



CITY OF SAINT PAUL  
Christopher B. Coleman, Mayor

Civil Division  
400 City Hall  
15 West Kellogg Blvd.  
Saint Paul, Minnesota 55102

Telephone: 651 266-8710  
Facsimile: 651 298-5619

January 7, 2011

NOTICE OF COUNCIL HEARING

Robert J. Foster  
Foster & Brever, PLLC  
Attorneys at Law  
2812 Anthony Lane, Suite 200  
St. Anthony, MN 55418

RE: All licenses held by MW #1, Inc. d/b/a Corner Meats & Grocery for the premises located at 516 Rice Street in Saint Paul  
License ID #: 20090000931  
OAH Docket #: 3-6020-21693-3

Dear Mr. Foster:

Please take notice that a public hearing to discuss the report of the Administrative Law Judge concerning the above-mentioned licenses has been scheduled for **Wednesday, February 2, 2011, at 5:30 p.m.** in the City Council Chambers, Third Floor, Saint Paul City Hall and Ramsey County Courthouse.

You have the opportunity to file exceptions to the report with the City Clerk at any time during normal business hours. You may also present oral or written arguments to the council at the hearing. No new evidence will be received or testimony taken at this hearing. The Council will base its decision on the record of the proceedings before the Administrative Law Judge and on the arguments made and exceptions filed, but may depart from the recommendations of such Judge as permitted by law in the exercise of its judgment and discretion.

Sincerely,

Rachel Tierney  
Assistant City Attorney

cc: Diane Nordstrom, Office of Administrative Hearings, P.O. Box 64620, St. Paul, MN 55164-0620  
Christine Rozek, Deputy Director of DSI  
Mohammad Wazwaz, Corner Meats & Grocery, 516 Rice Street, St. Paul, MN 55103  
Tait Danielson Castillo, Exec. Director, Frogtown Neighborhood Association, 685 Minnehaha Avenue West  
St. Paul, MN 55104

STATE OF MINNESOTA)  
) ss.

AFFIDAVIT OF SERVICE BY U.S. MAIL

COUNTY OF RAMSEY )

Julie Kraus, being first duly sworn, deposes and says that on the 7<sup>th</sup> day of January, she served the attached **NOTICE OF COUNCIL HEARING** placing a true and correct copy thereof in an envelope addressed as follows:

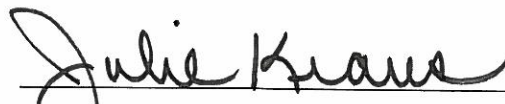
Robert J. Foster  
Foster & Brevier, PLLC  
Attorneys at Law  
2812 Anthony Lane, Suite 200  
St. Anthony, MN 55418

Diane Nordstrom  
Office of Administrative Hearings  
P.O. Box 64620  
St. Paul, MN 55164-0620

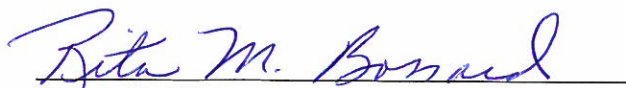
Mohammad Wazwaz  
Corner Meats & Grocery  
516 Rice Street  
St. Paul, MN 55103

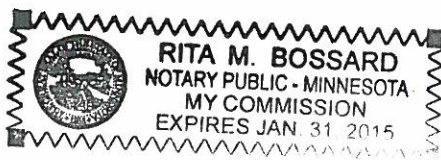
Tait Danielson Castillo, Executive Director  
Frogtown Neighborhood Association  
685 Minnehaha Avenue West  
St. Paul, MN 55104

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

  
Julie Kraus

Subscribed and sworn to before me  
this 7<sup>th</sup> day of January 2011

  
Notary Public





## MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

600 North Robert Street  
Saint Paul, Minnesota 55101

Mailing Address:  
P.O. Box 64620  
St. Paul, Minnesota 55164-0620

Voice: (651) 361-7900  
TTY: (651) 361-7878  
Fax: (651) 361-7936

December 23, 2010

Shari Moore  
City Clerk  
310 City Hall  
15 West Kellogg Blvd.  
St. Paul, MN 55102

Re: *In the Matter of All Licenses Held by MW#1, Inc.,  
d/b/a Corner Meats & Grocery for the Premises  
Located at 516 Rice Street in St. Paul  
OAH Docket No. 3-6020-21693-3*

Dear Ms. Moore :

Enclosed herewith and served upon you by mail is the Administrative Law Judge's Findings of Fact, Conclusions, and Recommendation in the above-entitled matter. Also enclosed is the official record, excluding a copy of the digital recording of the hearing. If you would like a copy of the digital recording, please contact our office. Our file in this matter is now being closed.

