

OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COUNCIL OF
THE CITY OF SAINT PAUL

OAH File 71-6020-38502

In re the Tobacco Shop License held by
Moundsview Retail Inc, d/b/a Mounds Park Market
for the premises located at 241 Earl Street
in Saint Paul.

CITY'S CLOSING ARGUMENT

INTRODUCTION

Adverse action is defined as “the revocation or suspension of a license, the imposition of conditions upon a license, the denial of an application for the grant, issuance or renewal of a license, the imposition of a fine, the assessment of the costs of a contested hearing and any other disciplinary or unfavorable action taken with respect to a license, licensee or applicant for a license.” Saint Paul Legislative Code (“SPLC”) §310.01.

Under SPLC §310.05 (m)(2) and SPLC §310.06 (b)(6), the City of Saint Paul (“City”) can take adverse action against a license for a variety of reasons including a violation of any of the provisions of a statute or ordinance reasonably related to the licensed activity. Under SPLC §310.17, “Any act or conduct by any clerk, employee, manager or agent of a licensee, or by any person providing entertainment or working for or on behalf of a licensee, whether compensated or not, which act or conduct takes place either on the licensed premises or in any parking lot or other area adjacent to (or under the lease or control of the licensed premises, and which act or conduct violates any state or federal statutes or regulations, or any city ordinance, shall be considered to be and treated as the act or conduct of the licensee for the purpose of adverse

action against all or any licenses held by such licensee.”

The City of St. Paul regulates tobacco and requires a city license to sell tobacco pursuant to Chapter 324 of the City’s Legislative Code. SPLC §324.07 (j) prohibits any person from “offering for sale or otherwise distributing any flavored products unless excepted under section 324.07(l)”. Under SPLC §324.07 (l), exceptions to the prohibition of flavored products are laid out, which includes a licensee being the holder of a Tobacco Product Shop License.¹ SPLC §324.10 (b) lays out the presumptive penalties for tobacco related violations of Chapter 324 and states that the presumptive penalty for a second appearance related to the display, possession or multiple incidents of single cigarettes, menthol tobacco products; or flavored tobacco products is revocation. Because the evidence demonstrates that the Mounds Park Market Licensee possessed numerous flavored tobacco products for distribution, the City has demonstrated a violation occurred. This is Licensee’s third flavored tobacco violation since 2019 and his second violation in 24 months, so the presumptive penalty for the violation is revocation of the tobacco license.

I. Facts.

Mounds Park Market is a convenience store owned by Akil Jahed (“Licensee”).² Licensee was granted license #20170000776 to sell tobacco and tobacco products by the Department in 2017.³ Since receiving his License, Licensee has incurred the following violations against his License:

- A 2019 inspection that documented the presence of prohibited flavored products. This violation was resolved under Council File 19-330, the Licensee admitted the violation

¹ A tobacco products shop license means a license issued to an establishment that must derive at least ninety percent of revenue from sale of licensed products, must prohibit persons under the age of twenty-one, must be accessible through an outside door, and staffed by one person solely dedicated to the tobacco products shop.

² Ex. 3-1.

³ Ex. 5-1.

and Council stayed the fine for 1 year on the condition that the Licensee have no same or similar violations.⁴

- A 2021 Youth Compliance Check Failure that also included observation and documentation of prohibited flavored tobacco products. This violation was resolved after the Licensee paid the \$500 fine on or about September 14, 2021.⁵

On April 11, 2022, the Department received a complaint stating that the Licensee was “selling flavored products from candy boxes + (Newport’s/Camel) without tax stamps”.⁶ On May 12, 2022, Inspector Joseph Voyda conducted a complaint inspection at the Licensed Premises and observed and documented with a report and photos, prohibited flavored tobacco products and cigarettes without tax stamps in plain sight behind the counter, in candy boxes, in a tub/tote and under the base of the counter.⁷

On June 7, 2022, the Department of Safety and Inspections (“Department”) initiated Adverse Action through a Notice of Violation (“NOV”) against the Tobacco Shop License held by Moundsview Retail Inc., d/b/a Mounds Park Market for the premises located at 241 Earl Street in Saint Paul (“Licensed Premises”) after an inspection, based on an anonymous complaint, uncovered numerous prohibited tobacco products both in plain view and hidden within the Licensed Premises.⁸ The Licensee holds a Tobacco Shop License not a Tobacco Product Shop License, and is therefore prohibited from selling prohibited flavored products.⁹ Based on a prior adverse action for possession of prohibited flavored products in 2021, the Department recommended the standard matrix penalty for a second appearance of revocation.¹⁰

