondent has always agreed, and will agree, to comply with all Building Official requirements arising out of analysis with is based on the assumption that there has been no change of use relative to the West Dining Area.
- d. The reliance upon the fact that the Building Permit and Approved Plans covered the buildout of the Western Dining Area was reasonable and in good faith, and substantial expenses were incurred as a result of that reliance.

The Respondent's Arguments and Authorities.

Please see Section III of this Memorandum.

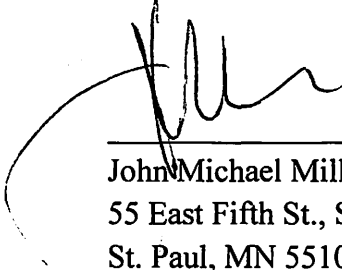
A. CONCLUSION

In summary, the Respondent respectfully requests an Determination granting the relief requested in its Motion for Summary Determination be denied

PFB Law, P.A.

Dated: _____

5/21/2018



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Facsimile: (651) 228-1753
Attorney for Respondent

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of all licenses held by the
University Club of St. Paul, d/b/a The
Commodore for the premises Located at 79
Western Avenue in Saint Paul

**RESPONDENT'S
MEMORANDUM IN RESPONSE TO
PETITIONER'S MOTION FOR
SUMMARY DISPOSITION**

This Memorandum (the "*Memorandum in Response*") is offered in response to the City's Motion for Summary Disposition dated May 18, 2018 (the "*City's Motion*").

INTRODUCTION AND GENERAL COMMENTS

Several documents accompany the City's Motion, including the Memorandum of Law in Support of the City's Motion for Summary Judgment (the "*City's Memorandum in Support*") and numerous affidavits executed the current and former employees of the City. Throughout this *Memorandum in Response*, there will be references to the *City's Memorandum in Support*, and those affidavits. References herein to the affidavits will cited in the same format as used in the *City's Memorandum in Support*, e.g., "*Ubl Aff. ¶____*" or "*Skradski Aff. ¶____*".

Generally the defined terms in this *Memorandum in Response* will have the same meaning as attributed to them in the *Respondent's Memorandum in Support of Motion for Summary Disposition* dated May 21, 2018 (the "*Respondent's Initial Memorandum*"). Most of the Respondent's Exhibits referred to herein can be found in the *Respondent's Transcript of Exhibits* which was filed on May 21, 2018. Exhibits referred to herein which were not included the *Respondent's Transcript of Exhibits* are included in the *Respondent's Supplemental Transcript of Exhibits*, which is being served and filed herewith. There is also one reference below to the City's

Exhibits, which reference is to the entire deposition transcript of Jim Bloom, which is City's Exhibit 29. Additional references will also be made to the Second Affidavit of John R. Rupp (the "*Rupp Second Affidavit*"), the Second Affidavit of Patrick McGuire (the "*McGuire Second Affidavit*"), and the Second Affidavit of John M. Miller (the "*Miller Second Affidavit*") which affidavits are also being served and filed herewith. The first Affidavit of John R. Rupp, dated and filed May 21, 2018, will also be referred to in numerous places below.

Finally, by way of further clarification, the "revised plan" which is referred to in the *City's Memorandum in Support* is the same document which was referred to as the "*Approved Plan*" in the Respondent's Memorandum and accompanying documents. For purposes of consistency the "revised plan" will continue to be referred to as the "Approved Plan"

ARGUMENT

A. The Work Performed by the Respondent in Western Dining Area Was Included in the Application for Building Permit (*Respondent's Exhibit R-2*) and the Approved Plan (*Respondent's Exhibit R-7*). Generally the City's Undisputed Facts 1 – 16 in the *City's Memorandum in Support* address the Application for Building Permit (the "*Application*") and the Approved Plan, and allege "facts" with respect to whether the Western Dining Area was to be included in the Building Permit for the Project which was issued on August 30, 2012 (the "*Building Permit*") (*Respondent's Exhibit R-8*). This section will demonstrate that the Application and the Approved Plan, as well as other matters, did contain information that the Western Dining Area was included in the Approved Plan.

References to the The Building Permit Application.

City's Undisputed Facts #3 and #8. Based on the content of these items, including the statements in the Affidavits referred to in the footnotes, the stated value of \$10,000 was low if it

was intended to include the work done on the Western Dining Area. However, according to Rupp, that amount was chosen because at the time of the Application he was aware of the fact that there were going to be several other subcontractors who would be pulling permits for the various items of work on the Project. These included, but are not necessarily limited to, electrical, plumbing, lift, exterior stair and the bar. He also knew that the applications for those permits would include valuations which would be the basis for the calculation of the permit fees, which permit fees would be passed along to him at the time the subcontractors would be paid. *Rupp Second Affidavit ¶8.*

City's Undisputed Fact #7. It is correct that Rupp did not amend the Application to indicate his intent to finish off the Western Dining Area. However, the reason that was not done is because the Western Dining Area was already included in the Approved Plans. *Rupp Second Affidavit ¶9.*

References to The Revised Plan.

City's Undisputed Fact #6. The Western Dining Area is not labeled “Future West Dining Area” on the Approved Plan. It is labeled “West Dining”. *Respondent's Exhibit R-7.*

City's Undisputed Facts #9 and #11. These items refer to failure of the architect to expressly note the changes between the Original Plan and the Approved Plan. In an Affidavit referred to in the footnotes of both of these items, Mr. Skradski points out that the “Symbol Key” and “dash-dot-dot” lines were not “clouded” to highlight that there was a revision which changed the “Existing” area shown on the Original Plan to “Scope of Interior Alteration Work” area shown on the Approved Plan. According to the architect of record, Patrick McGuire, such a highlight was not necessary under these circumstances. *McGuire Supp. Affidavit ¶9.*

Moreover, Mr. Skradski carefully examined the Approved Plans during the review process,

and took the time to actually “color code” the Approved Plans. *Respondent’s Exhibit R -63, in the Respondent’s Supplemental Transcript (Skradski Depo pp. pp. 12 – 13)*. Mr. Skradski also testified at his deposition that he *compared* the Approved Plans with the Original Plans. See *Respondent’s Exhibit R -64, Respondent’s Supplemental Transcript (Skradski Depo p. 54, lines 5 - 7)*. Perhaps, more than anything, the most obvious difference between the Approved Plan and the Original Plan, is that the Western Dining Area *is* part of the Approved Plan. Yet, despite that comparison, review and color coding, he testified that he simply “missed” the obvious fact that the Western Dining Area was entirely inside the “dash-dot-dot” line on the Approved Plan. See *Respondent’s Exhibit R-65, in Respondent’s Supplemental Transcript (Skradski Deposition Transcript pp. 40 - 41)*.¹

City’s Undisputed Fact # 12. This section states that the DSI staff interpreted the information provided by the Respondent and architect “. . . according to “. . . applicable codes that govern plan review. However, there is no reference in the City’s Memorandum or footnoted Affidavits what those “*applicable codes*” are.

City’s Undisputed Fact #13 and #14. The Affidavits contained in the footnotes to these items generally refer to the items which were discussed in the Items 9, 10 and 11. To the extent that the conclusions of the staff were based on the alleged “facts” of the referred to those Items, those conclusions are flawed and not undisputed.

City’s Undisputed Fact #15. To the extent that the staff’s conclusions were based “facts” which are disputed, those conclusions are flawed and not undisputed.

¹ Please note that in the Skradski Deposition, Exhibit 55 is the “Original Plan”, and Exhibit 66 is the “Approved Plan”. Letter sized copies of Exhibit 55 and 66 are attached as the last two (2) pages of Respondent’s Exhibit R-65. However, 11 x 17 copies are also included under the tab 65 of the Respondent’s Supplemental Transcript of Exhibits.

City's Undisputed Fact #22. The September 18, 2015 email referred to in the section is not an acknowledgement that Rupp understood that he did not have the right to occupy the Western Dining Area. *Rupp Second Affidavit*, ¶5.

Reference/Items Not Included in City's Undisputed Facts 1- 16

Plumbing Fixtures Table/Area of Future Toilet Rooms. Conspicuous by the absence of any express reference in the *City's Memorandum in Support*, to the "Plumbing Fixtures Table" which is a table located on the upper left corner of the Approved Plans. As noted in the McGuire Second Affidavit, ¶8. a, the "Plumbing Fixtures Table" is a table which is included on architectural plans in order to show that there is an adequate number of water closets and lavatories based on projected occupancy of a project. Paragraph 34 of the *Skradski Affidavit* briefly refers to City's Exhibit 19-13, which is a copy of the "Plumbing Fixtures Table" from the Approved Plans. Mr. Skradski goes on to note in that paragraph that the "cloud" around that section tells him that information has changed, and that he should review it. However, there is no other reference to the Plumbing Fixtures Table in the Skradski Affidavit, nor, does it appear anywhere else in the City's Motion documents, with the exception of deposition Jim Bloom, pp. 29 – 33, where he is asked if he looked at it during the review process, and he said he could not remember. (*See Petitioner's Exhibits, Exhibit 29 pp. 29 -33.*)

At Mr. Skradski's deposition, however, he was asked about the Plumbing Fixtures Table, and the significance thereof. See *Respondent's Exhibit R-66, Respondent's Supplemental Transcript* ("Skradski Depo Transcript pp. 43 – 48"). He stated that the changes from the Original Plans (*Deposition Exhibit 55*) and the Approved Plans (*Deposition Exhibit 66*) are something that he would have looked at (*Skradski Depo Transcript p. 45*). However, he stated that he *was not*

aware that the Plumbing Fixture Table took into account the addition of the Western Dining Area to the Approved Plans. (*Skradski Depo Transcript p. 47*).

This failure to review the Plumbing Fixture Table is critical. As pointed out in the *McGuire Second Affidavit* ¶ 8.b. the Plumbing Fixture Table on the Approved Plans, was a change from the Original Plan, *which change was necessitated by the fact that the Western Dining Area was now included in the Approved Plans*. If Mr. Skradski had reviewed and interpreted the clouded change correctly, he would have realized that the Western Dining Area *was* included in the Approved Plans, or, at the very least, that would have triggered a further inquiry by him of the architect or Mr. Rupp.

Similarly, on the Original Plan, the area of Future Toilet Rooms are located and designated Key Note 10. *McGuire Second Aff.* ¶ 8.d. On the Approved Plan, Mens 126 & Womens 127 is shown and Key Note 10 is included in a “cloud” and re-designated “New Toilet Rooms, see detail 1/RA2.” The addition of New Toilet Rooms was only required to satisfy the additional plumbing fixture requirements for the Western Dining Area. *Id.*

Based on the foregoing, it is the Respondent’s position that the Western Dining Areas was intended to be including within the scope of the word which was permitted by the General Permit and the Approved Plan. Alternatively, it is clear that the City’s Undisputed Facts 6, 11, 12, 13, 14, 15, 22 are in fact, disputed, and cannot be relied upon by the City in support of its Motion for Summary Disposition.

