

December 6, 2019

**VIA EMAIL ONLY**

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Re: ***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***  
**OAH 65-6020-34289**

Dear Counsel:

Enclosed and served upon you please find the **RECOMMENDATION AND ORDER ON CROSS MOTIONS FOR SUMMARY DISPOSITION** in the above-entitled matter.

If you have any questions, please contact me at (651) 361-7865, at [andrew.hart@state.mn.us](mailto:andrew.hart@state.mn.us), or via fax at (651) 539-0310.

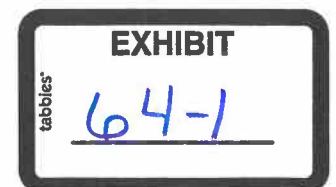
Sincerely,

s/ Andrew Hart

ANDREW HART  
Staff Attorney

Enclosure

cc: Docket Coordinator



STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF ST. 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

**RECOMMENDATION AND  
ORDER ON CROSS MOTIONS  
FOR SUMMARY DISPOSITION**

This matter comes before Administrative Law Judge Ann C. O'Reilly on the parties' cross motions for summary disposition.

Therese Skarda, Assistant City Attorney, represents the City of St. Paul (City). John Miller, PFB Law, represents the University Club of St. Paul, d/b/a The Commodore (Licensee).

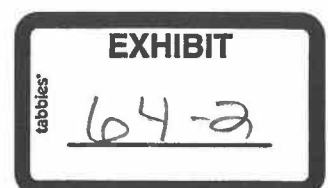
This case has a lengthy and complicated procedural history, interrupted by numerous attempts by the parties to resolve this case without an evidentiary hearing. On May 18, 2018, the City filed its first Motion for Summary Disposition. On May 22, 2018, Respondent filed its first Motion for Summary Disposition. The parties both filed responsive pleadings on June 4, 2018, and reply briefs on June 18 and 19, 2018. Oral argument on the parties' original cross motions for summary disposition occurred on June 28, 2018.

Given the significant fact disputes presented in the parties' briefs and arguments, the Administrative Law Judge offered the parties an opportunity to revise and resubmit their motions with specific instructions to identify, in numbered paragraphs, the disputed and undisputed facts. The parties agreed to amend their motions.

On October 24, 2018, the parties each filed Amended Motions for Summary Disposition. Responsive briefs were filed on November 28 and 29, 2018. A site visit was held on December 4, 2018, and oral argument on the amended motions was scheduled for February 28, 2019.

Prior to the oral argument scheduled for February 28, 2019, the parties advised the Judge that they were engaging in additional settlement discussions and requested that consideration of the motions be stayed and oral argument be continued until the parties had exhausted their settlement discussions.

Several months passed, and when settlement discussions were not fruitful, the Administrative Law Judge scheduled oral argument. Oral argument on the parties'



amended motions occurred on August 21, 2019. The Motion record closed on November 7, 2019, upon receipt of the City's Exhibits 61 and 62.

Based upon the parties' arguments and the record in this matter,


**IT IS HEREBY RECOMMENDED THAT:**

1. The City's Motion for Summary Disposition be **GRANTED IN PART** and **DENIED IN PART**;
2. Licensee's Motion for Summary Disposition be **DENIED**;
3. Violation Numbers 1, 3, 4, 5, and 6 be **AFFIRMED**;
4. Violation Number 2 be **DISMISSED**;
5. Violation Number 7 be continued to an evidentiary hearing or be dismissed by the City in the interest of the efficient resolution of this matter; and
6. The City impose a fine of \$500 and reasonable conditions on the subject licenses.

**IT IS HEREBY ORDERED THAT:**

1. A prehearing conference be held on **January 6, 2020, at 11:00 a.m.** to discuss Violation Number 7.
2. On January 6, 2020, the parties shall call **1-888-742-5095** and enter conference code **992-715-4908#**.

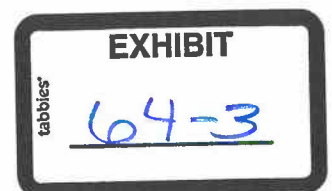
Dated: December 5, 2019



ANN C. O'REILLY  
Administrative Law Judge

**NOTICE**

This Report is a recommendation, not a final decision. The Saint Paul City Council will make a final decision after a review of the record and may adopt, reject, or modify these Findings of Fact, Conclusions of Law, and Recommendation. Pursuant to Saint Paul Legislative Code § 310.05 (c-1), the City Council shall not make a final decision until the parties have had the opportunity to present oral or written arguments to the City Council. Parties should contact Shari Moore, City Clerk, City of Saint Paul, 310 City Hall, 15 W. Kellogg Blvd., Saint Paul, Minnesota 55102, to ascertain the procedure for filing exceptions or presenting arguments.