Sincerely,

A handwritten signature in cursive script that reads "Kathleen D. Sheehy".

KATHLEEN D. SHEEHY  
Administrative Law Judge

Telephone: (651) 361-7848

KDS:nh

Enclosure

cc: Rachel Tierney  
Robert J. Foster

RECEIVED  
DEC 27 2010  
CITY ATTORNEY

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF SAINT PAUL

In the Matter of All Licenses Held by MW#1, Inc.,  
d/b/a Corner Meats & Grocery for the Premises  
Located at 516 Rice Street in St. Paul

**FINDINGS OF FACT,  
CONCLUSIONS, AND  
RECOMMENDATION**

This matter came on for hearing on December 2, 2010, before Administrative Law Judge Kathleen D. Sheehy, at Room 220 of the City Hall/Courthouse Building, 15 West Kellogg Boulevard, St. Paul, MN 55102. The OAH record closed at the conclusion of the hearing that day.

Rachel Tierney, Assistant City Attorney, 400 City Hall, 15 West Kellogg Boulevard, St. Paul, MN 55102, appeared for the City of St. Paul's Department of Safety and Inspections (DSI).

Robert J. Foster, Esq., Foster & Brever, PLLC, 2812 Anthony Lane, Suite 200, St. Anthony, MN 55418, appeared for MW#1, Inc. (Licensee).

**STATEMENT OF THE ISSUES**

1. Did the Licensee violate the Minnesota Clean Indoor Air Act, Minn. Stat. § 144.414, subd. 1 (2008)?
2. If so, is the proposed \$1,000 penalty the appropriate licensing sanction under the St. Paul Legislative Code?

The Administrative Law Judge concludes that the alleged violation occurred, but that this violation is an insufficient basis to take adverse licensing action under § 331A of the St. Paul Legislative Code.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. MW#1, Inc. (Licensee) did business until recently as Corner Meats & Grocery at 516 Rice Street in St. Paul. The store had, among other licenses, a

retail food grocery license and a retail food butcher license issued by the City of St. Paul.<sup>1</sup>

2. The Licensee leased the premises at 516 Rice Street for the retail grocery store and meat market. The Licensee also leased the adjacent premises at 520 Rice Street, where it maintained an office, some storage space, a living room area, and an area that the Licensee at one time intended to convert into restaurant space. The Licensee's manager, Antar Wazwaz, used the office space at 520 Rice Street to manage the grocery store and meat market operated next door, as well as two other retail businesses located elsewhere.<sup>2</sup>

3. The addresses have separate shop fronts on Rice Street, but 516 and 520 Rice Street are attached to each other and are divided only by a load-bearing wall. At some point prior to the Licensee's occupancy of the building, a previous tenant had knocked down a portion of the load-bearing wall toward the back, so that both addresses are now accessible to each other from the inside. There is no door installed in this opening; it is simply a rough archway between the two spaces.<sup>3</sup> The office space in 520 Rice Street that is used as management space for the grocery store is immediately adjacent to the archway.<sup>4</sup>

4. In December 2009, the Licensee was cited for selling single cigarettes, in violation of § 324.07(a) of the St. Paul Legislative Code.<sup>5</sup> The Licensee did not dispute the violation and paid the \$500 fine on or about January 11, 2010.<sup>6</sup>

5. On September 9, 2010, Fong Lor, an Environmental Health Specialist with the City of St. Paul's Department of Safety and Inspections (DSI), conducted an inspection of the Licensee's store.<sup>7</sup> When he completed his inspection of the grocery store and butcher shop, he recalled the Licensee's plan to open a restaurant next door and asked to see what progress had been made. He went through the archway and past the office space, where he noticed a large hookah pipe sitting on the desk. At the top of the pipe, there is a built-in tray that would normally hold a bowl. Instead of a bowl, the tray contained what appeared to be ashes.<sup>8</sup> Lor observed another hookah pipe in the living room area of 520

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<sup>1</sup> Ex. 6-2.

<sup>2</sup> Testimony of Antar (Tony) Wazwaz; Ex. 12.

<sup>3</sup> Test. of A. Wazwaz.

<sup>4</sup> Ex. 12.

<sup>5</sup> Ex. 7-1.

<sup>6</sup> Ex. 8.

<sup>7</sup> The City of St. Paul has a delegation agreement with the Minnesota Department of Agriculture to enforce state food licensing laws for retail grocery stores. See <http://www.health.state.mn.us/divs/eh/food/license/locals.pdf>.