B. Review and Comment on the Ubl Letter.

Below is the point-by-point comments on the Ubl Letter as referred to in section II. B of the Respondent’s Initial Memorandum. However, it is also relevant to the Respondent’s Response. The type in italics is a quote from the Ubl Letter, and the Respondent’s responses follow.

“In addition to the above concerns, other key issues are outstanding that need to be resolved prior to occupancy of the proposed west space expansion and the primary restaurant use. The Fire Certificate of Occupancy for the primary restaurant space has been revoked because of the extended time the facility has not been in use.”

RESPONSE: Before Western Dining Area was opened in 2015 it was inspected by the fire officials and approved for occupancy. *Rupp Affidavit ¶ 29*. The Original Restaurant was also approved for occupancy, which had not be out of use for “an extended period of time”. A request to inspect the Original Restaurant was rejected because of the current litigation. *Rupp Affidavit, ¶38*.

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“Additionally, records from our office, as well as records provide by Met Council, show no SAC determination for an A-2 use in the proposed west expansion space to the west of the primary restaurant facility.”

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Western Dining Area would have been contingent upon receiving a SAC determination. The lack of records proves nothing, and the presumption that SAC was paid for restaurant use should control until evidence is produced otherwise.

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“2.) The fire Certificate of Occupancy has been revoked. Coordinate an inspection form the Fire Inspection Division to perform a walk-through of the facility to remove the Fire Certificate of Occupancy revocation and pay any outstanding fees associated with a Fire Certificate of Occupancy.

RESPONSE: The inspection was completed in 2015. *Rupp Affidavit ¶29.* Another was requested on May 14, 2018, but it was refused because of the commencement of the Action. *Rupp Affidavit ¶ 38.*

“You will need to complete the following items in order to be allowed to occupy the proposed west expansion space addition at 79 Western Ave. N.:”

“1.) Provide a design and apply for a permit to remodel the proposed west expansion

RESPONSE: Reference is made to ¶ 36 of the Rupp Affidavit. As a result of the failure of the City to acknowledge the receipt of the subsequent Plan Revisions 2 through 5 as they were delivered, on April 10, 2018, the Respondent dropped off at the plan review desk the Supplemental Submission Package. That Package constitutes application for a permit referred to in this item. The receipt received states that the plans would be sent to Steve Ubl for comment. To date, the Respondent has not received any response.

“2.) Provide a design and apply of a permit to an install an alarm system per the current 2015

building code in an A-2 Occupancy

RESPONSE: Reference is made to ¶ 31 of the Rupp Affidavit. A proposal for an alarm system was attached to the Summit Report. The Respondent was at one time willing to install an alarm system at the beginning of the litigation as set forth in that proposal, but to date the Petitioner has refused to consider it even though Respondents Fire Safety Engineer found that an alarm system is not required

“3.) Provide a design and apply and apply of a permit to install a sprinkler system per the current 2015 building code in an A-2 occupancy”.

RESPONSE: Reference is made to ¶ 31 of the Rupp Affidavit. Respondent’s Fire Safety Engineer found that no sprinkler system is required. The City Building Official Steve Ubl asked Respondent to hire this engineer to make a determination of whether a sprinkler and alarm systems are required. That determination was made and delivered to Mr. Ubl.

“4.) Obtain a SAC determination of the proposed west space expansion for a restaurant. Paid all required fees.”

RESPONSE: Reference is made to ¶33 of the Rupp Affidavit. The Respondent has attempted to obtain a correct SAC determination. However, the City filed an affidavit with incorrect information that the Western Dining Area had been previously used as an exercise area, which resulted in a SAC fee which was not owed. In order to obtain a correct SAC determination, the Petitioner will have to prepare and sent to the Metropolitan Counsel a corrected affidavit stating that there has been no change in use in the Western Dining Area to date the Petitioner has refused to do so.

“5.) Provide accessibility to the proposed west expansion space”.

RESPONSE: This requirement has been completed.

“6.) Provide evidence that establishes all prior uses of the restaurant expansion space. Secure any necessary zoning approvals.”

RESPONSE: Evidence for prior intended uses has been provided and accepted by the zoning. Specifically, the Western Dining Area was intended to be a dining room. Rupp Aff ¶ 27. The Respondent, at the suggestion and support of the Principal City Planner and the part and current Zoning Administrators has initiated a proceeding to formally reestablish the restaurant use. Rupp Aff. ¶28.

“7.) A balance report of the A-2 occupancy space from a licensed contractor or a design professional.”

RESPONSE: This task has been completed. Rupp Affidavit ¶ 32.

C. There Has Been No Change in the Use or Occupancy of the Western Dining Area.

The issue of whether or not the Western Dining Area underwent a “change of use” or “change in occupancy” is a critical issue in this Action. It is the Respondent’s position that there has been no change of use or occupancy. The Building Permit states that there was no “Change/Expansion of Use.” *Respondent’s Exhibit R-8*. Both the previous & current Zoning Administrators, PED staff, and all evidence presented confirm that West Dining room was originally constructed in 1976 for restaurant use, no other use has ever been legally established, and therefore agree with Respondent that there has been no legal change of use. *See ¶¶ 27 and 28 of the Rupp Affidavit.*

According the testimony in the deposition of John Skradski and Lawrence Zangs, while there was some evidence that the Western Dining Area was used as an exercise facility at some point more than seventeen (17) years ago, there is no evidence that use was legally permitted by the City or ever legally established which requires all three of the following steps – none of which

occurred: by a zoning action approved by the Planning Commission to change the originally intended use from restaurant use to health club use; by the issuance of a building permit and associated certificate of occupancy approving that all required improvements for health club occupancy have been completed; and by receiving a health club license to allow it to be operated. Rupp on the other hand used the West Dining Room as part of his restaurant/catering operations from 2001 continuously until now with a liquor license and no objections from the City until the commencement of this Action. *Rupp Affidavit ¶ 33, and other Exhibits referred to therein.*

Respondent agrees with both the current and past Zoning Administrators who, along with Planning and Economic Development staff have all determined that a restaurant use has never been fully legally established in the Western Dining Area, after the original zoning approval for restaurant use in 1976. Although the Western Dining Area was covered by a liquor license it was never built out as a restaurant seating area, with required associated restrooms, until Respondent filed the Building Permit Application to do so in 2012. *Respondent's Exhibit R-2.* Zoning regulations require that if a non-conforming use is established for zoning purposes, there is limited period of time that the permitted non-conforming use allows construction to take place, and the use to be fully legally established. *See Respondent's Exhibit 4 (Wendy Lane Letter).* In this case the required construction to fully legally establish the legal non-conforming restaurant use in the Western Dining Area did not start until 2012, approximately 36 years after the 1976 zoning approval. As a consequence, because of the passage of time, the re-establishment of the non-conforming restaurant use must be approved by the planning Commission, a requirement that was not enforced by the Zoning Department when the Permit was issued in 2012 for unknown reasons.

In short, it appears that there has never been any specific use fully legally established for the Western Dining Area after the initial zoning approval for restaurant use in 1976. However, the zoning has also determined that even though it is located in residential zone, it was grandfathered in as a non-conforming use in that zone. *Respondent's Exhibit 4 (Wendy Lane Letter).* Because of the passage of time the Respondent is following the advice of the past and current Zoning Administrators and the Department of Planning and Economic Development to take steps to reestablish the nonconforming use, so that the actual use of the Western Dining Area will be consistent with its initially approved zoning. Respondent is in the process of doing so now. *Rupp Affidavit ¶¶26 and 27.*

D. Rupp’s View of the Action and Resolution. In John Rupp’s Affidavit, he has set forth his view of the Action and a suggestion for its resolution. Please see ¶¶ 10 and 11 of Rupp’s Second Affidavit.

E. Collateral Estoppel Does Not Prevent the Respondent From Challenging the Determination by the City Council In Resolution RES 18-512. The Petitioner correctly cites the elements of collateral estoppel in Section B of the ARGUMENT portion of the Petitioner’s Memorandum of Law in Support of City’s Motion for Summary Disposition. However, as noted in the Petitioner’s Memorandum, application of the collateral estoppel requires a “final judgment on the merits” in the prior proceeding. *Petitioner’s Memorandum*, p. 12; *Barth v. Stenwick*, 761 N. W. 2d 502, 508 (Minn. App. 2009). In *Barth*, as well as the other cited case, final judgments in the prior action had been entered. *Id.*; *Pope Cty. Bd. Of Comm’rs v. Pryzmus*, 682 N. W. 2d 666, (Minn. Ct. App. 2004). Resolution RES 18-512 does not constitute a “final judgment”, and therefore does not constitute an element of collateral estoppel. Accordingly, the Respondent is not barred by collateral estoppel from making any arguments in this Action.

PFB Law, P.A.

Dated: June 4, 2018

/s/ John Michael Miller
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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of all licenses held by the
University Club of St. Paul, d/b/a The
Commodore for the premises Located at 79
Western Avenue in Saint Paul

**RESPONDENT'S
AMENDED MEMORANDUM
IN SUPPORT OF MOTION FOR
SUMMARY DISPOSITION**

This Memorandum (the "*Respondent's Amended Memorandum*") is offered in support of the *Respondent's Amended Motion For Summary Disposition* of even date herewith (the "*Respondent's Motion*").

INTRODUCTION AND PROCEDURAL POSTURE

A hearing on the Parties' cross Motions for Summary Disposition was held on June 28, 2018. Upon the conclusion of that hearing, the Court directed the Parties to submit "revamped" Memoranda and documents in support of their respective Motions. This Amended Memorandum constitutes the Respondent's facts and arguments in support of *Respondent's Amended Motion*. Please note that all references to "Exhibit(s)" in this Amended Memorandum refer to the Exhibits attached to the *Fourth Affidavit of John R. Rupp*, submitted herewith.

FACTUAL BACKGROUND

A general description of the factual background of this matter has been set forth in the Respondent's previous submissions on May 21, 2018, June 4, 2018, and June 18, 2018. In the interest of brevity, that factual background will not be repeated in this Amended Memorandum. Nevertheless, there are additional relevant facts which will be set forth below.