## MEMORANDUM

### I. Undisputed Facts

The University Club of St. Paul, d/b/a The Commodore (hereafter referred to as "Licensee") is a restaurant and bar located at 79 Western Avenue North in St. Paul, Minnesota.<sup>1</sup> The Licensee holds three pertinent licenses issued by the City: (1) a liquor on-sale Sunday license; (2) a liquor on-sale (181-290 seats) license; and (3) an entertainment (B) license.<sup>2</sup>

The liquor on sale Sunday license was initially issued on August 1, 1992, and has been annually renewed since that date.<sup>3</sup> The liquor on sale (181-290 seats) license was initially issued on January 31, 2008, and has been annually renewed since that date.<sup>4</sup> The entertainment (B) license was initially issued on August 1, 1992, and has been annually renewed since that date.<sup>5</sup>

All three licenses contain 15 conditions established by the City.<sup>6</sup> The ninth condition of the licenses provides as follows:

There will be full compliance with City ordinances including the noise ordinance and those regulating the consumption of alcohol outside of the building.<sup>7</sup>

(referred to herein as "Condition No. 9").

#### A. A. History of 79 Western Avenue

The building located at 79 Western Avenue, where The Commodore bar and restaurant operates, houses other businesses and has various uses.<sup>8</sup> First, the building contains The Commodore bar and restaurant, the business at issue in this case ("The Commodore").<sup>9</sup> Second, it holds the Commodore Squash Club, which is comprised of indoor squash<sup>10</sup> courts, a bar/lounge, and an exercise facility.<sup>11</sup> Third, it includes two

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<sup>1</sup> Exhibit (Ex.) 16.

<sup>2</sup> Ex. 48.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* It is unclear in this record whether the three licenses at issue in this case are specific to The Commodore bar and restaurant or are also shared by the Commodore Squash Club, which is also located at 79 Western Avenue.

<sup>6</sup> Ex. 48-3.

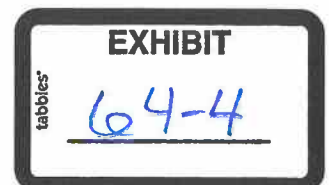
<sup>7</sup> *Id.*

<sup>8</sup> Fourth Affidavit of John Rupp (Rupp 4<sup>th</sup> Aff.) at ¶ 7.

<sup>9</sup> *Id.*

<sup>10</sup> Squash is a game played with small racquets and balls hit onto walls, similar to racquet ball. See [https://en.wikipedia.org/wiki/Squash\\_\(sport\)](https://en.wikipedia.org/wiki/Squash_(sport)).

<sup>11</sup> Rupp 4<sup>th</sup> Aff. at ¶ 7.



commercial offices.<sup>12</sup> Fourth, the building houses approximately 50 residential condominium units.<sup>13</sup> Each of these areas were constructed or renovated at various times over an approximate 100-year history.<sup>14</sup>

The original building located at 79 Western Avenue was constructed in 1920 as the Commodore Hotel ("Original Hotel Building").<sup>15</sup> The Original Hotel Building was comprised of a six-story hotel and a first floor bar, restaurant, and dining room.<sup>16</sup> The first floor bar, restaurant, and dining room shall be referred to herein as the "Original Restaurant."

In 1976, an addition was built on the western portion of the Original Hotel Building ("Western Addition").<sup>17</sup> The Western Addition included a squash club on the lower level and a "future dining room" on the upper level -- on the same elevation as the Original Restaurant.<sup>18</sup> Together, the Original Hotel Building and the Western Addition shall be referred to as the "Commodore Complex."

In 1978, an explosion occurred that damaged the entire Commodore Complex.<sup>19</sup> Reconstruction began in the 1980s.<sup>20</sup> Both the Original Hotel Building and the Western Addition were rebuilt and/or renovated.<sup>21</sup>

As part of the reconstruction, the Original Hotel Building was converted into a mixed-use condominium building ("Commodore Condominium Building").<sup>22</sup> The hotel rooms were converted into approximately 50 residential condominium units.<sup>23</sup> The original hotel bar and kitchen, and two main-floor offices, became commercial condominium units.<sup>24</sup> The restaurant's original dining room ("1920 Dining Room"), however, was somehow not included in the condominium plans and was assigned a separate legal description (the "1920 Dining Room Parcel").<sup>25</sup>

The Western Addition was reconstructed based upon the 1976 City-approved plans, which included a squash club and lounge, as well as a first-floor area designated as a "future dining room."<sup>26</sup> The "future dining room" is referred to herein as the "Western Dining Area."

