



APPLICATION FOR APPEAL

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 Saint Paul City Council – Legislative Hearings
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 Saint Paul, Minnesota 55102
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We need the following to process your appeal:

- \$25 filing fee (non-refundable) (payable to the City of Saint Paul) (if cash: receipt number # 6613)
 - Copy of the City-issued orders/letter being appealed
 - Attachments you may wish to include
 - This appeal form completed
 - Walk-In OR Mail-In
- for abatement orders only: Email OR Fax

<p>HEARING DATE & TIME (provided by Legislative Hearing Office) Tuesday, <u>1-19-16</u></p> <p>Time <u>11:30 a.m.</u></p> <p><u>Location of Hearing:</u> Room 330 City Hall/Courthouse</p>
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Address Being Appealed:

Number & Street: 841 Grand Ave City: St. Paul State: MN Zip: 55105

Appellant/Applicant: Emperral Vapor LLC Email: _____
by its counsel Thompson Hall

Phone Numbers: Business _____ Residence _____ Cell _____

Signature: MC S A Date: 1/6/16
for the firm

Name of Owner (if other than Appellant): Bill Wengler

Mailing Address if Not Appellant's: 857 Grand Ave, St. Paul, MN 55105

Phone Numbers: Business _____ Residence _____ Cell _____

What Is Being Appealed and Why? *Attachments Are Acceptable*

- Vacate Order/Condemnation/Revocation of Fire C of O
 - Summary/Vehicle Abatement
 - Fire C of O Deficiency List/Correction
 - Code Enforcement Correction Notice
 - Vacant Building Registration
 - Other (Fence Variance, Code Compliance, etc.)
- See attachment
- ↓

Attachment to Application for Appeal
St. Paul City Council - Legislative Hearings

January 6, 2016

Dear Legislative Hearing Officer:

The undersigned law firm has been retained to represent Imperial Vapor LLC (“Imperial”) in relation to the attached “Correction Notice – Complaint Inspection” from Fire Inspector A.J. Neis dated January 4, 2016 (the “Correction Notice”). Imperial has a leasehold interest at the subject property at 841 Grand Ave., St. Paul, MN 55105 (the “Premises”) and has standing to file his appeal under SPLC § 34.30.

The Correction Notice lists three enforcement actions, namely, a condemnation under SPLC § 34.23, a revocation of the Fire Certificate of Occupancy under SPLC § 40.06, and an alleged non-conforming use under SPLC § 65.535. Each of these actions stems from an alleged violation of SPLC § 65.535 (re. proximity of tobacco products shops). The Correction Notice also demands access to the entire building for a Fire Certificate of Occupancy renewal inspection under SPLC § 34.19.

Several months ago the City of St. Paul initiated criminal proceedings against Imperial’s owners Jacob and Daniel Bernstein based on the same allegation of unapproved use of the subject premises as a tobacco products shop. Those cases are moving through the judicial process and it will ultimately be determined whether the Bernsteins have violated SPLC § 65.535 and similar provisions. Until a verdict is reached, however, the Bernsteins are presumed innocent. Despite their innocence, the City is unwilling to wait for judicial proceedings to run their course and seeks an expedited solution through enforcement actions.

St. Paul Legislative Code § 65.535(a) provides “no tobacco products shop shall be located within one-half (½) mile (2,640 feet) of another tobacco products shop.”

Section 65.535 defines “tobacco products shop” as a:

retail establishment with a principal entrance door opening directly to the outside that derives more than ninety (90) percent of its gross revenue from the sale of loose tobacco, plants, or herbs and cigars, cigarettes, pipes, and other smoking devices for burning tobacco and related smoking accessories and in which the sale of other products is merely incidental. "Tobacco products shop" does not include a tobacco department or section of any individual business establishment with any type of liquor, food, or restaurant license.