The City's principal claim in this action is that the Respondent allowed the occupancy of

the Western Dining Area without a Certificate of Occupancy. Specifically, it is alleged in the May 31, 2017 Amended Petition that on September 13, 2016 Respondent allowed the “Western Dining Area” to be occupied without a Certificate of Occupancy. *See, generally, page 9, et seq. of the Amended Petition.* Upon the conclusion of the June 28, 2018 hearing on this matter, Mr. Rupp determined that the focus of the Respondent’s position should be directed toward establishing that there was, in fact, Certificates of Occupancy for both the Original Restaurant¹ and the Western Dining Area at all relevant times herein. *Fourth Rupp Aff.* ¶ 5. To that end, on June 29, 2018 the Respondent requested that the City provide

. . . copies of all of the ‘Fire Certificates of Occupancy’ issued for the Squash Club Building, which would have included the Western Dining Area. . . Fourth Rupp Aff. ¶ 5; Exhibit A, p. 1.

In response, on July 6, 2018 the City sent a reply email to which was attached

. . . imaged copies of the Fire Certificates of Occupancy records for the primary occupancy at 79 Western. . . Id.

Copies of those Fire Certificates of Occupancy referred to are attached to the *Fourth Rupp Affidavit* as *Exhibit B* and *Exhibit C*, which Exhibits will be described and discussed in greater detail below.

It also should be noted that “79 Western”, which is mentioned in the City’s reply email, refers to the building at 79 Western Avenue North, St. Paul, MN, which building is referred herein to as the “Commodore Complex”. *Fourth Rupp Aff.* ¶ 7. That address is used by several businesses and residential units which are located in different areas of the Commodore Complex. *Id.* These

¹ The location of the Original Restaurant and the Western Dining Area is shown on Exhibit D, page 1.

include the “Commodore Squash Club” (which includes a bar and exercise facility), the “Commodore Bar and Restaurant”, several commercial condominium offices, and approximately 50 residential condominium units. *Id.* Although the Commodore Complex was constructed and reconstructed in several different stages (described below), all of the different areas are either connected by passageways or by party walls. *Id.* The general location of the areas referred to above and in the following paragraphs are shown on the diagrams in *Exhibit D*.

A brief history of the construction of the Commodore Complex is helpful. The initial construction of the Commodore Complex was completed in the 1920’s. *Fourth Rupp Affidavit*, ¶ 8. That construction included a six (6) story hotel with a bar located on the first floor; a one story dining room; a parking garage; and, a maintenance/service room. *Id.* The six (6) story portion of the Commodore Complex was converted into a mixed-use condominium (the “*Commodore Condominium Building*” in the early 1980’s. *Id.* The bar/restaurant, and two other offices on the main floor became the “commercial condominium units”, and the hotel rooms became the residential condominium units. *Id.* (It may be noted that because of an error, the dining room built in the 1920’s was not included in the condominium, and remains a separate legally described parcel. *Id.*)

The Westerly Portion of the Commodore Complex (shown on *Exhibit D*) received zoning, licensing, and building permit approvals for construction and remodeling in 1976, and was constructed/remodeled in the late 1970’s. *Fourth Rupp Affidavit*, ¶ 9. This portion consisted of the Squash Club, and the Western Dining Area. Importantly, the Western Dining Area was built to provided room for the *expansion* of the service area of the Original Restaurant which is immediately adjacent to the Western Dining Area. *Id.* The West Dining Area was *not* intended,

nor approved, for any restaurant use independent of the Original Restaurant. *Id.* A liquor license covered the entire Commodore Complex including, but not limited to, the Squash Club and bar, racquet ball courts, and the Western Dining Area. *Id.*

The entire Commodore Complex suffered significant damage in a 1978 explosion. *Fourth Rupp Affidavit*. ¶10. The reconstruction of the Commodore Complex commenced in the early 1980's and was completed pursuant to the 1976 plans and approvals in approximately 1982.

On July 8, 2018, an email on behalf of the Respondent was sent to Angie Wiese, who is the Fire Safety Manager of the Department of Safety & Inspections. *Exhibit A, pp. 2 -3.* Ms. Wiese responded to the July 8, 2018 email on August 2, 2018. *Exhibit A, p. 6.* For ease of reference, Ms. Wiese's email, in part, states as follows:

Mr. Rupp-

In response to your emails dated July 8, 2018:

Per your request, I went through the files and pulled our records related to the Fire Certificate of Occupancy. Our records only go back to the 1980s. Our Fire Certificates of Occupancies do not display dates so I dated the files in order to assist you with the timeline. I believe the following information answers your questions:

It appears that there have been 2 Fire Certificates of Occupancy on this building since its inception. One Fire Certificate of Occupancy has been for the amusement/recreation center and another for the apartment building. There is no record of a Fire Certificate of Occupancy for a restaurant. It also does not appear that either of the 2 fire Certificates of Occupancy were ever revoked.

In 2007 the city's electronic file begins to show an assembly occupancy load in the fire certificate of occupancy file however the file does not document what area the occupant load is for. I asked the inspectors who were listed on the files if they recalled anything about the space. Leanna Shaff has no recollection of anything related to 79 Western. AJ Neis does not recall inspecting what we are referring to as the future west dining room except to investigate a roof leak complaint in 2014. He said that at that time all contents were covered by heavy plastic and the space was not in use due to the continual water damage. (ANGIE-does AJ recall that the

space was finished? Does he recall that it was in a raw state? Any other recollections about its condition?

It should be noted that the word “*inception*” in the third paragraph of Ms. Weise’s email refers to the time of the completion of the construction of the Westerly Portion in the early 1980’s. This was mentioned in Respondent’s June 29 email request, and, as Ms. Weise points out, the relevant records of the City only go back to the 1980’s. *Fourth Rupp Affidavit*. ¶ 12.

The “. . . 2 *Fire Certificates of Occupancy*. . .” referred to Ms. Weise’s email are determined and described as follows:

- a. The first Fire Certificate of Occupancy is determined by the individual certificates that are included in *Exhibit B*. This is referred to as “*Fire Certificate of Occupancy B*”. The references on the individual certificates are as follows:
 1. “TYPE: Dwelling Units UNITS: 52” (Exhibit B, pp 1 – 3);
 2. “TYPE: Dwelling Units UNITS: 49” (pp 4-16);
 3. Residential 3+ Units 49 Dwelling Units” (p. 17);
 4. “48 DWELLING UNITS, OFFICE” (pp 18 -20);
 5. “51 DWELLING UNITS” (p. 20).

- b. The second Fire Certificate of Occupancy is determined by the individual certificates which are included in Exhibit C. This is referred to a “*Fire Certificate of Occupancy C*”.
 1. TYPE: Amusement / Recreation Center (Exhibit C, pp. 1-6)
 2. TYPE: Amusement / Recreation Center UNITS: 0 (pp. 1-7)
 3. Amusement/ Recreation Center Assembly (p. 18)
 4. AMUSEMENT/RECREATION CENTER) pp. 19,20,22,23)
 5. Racquet Ball Courts (p. 21)
 6. REC.CENTER (p.24)

Fire Certificate of Occupancy B covers not only the residential condominium units, but also the Original Restaurant and the commercial condominium units on the first floor. Fire

Certificate C covers the entire Westerly Portion, including the Squash Courts, exercise room, lockers, bar in the Squash Club, and the Western Dining Area. *Fourth Rupp Affidavit*. ¶14. The Respondent agrees with the statement in Ms. Wiese’s email that “. . .[t]here is no record of a Fire Certificate of Occupancy for a restaurant. . .” This make sense since the Western Dining Area was intended to be used to provide an expansion of the service area for the Original Restaurant, not intended to be a “stand alone” restaurant. *Fourth Rupp Affidavit*, ¶15.

Importantly, it should also be noted that Ms. Wiese also confirms that it does not appear that either of the 2 Fire Certificates of Occupancy have been revoked. Respondent agrees. Also in support of this conclusion, it should be noted that Mr. Rupp has owned the Original Restaurant since the 1980’s and the Western Dining Area since 2001. *Fourth Rupp Affidavit*, ¶ 16. During that period he has never received any notice of revocation of any fire certificate of occupancy that complies with the provisions of section 40.06 of Chapter 40 of the Legislative Code. *Id.* That section, which governs revocation, states in relevant part as follows:

(b) Notice of suspension, revocation or denial.

(1) When the fire code official revokes, suspends or denies a fire certificate of occupancy for safety code violations, the notice shall state:

- a. The specific reason(s) for the city's suspension, revocation or denial of the fire certificate of occupancy;*
- b. The effective date of the revocation, suspension or denial of the fire certificate of occupancy;*
- c. A statement indicating that the commercial building or residential occupancy, or portion thereof, shall not again be used or occupied until such time as the said certificate is issued or renewed or suspension lifted following inspection and a determination by the fire code official that the commercial building or residential occupancy, or portion thereof, is in compliance with applicable safety codes; and*

d. A statement indicating that the suspension, revocation, or denial may be appealed to the legislative hearing officer within ten (10) days of issuance

As noted in Ms. Wiese's email, several of the individual Fire Certificates of Occupancy did not include the date on the face of the documents. Those dates were embedded in the digital name of the electronic version of the documents. For the purposes of this Affidavit, it should be noted that the individual certificates on pages 11 – 14 of Exhibit C were dated "2015". Accordingly, Fire Certificate of Occupancy C would clearly have been in place in September 2016. In this matter, it is clear from the above that the Fire Certificate of Occupancy B and Fire Certificate of Occupancy C were in effect at all times relevant herein. *Fourth Rupp Affidavit, ¶¶ 17 and 18.*

Rule 115(d) INFORMATION

Although the information required by Rule 115(d) of the General Rules of Practice is interspersed throughout this Memorandum, below is a summary of that information.

1. **Respondent's Statement of the Issues Involved Which Are The Grounds for the Motion for Summary Judgment.**

For the purposes of this Amended Memorandum, the Issue is whether or not the Western Dining Area was covered by a Certificate of Occupancy at all relevant times herein

2. **The Documents Which Comprise the Record on Which the Motion for Summary Judgment is Made.**

The documents which comprise the record on which the Summary Judgment Motion is made are as follows:

- a. The Fourth Affidavit of John R. Rupp, including the Exhibits attached thereto;

3. **Respondent's Recital of Material Facts as to Which There is No Genuine Dispute, Together With The Specific Citation to Each Part of the Record Supporting Such Fact.**

- A. The City has issued a Fire Certificate of Occupancy, referred to herein as Fire Certificate of Occupancy B. Fourth Rupp Affidavit, ¶¶ 12, 13.
- B. Fire Certificate of Occupancy B covers the Original Restaurant, the residential condominium units and the commercial office condominiums on the first floor of the Easterly Portion of the Commodore Complex. Fourth Rupp Affidavit, ¶ 14.
- C. The City has issued a Fire Certificate of Occupancy, referred to herein as Fire Certificate of Occupancy C. Fourth Rupp Affidavit, ¶¶ 12, 13.
- D. Fire Certificate of Occupancy C covers the Westerly Portion of the Commodore Complex, including, but not limited to, the Westerly Dining Area. Fourth Rupp Affidavit, ¶ 14.
- E. Fire Certificate of Occupancy C was effect on September 13, 2016. Fourth Rupp Affidavit, ¶ 16.
- F. Fire Certificate of Occupancy B has not been revoked. Fourth Rupp Affidavit, ¶ 16.
- G. Fire Certificate of Occupancy C has not been revoked. Fourth Rupp Affidavit, ¶ 16.