<sup>8</sup> Testimony of Fong Lor; Ex. 2.

Rice Street.<sup>9</sup> He concluded that someone had been smoking in a prohibited area and cited this as a non-critical food code violation.<sup>10</sup>

6. On September 30, 2010, License Inspector Kristina Schweinler went to the premises to follow up on the reported violation. She did not see any hookah pipes or other evidence of smoking. She did speak with Mr. Wazwaz, who acknowledged that he had smoked a hookah pipe in the living room area of the 520 building. He stated he was unaware that this was a violation and said he would not do it any more.<sup>11</sup>

7. On October 19, 2010, Lor returned to the premises for a follow-up inspection. He observed that the large hookah pipe that was previously on the office desk had been moved to the floor of the office. There is no evidence that the pipe had been recently used for smoking. At that time, a young woman who worked for the Licensee was doing filing in the office.<sup>12</sup>

8. Shortly thereafter, the City condemned 516 and 520 Rice Street because of structural deficiencies that the building owner had failed to correct. The Licensee moved out of the building, which is now vacant.<sup>13</sup> The Licensee is planning to open a new grocery store across the street.<sup>14</sup>

9. By letter dated October 20, 2010, Rachel Tierney, Assistant City Attorney, notified the Licensee that on September 9, 2010, it had violated the Minnesota Clean Indoor Air Act, Minn. Stat. §§ 144.414, subd. 1, and 144.416(a), by allowing smoking on the premises. In addition, the letter advised the Licensee that the City intended to recommend a \$1,000 matrix penalty under § 310.05(m)(2) of the St. Paul Licensing Code.<sup>15</sup>

10. On November 2, 2010, the Licensee requested a hearing.<sup>16</sup>

11. On November 19, 2010, the City issued a Notice of Administrative Hearing, scheduling the hearing to take place on December 2, 2010.<sup>17</sup>

Based on these Findings of Fact, the Administrative Law Judge makes the following:

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<sup>9</sup> Ex. 4.

<sup>10</sup> Ex. 1-5.

<sup>11</sup> Testimony of Kristina Schweinler.

<sup>12</sup> Test. of F. Lor.

<sup>13</sup> Testimony of Christine Rozek.

<sup>14</sup> Test. of A. Wazwaz.

<sup>15</sup> Ex. 9.

<sup>16</sup> Ex. 10.

<sup>17</sup> Ex. 11.

## CONCLUSIONS

1. The Administrative Law Judge and the St. Paul City Council have authority to hear this matter pursuant to St. Paul Legislative Code § 310.05(c).

2. The hearing in this matter was conducted in accordance with the applicable portions of the procedures set forth in section 310.05 of the St. Paul Legislative Code.

3. The City gave proper notice of the hearing in this matter and has fulfilled all procedural requirements of rule or law.

4. The City has the burden of proving by a preponderance of the evidence that adverse action is warranted against the licenses held by MW#1, Inc.

5. The St. Paul City Council may take adverse action against any or all licenses or permits, licensee or applicant for a license, on the basis that the licensee or applicant has failed to comply with any condition set forth in the license or has violated any of the provisions of any statute, ordinance or regulation reasonably related to the licensed activity.<sup>18</sup>

6. The City's no-smoking ordinance applies to, among others, restaurants that are licensed under Legislative Code sections 331A.04(d)(19)-(24) & (26).<sup>19</sup>

7. The City's no-smoking ordinance is not applicable to the Licensee because the Licensee's retail food grocery and butcher licenses are issued under § 331A.04(d)(27) & (31) of the St. Paul Legislative Code.<sup>20</sup>

8. Section 331A.07(a) of the St. Paul Legislative Code adopts by reference the standards contained in the Minnesota Food Code, Chapter 4626 of Minnesota Rules.

9. The Minnesota Food Code, Minn. R. 4626.1820 (2009), requires that a food establishment shall meet the requirements of the Minnesota Clean Indoor Air Act, Minn. Stat. §§ 144.411 to 144.417, and rules adopted under that section.

10. The Minnesota Clean Indoor Air Act generally prohibits smoking in a place of employment or in a public place, including retail stores and other commercial establishments. It also requires that a person in charge of a public

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<sup>18</sup> St. Paul Legislative Code § 310.06 (b)(6)(a).

<sup>19</sup> St. Paul Legislative Code § 238.02(5).