Imperial sells vaporizers. While this technology is somewhat new and unfamiliar, it cannot simply be lumped in with "tobacco products." The City will not be able to establish the elements of a violation of SPLC § 56.535 which, broken down, are:

- (1) a retail establishment with a principal entrance door opening directly to the outside;
- (2) that is operating within one-half mile (2,640 feet) of another tobacco products shop;
- (3) that derives more than ninety (90) percent of its gross revenue from the sale of:
 - a. loose tobacco, plants, or herbs;
 - b. cigars, cigarettes, pipes, and other smoking devices for burning tobacco; and,
 - c. related smoking accessories; and,
- (4) in which the sale of other products is merely incidental

Note the conjunctive use of "and" throughout the definition creating a requirement that the business must sell items in each of categories (3) a-c above. The City will not be able to establish that Imperial sells items in each of these categories.

Imperial concedes that elsewhere in the St. Paul Code of Ordinances the definition of tobacco includes "electronic cigarettes containing or delivering nicotine" (St. Paul Ordinances § 324.03) but: (A) SPLC § 54.535 only references "loose tobacco;" (B) the City will not be able to establish that Imperial sells "electronic cigarettes containing or delivering nicotine;" and, (C) as previously mentioned, the City will be unable to establish that Imperial sells the other required items listed in categories (3) a-c above.

The Correction Notice notes that Imperial applied for a variance to operate a tobacco products shop and is operating in violation of the ordinances in the absence of that variance. That statement is a red herring. First, what Imperial applied for is irrelevant. The only relevant inquiry pertains to the type of business Imperial currently conducts at the Premises. That business cannot be shown to be nonconforming. Second, Imperial only filed for a variance based on erroneous advice received from a City employee. The City cannot benefit from its own negligence.

During this appeal process all enforcement actions must be held in abeyance pursuant to SPLC § 34.25(2). This includes, but is not limited to, immediate removal of the Condemnation Notice at the premises. The posted notice is harmful to Imperial's business operations and to the building as a whole. In order to protect its business and livelihood, Imperial intends to hold any and all responsible City employees or agents personally liable for any violations of the abeyance, or otherwise, in accordance with SPLC § 34.27.

Finally, the Fire Inspector's request for an inspection of the "entire building" as noted in section four (4) the Deficiency Letter appears to be retaliatory when its timing is considered in the context City's crusade to run Imperial out of business. Imperial respectfully requests an admonishment to the City that it shall not unduly harass or target Imperial or its owners, employees, agents, or customers while Imperial is appealing through the proper channels.

Based on the foregoing, Imperial respectfully requests that you recommend dismissal of the enforcement actions, removal of the condemnation notice, reinstatement of the Fire Certificate

of Occupancy, find that Imperial is not a tobacco products shop, and make any other and further recommendations as are just and reasonable.

Thank you for your time and attention to this matter.

Respectfully submitted,



Mark C. Santi (MN Bar No. 0392859)

THOMPSON HALL SANTI CERNY & KATKOV

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FOR IMPERIAL VAPOR LLC



CITY OF SAINT PAUL
Christopher B. Coleman, Mayor

375 Jackson Street, Suite 220 Telephone: 651-266-8989
Saint Paul, MN 55101-1806 Fax: 651-266-8951

January 4, 2016

BILL WENGLER
857 GRAND AVE
ST PAUL MN 55105

CORRECTION NOTICE - COMPLAINT INSPECTION

RE: 841 GRAND AVE
Ref. # 16763

Dear Property Representative:

You are hereby notified that the following deficiency list must be corrected immediately. A reinspection will be made on **January 8th, 2016 at 10:00am.**

Failure to comply will result in a criminal citation. The Saint Paul Legislative Code requires that no building shall be occupied without a Certificate of Occupancy. The code also provides for the assessment of additional reinspection fees.