4. **The Respondent's Arguments and Authorities.** Please see the following Section of this Memorandum.

ARGUMENT AND AUTHORITIES

A. **Summary Disposition –Description of Standard and Application Thereof.**

Minn. Rule 1400.5500. K. provides that an Administrative Law Judge may recommend a summary disposition of a case or any part thereof where there is no genuine issue as to any material

fact. Summary disposition is the administrative equivalent to summary judgment motion. Minnesota Administrative Procedure; Section 7.4.1, George A. Beck, Mitchell Hamline School of Law. The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters. *Id; Rule 1400.6600*. Accordingly, pursuant to the above, and this Courts Prehearing Order of April 2, 2018, the Respondent’s Motion Documents will generally follow the requirements of General Rules of Practice, Rule 115, subject to the requirements of any applicable scheduling order.

Minnesota Rules of Civil Procedure Rule §56.03 states: “judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law.” Minn. R. Civ. P. §56.03 (2015). The adverse party may not rest on the mere averments or denials of its pleadings, but must present specific facts showing there is genuine issue for trial. *Id.* “A material fact issue is one which will affect the result or outcome of the case depending on its resolution.” *Northwestern Nat’l Cas. Co. v. Khosa, Inc.*, 520 N.W.2d 711, 773 (Minn. Ct. App. 1994).

In addition, the Court must view the record in the light most favorable to the party opposing the motion and all factual inferences must be drawn against the movant for summary judgment. *Sauter v. Sauter*, 244 Minn. 482, 484-485, 70 N.W.2d 351, 353 (1955). Even when a movant’s documents are uncontradicted, they in themselves may be insufficient to sustain the movant’s burden of proof. *Id.* However, although the burden of proof rests on the moving party to show there is no issue of material fact and they are entitled to judgment as a matter of law, *Id.*, the non-

moving party must also bring forward demonstrable evidence establishing that specific facts are in dispute creating a genuine issue for trial. *Erickson v. Gen. United Life Ins. Co.*, 256 N.W.2d 255, 259 (Minn. 1977). A “mere scintilla” of evidence is not sufficient to overcome summary judgment; there must be enough evidence or material facts that would permit a jury to find for the non-moving party. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). This Court must decide whether Sealock has provided any facts that affect the outcome of this case and if Demvi is entitled to judgment as a matter of law.

The Court should also consider the motion of summary judgment within the context of its purpose to “secure a just, speedy and inexpensive disposition.” See *Vieths v. Thorp Fin. Co.*, 305 Minn. 522, 524, 232 N.W.2d 776, 778 (1975). The motion for summary judgment may not be used to replace a trial where the issues of material fact should be decided. *Id.* However, when no issues of material fact are present, even the United States Supreme Court has recognized motions for summary judgment as an integral part of our rules as a whole and not a disfavored procedural shortcut. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

B. Argument.

Section 40.01 of the Saint Paul Legislative Code states as follows:

Sec. 40.01. - Fire certificate of occupancy requirement.

(a) All existing buildings in the city are required to have and maintain a fire certificate of occupancy, issued by the department of safety and inspections. The fire certificate of occupancy shall be an indication that the building meets, at the time of inspection, all relevant codes to maintain the health, safety and welfare of the building's occupants and the general public.

Section 40.03 of the Legislative Code defines “safety codes” as follows:

Safety code or safety codes. Any building, fire, housing, health, safety, zoning or other similar code, law and ordinance, promulgated or enacted by the United States, the State of Minnesota, the County of Ramsey and the City of Saint Paul, or any lawful agency or department thereof, which are applicable to a building in such city. Safety code includes, without any limitation of the foregoing sentence as a result of this specification, the provisions of Chapters 33, 34, 43, 45, 49, 55, 56 and 58 of the Legislative Code.

The City of Saint Paul had adopted the Minnesota State Building Code pursuant to Section 33.02 of the Legislative Code. Therefore, the Minnesota Building Code, as adopted by Section 33, is a “safety code” as that term is defined by Section 40.03, and referred to in Section 40.01. The Amended Petition has alleged that the Respondent did not have a Certificate of Occupancy required by Section 1300.0220 of the Minnesota State Building Code.

Fire Certificate of Occupancy B and Fire Certificate of Occupancy C were issued for the Original Dining Room and the Western Dining Area and were not in revoked status at any relevant time herein. As such, they are evidence of compliance with the requirements of Chapter 33 of the Legislative Code pursuant to Section 40.01 of the Legislative Code.

A. FINAL COMMENTS AND CONCLUSION

In closing, the Respondent wants to note that it is still the Respondent’s position that this Court has the clear authority to issue a recommendation which takes into account mitigating circumstances. See, pp 2 – 3, and 10 in the Respondent’s Memorandum in Reply dated and filed June 18, 2018. Accordingly, nothing related to the Amended Motion and this Amended Memorandum should be interpreted as an abandonment of any of the points and arguments made in Respondent’s previous submissions.

Based on the foregoing, the Respondent respectfully requests an Determination recommending that the relief requested in the Amended Petition be denied in its entirety.

RESPECTFULLY SUBMITTED

PFB Law, P.A.

Dated: _____

10/24/19



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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of all licenses held by the
University Club of St. Paul, d/b/a The
Commodore for the premises Located at 79
Western Avenue in Saint Paul

**RESPONDENT’S
MEMORANDUM IN RESPONSE TO
PETITIONER’S REVISED
MEMORANDUM OF LAW
IN SUPPORT OF CITY’S MOTION
FOR SUMMARY DISPOSITION**

This Memorandum (the “*Memorandum in Response #2*”) is offered in response to the *Petitioner’s Revised Memorandum of Law In Support Of City’s Motion For Summary Disposition* dated October 24, 2018 (the “*City’s Revised Memorandum*”).

INTRODUCTION AND GENERAL COMMENTS

This *Memorandum in Response #2* follows several memoranda previously submitted by the Respondent including the following: *Respondent’s Memorandum in Support of Motion for Summary Disposition* dated May 21, 2018 (the “*Respondent’s Initial Memorandum*”); *Respondent’s Memorandum In Response to Petitioner’s Motion for Summary Disposition* dated June 4, 2018 (the “*Respondent’s Memorandum in Response #1*”); *Respondent’s Memorandum In Reply To Petitioner’s Motion In Opposition*, dated June 18, 2018 (the “*Respondent’s Reply Memorandum*”); and, *Respondent’s Amended Memorandum In Support Of Motion For Summary Disposition* dated October 24, 2018 (the “*Respondent’s Amended Memorandum*”).

Throughout this Memorandum in Response #2, there are references to the *Fifth Affidavit of John R. Rupp*, which is submitted of even date herewith. That document is referred to as the “*Fifth Rupp Affidavit*”.

Generally, the defined terms in this *Memorandum in Response #2* will have the same meaning as attributed to them in the *Respondent's Initial Memorandum*. The Respondent's Exhibits referred to herein can be found in the *Respondent's Transcripts of Exhibits* which have been previously filed. Additional references may also be made to previously submitted affidavits of John R. Rupp.

RESPONSE TO THE PETITIONER'S STATEMENT OF UNDISPUTED FACTS

The Respondent's Response to the City's Statement of Undisputed Facts is set forth below. For ease of reference, each alleged Undisputed Fact is stated below, and the Respondent's response to each is set forth immediately thereafter.

1. Respondent is the owner of the Commodore, a bar and restaurant located at 79 Western Avenue in the City of Saint Paul.

RESPONSE: The real estate upon which the bar and restaurant located at 79 Western Avenue is owned by 79 Western, LLC, a Minnesota limited liability company, which is wholly owned by John R. Rupp. The business operated on the premises is owned and operated by "The University Club of Saint Paul d/b/a The Commodore."

2. The University Club d/b/a the Commodore holds liquor on-sale, liquor on-sale Sunday and entertainment (B) licenses.

RESPONSE: Respondent does not dispute this statement.

3. Condition #9 of the licenses granted to the Respondent for the Commodore requires "full compliance with City ordinances".

RESPONSE: Respondent does not dispute this statement.

4. Saint Paul Legislative Code Section ("SPLC") 310.05(m)(2) supports adverse action and the imposition of a matrix penalty when there has been a violation of the "provisions of the legislative code related to the licensed activity."

RESPONSE: Respondent does not dispute this statement. However, reference is made to the text of the entire referred to section.

5. SPLC §409.08(3) provides that "No sale shall be made in any place or part of a building where such sales are prohibited by state law or this chapter."

RESPONSE: Respondent does not dispute this statement. However, reference is made to the text of the entire referred to section.

6. SPLC §310.05 (m)(5) supports adverse action and the imposition of a matrix penalty where there has been the "Commission of a crime other than a felony on the premises by the licensee or employee."

RESPONSE: Respondent does not dispute this statement. However, reference is made to the text of the entire referred to section.

7. SPLC §310.06(b)(3) supports adverse action and the imposition of conditions when "... the premises which are licensed, or which are to be licensed do not comply with applicable health, housing, fire, zoning and building codes and regulations."

RESPONSE: Respondent does not dispute this statement. However, reference is made to the text of the entire referred to section.

8. SPLC §310.06(b)(5) supports adverse action and the imposition of conditions when the "licensee... has failed to comply with any condition set forth in the license".

RESPONSE: Respondent does not dispute this statement. However, reference is made to the text of the entire referred to section.

9. SPLC §310.06 (b)(6)(a) supports adverse action when: "the licensee or applicant (or any person whose conduct may by law be imputed to the licensee or applicant) has violated, or performed any act which is a violation of, any of the provision of these chapters or of any statute, ordinance or regulation reasonably related to the licensed activity, regardless of whether criminal charges have or have not been brought in connection therewith... "

RESPONSE: Respondent does not dispute this statement. However, reference is made to the text of the entire referred to section.

10. SPLC §310.06 (b)(6)(c) supports adverse action when: "the licensee or applicant (or any person whose conduct may by law be imputed to the licensee or applicant) has engaged in or permitted a pattern or practice of conduct of failure to comply with laws reasonably related to the licensed activity or from which an inference of lack of fitness or good character may be drawn."

RESPONSE: Respondent does not dispute this statement. However, reference is made to the text of the entire referred to section.