4 Ex. 5-1, 15-1 – 15-15.

5 Ex. 16-1 – 16-44.

6 Ex. 17.

7 Ex. 2-1 – 2-6.

8 Ex. 1-4 – 1-4, 2-1 – 2-6, 17.

9 Hudak Testimony 17:51 – 18:02, Ex. 16-44, SPLC §324.03.

10 Ex. 16-1 – 16-44, 1-1 – 1-4, SPLC §324.10 (b)(2), SPLC §324.10 (d).

II. The City has met its burden and proven by a preponderance of the evidence that the Licensee possessed and sold prohibited flavored products within the Licensed Premises in violation of SPLC §324 on May 12, 2022.

Both Licensing Manager Eric Hudak (“Hudak”) and Inspector Joseph Voyda (“Voyda”) testified at the administrative hearing regarding the License history, inspections of the Licensed Premises, education and training given to licensees, and interactions with the Licensee over time. Their testimony was credible and unrefuted. The complaint-based inspection that Voyda conducted at the Licensed Premises on May 12, 2022 was part of his assigned job duties. His findings were documented with both a report and photographs. He carefully reviewed each photo and testified as to which prohibited flavored tobacco products he found, why an item was a prohibited flavored tobacco product and where he found the item.¹¹ Voyda testified he found numerous flavored products of different varieties and that it was his opinion that some of the prohibited flavored tobacco items he found were purposefully hidden in a Mott snack box, Reese’s candy box on a refrigerator area open to the public, under the clerk counter, shelves in plain sight and open for sale, and in a tube/tote bin behind the counter.¹² In total, Voyda testified that he observed well over 300 individual flavored tobacco items.¹³ Voyda also testified that he understood that the purpose of the changes to SPLC §324 were to ensure that children were not exposed to flavored tobacco products.¹⁴ Voyda testified that the Licensee told him he had just gotten back from Iraq and that the prohibited flavored tobacco products were for personal use.¹⁵

11 Voyda Testimony 1:14:07.

12 Voyda Testimony 1:23-1:

13 Voyda Testimony 1:38.

14 Voyda Testimony 1:49.

15 Voyda Testimony 1:36.

Voyda also documented this in his report writing that the Licensee told him that the unstamped cigarettes were for personal use.¹⁶

Hudak testified that he reviewed Voyda's report and photographs, agreed with the recommendation for adverse action and the imposition of the standard matrix penalty.¹⁷ They have no personal stake in the outcome of this matter. They both testified as to their training in recognizing prohibited flavored products and how they handle their individual assignments. Their testimony was credible and reasonable. When unsure, they reviewed their reports and refreshed their recollection. The testimony of the City's witnesses was not challenged by the Licensee or any direct evidence.

The Licensee testified and provided additional details about the license history and the violations found by Voyda. Licensee testified that he does not personally use tobacco products.¹⁸ As to why the prohibited flavored products were located within and being offered for sale on the Licensed Premises, the Licensee offered the explanation that he had been out of the country for six months to assist his wife with her visa, and he didn't have control over what was happening. Licensee testified that he left the Licensed Premises in the care of his brother and friends and thought the store would be fine operating by itself.¹⁹ He asserted that he did not have access to internet or communications while out of the country, so he was unable to check in on the business.²⁰ Licensee admitted he did not have any manuals or instructions about how to run the store or what products to order.²¹ Through his testimony, Licensee suggested that the friends

¹⁶ Ex. 2-1.

¹⁷ Hudak Testimony 47:28.

¹⁸ Licensee Testimony 2:15.

¹⁹ Licensee Testimony 1:58.

²⁰ Licensee Testimony 2:03-2:04.

²¹ Licensee Testimony 2:32.

who were running the Licensed Premises, without pay, in his absence, were responsible for the presence of prohibited flavored tobacco products within the Licensed Premises.