DEFICIENCY LIST

- 841 GRAND – IMPERIAL VAPOR - SPLC 34.23** This occupancy is condemned due to illegal occupancy as a tobacco products shop in violation of Zoning Ordinance SPLC 65.535. (1) Action authorized to condemn structures or units as unfit for occupancy. Whenever an enforcement officer finds that any dwelling unit, structure or portion thereof constitutes a hazard to the health, safety or welfare of the occupants or to the public for any of the reasons enumerated in this chapter, including those violations defined herein as constituting material endangerment, but which structure does not constitute a dangerous structure, the officer may take action to condemn the unit or structure as being unfit for occupancy.
(2) Illegal occupancy. If any dwelling unit, structure or any part thereof is occupied by more occupants than provided by this chapter or is erected, altered or occupied contrary to law, the unit, structure or part thereof shall be deemed an unlawful structure and the enforcement officer shall cause the unit or structure vacated. It shall be unlawful to occupy such unit or structure until it or its occupation, as the case may be, has been made to conform to the law.
(7) Material endangerment violations. The following violations may constitute material endangerment if in combination or alone the conditions are substantial and expose the occupants or the public to danger or peril: (f) Violations of other requirements. Whenever any dwelling unit, structure or any part thereof is: 3. Is erected, altered or occupied contrary to law.

–IMMEDIATELY CEASE OPERATION OF THIS BUSINESS OR A CRIMINAL CITATION WILL BE ISSUED AND ADDITIONAL ENFORMENT MAY BE TAKEN.

2. **841 GRAND – IMPERIAL VAPOR - SPLC 40.06 - Suspension, revocation and denial.**
(a) Grounds for revocation, The fire code official may, in writing, issue a notice to the owner(s) and known interested parties of the city's suspension or revocation of a fire certificate of occupancy issued under the provisions of this code, or deny an application therefor;
(3) If it is found upon inspection of the fire code official that the building or occupancy is in violation of provisions of this or other applicable safety codes, ordinances, rules and regulations.
-The Fire Certificate of Occupancy has been revoked for the commercial (mercantile) space due to its illegal operation in violation of Zoning Ordinance SPLC 65.535.

3. **841 GRAND – IMPERIAL VAPOR - SPLC 65.535 - Use of this property does not conform to zoning ordinance. Immediately discontinue the unapproved use. Discontinue: Use as Tobacco products shop.**

A retail establishment with a principal entrance door opening directly to the outside that derives more than ninety (90) percent of its gross revenue from the sale of loose tobacco, plants, or herbs and cigars, cigarettes, pipes, and other smoking devices for burning tobacco and related smoking accessories and in which the sale of other products is merely incidental. "Tobacco products shop" does not include a tobacco department or section of any individual business establishment with any type of liquor, food, or restaurant license.

Standards and conditions:

(a) No tobacco products shop shall be located within one-half (½) mile (2,640 feet) of another tobacco products shop.

(b) In the BC community business (converted) and T2 traditional neighborhood districts, a conditional use permit is required for tobacco products shops with a floor area greater than two thousand five hundred (2,500) square feet.

This location at 841 Grand Ave. does not meet the first condition. It is 1,282 feet away from another tobacco products shop. A variance from the separation requirement was sought by the leasee, Jacob Bernstein, and was denied by the Board of Zoning Appeals – No appeal was filed and the business opened in violation.

4. **ENTIRE BUILDING - SPLC 34.19 - Provide access to the inspector to all areas of the building.**
–The Fire Certificate of Occupancy is due for renewal. You or your representative must be present to allow the inspector full access to the entire building for a full inspection and verify the commercial space is no longer in use on December 31st, 2015 at 10:00am. Have all necessary keys available.

Saint Paul Legislative Code authorizes this inspection and collection of inspection fees. For forms, fee schedule, inspection handouts, or information on some of the violations contained in this report, please visit our web page at: <http://www.stpaul.gov/cofo>

You have the right to appeal these orders to the Legislative Hearing Officer. Applications for appeals may be obtained at the Office of the City Clerk, 310 City Hall, City/County Courthouse, 15 W Kellogg Blvd, Saint Paul MN 55102 Phone: (651-266-8585) and must be filed within 10 days of the date of the original orders.

If you have any questions, email me at: adrian.neis@ci.stpaul.mn.us or call me at 651-266-8992 between 7:30 a.m. - 9:00 a.m. Please help to make Saint Paul a safer place in which to live and work.

Sincerely,

A.J. Neis
Fire Inspector

Ref. # 16763