11. SPLC §310.06 (b)(8) permits adverse action when: "the licensed business, or the way in which such business is operated, maintains or permits conditions that unreasonably annoy, injure or endanger the safety, health, morals, comfort or repose of any considerable number of members of the public."

RESPONSE: Respondent does not dispute this statement. However, reference is made to the text of the entire referred to section.

12. The City of Saint Paul adopted the Minnesota State Building Code under SPLC §33.02.

RESPONSE: Respondent does not dispute this statement. However, reference is made to the text of the entire referred to section.

13. SPLC §33.03 requires permits when the occupancy of a building is changed or when a structure is constructed, enlarged, altered or repaired.

RESPONSE: Respondent does not dispute this statement. However, reference is made to the text of the entire referred to section.

14. SPLC §33.09 sets the penalty for any violation of section 33 of the legislative code as a misdemeanor level crime.

RESPONSE: Respondent does not dispute this statement. However, reference is made to the text of the entire referred to section.

15. SPLC §61.02 states that "Certificates of occupancy as required by the Saint Paul Legislative Code shall also constitute certification of zoning compliance as required by the zoning code.

RESPONSE: Respondent does not dispute this statement. However, reference is made to the text of the entire referred to section.

16. SPLC §61.901 sets the penalty for a violation of a zoning code provision as a misdemeanor

RESPONSE: Respondent does not dispute this statement. However, reference is made to the text of the entire referred to section.

17. Minnesota Administrative Provision for the Minnesota State Building Code §1300.0220 prohibits use or occupancy of a space until the Building Official has issued either a Certificate of Occupancy or a Temporary Certificate of Occupancy.¹⁷

RESPONSE: Respondent does not dispute this statement. However, reference is made to the text of the entire referred to section.

18. Minnesota Administrative Provision for the Minnesota State Building Code §1300.0150 states that a violation of the code is a misdemeanor under Minnesota Statutes, section 326B.082.

RESPONSE: Respondent does not dispute this statement. However, reference is made to the text of the entire referred to section.

19. The Building Official for the City of Saint Paul has reviewed the electronic and paper files kept by the Department related to the Commodore and a Temporary Certificate of Occupancy was not issued for the Western Dining Area of the Commodore.

RESPONSE: This alleged fact is disputed. The Respondent does not dispute that Mr. Ubl has reviewed certain electronic and paper files kept by the Department related to the Commodore.

However, as described in the *Respondent's Amended Memorandum*, the Western Dining Area was covered by unrevoked Fire Certificate of Occupancy and by a Building Code Certificate of Occupancy, and as a consequence Respondent did not need a temporary certificate of occupancy to allow it to be legally occupied.

In addition, please see *Fifth Rupp Affidavit*, ¶ 4. On October 27, 2015, Mr. Rupp met with Michael Palm who was the Senior Building Inspector at that time. Mr. Palm had been sent to the Commodore to conduct an inspection. At that point in time, the arrangements to open the restaurant, including the Western Dining Area, within a day or two, had been made, after three years of work. Rupp and Palm discussed allowing Respondent to open, which Palm thought was reasonable, and told Rupp he could open.

At the time of the Fire and Building inspections there was a valid certificate of occupancy for the entire restaurant complex, including the West Dining Room that had been in place since the early 1980's and had never been revoked. All permitted work had been completed and inspected inside the premises. The exterior fire stair permit had not been approved by the HPC and it refused to review the permit until 60 days after the upcoming opening. As a consequence of the HPC refusal to review the fire stair permit, Respondent informed the city that it would construct a temporary fire exit stair. The city did not issue a permit and the stair was constructed anyway. The completed fire stair was nevertheless approved for temporary use during the fire and building inspections. The temporary nature of the fire exit stair necessitated the need for an agreement for temporary occupancy.

During that discussion, it was agreed that the restaurant, including the Western Dining Area, could open as scheduled, and that he would send a "punch-list" of items which would need to be addressed within thirty (30) days. Based on that representation, the restaurant was opened as scheduled.

This procedure described in the preceding paragraph is basis for all Fire Certificate of Occupancy renewals city wide which follow inspections, whether or not the building in question has undergone any modifications and/or improvements. However, Mr. Palm did not send the "punch list", and Rupp believes that meeting was the last communication which he had with Mr. Palm regarding the Project.

The Fire Inspector has refused to conduct an inspection since this action began over three years ago, to identify any issues that might prevent the renewal of the Fire Certificate of Occupancy, nor has the current Fire Certificate of Occupancy been revoked. With the exception of the temporary fire stair Respondent is unaware of any issues that would prevent the renewal.

20. The Building Official for the City of Saint Paul has reviewed the electronic and paper files kept by the Department related to the Commodore and a Certificate of Occupancy was not issued for the Western Dining Area of the Commodore.

RESPONSE: This alleged fact is disputed. The Respondent does not have any knowledge of whether Ubl has reviewed certain electronic and paper files kept by the Department related to the Commodore.

However, as described in the *Respondent's Amended Memorandum*, the Western Dining Area was covered by unrevoked Fire Certificate of Occupancy and by a Building Code Certificate of Occupancy. Other than the review of the City's review of the City's records, the City has produced no evidence that there was no Building Certificate of Occupancy issued when the West Dining Room was competed and occupied in the early 1980's, or that if issued had been revoked. The City has confirmed that there is a current Fire Certificate of Occupancy for the entire building containing the West Dining Room, and that it has also not been revoked.

21. As of May 16, 2018 (the date that the Building Official swore out his affidavit), the Western Dining Area of the Commodore still lacked approval for occupancy.

RESPONSE: This alleged fact is disputed. The Respondent does not have any knowledge whether Mr. Ubl has reviewed certain electronic and paper files kept by the Department related to the Commodore.

However, as described in the *Respondent's Amended Memorandum*, the Western Dining Area was covered by unrevoked Fire Certificate of Occupancy and by a Building Code Certificate of Occupancy. Other than the alleged review of the City's review of its records, the City has produced no evidence that there was no Building Certificate of Occupancy issued when the West Dining Room was competed and occupied in the early 1980's, or that if issued had been revoked. The City has confirmed that there is a current Fire Certificate of Occupancy for the entire building containing the West Dining Room, and that it has also not been revoked.

22. On September 17, 2015 Respondent acknowledged via an email to Building Official Ubl that he understood he did not have the right to occupy the Western Dining Area but believed he could occupy the Main Dining Area.

RESPONSE: This alleged fact is disputed. The September 18, 2015 email referred to in the section is not an acknowledgement that Rupp understood that he did not have the right to occupy the Western Dining Area. *Fifth Rupp Affidavit*. ¶ 7 which states: I have reviewed the email referred to in Petitioner's Undisputed Fact #22. That email is not an acknowledgement that I understood that I did not have the right to occupy the Western Dining Area. I was merely stating that I understood I already had the right to occupy the Original Restaurant. Read in its entirety, it is clear that the email in no way suggests I believed I did not have the right to occupy the Western Dining Area for customer seating, (even though it had been used as part of the Commodore Bar, Restaurant, and catering operations since 2001 with no city complaint) after I completed the permitted improvements.

23. On September 22, 2015 DSI staff met with Respondent at the Commodore and discussed requirements for use of both the Main Dining Area and the Western Dining Area. DSI staff documented the unpermitted work done in the Western Dining Area and took pictures.

RESPONSE: Respondent does not dispute that a meeting took place on September 22, 2015 at which time there was a discussion regarding what the City maintained were its requirements for the use of the Main Dining Area and the Western Dining Area. However, Respondent did not agree with the requirements, and objected to the accusation that work was done without the proper permits.

24. During the September 22, 2015 meeting at the Commodore to discuss requirements for use of both the Main Dining Area and the Western Dining Area, Inspector Palm recalls Respondent getting very angry with him and stating something to the effect of "I can do anything I God damn want to. It is my place and I don't need you guys telling me what I can and can't do in my own building". *Fifth Rupp Affidavit* ¶10.

RESPONSE: This alleged fact is disputed. Inspector Palm acknowledges that the quoted statement is "something to the effect".

25. During the September 22, 2015 meeting at the Commodore to discuss requirements for use of the Main Dining Area and the Western Dining Area, Inspector Sutter recalls

Respondent telling him in a matter of fact tone, "I don't care about your permits; I have a business to open."

RESPONSE: Respondent disputes this statement. That is not his recollection of what Respondent said. *Fifth Rupp Affidavit, ¶12.*

26. On October 26, 2015, Building Official Ubl sent a letter to Respondent outlining the steps he needed to follow in order to legally occupy both the Main Dining Area and the Western Dining Area.

RESPONSE: The Respondent acknowledges that a letter dated October 26, 2015 was sent by Mr. Ubl and received by the Respondent; and, that a copy of that letter is included in Petitioner's Exhibits as Exhibit 20. The terms of the letter speak for themselves. The Respondent disputes that the letter outlined the steps that Responded needed to follow in order to legally occupy both the Main Dining Area the Western Dining Area. *Fifth Rupp Affidavit ¶ 12.* As noted in the *Respondent's Amended Memorandum*, both the Main Dining Area and the Western Dining Area were covered by Fire Certificates of Occupancy and Building Code Certificates of Occupancy, and therefore could be legally occupied. In addition, the demands in the Ubl letter were based on the erroneous assumption that there had been a "change in use" – can accordingly there was no basis for the demands which were made in that letter. *Fifth Rupp Affidavit ¶5.*

27. On October 26, 2015, Fire Inspector Perucca inspected 79 Western for renewal of the Fire Certificate of Occupancy and sent Respondent a letter notifying him of a number of deficiencies that needed to be corrected before occupancy of the Main Dining Area and Western Dining Area could be allowed. In his letter, Fire Inspector Perucca told Respondent that the current Certificate of Occupancy was in "Revoked Status" and that the Certificate of Occupancy did not include the use of the future West Dining Room. Fire Inspector Perucca laid out a number of steps that respondent needed to take in order to legally occupy the Main Dining Area and the Western Dining Area.

RESPONSE: The Respondent acknowledges that a letter dated October 26, 2015 was sent by Mr. Perucca and received by the Respondent; and, that copy of

that letter is included in Petitioner's Exhibits as Exhibit 23. The terms of that letter speak for themselves. However, the Respondent disputes that there were in fact any deficiencies which allegedly needed to be corrected before the occupancy of the Main Dining Area and Western Dining Area could be allowed. The letter does expressly state whether or not the "Certificate of Occupancy" referred to is a "Fire Certificate of Occupancy" or a Building Certificate of Occupancy". As noted in the *Respondent's Amended Memorandum*, any Fire Certificate of Occupancy related to the Main Dining Area and Western Dining Area *had not been revoked*; and, the Main Dining Area and the Western Dining Area were both covered by Building Code Certificates of Occupancy. The City has not produced any evidence that and Fire Certificate of Occupancy has been revoked in accordance with the applicable regulations.