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Rupp 4<sup>th</sup> Aff. at ¶ 8.

<sup>16</sup> *Id.*

<sup>17</sup> Ex. 41-17.

<sup>18</sup> Exs. 41-1, 41-17.

<sup>19</sup> Rupp 4<sup>th</sup> Aff. at ¶ 10.

<sup>20</sup> Ex. 41-17.

<sup>21</sup> *Id.*

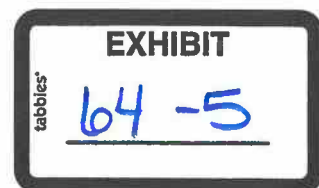
<sup>22</sup> Rupp 4<sup>th</sup> Aff. at ¶ 8.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

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

<sup>26</sup> Exs. 41-1, 41-17.



The renovation to the Western Addition was completed in the early 1980s.<sup>27</sup> According to evidence provided by the City, the 1980 “Repair and Replacement” documents continued to identify the Western Dining Area as a “future dining room.”<sup>28</sup>

A building certificate of occupancy was issued to 79 Western Avenue by the City Division of Housing and Building Code Enforcement on October 21, 1981 (“1981 Certificate of Occupancy”).<sup>29</sup> The 1981 Certificate of Occupancy authorized use and occupancy of the property for “racquet ball courts.”<sup>30</sup> There is no evidence that the 1981 Certificate of Occupancy has ever been revoked by the City and there is no evidence that any other building certificates of occupancy have ever been issued to the property located at 79 Western Avenue.<sup>31</sup>

In 1987, a building permit was issued for a remodel of the Western Addition related to the replacement of windows.<sup>32</sup> The City-approved plans for the 1987 remodel label the Western Dining Area as an “exercise room.”<sup>33</sup> The architectural plans show a solid wall and no doors between the Western Dining Area and the Original Restaurant.<sup>34</sup>

In 2001, and through subsequent court actions to clarify legal descriptions, the Western Dining Area was added to the 1920 Dining Room Parcel.<sup>35</sup> While the Western Dining Area was added to the 1920 Dining Room Parcel, they remained separate rooms, divided by a wall, in separate parts of the Commodore Complex.<sup>36</sup> The original dining room remains in the Original Hotel Building and the Western Dining Area is located in the Western Addition.

The Commodore bar and restaurant, as it exists today, is located in both the Commodore Condominium Building and the 1920 Dining Room Parcel.<sup>37</sup> The bar, restaurant, and 1920 Dining Room, are located in the same place as the Original Restaurant.<sup>38</sup> The Western Dining Area is located in the Western Addition.<sup>39</sup>

The Commodore Complex is located in a RM3 residential zoning district, pursuant to the St. Paul Zoning Code.<sup>40</sup> Use of the property for a restaurant, bar, dining hall, or

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<sup>27</sup> See Respondent’s Amended Memorandum in Support of Motion for Summary Disposition (Oct. 24, 2018) at 4.

<sup>28</sup> Ex. 41-17.

<sup>29</sup> Ex. 56-1.

<sup>30</sup> *Id.*

<sup>31</sup> Fire certificates of occupancy are addressed separately herein.

<sup>32</sup> Ex. 57-3.

<sup>33</sup> Exs. 57-1, 57-2.

<sup>34</sup> Exs. 57-1, 57-2; Supplemental Affidavit of Ubl (Ubl Supp. Aff.) at ¶ 14.

<sup>35</sup> Rupp 4<sup>th</sup> Aff. at ¶ 8.

<sup>36</sup> See Ex. 19.

<sup>37</sup> Ex. 41-17.

<sup>38</sup> As clarified by the Administrative Law Judge at the Site Visit on December 4, 2018.

<sup>39</sup> *Id.*

<sup>40</sup> Ex. 41-1.



squash club are nonconforming uses in a RM3 residential zoning district, unless such uses existed prior to the establishment of the zoning code in 1975.<sup>41</sup>

## **B. B. Renovation of The Commodore and Western Dining Area**

John Rupp acquired The Commodore bar and restaurant (Original Restaurant) in 1984 and continued operating it as a restaurant and catering business.<sup>42</sup> In 2001, as a result of legal actions, Mr. Rupp acquired the Western Dining Area.<sup>43</sup>

Pictures of the Western Dining Area taken by the City in approximately 2000 show the space with exercise equipment in the room, consistent with the 1987 window renovations plans that labeled the room as an “exercise room.”<sup>44</sup> However, a Certificate of Survey on file with the City completed in 2004 includes a photograph of the Western Dining Area and describes the space as the “Proposed Banquet Room Parcel.”<sup>45</sup> The survey photograph depicts a vacant room with no finished ceiling.<sup>46</sup>