<sup>20</sup> *Id.* § 331A.04(d)(27) (retail food establishment) & (31) (butcher operation within a grocery store).

place or place of employment must not provide smoking equipment, including ashtrays or matches, in areas where smoking is prohibited.<sup>21</sup>

11. A "place of employment" means any indoor area at which two or more individuals perform any type of service for consideration of payment, including retail stores, and including any rooms or areas containing office equipment used in common.<sup>22</sup>

12. The City demonstrated by a preponderance of the evidence that the Licensee permitted smoking in a public place or a place of employment.

13. The City may take adverse licensing action for a violation of the Minnesota Clean Indoor Air Act as provided in § 311A.11 of the St. Paul Legislative Code. That section of the Code provides that any violation shall be categorized as either a critical or noncritical violation as defined by the state food code. Critical violations pose an imminent public health risk; non-critical violations are all violations of the state food code or related regulations of the state or city other than those defined as critical violations.<sup>23</sup>

14. Smoking in a prohibited place is a non-critical violation of the Minnesota Food Code.<sup>24</sup>

15. Under 331A.11(2) of the St. Paul Legislative Code, non-critical violations may result in adverse licensing action when the same violation is documented and uncorrected at three consecutive full inspections; when the same violation is documented at four inspections within five years; or when there are ten or more non-critical violations of any kind documented at two consecutive full inspections.

16. The penalty matrix contained in § 310.05(m) expressly provides that all penalty recommendations for Chapter 331A violations shall be based on the food penalty guideline referred to in Chapter 331A. In addition, § 310.05(l) provides more generally that, to the extent that any other provision of the Legislative Code provides for the imposition of a fine, both provisions shall be read together to the extent possible; provided, however, that in the case of any conflict or inconsistency, the other provision shall be controlling.

17. There is an insufficient basis to take adverse action against the Licensee under § 331A.11(2) of the St. Paul Legislative Code.

18. If grounds for adverse action were established under § 331A.11(2) of the St. Paul Legislative Code, the maximum presumptive penalty under § 310.05(m) would be \$250 for a second appearance within one year. The Food

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<sup>21</sup> Minn. Stat. §§ 144.414, subd. 1; 144.416(b).

<sup>22</sup> Minn. Stat. § 144.413, subd. 1b.

<sup>23</sup> St. Paul Legislative Code §331A.11(1) & (2).

<sup>24</sup> <http://www.stpaul.gov/DocumentView.aspx?DID=3858>.



Code Penalty Matrix would call for a fine in the amount of 60% of \$250 for a continuous non-critical violation.<sup>25</sup>

19. There is no basis in this case to assess a \$1,000 matrix penalty, as recommended by DSI, for a single non-critical violation of the Minnesota Food Code.


20. The City's recommendation to assess a \$1,000 civil penalty against the Licensee is unsupported and should not be accepted.<sup>26</sup>

Based upon these Conclusions, and for the reasons explained in the Memorandum attached hereto, the Administrative Law Judge makes the following:

### RECOMMENDATION

It is respectfully recommended that the St. Paul City Council take no adverse action in this matter against the licenses held by MW#1, Inc., d/b/a Corner Meats & Grocery, for the premises located at 516 Rice Street in St. Paul.

Dated: December 23, 2010

  
KATHLEEN D. SHEEHY  
Administrative Law Judge

Reported: Digitally recorded,  
No transcript prepared

### NOTICE

This report is a recommendation, not a final decision. The St. Paul City Council will make the final decision after reviewing the record and may adopt, reject or modify the Findings of Fact, Conclusions and Recommendation contained herein. Pursuant to Section 310.05 of the St. Paul Legislative Code, the City Council's final decision shall not be made until this Report has been made available to the parties to the proceeding and the Licensee has been provided an opportunity to present oral or written arguments alleging error on the part of the Administrative Law Judge in the application of the law or the interpretation of the facts and an opportunity to present argument relating to any recommended adverse action. The Licensee and any interested parties should contact Shari Moore, Saint Paul City Clerk, 290 City Hall, 15 West Kellogg Boulevard, St. Paul, MN 55102, to find out the process for presenting argument.

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<sup>25</sup> *Id.*

<sup>26</sup> See St. Paul Legislative Code § 310.05(m) (penalty for non-critical violations under § 311A is \$250.)