Licensee testified that he had just returned to the country the day before the inspection and that he immediately responded to the Licensed Premises when he learned of Voyda's inspection.²² The Licensee also admitted that he had talked with the inspector in the prior 2021 offense and that it wouldn't happen again.²³ After the 2021 violation, Licensee testified that he told his team that any tobacco ordered would go through him.²⁴ Nevertheless, Licensee testified that "anyone working at the store" would have been responsible for ordering tobacco products while Licensee was out of the country from December 2021 to May 2022.²⁵ Licensee's testimony attempted to show that he didn't believe he was responsible for the current violations as he told Voyda "it wasn't on me I was gone".²⁶

The witness testimony and exhibits demonstrate that Licensee knew flavored tobacco products were prohibited in his convenience store. Licensee had two prior flavored related violations in 2019 and 2021, and after the 2021 violation, he said all tobacco orders would go through him to ensure it wouldn't happen again. However, Licensee admitted that when he left the country in December 2021, he left the store completely in the hands of family and friends without any instructions or oversight. Whether he is physically present or not, the Licensee is responsible for the prohibited flavored tobacco products found on the Licensed Premises. Under the City's Uniform License Procedures, SPLC §310.17, the Licensee is the ultimate responsible

²² Licensee Testimony 2:07.

²³ Licensee Testimony 2:10.

²⁴ Licensee Testimony 2:17.

²⁵ Licensee Testimony 2:13-2:14.

²⁶ Voyda Testimony 1:12, Licensee Testimony 2:07.

party: “Any act or conduct by any clerk, employee, manager or agent of a licensee, or by any person providing entertainment or working for or on behalf of a licensee, whether compensated or not, which act or conduct takes place either on the licensed premises or in any parking lot or other area adjacent to (or under the lease or control of the licensed premises, and which act or conduct violates any state or federal statutes or regulations, or any city ordinance, shall be considered to be and treated as the act or conduct of the licensee for the purpose of adverse action against all or any licenses held by such licensee.” Travel out of the country for an extended period and/or lack of control over the Licensed Premises is not an excuse and there is no defense to the violations observed and documented by Voyda.

Licensee’s attorney also asked questions to suggest that the tobacco products weren’t actually sold or transferred. SPLC §324.07 (j) does not require a completed sale because it prohibits any person from “offering for sale or otherwise distributing any flavored products unless excepted under section 324.07(1)”. The City’s penalty matrix also includes language providing penalties for “Display, possession or multiple incidents of sales of single cigarettes, menthol tobacco products or flavored tobacco products.” According to Voyda’s testimony and his report, some of the flavored products were in plain sight and open for sale on open shelving behind the clerk counter. Other products were found in candy boxes on top of a fridge in an area open and accessible to the public. Individual shoppers could have easily accessed and attempted to purchase the items in the candy box, or could have requested the products in the open shelving behind the clerk counter. Although Licensee claimed that at least some products were for personal use during the inspection, Licensee testified that he did not use tobacco products. Further, the sheer amount of flavored products was well over 300 and suggests that the products

were not for personal consumption. In light of all the evidence and circumstances, the placement and number of the prohibited flavored products demonstrate by a preponderance of the evidence that Licensee possessed, displayed and offered the items for sale. Licensee failed to learn from his past mistakes as this is the third time that prohibited flavored products have been found at the Licensed Premises.

III. The May 12, 2022, violation is the Licensee's second appearance within 24 months and the presumptive penalty of revocation of the Tobacco Shop License requested by the Department is appropriate.

The Department based its recommendation for revocation of the Tobacco Shop License held by Licensee on the penalty matrix laid out in SPLC § 324.10. Chapter 324 of the SPLC was updated by City Council in 2021 and the changes became effective in December 2021.²⁷ Evidence presented by the City showed that Licensees were provided with notice of the changes along with the proposed new ordinance language and given information on public hearing dates.²⁸ This included a letter summarizing the changes with effective dates was also mailed to licensees. The testimony of Voyda and whereas clauses in ORD 21-29 document City Council's rationale for the updates.²⁹ These include the City Council's understanding of the harm that access to flavored tobacco products for individuals under the age of 21 causes.³⁰ ORD 21-29 also updated the penalty matrix with greater penalties and SPLC §324.01 (d) removed any exception that would have allowed the Department to issue another license to the same location under a new licensee within 5 years of revocation for any other reason than nonpayment of fines.