In 2012, Mr. Rupp decided to renovate the bar and restaurant, along with the Western Dining Area, and fully join the Western Dining Area to the Original Restaurant to use the Western Dining Area as an additional dining room and entertainment area.<sup>47</sup> Mr. Rupp hired an architecture firm to prepare plans for the renovations (“Original Plans”).<sup>48</sup> Using these Original Plans, Mr. Rupp prepared a General Building Permit Application (“Permit Application”) and submitted it, along with the Original Plans, to the City for approval on February 2, 2012.<sup>49</sup>

The Permit Application stated that the work was an “interior remodel” with a value of completed work estimated at \$10,000.<sup>50</sup> Mr. Rupp did not complete the section of the Permit Application that asked whether the renovation would change or expand the existing use of the building.<sup>51</sup> Instead of circling “yes” or “no,” Mr. Rupp left the question blank.<sup>52</sup>

The Original Plans submitted to the City with the Permit Application had an arrow specifically pointing to the Western Dining Area, identifying it as an “Area of Future Work.”<sup>53</sup> In addition, there was a dotted line around the entire Western Dining Area specifically designating this area is an “Area of Future Work.”<sup>54</sup>

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<sup>41</sup> Ex. 41-4.

<sup>42</sup> First Affidavit of John Rupp (Rupp 1<sup>st</sup> Aff.) at ¶ 9.

<sup>43</sup> *Id.* at ¶ 10.

<sup>44</sup> Affidavit of Steve Ubl (Ubl Aff.) at ¶ 26; Exs. 13, 57-1, 57-2.

<sup>45</sup> Ex. 14 (Survey in entirety).

<sup>46</sup> Ex. 14-2 (enlarged photos from Survey).

<sup>47</sup> Rupp 1<sup>st</sup> Aff. at ¶ 11.

<sup>48</sup> *Id.* See also, Exs. R-1, 18

<sup>49</sup> Rupp 1<sup>st</sup> Aff. at ¶ 13; Exs. R-1 and 18 (Original Plans); Exs. R-2 and 16 (Permit Application).

<sup>50</sup> Exs. R-2, 16 (Permit Application).

<sup>51</sup> Exs. R-2, 16 (Permit Application).

<sup>52</sup> Exs. R-2, 16 (Permit Application).

<sup>53</sup> Exs. R-1 and 18 (Original Plans).

<sup>54</sup> Exs. R-1 and 18 (Original Plans).



After filing his Permit Application and Original Plans, Mr. Rupp revised the Original Plans and delivered a revised version of the plans to the City on May 17, 2012 (“1<sup>st</sup> Revised Plans”).<sup>55</sup> Mr. Rupp did not update his Permit Application.<sup>56</sup>

The 1<sup>st</sup> Revised Plans had significant changes from the Original Plans. The 1<sup>st</sup> Revised Plans changed the designation of the Western Dining Area from “Area of Future Work” to “Scope of Interior Alteration Work.”<sup>57</sup> Specifically, the 1<sup>st</sup> Revised Plans removed the designation and arrow pointing to the West Dining Area as “Area of Future Work.”<sup>58</sup> In addition, the dotted line that once identified the Western Dining Area as an “Area of Future Work” was removed and replaced with a dashed line.<sup>59</sup> This dashed line outlined both the Original Restaurant and the Western Dining Area, and defined the entire area as the “Scope of Interior Alteration Work.”<sup>60</sup>

The 1<sup>st</sup> Revised Plans were reviewed and approved by the City (“Approved Plans”).<sup>61</sup> The Approved Plans showed: (1) the removal of portions of the existing masonry wall separating the Western Dining Area from the existing Commodore restaurant dining area; (2) the installation of doors connecting the Western Dining Area to the existing Commodore restaurant dining area; (3) a new service bar and counter in the Western Dining Area which would require a “future permit”; (4) a “future platform and greenroom” in the Western Dining Area; and (5) new exterior stairs outside of the Western Dining Area requiring “separate permit with HPC approval.”<sup>62</sup>

The Approved Plans also include a table entitled “Occupant Load,” which identifies the Western Dining Area as “Future West Dining.”<sup>63</sup> The table sets forth the square footage and future occupancy limits for that area.<sup>64</sup> The Approved Plans were signed off on by both Jim Bloom, the City’s designated Building Official at the time, and John Skradski, a City Plan Examiner.<sup>65</sup>

On August 30, 2012, the City issued a Building Permit GBP#12-017614 (“Building Permit”) for the renovation project based upon the 1<sup>st</sup> Revised Plans.<sup>66</sup> The Building Permit indicated that the project included only “minor structural work,” that the project was a “minor remodel,” and that the estimated cost of the renovation was \$10,000.<sup>67</sup> The

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<sup>55</sup> Rupp 1<sup>st</sup> Aff. at ¶¶ 16-17; Ex. R-21 (1<sup>st</sup> Revised Plans); Ubl Aff. at ¶ 32.