## MEMORANDUM

The Licensee argues first that there is insufficient evidence that smoking occurred anywhere. It argues that, as defined in the Minnesota Clean Indoor Air Act, smoking means "inhaling or exhaling smoke from any lighted cigar, cigarette, pipe, or any other lighted tobacco or plant product," or "carrying a lighted cigar, cigarette, pipe, or any other lighted tobacco or plant product intended for inhalation."<sup>27</sup> It argues the City has failed to prove that anyone actually smoked in a public place or a place of employment. This argument is unfounded. The presence of ashes in a pipe is evidence that smoking took place in the office area adjacent to the grocery. The office area is not separated from the retail premises except by an archway, and it is plainly a place of employment where two or more persons work. It is not disputed that the office is used by the Licensee's manager, as well as another employee who was doing filing there at the time of one inspection.

Second, the Licensee argues that even if smoking did occur at 520 Rice Street, this property is distinct from the licensed premises, and any violation there cannot be attributed to the business license for 516 Rice Street. The City argues that the license simply reflects the street address provided by the Licensee and that the facts here establish that the Licensee was using 520 Rice Street as part of its licensed business at 516 Rice Street. The City's argument is persuasive. The Licensee's manager testified that the office is used in the management of the grocery store, as well as two other businesses. The space at 520 Rice Street was part of the licensed business, and a violation taking place there is properly attributable to the licensed business.

The City's Legislative Code provides, in general, that the City may take adverse action against any or all licenses or permits on the basis that the licensee has failed to comply with any condition set forth in the license or has violated any of the provisions of "any statute, ordinance or regulation reasonably related to the licensed activity."<sup>28</sup> The Legislative Code has explicitly addressed, however, the manner in which violations of the Minnesota Clean Indoor Air Act are to be treated for licenses issued under § 331A. Section 331A.07 incorporates into the legislative code the Minnesota Food Code, which in turn requires licensed food establishments to comply with the standards of the Clean Indoor Air Act.<sup>29</sup>

Section 331A also expressly addresses the circumstances under which the City may take adverse licensing action for a violation of the Minnesota Food Code. Violations must be categorized as critical or non-critical; and adverse action may be taken for continuous, recurring, or numerous violations documented in multiple inspections over varying periods of time.<sup>30</sup> The

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<sup>27</sup> Minn. Stat. § 144.413, subd. 4.

<sup>28</sup> St. Paul Legislative Code § 310.06 (b)(6)(a).

<sup>29</sup> Minn. R. 4626.1820.

<sup>30</sup> St. Paul Legislative Code § 311A.11(2).

Department of Safety and Inspections is required to make a penalty recommendation as outlined in that section, after considering mitigating or aggravating factors including the potential for harm or imminent threat to public health; the extent of deviation from statutory or regulatory requirements; the degree of willfulness or negligence; the history of noncompliance or compliance; the demonstration of good faith efforts to correct a violation; and the type of operation, including the methods and extent of food storage, preparation, and service.<sup>31</sup>

General principles of statutory construction provide that specific language governs over more general terms.<sup>32</sup> In this case, the specific language controlling the taking of adverse action against licenses issued under § 331A should take precedence over the more general language in § 310.06, which is applicable to all licenses.

The City has failed to show or even allege that the Licensee has allowed smoking in a prohibited place on more than one occasion. Its previous violation for selling single cigarettes was under a different section of the Legislative Code applicable to cigarette sales (§ 324.07(a)). There is no evidence that this is a continuous or recurring violation, or part of a pattern of multiple violations over any period of time. The City has accordingly failed to substantiate a basis for taking adverse licensing action under section 331A of the Legislative Code. Moreover, its recommended penalty is not based on Section 331A, which would call for a much smaller penalty even in the event adverse action were justified.<sup>33</sup>

The record reflects that this was an unintentional violation based largely on the proximity of the two building spaces; the Licensee acknowledged the violation, and there is no evidence that smoking occurred at either 516 or 520 Rice Street after the September inspection. There are no aggravating factors that would justify a deviation from the presumptive penalty, if any penalty were appropriate. The Administrative Law Judge consequently recommends that no adverse licensing action be taken in this case.

**K.D.S.**

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<sup>31</sup> St. Paul Legislative Code § 311A.11(3).

<sup>32</sup> See, e.g., Minn. Stat. § 645.08(3); *City of St. Paul v. Hall*, 239 Minn. 378, 381, 58 N.W.2d 761, 763 (1953) (specific penalty in a statute governs over more general terms).

<sup>33</sup> See <http://www.stpaul.gov/DocumentView.aspx?DID=3858> (calling for a fine in the amount of 60% of the maximum \$250 fine for a second appearance for a non-critical violation); St. Paul Legislative Code § 310.05(m) (all penalty recommendations for chapter 331A violations shall be based on the food penalty guideline referred to in Chapter 331A).