27 Exhibit 12-1 – 12-11, 13-1, 13-2.

28 Exhibits 10-1 – 10-10, 11-1, 13-1 – 13-2.

29 Exhibits 10-1 – 10-10, 11-1, 12-1 – 12-11, 13-1-13-2.

30 Exhibit 12-1, 12-2.

Under SPLC Section 324.10(d)(1) a “second violation within 24 months shall be treated as a second appearance”. When it amended SPLC §324.10 City Council laid out its intention to treat youth sales and prohibited flavor violations more harshly than some of the more germane violations laid out in the penalty matrix in SPLC §310.01(m). Under the amended penalty matrix in SPLC §324.10 (b), if the second appearance is related to the “Display, possession or multiple incidents of sales of single cigarettes, menthol tobacco products or flavored tobacco products, the presumed penalty is revocation.” While revocation might seem harsh, it is within the matrix set by the city council and given the seriousness of the offenses in this penalty matrix, revocation is reasonable. The City’s application of the penalties laid out in SPLC §324.10 is also consistent with the method it uses to determine other licensing penalties. Except for the now unused food code, the City’s licensing code has always used the number of appearances to determine which box of the penalty matrix contains the applicable penalty. The City is applying the penalty matrix laid out in SPLC § 324.10 in the same manner that it has historically applied the matrix in SPLC § 310.05 (m) by recommending the presumptive penalty for the violation or violations giving rise to the subsequent appearance without regard to the violation or violations that were the subject of the first or prior appearance. Additionally, as laid out in SPLC 324.10 (a), while the penalties are presumed appropriate, the council may deviate in an existing case when the council finds substantial and compelling reasons.

A reading that the penalty matrix is not progressive by appearance also conflicts with the provisions that give City Council the authority to upwardly depart if substantial and compelling reasons are found. While the Department believes that the standard matrix penalty of revocation is applicable, there are more than ample grounds in this case for an upward departure to

revocation based on the number of prior violations, the amount of prohibited flavored tobacco products found during each of those violations, the short timeframe in between violations, the failure of the Licensee to manage the Licensed Premises in a manner that would have ensured that violations did not continue to occur and the evidence of concealment observed and documented by Inspector Voyda.

IV. Conclusion

The City provided ample evidence including written documents, photographs, and testimony in support of its request for revocation of the License. The ongoing behavior and facts surrounding the Licensee's repeated violations related to prohibited flavored tobacco products merit a recommendation of revocation. The City submits that it has shown by a preponderance of the evidence that the licensee has violated provisions of an ordinance reasonably related to the licensed activity and that the Licensee has been caught with prohibited flavored tobacco products twice before. The License held by Licensee belongs to the City and the City ought not be compelled to license a business for any purpose, when the license is used, in part, to facilitate illegal or prohibited activity. The City should not be made an unwilling partner to the continuation of this type of conduct in the Licensed Premises. The City has shown that revocation of the license is necessary to ensure that continued violations related to the sale of prohibited tobacco products do not occur and that City Council's intent to keep prohibited flavored tobacco products out of the hands and sight of underaged individuals is upheld and the License held by the Licensee revoked.

Dated: November 18, 2022

Respectfully submitted,

A handwritten signature in cursive script that reads "Therese Skarda /s.m.". The signature is written in black ink and is positioned above a horizontal line.

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STATE OF MINNESOTA)
) ss.

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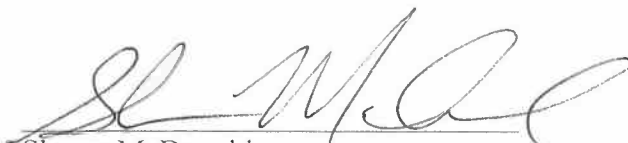
COUNTY OF RAMSEY)

Shawn McDonald, being first duly sworn, deposes and says that on the 18th day of November, he served the attached **CITY'S CLOSING ARGUMENT** and a correct copy thereof in an envelope addressed as follows:

Derek Thooft
Attorney at Law
Thooft Law LLC
3460 Washington Dr, Suite 212
Eagan, MN 55122

Judge Jessica A. Palmer-Denig
P.O. Box 64620
Saint Paul, MN 55164

(which is the last known address of said person) depositing the same, with postage prepaid, in the United States mail at St. Paul, Minnesota.


Shawn McDonald

Subscribed and sworn to before me
This 18th day of November 2022


Notary Public