<sup>56</sup> Exs. R-2, 16 (Permit Application).

<sup>57</sup> Ubl Aff. at ¶ 32; *compare* Exs. R-1 and 18 (Original Plans), Ex. R-17 (1<sup>st</sup> Revised Plans), and Ex. 19 (Approved Plans in totality).

<sup>58</sup> Ex. R-17.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Affidavit of John Skradski (Skradski Aff.) at ¶ 28; Ex. 19-2 (Signature Block on Approved Plans).

<sup>62</sup> Ex. 19-1 (Approved Plans)

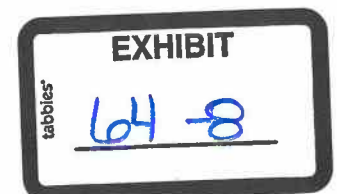
<sup>63</sup> Ex. 19-14 (Occupant Load Table on Approved Plans).

<sup>64</sup> *Id.*

<sup>65</sup> Skradski Aff. at ¶ 28; Ex. 19-2 (Signature Block on Approved Plans).

<sup>66</sup> Exs. 17 and R-8 (Building Permit). *See also* Ex. 19 (Approved Plans in totality).

<sup>67</sup> *Id.*





Building Permit also noted that the renovation would not change or expand the existing use of the building.<sup>68</sup>

### C. C. City Inspections and Withholding of Approvals

City inspections of the remodeling project occurred on July 26, 2013, August 24, 2015, September 22, 2015, and October 27, 2015.<sup>69</sup> The 2013 inspection did not cover the Western Dining Area and only reviewed the renovations to the Original Restaurant.<sup>70</sup> Similarly, the August 24, 2015, inspection related to a wheelchair lift and the bathrooms in the Original Restaurant, not the Western Dining Area.<sup>71</sup>

Mr. Rupp completed the renovations to the Original Restaurant and the Western Dining Area in approximately the fall of 2015.<sup>72</sup> By this time, the City had a new designated Building Official, Steve Ubl.<sup>73</sup>

An inspection of the project occurred on September 22, 2015.<sup>74</sup> Senior Building Inspector Mike Palm, along with representatives from the City's licensing, fire, and zoning divisions, attended that meeting with Mr. Rupp.<sup>75</sup> The parties discussed the actions necessary before a temporary certificate of occupancy could be issued.<sup>76</sup> It is unclear in the record whether the parties were discussing a temporary fire certificate of occupancy or a temporary building certificate of occupancy.

During the City inspection on September 22, 2015, photographs were taken of the Western Dining Area.<sup>77</sup> One of these photos shows the Western Dining Area fully renovated with new flooring, a new ceiling, and finished walls.<sup>78</sup>

On October 26, 2015, Building Official Ubl sent Mr. Rupp a letter advising him that the Building Permit issued in 2012 did not authorize the scope of the work completed on the Western Dining Area, and only permitted renovation to the Original Restaurant.<sup>79</sup> Mr. Ubl advised that, before a building certificate of occupancy would be granted for the

<sup>68</sup> *Id.* After receiving the Building Permit, Mr. Rupp asserts that he revised the building plans in 2014, 2015, 2017, and 2018. Rupp 1<sup>st</sup> Aff. at ¶¶ 22-25. In its Amended Notice and Order for Hearing, the City states, "DSI records show that the revisions proposed by [Licensee] were never submitted for plan review or approved (with the exception of the exit stair), fees were not paid[,] and permits were not issued for any additional work. Inspections were also not performed." Because the City does not acknowledge receiving such updated plans, these facts are in dispute. Amended Notice and Order for Prehearing Conference (May 31, 2017). See *also*, Ubl Aff. at ¶ 45.

<sup>69</sup> Ubl Aff. at ¶ 30(a).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See Ex. 15-5.

<sup>73</sup> Ubl Aff. at ¶ 5.

<sup>74</sup> Affidavit of Mike Palm (Palm Aff.) at ¶ 29.