28. On October 30, 2015, Inspector Ferrara inspected the Western Dining Area of the Commodore for evidence of occupation and did not observe activity that led him to conclude that the Respondent was allowing occupancy of the space. Inspector Ferrara reported this conclusion to his supervisor.

RESPONSE: The Respondent does not have any knowledge of whether or not made the statement.

29. On November 30, 2015, Fire Inspector Perucca placed a notation in the file that stated that on November 30, 2015 a Temporary Certificate of Occupancy "was granted for bar & restaurant, but not west banquet room" and on December 29, 2015 he further noted that the "west dining room needs permits" and was "currently unoccupied".

RESPONSE: The Respondent does not have any knowledge that the notation was placed in the file on or about November 30, 2015

30. On November 4, 2015 Building Official Ubl emailed Respondent, again notifying him that there were a number of outstanding items that needed to be completed before use or occupancy of the Western Dining Area could be allowed.

RESPONSE: The Respondent does not dispute that the referred to email dated November 4, 2015 was sent and received as addressed. The

Respondent does dispute that there was “. . . a variety of future work to be performed under separate permits. . .”

31. On May 25, 2016, OSI Deputy Director Bistodeau sent Respondent a letter outlining the steps he needed to take to obtain a Certificate of Occupancy for the Western Dining Area.

RESPONSE: The Respondent acknowledges that a letter dated May 25, 2013 was sent by Mr. Bistodeau and received by the Respondent; and, that a copy of that letter is included in Petitioner’s Exhibits as Exhibit 25. The terms and provisions of the letter speak for themselves. The Respondent disputes that the letter outlined the steps that Respondent was legally required to take to obtain a Certificate of Occupancy in order to legally occupy both the Main Dining Area the Western Dining Area. [Fifth Rupp Affidavit]. As noted in the *Respondent’s Amended Memorandum*, both the Main Dining Area and the Western Dining Area were covered by Fire Certificates of Occupancy and Building Code Certificates of Occupancy, and therefore could be legally occupied.

32. On September 13, 2016 Inspector Ferrara inspected the Commodore for evidence of occupation in the Western Dining Area in response to a complaint and observed occupancy and the sale and consumption of alcohol in the Western Dining Area.

RESPONSE: Respondent does not dispute this statement.

33. On September 13, 2016 the Western Dining Area of the Commodore lacked approval for occupancy as it had neither a Temporary Certificate of Occupancy nor a Certificate of Occupancy.

RESPONSE: Respondent disputes this statement. The Western Dining Area had a Certificate of Occupancy which allowed it to be legally occupied. *See Respondent’s Amended Memorandum.*

34. On December 4, 2107 Respondent testified before the Board of Zoning

Appeals and the notes from that hearing show that Respondent acknowledged that the Western Dining Area had not received approval for occupancy stating: "The last inspection by the City, the City inspector told him he was going to provide a temporary certificate of occupancy. He never got one but was told that two days before he opened."

RESPONSE: Respondent did not say that he did not have approval for occupancy. He had been told that he could occupy the space and had a valid Certificate of Occupancy. See *Fifth Rupp Affidavit*, ¶8; and the Respondent's Amended Memorandum.

35. On February 3, 2018 by Council RES 18-512 Saint Paul City Council upheld an October 30, 2017 determination that the Western Dining Area was, for zoning purposes "never legally established as a "restaurant" space".

RESPONSE: Respondent does not dispute this statement. The West Dining Area was never legally established as a "restaurant space", but was legally established for use as a dining room only - associated with the adjacent restaurant and given a certificate of occupancy for that use in the early 1980's that has never been cancelled. *Fifth Affidavit of Rupp*, ¶9.

36. Minnesota Administrative Provision for the Minnesota State Building Code §1300.0030 states that "The purpose of this code is to establish minimum requirements to safeguard the public health, safety and general welfare through structural strength, means of egress facilities, stability, sanitation, adequate light and ventilation, energy conservation and safety to life and property from fire and other hazards attributed to the built environment."

RESPONSE: Respondent does not dispute this statement. However, reference is made to the text of the entire referred to section.

RESPONDENT'S ARGUMENT
IN OPPOSITION TO PETITIONER'S
STATEMENT OF ISSUES AND ARGUMENTS IN SUPORT THEREOF

The Respondent's arguments and points in opposition to the City's ARGUMENT is set forth below. Reference to the description of the Standard of Review included in the Respondent's Amended Memorandum in Support of Motion for Summary Disposition.

ISSUE 1. Undisputed facts show that Respondent did NOT Violate SPLC §409.08 when he allowed alcohol to be sold in the Western Dining Area space because the Western Dining Area was covered by an agreement to allow temporary occupancy and a Certificate of Occupancy.

The Respondent's *Amended Memorandum in Support of Motion for Summary Disposition* dated and filed October 24, 2018 explains, in detail, that the Western Dining Area was covered by a Certificate of Occupancy on September 13, 2016. In order to avoid redundancy, reference is hereby made to the *Amended Memorandum in Support*. Alternatively, it is clear that there is, at a minimum, a genuine issue of material fact with respect to the existence of a Certificate of Occupancy for the Western Dining Area on September 13, 2016.

In addition, there was an agreement to allow temporary occupancy with respect to the entire restaurant, including the Western Dining Area, to open as planned. *Fifth Rupp Affidavit*, ¶ 4..

Specifically, on October 27, 2015, Mr. Rupp met with Michael Palm who was the Senior Building Inspector at that time. Mr. Palm had been sent to the Commodore to conduct an inspection. At that point in time, the arrangements to open the restaurant, including the Western Dining Area, within a day or two, had been made, after three years of work. Rupp and Palm discussed allowing Respondent to open, which Palm thought was reasonable, and told Rupp he could open.

At the time of the Fire and Building inspections there was a valid certificate of occupancy for the entire restaurant complex, including the West Dining Room that had been in place since the early 1980's and had never been revoked. All permitted work had been completed and inspected inside the premises. The exterior fire stair permit had not been approved by the HPC and it refused to review the permit until 60 days after the upcoming opening. As a consequence of the HPC refusal to review the fire stair permit, Respondent informed the city that it would construct a temporary fire exit stair. The city did not issue a permit and the stair was constructed anyway. The completed fire stair was nevertheless approved for temporary use during the fire and building inspections. The temporary nature of the fire exit stair necessitated the need for an agreement for temporary occupancy and/or a temporary occupancy permit.

During that discussion, it was agreed that the restaurant, including the Western Dining Area, could open as scheduled, and that he would send a "punch-list" of items which would need to be addressed within thirty (30) days. Based on that representation, the restaurant was opened as scheduled.

This procedure described in the preceding paragraph is basis for all Fire Certificate of Occupancy renewals city wide which follow inspections, whether or not the building in question has undergone any modifications and/or improvements. However, Mr. Palm did not send the "punch list", and Rupp believes that meeting was the last communication which he had with Mr. Palm regarding the Project.

The Fire Inspector has refused to conduct an inspection since this action began over three years ago, to identify any issues that might prevent the renewal of the Fire Certificate of Occupancy, nor has the current Fire Certificate of Occupancy been revoked. With the expect of the temporary fire stair Respondent is unaware of any issues that would prevent the renewal.

ISSUE 2. The undisputed facts show that Respondent did NOT remodel the Western Dining Area without obtaining the permits required under both the SPLC and the Minnesota Administrative Provision for the Minnesota State Building Code. Accordingly, there was no "crime" committed when he allowed occupancy of the space. Alternatively, at a bare minimum, there is a genuine issue of material fact with respect to each of the items below.

- A. The approved plans for the remodeling project included the Western Dining Area. The entire process of obtaining the approval of the “plans” for the Western Dining Area was addressed in great detail in the *Respondent’s Memorandum in Support of Motion for Summary Disposition*. See “A. Part One” of that Memorandum, pp. 3 – 6.
- B. All of the necessary permits for the remodeling of the Western Dining Area were issued. As noted in the Respondent’s Memorandum in Support of Motion for Summary Disposition. The “Approved Plans” were incorporated into the “Building Permit” which was issued on August 28, 2012. See PP. 5 – 6 of that Memorandum in Support. The Respondent has not been informed of any other remaining “open” permits related to the remodeling of the Western Dining Area. (First)Rupp Affidavit, dated May 21, 2018, ¶ 36.
- C. As noted in the Memorandum in Support, all requested inspections have taken place. See page 6 of the Memorandum in Support.
- D. There are no “fees” which remain to be paid. *Fifth Rupp Aff.* ¶ 10.
- E. The Western Dining Area was covered by any necessary Occupancy Permits at all relevant times herein. This was described in detail in the *Amended Memorandum in Support*.
- F. There is no issue regarding zoning because there has been no change in the use or occupancy of the Western Dining Area. The issue of whether or not the Western Dining Area underwent a “change of use” or “change in occupancy” is a critical issue in this Action. It is critical, because many of the City’s demands for further improvements to the entire restaurant, including the west dining room, are based on the Building Official’s (Steve Ubl’s) assumption that there has in fact been a change of use. If the City had agreed with Respondent that there had been no change of use or change of occupancy, it would have approved Respondent’s 2012 building permit essentially if not literally as submitted, and there would have been no dispute. *Fifth Rupp Affidavit* ¶ 5.

It is the Respondent’s position that there has been no change of use or change of occupancy. The Building Permit agrees with Respondent’s position by stating that there was no “Change/Expansion of Use.” *Exhibit R-8*. Respondent relied on the City’s agreement of no change/expansion of use and proceeded with the renovation. If the City had taken the position at the time the Building Permit was applied for that there had been a “change/expansion of use”, Respondent would not have undertaken the project. *Fifth Rupp Affidavit*, ¶5. Both the previous & current Zoning Administrators, PED staff, and all evidence presented confirm that West Dining room was originally constructed in 1976 for use as a dining room associated with the adjacent restaurant, no other use has ever been legally established, and therefore all agree with Respondent that there has been no legal Change of Use or Change of Occupancy. See ¶¶ 27 and 28 of the *Rupp Affidavit*.

According to the testimony in the depositions of John Skradski and Lawrence Zangs, they agreed with Respondent. They both testified that while there was some evidence that the Western Dining Room was used as an exercise facility at some point more than seventeen (17) years ago, but there is no evidence that that use was legally permitted by the City, or ever legally established, which required all three of the following steps – none of which occurred: by a zoning action approved by the Planning Commission to change the originally intended use from dining room associated with adjacent restaurant to health club use; by the issuance of a building permit and associated certificate of occupancy approving that all required improvements for health club occupancy have been completed; and by receiving a health club license to allow it to be operated. Rupp on the other hand used the West Dining Room as part of his restaurant/catering operations from 2001 continuously until now with a liquor license and no objections from the City until the commencement of this Action. *Rupp Affidavit* ¶ 33, and other Exhibits referred to therein.