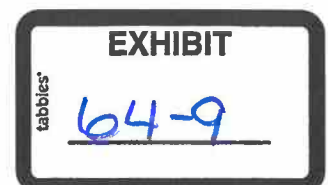
<sup>75</sup> *Id.*; Ex. 35-2.

<sup>76</sup> Ex. 35-2; Palm Aff. at ¶ 29.

<sup>77</sup> Ex. 15 (Photos from Sept. 22, 2015 inspection).

<sup>78</sup> Ex. 15-5 (Photo of Western Dining Area 9/22/15). A site visit by the Administrative Law Judge on December 4, 2018, showed the Western Dining Area fully renovated and in use by The Commodore bar and restaurant.

<sup>79</sup> Ex. R-11.



Western Dining Area, Mr. Rupp would need to: (1) apply for, and obtain, permits for the remodel of the Western Dining Area space; (2) apply for permits and install an alarm system in the Western Dining Area; (3) apply for permits and install a sprinkler system in the Western Dining Area; (4) obtain a sewer access charge (SAC) determination and pay all required fees; (5) provide accessibility to the space; (6) secure necessary zoning approvals to by demonstrating that the intended use of the Western Dining Area is a permitted, existing nonconforming use; and (7) obtain a balance report from a licensed contractor or design professional.<sup>80</sup>

Also on October 26, 2015, the City's Department of Safety and Inspections ("DSI") conducted an inspection of the property, this time for purposes of "renewing," what appears to be, a fire certificate of occupancy for the premises located at 79 Western Avenue.<sup>81</sup> That same day, City Fire Inspector James Perucca sent Mr. Rupp a letter advising him that "approval for occupancy" would only be granted if Mr. Rupp completed the following:

- (1) obtain zoning approval for any expansion of nonconforming use and/or parking requirements;
- (2) provide and maintain panic release hardware on all exit doors;
- (3) obtain inspections and close permits for all work performed in the Western Dining Area; and
- (4) provide approved fire extinguishers.<sup>82</sup>

Mr. Perucca advised that a reinspection would occur on November 30, 2015.<sup>83</sup>

The next day, October 27, 2015, Building Inspector Palm conducted a final walk-through of the property.<sup>84</sup> Mr. Palm noted that sprinkler and fire alarm systems were missing throughout the project; that a building permit was still needed to approve the finishing of the Western Dining Area; and that several minor issues remained outstanding for the bar and restaurant area.<sup>85</sup> Mr. Palm noted that he would "be ok" with a "temporary certificate of occupancy" being issued so long as Mr. Rupp would sign a document agreeing to complete "all corrections" within 30 days and obtain "a permit" for the Western Dining Room.<sup>86</sup> There is no evidence in the record that any such agreement was prepared or executed. Also, it is unclear in the record whether Mr. Palm was referring to a temporary building certificate of occupancy or a temporary fire certificate of occupancy.

On November 30, 2015, a "Temporary Certificate of Occupancy" was issued to The Commodore bar and restaurant (Original Restaurant), but not to the Western Dining

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<sup>80</sup> *Id.*

<sup>81</sup> Exs. 23-3, 23-4.

<sup>82</sup> Exs. 23-3, 23-4.

<sup>83</sup> Exs. 23-3, 23-4.

<sup>84</sup> Exs. 17-9, 35-2; Affidavit of Mike Palm (Palm Aff.) at ¶ 31.

<sup>85</sup> *Id.*

<sup>86</sup> Palm Aff. at ¶ 36.; Ex. 17-9.



Area.<sup>87</sup> It is unclear whether this Temporary Certificate of Occupancy was a fire certificate of occupancy or a building certificate of occupancy. The parties have not provided any documentation of the Temporary Certificate of Occupancy issued on November 30, 2015, aside from Inspector Perucca's notes reflecting the same.<sup>88</sup>

On May 25, 2016, Travis Bisteau, the Deputy Director of the City's DSI, sent Mr. Rupp a letter specifically stating that the Western Dining Area lacked a certificate of occupancy and cannot be used "for any purpose."<sup>89</sup> The letter reads:

The goal of this letter is to provide you with a clear understanding of what will be required before occupancy of the western dining area is allowed. Occupancy cannot be permitted until the following actions are taken, and ultimately approved, by the Department of Safety and Inspections and/or the St. Paul Planning Commission:<sup>90</sup>

The letter continued by identifying seven items that Mr. Rupp would need to complete before the City would issue a certificate of occupancy for the space.<sup>91</sup> These seven items included the same items as noted by Building Official Ubl in his letter of October 26, 2015: applying for a permit to remodel the Western Dining Area; applying for a permit to install a sprinkler and alarm system in the Western Dining Area; applying for permits to ensure compliance with accessibility standards; paying SAC fees; providing a balance report; and applying for a change of non-conforming use permit.<sup>92</sup>

Mr. Bisteau's letter also addressed Licensee's Liquor On-Sale License (181-290 seats) and the Limited Entertainment License.<sup>93</sup> The letter advised that if Licensee intended to use the Western Dining Area as part of The Commodore bar and restaurant, it would need to upgrade its liquor license to 291+ seats.<sup>94</sup> In addition, if Licensee intended to furnish entertainment in the Western Dining Area, Licensee would need to apply for a different class of entertainment license.<sup>95</sup>

Licensee acknowledges receipt of Mr. Bisteau's May 25, 2016 letter, but disagrees with the steps outlined by the City for issuance of a certificate of occupancy.<sup>96</sup>

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<sup>87</sup> Ubl Aff. at ¶ 59; Ex. 23-6.

<sup>88</sup> Ex. 23-6.

<sup>89</sup> Ex. 25.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See Respondent's Memorandum in Response to Petitioner's Revised Memorandum of Law in Support of City's Motion for Summary Disposition (Nov. 27, 2018) at 11. As explained in the Analysis Section below, Licensee asserts that the Western Dining Area was covered by a building certificate of occupancy and fire certificates of occupancy issued prior to the May 25, 2016 letter. *Id.*



## D. D. Zoning Determination

In October 2017, Mr. Rupp made a request to the City Zoning Administrator to allow him to use the Western Dining Area for additional dining space as part of The Commodore bar and restaurant.<sup>97</sup> The Zoning Administrator denied that request, concluding that Mr. Rupp had failed to present evidence that the Western Dining Area had ever been used for restaurant dining during the property's history.<sup>98</sup>

Mr. Rupp appealed that decision to the City's Board of Zoning Appeals (Zoning Board).<sup>99</sup> The Zoning Board held a public hearing on the matter on December 4, 2017, and affirmed the Zoning Administrator's determination that the Western Dining Area was never legally established, for zoning purposes, as "restaurant" space.<sup>100</sup>

Mr. Rupp then appealed the Zoning Board's decision to the City Council.<sup>101</sup> In its decision, the City Council acknowledged that The Commodore bar and restaurant – with the exception of the Western Dining Area – qualifies as a legal nonconforming use because its use as a bar and restaurant was established prior to the enactment of the 1975 zoning code.<sup>102</sup> However, the City Council concluded that the Western Dining Area was never legally established as restaurant space and, therefore, if used for restaurant dining, it would be a nonconforming use in the RM3 residential zoning district.<sup>103</sup> As a result, Mr. Rupp's request to use the Western Dining Area for additional dining space for The Commodore bar and restaurant, was denied.<sup>104</sup> A City Council resolution affirming the City Zoning Administrator and the Zoning Board's decisions passed on March 28, 2018.<sup>105</sup> There is no evidence in the record that Licensee appealed this decision to a court of law. As a result, it appears that the City's zoning decision is now final.

According to St. Paul Zoning Code § 62.109, the City Planning Commission may approve nonconforming use permits or grant legal nonconforming status to uses or structures that do not meet the standards for legal nonconforming status.<sup>106</sup> There is no evidence in the record that Licensee has sought a nonconforming use permit or has been granted legal nonconforming status for the Western Dining Area.

## E. Certificates of Occupancy

Neither the City nor the Licensee has presented documentary evidence of any building or fire certificate(s) of occupancy specifically issued to the Original Restaurant or

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<sup>97</sup> Ex. 41-4.

<sup>98</sup> Affidavit of YaYa Diata (Diata Aff.) at ¶ 15(a); Ex. 41-4, 41-5.

<sup>99</sup> Diata Aff. at ¶ 15(c).

<sup>100</sup> Diata Aff. at ¶ 14(d); Exs. 41-29 to 41-32.

<sup>101</sup> Diata Aff. at ¶ 16.

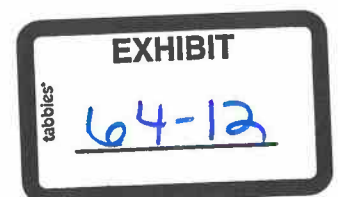
<sup>102</sup> Exs. 41-1 through 41-3.

<sup>103</sup> Exs. 41-1 through 41-3.

<sup>104</sup> Exs. 41-1 through 41-3.

<sup>105</sup> Exs. 41-1 through 41-3.