Respondent agrees with both the current and past Zoning Administrators, the Planning and Economic Development staff, and the City Council that a restaurant use has never been fully legally established in the Western Dining Area, because the only approved use was, and is now, only a dining room associated with the adjacent restaurant - not an independent restaurant use. *Fifth Rupp Affidavit* ¶5.

ISSUE 3. The undisputed facts show that Western Dining Area does comply with applicable housing, fire, zoning, and building codes and regulations.

- A. Housing Codes. The Western Dining Area is commercial property, and therefore there are no housing codes or regulations which are applicable.
- B. Certificates of Occupancy. As noted in *Respondent's Amended Memorandum*, the Western Dining Area has been covered by a Certificate of Occupancy at all relevant times herein.
- C. Fire Code. As noted in *Respondent's Amended Memorandum*, the Western Dining Area has been covered by a Fire Certificate of Occupancy at all relevant times herein.

- D. Zoning. As noted in the discussion of zoning compliance in *Issue 2*, page 15 of this Memorandum, the Western Dining Area has complied with the applicable zoning regulations at all relevant times herein.
- E. Permits. The Western Dining Area has had all necessary permits at all relevant times herein. *Fifth Rupp Affidavit*, ¶ 11.
- F. Inspections. The Western Dining Area has had all necessary inspections at all relevant times herein. *Fifth Rupp Affidavit*, 11.

ISSUE 4. The undisputed facts show that the Respondent has NOT failed to comply with City Ordinances, and therefore Respondent has not failed to comply with License condition #9.

In support of the City’s position with respect to this issue, the Revised Memorandum states as follows

As previously argued, Respondent has not complied with City ordinances relating to permits, inspections, zoning occupancy and service of alcohol in part of a building where sales are prohibited. The violations asserted in issues 1, 2 and 3 above show that Respondent has failed to comply with numerous city ordinances.

In response, the Respondent simply refers to the Respondent’s responses relative those issues.

ISSUE 5. The undisputed facts show that the Respondent has Western Dining Area was covered by a Certificate of Occupancy and/or Temporary Certificate of Occupancy, and therefore did violate statutes, ordinances, or regulations reasonably related to the licensed activity.

In support of the City’s position with respect to this issue, the City states as follows:

As previously argued Respondent finished the Western Dining Area without the required permits, failed to obtain zoning approval and allowed occupancy of the western dining area without a certificate of occupancy.

In response, the Respondent simply refers to the Respondent's responses relative to whatever issues are being referred to by the City.

ISSUE 6. There are no undisputed facts which show: That the Respondent failed to disclose that he was using the Western Dining Area without a Certificate of Occupancy or Temporary Certificate of Occupancy which shows that the Respondent was in a pattern of conduct of failure to comply with laws from which an inference of lack of fitness or good character can be drawn. In any event, conclusions based on "inference" are not properly determined in a summary disposition proceeding.

The City alleges that the Respondent was informed of what the City said he had to do, that Respondent failed to comply, and that failure to comply demonstrates a lack of fitness, or good character. This is not true. *See Fifth Affidavit of Rupp*, ¶ 6.

Cited in the footnotes were references to the City's alleged Undisputed Facts ("UDF") referred to below.

1. UDF No. 23. This refers to a meeting between the City Staff and me on September 22, 2015. Although there was discussion regarding the City's position, I did not agree with that position, and nothing was said by me at that time that I agreed with the City's position.
2. UDF No. 26. This refers to the October 26, 2015 letter from Steve Ubl, the Building Official. I did not agree with the requirements of that letter, and have never represented that that I agreed with that letter.
3. UDF No. 27 This refers to the October 26, 2015 letter from James Perucca. Fire Inspector. The only requirements in that letter with which I agreed had to do with the fire extinguishers, and panic hardware. I did not agree with the other statements in that letter, and nothing was said by me which would indicate that I did agree with that letter.
4. UDF No. 30 This refers to the November 4, 2015 email from Steve Ubl, the Building Official. I did not agree with that email, and nothing has ever been said by me which would indicate that I did agree with that email.
5. UDF No. 31 This refers to the May 25, 2016 letter of Steve Bistedeau. I did not agree with that letter, and nothing has ever been said by me which would indicate that I did agree with that letter.

Respondent did not, at any time, engage in any "deception" regarding my intent to open the Western Dining Area, and no direct evidence of that has been presented. There is no evidence of

any deception. The UDF's commence on September 22, 2015 and continue until May 25, 2016 (approximately eight (8) months), which shows that the City was well aware of the situation and my intentions.

Finally, the City, by its own admission, is requesting the Court to draw an "inference" from disputed facts. In summary proceeding, such as this, all inferences must be drawn in favor of the party in opposition to the motion for summary judgment. *Rediske v. Minnesota Valley Breedere's Association*, 374 NW 2nd 745 (Minn. Ct. App. 1985). The evidence and argument submitted by the City does not even approach meeting that standard.

ISSUE 7. There are no Undisputed facts which show that Respondent's use of the Western Dining Area was without a Certificate of Occupancy or Temporary Certificate of Occupancy; nor has it provided and support for the conclusion that if Respondent were to have used the Western Dining Area, that doing so endangered the public.

The Western Dining Area has been covered by a Certificate of Occupancy at all relevant times herein. *See Respondent's Amended Memorandum*. Moreover, in any event, the City has not offered any evidence, of any nature whatsoever, that the Respondent has ever endangered the public.

Respectfully Submitted

PFB Law, P.A.

Dated: November 27, 2018

/s/ John Michael Miller
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Attorney for Respondent

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of all licenses held by the
University Club of St. Paul, d/b/a The
Commodore for the premises Located at 79
Western Avenue in Saint Paul

**RESPONDENT'S
MEMORANDUM IN REPLY TO
PETITIONER'S MOTION IN
OPPOSITION**

This Memorandum (the "*Memorandum in Reply*") is offered in reply to the City's *Memorandum in Opposition to Respondent's Motion for Summary Disposition* dated June 4, 2018 (the "*City's Response Memorandum*")

INTRODUCTION AND GENERAL COMMENTS

Several documents which have been previously served and filed in this Action are referred to in this *Memorandum in Reply*. For ease of reference, those documents include the following:

- *Respondent's Memorandum in Support of Motion Summary Disposition*, dated May 22, 2018 (the "*Respondent's Memorandum in Support*");
- *Respondent's Memorandum In Response to Petitioner's Motion for Summary Disposition*, dated June 4, 2018 (the "*Respondent's Memorandum in Response*")
- *Petitioner's Memorandum of Law in Support of City's Motion for Summary Disposition*, dated May 18, 2018 (the "*City's Memorandum in Support*");
- *Affidavit of John R. Rupp*, dated May 21, 2018 (the "*Rupp Affidavit*");
- *Affidavit of John R. Rupp*, dated June 4, 2018 (the "*Rupp Second Affidavit*");
- *The Amended Notice and Order for Prehearing Conference*, dated May 31, 2017 (the "*Amended Notice*").

Some of the Respondent's Exhibits referred to herein can be found in *Respondent's Transcript of Exhibits* which was served and filed on May 21, 2018, and *Respondent's Supplemental Transcript of Exhibits*, which was served and filed on June 4, 2018. The balance of the Respondent's Exhibits referred to herein are included in the *Respondent's Second Supplemental Transcript of Exhibits*, which will be served and filed herewith.

Other documents of even date herewith which are offered in support include the *Third Affidavit of John R. Rupp* (the "*Rupp Third Affidavit*") and *Third Affidavit of John M. Miller* (the "*Miller Third Affidavit*").

ARGUMENT

A. The Scope of this Action Goes Beyond the Narrow Issue of Whether or Not a Formal Certificate of Occupancy Has Been Issued.

The *City's Response Memorandum* asserts that since there was no formal Certificate of Occupancy issued prior to the occupancy of the Western Dining Area, that it is ". . . entitled to an Order for summary disposition and entry of a recommendation in favor of the City . . ." As described below, the scope of this Action is not that narrow.

Section 310.05 of the Saint Paul Legislative Code addresses the hearing procedures in adverse actions concerning licensing matters. (*Respondent's Exhibit R-73* is a copy of the relevant portion of Section 310.05.) Subsections (c) and (c-1) describe the procedures to be followed in such hearings. Generally, the hearings are initially to be heard before the City Council. §310.05, *Subd. c.* However, if there is a dispute as to the underlying violation *or as to the facts establishing mitigating or aggravating circumstance*, the hearing is referred to a hearing examiner appointed by the council or retained by contract for that purpose. *Id.* The hearing examiner then hears the evidence offered by the City and licensee, and presents to the council written findings of fact,

conclusions of law and a recommendation. *Id.* This Action has been referred to the Office of Administrative Hearing to take on the role of the hearing examiner, and it has been conducted pursuant to the contested case procedures set forth in the Rules of Administrative Hearings (*Minn. Rules 1400.5100 – 1400.8600*) and under Section 310.05 and 310.05 of the Saint Paul Legislative Code. (*Amended Notice, p.3.*)

It is important to note that the hearing examiner is tasked with hearing facts which establish *mitigating* circumstances. It makes no sense to require the hearing examiner to take into account mitigating circumstances if those circumstances cannot impact the final recommendation. In this Action, the Respondent has described and argued circumstances which may have a mitigating effect on the final recommendation which this Court may make in this Action. Specifically, the Respondent has raised and argued the following issues and matters which constitute mitigating circumstances which can, and should, be taken into account in making any recommendation to the City Council. This is not necessarily an exclusive list.

1. The Respondent has discussed and analyzed the October 26, 2015 “*Ubl Letter*” and agreed that it will comply with the recommendations contained therein, provided the analysis is premised on the assumption that there has been “no change in use”. *Respondent’s Memorandum in Support, II. E. pp. 16 – 19; Respondent’s Memorandum in Response, Part B. pp. 6 – 10.*
2. There has been no change in use or occupancy of the Western Dining Area. *Respondent’s Memorandum in Support, Part C. pp. 13 – 14; Respondent’s Memorandum in Response, Part C, pp. 10 – 11; See below, Section B.*
3. Respondent was authorized to occupy the Western Dining Area. *Respondent’s Memorandum in Support, Part C., p. 10.*
4. The Western Dining Area was included in the Approved Plans, and was reasonably relied upon to the detriment of the Respondent. *Respondent’s Memorandum in Support, Part D. pp. 14 – 16 and Part F., 19 - 20; Respondent’s Memorandum in Response, Part A. pp. 2 – 6.; See below, Part c. 1.*

As a final comment on the whether or not the Western Dining Area, was included in the Approved Plans, it should be noted that as a practical matter, subsequent discussions concerning the Project, such as those concerning the October 26, 2015 *Ubl Letter*, have been premised on the assumption that the Western Dining Area was included in the plans. *Rupp Third Affidavit*, ¶7.

B. There Has Been No Change in Use or Occupancy.

The *City's Response Memorandum* raises the “change of use” issue on page four (4) and page seven (7). The page 4 reference simply maintains that the “. . . *plans and supplementary information appear to be based on his faulty assumption that there was no change in use of the Western Dining Area.*” On page seven (7) in the context of the *Ubl Letter*, it is stated

. . . Respondent continues to assert that he will comply, but only if compliance is based on his belief that there has been no change of use relative to the Western Dining Area. Based on the record before it, the City views the Western Dining Area space as “raw space” with no use established.

The support for the allegation that the Western Dining Area is “raw space” is set forth in footnote 24. That footnote refers to several pages from the transcript of the Bloom Deposition and two deposition Exhibits, namely *Exhibit 130* and *Exhibit 131* (the “*Deposition Exhibits*”). For reference, copies of *Deposition Exhibits* are included in the Second Supplemental Transcript as *Respondent's Exhibit R- 71*. Exhibit 131 is a survey/site plan of “The Commodore” prepared for Mr. Rupp in approximately 2004 which has some photographs of the Commodore facility. *Rupp Third Affidavit* ¶4.

One of those photographs in *Exhibit R-71* shows the easterly end of the Western Dining Area, and another one is a photograph showing the westerly end of the Western Dining Area. (Exhibit 130 is just an enlargement of the photographs.) After Mr. Bloom testified that he could

not recall ever being in the Western Dining Area (*Respondent Exhibit R-72 (Bloom Deposition, p. 69, lines 17 - 19)*), he was shown the pictures of the Western Dining Area. Based on his review of those pictures, he reached the conclusion that it was “raw space”, meaning that there was “no use”, ie. not “finished” space . *Exhibit R-71, page 65, line 21.*

However, later in the deposition Mr. Bloom looked at the pictures again. He was asked if there were lighting, HVAC, paint on the concrete block walls, a bar joist ceiling, could that area be considered to be a “finished” space. In response, Mr. Bloom said “Absolutely”. *Respondent Exhibit R-71, page 71, line 21 – page 73, line 11.*

In fact, at the time the pictures were taken, the Western Dining Area had in fact: a complete electrical service including all needed lighting & wall outlets; a heating, ventilating & air conditioning (HVAC) system; all exterior walls & ceiling had been painted; complete floor coverings; exterior windows; and two legal fire exits. *Rupp Third Affidavit ¶ 4.*

Obviously, the Western Dining Area was not “raw space”, and even if it were, it has nothing to do with a zoning change in use, and that term is not even mentioned in the State Building Code.

Moreover, the Building Official has not evaluated whether there has been a “change of occupancy” pursuant to the 2015 Minnesota Conservation Code for Existing Buildings. Section 202 of the that Code has the definition of a “change in occupancy” as follows:

CHANGE OF OCCUPANCY. A change in the purpose or level of activity within a building that involves a change in application of the requirements of this code.

There has not been a change in the purpose or level of activity within the building to require the application of the requirements of the Code.

Further reference is also made to *Section C, pp. 10 - 11* of the *Respondent's Memorandum in Response* which also explains why the occupancy of the Western Dining Area does not constitute a change in use.

C. The Doctrine of Estoppel Is a Valid Defense.

1. Wrongful Conduct by the City.

The City maintains that there was no “wrongful conduct” by the City. In support of that position, the *City's Response Memorandum* alleges that there were processes and procedures in place which would trigger further questions and review if deemed necessary. It is also alleged that because the Respondent's “plans and supplements” were “flawed and deficient”, those further questions and reviews were never triggered. (*City's Response Memorandum, pp. 3-4.*) However, as explained below, Respondent's “plans and supplements” were not “flawed and deficient”, and the failure of the City to recognize that the build out of the Western Dining Area *was* part of the Approved Plan; or, in the alternative the City's failure to recognize triggering events which would have led to further questions and review, constitutes the “wrongful conduct”.

The basis for the “flawed and deficient” allegation is contained in the documents cited in footnote 5 on page 4. To a large extent those documents are references to alleged errors by the Respondent and the Project's architect. The City's position that the Western Dining Area was not part of the Approved Plan first raised in the *Amended Notice*, and subsequently addressed and rebutted *Section II. D.* of the *Respondent's Memorandum in Support (pp. 14 – 16)*. In order to avoid redundancy, reference is hereby made to the Section. The alleged errors and deficiencies were also raised in *City's Memorandum in Support*, and subsequently rebutted in *Section A* of the Respondent's *Memorandum in Response (pp 2 – 5)*. Again, in order to avoid redundancy,

reference is also hereby made to that *Section A*. After review of *Section II. D.* and *Section A*, suffice it to say, that it is clear that failure of the City staff to realize that the Western Dining Area was intended to be part of the Approved Plans is not the responsibility of the Respondent, and that the failure to recognize the triggers is wrongful conduct on which Respondent reasonably relied.

In addition to the failure to recognize any triggers during the review process between May 17, 2012 (the date *Plan Revision #1* was dropped off) and August 28, 2012 (the date *Plan Revision #1* became the “*Approved Plan*”), there was also another important event by which the City was provided with clear evidence that the Western Dining Area was intended to be included in the *Approved Plan*. In the *Rupp Affidavit*, Rupp noted that he learned for the first time during the deposition of John Skradski that the Petitioner claimed that it had not received Plan Revisions 2 – 5. *Rupp Affidavit* ¶ 36. Since that time, Rupp has come to realize that copies of *Plan Revision #2* were included in the documents provided by the Petitioner, proving that Petitioner did, in fact, receive *Plan Revision #2*. *Rupp Third Affidavit* ¶5. *Plan Revision #2* was dated May 30, 2014, and was dropped off by Rupp on or about the same date. *Rupp Affidavit* ¶22. *Respondent’s Exhibit R – 67* is a copy of *Plan Revision #1* (which later became the “*Approved Plan*”) that he dropped off at the same time as *Plan Revision #2*. *Exhibit R-67* has a hand-written annotation in the upper right hand corner which specifically notes that *Plan Revision #1* “*added west dining room to scope of interior alteration work*” and “*added restrooms to scope of work*”.

Respondent’s Exhibit R – 68 is the clean copy of *Plan Revision #2* which was dropped off. *Respondent’s Exhibit R- 70*, is copy of *Plan Revision #2* that has been “color coded” by the DSI, which shows that it was reviewed and even colored by DSI staff. *Respondent’s Exhibit R-70* is a copy of *Plan Revision #2* which has a hand-written annotation “. . . *Larry has this for Licensing*

purposes . . .” “Larry” presumably refers to Larry Zangs, a City employee. By 2014, there was no dispute that the Original Dining Room did not have any licensing issues, so the fact that *Plan Revision #2* was being reviewed for licensing purposes makes is a clear indication that DSI staff was treating, or should have been treating, the Western Dining Area as being included in the Approved Plan.

The failure to recognize this as a trigger for *at least* further review or questions is yet another example of wrongful conduct by the City.

2. The Respondent’s Reliance Upon the City’s Wrongful Conduct was Reasonable.

It was the intent of the architect and Rupp that the Western Dining Area was to be included in the *Approved Plans*. Rupp told Mr. Skradski of that fact at or about the time he dropped off the Original Plans on February 2, 2012. *Rupp Affidavit* ¶ 13. In March, 2012, Rupp received an email requesting some clarification regarding the “future work”. In response to that, he submitted the *Plan Revision #1* on May 17, 2012. More than three (3) months later, he finally picked up the Approved Plans. Rupp believed, reasonably, that three (3) month period was more than enough time to complete a thorough review and analysis. *Rupp Third Affidavit*, ¶6. The point is, if the zoning department had determined that there was a change in use in the Western Dining Area, the Respondent would not have done the Project.

In addition to the above, there were other opportunities to realize that the Western Dining Area was included in the Approved Plans. For instance, there were City inspections which took place during which it was obvious that work was being done in the Western Dining Area. (*See Respondent’s Support Memorandum, Section B, pages 6 – 7, and Affidavits cited therein.*)

Moreover, the failure of the City to provide and response to the submission of Plan Review #2 (see pp. _____, above) is further evidence that Respondent's reliance was reasonable.

3. Unique Expense. In reliance upon the wrongful conduct described above, a substantial investment was made. Restaurant related soft costs and opening expenses alone totaled well over \$150,000. Restaurant construction and related costs totaled approximately \$500,000. If the City were to prevail in this Action, the Western Dining Area would have to be closed and the Original Restaurant will have to also close, which will result in loss of going business value in excess of One Million Dollars (\$1,000,000). *Rupp Third Affidavit*, ¶9.

4. Balancing of Equities. To balance the equities, the City only needs to enforce its own rules and regulations and direct the building official to evaluate the permit and revisions based on the zoning department's determination of no change of use which has been Respondent's position for six (6) years; and, reimburse Respondent for his legal expenses incurred as a result of this Action.

D. Reply to Other Allegations in City's Response Memorandum.

Most of the allegations in the *City's Response Memorandum* have been raised in previous submissions by the Petitioner, and responded to by Respondent in its previous submissions. Not responding to each allegation in this *Memorandum in Reply* should not be interpreted as a waiver or abandonment of the previous responses.

E. John Rupp's Comments on City's Response Memorandum. Please see ¶ 10 of Rupp Third Affidavit, and attachment thereto.

CONCLUSION

In conclusion, it is clear that the scope of the Action goes beyond whether or not the Western Dining Area was occupied without a formal Certificate of Occupancy. In making its recommendation to the City Council, this Court can, and should, take into account the mitigating circumstance which have been raised and litigated in the this Action. Based upon that, the Respondent respectfully requests:

1. That this Court recommend that the relief requested in the City's Motion for Summary Disposition be denied and that no further action be taken against the Licenses; and, recommend that the City: make arrangements for a final building inspection based on no change of use or change of occupancy to develop a list of needed work to obtain a Certificate of Occupancy, and for a fire safety inspection based on no change of use or change of occupancy; respond to the Summit Report based on no change of use or change of occupancy; review and approve previously submitted plans based on no change in use or change of occupancy; provide the Met Council with an accurate affidavit which is predicated on the assumption that there has been no change of use or change in occupancy.

PFB Law, P.A.

Dated: June 18, 2018

/s/ John Michael Miller
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