<sup>106</sup> Ex. 21.



the Western Dining Area. All certificates of occupancy issued reference only 79 Western Avenue.<sup>107</sup>

The only building certificate of occupancy presented in this case is the 1981 Certificate of Occupancy issued to 79 Western Avenue, Lots 17,<sup>108</sup> 18 and 19, Block 13, of the Woodland Park Addition, for occupancy as "racquet ball courts."<sup>109</sup> The 1981 Certificate of Occupancy does not identify the Western Dining Area or include a use for restaurant, dining, bar, or banquet purposes.<sup>110</sup>

As part of this action, Licensee requested from the City "all certificates of occupancy issued to 79 Western Avenue."<sup>111</sup> Angie Wiese, Fire Safety Manager for DSI, responded to the request by providing all certificates of occupancy records dating back to the 1980s.<sup>112</sup> Ms. Wiese is the City's Fire Code Official.<sup>113</sup>

Ms. Wiese determined that there have been two fire certificates of occupancy ("COO") covering 79 Western Avenue "since its inception": (1) fire COO No. 15384; and (2) COO No. 76432.<sup>114</sup> While these two fire certificates of occupancy have been renewed over the years, neither reference restaurant, bar, or dining use.<sup>115</sup> These two fire certificates of occupancy are summarized as follows:<sup>116</sup>

<u>COO No.</u>	<u>Location</u>	<u>Primary Use/Occupancy</u>
15384	79 Western Ave. 79 Western Ave.	49 dwelling units, office 49 dwelling units 51 dwelling units 52 dwelling units <sup>117</sup>
76432	79 Western Ave. Apt. 608 79 Western Ave. 79 Western Ave. 79 Western Ave.	Amusement/Recreation Center Amusement/Rec Center Assembly Rec. Center Amusement/Recreation Center <sup>118</sup>

The City acknowledges that: (1) fire COO No. 76432 covers the "squash club" portion of the property, including the Western Dining Area, for occupancy as an "amusement/recreation center"; and (2) fire COO No. 15384 covers the Condominium

<sup>107</sup> Exs. 56-1 to 56-51.

<sup>108</sup> There is a question as to whether this is partial lot 17 based upon the document.

<sup>109</sup> Ex. 56-1.

<sup>110</sup> *Id.*

<sup>111</sup> Rupp 4<sup>th</sup> Aff. at ¶ 11, Ex. A.

<sup>112</sup> Rupp. 4<sup>th</sup> Aff. at Ex. A, p. 6.

<sup>113</sup> See St. Paul Leg. Code § 40.03 (definition of "fire code official").

<sup>114</sup> Rupp 4<sup>th</sup> Aff. at Ex. A., p.6.

<sup>115</sup> *Id.*

<sup>116</sup> Rupp 4<sup>th</sup> Aff. at Exs. A-C.

<sup>117</sup> The descriptions of the occupancy changed over the years. These are the four types of occupancies listed on the certificates over the years.

<sup>118</sup> The descriptions of the occupancy changed over the years. These are the four types of occupancies listed on the certificates over the years.



Building, commercial office units, and, apparently, the Original Restaurant, even though there is no indication in the certificates that there is any restaurant, bar, or dining use authorized.<sup>119</sup>

The most recent fire certificates of occupancy issued to 79 Western Avenue include: (1) fire COO No. 76432 issued in 2015 for an “Amusement/Recreation Center” and renewed in 2018 for an “Amusement/Recreation Center Assembly”;<sup>120</sup> and (2) fire COO No. 15384 issued in 2016 and 2018 to the Commodore Condo Association for “Residential 3+ Units, 49 Dwelling Units”.<sup>121</sup>

According to the City, no fire certificates of occupancy have ever been revoked.<sup>122</sup> However, the City has refused to issue a fire certificate of occupancy for the Western Dining Area unless certain conditions are met, including obtaining zoning approval and obtaining a permit for the work completed to the Western Dining Area.<sup>123</sup>

The City does not dispute that a “Temporary Certificate of Occupancy” was granted to the Original Restaurant (excluding the Western Dining Area) on November 30, 2015.<sup>124</sup> It is unclear in the record whether this was a temporary fire or temporary building certificate of occupancy.

The City has, to date, refused to issue any certificate of occupancy, whether temporary or permanent, building or fire, to the Western Dining Area.<sup>125</sup>

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<sup>119</sup> Affidavit of Angie Wiese (Wiese Aff.) at ¶¶ 22 (“My research had led me to understand that the Commodore Complex has had multiple uses and it has had 2 [fire] certificates of occupancy, one for the area that contains the Squash Club and the space referred to as the Exercise Room or Western Dining Area and one that contains the Commodore Condominiums and in latter [sic] years, the Commodore Restaurant for as long as we have records, which is 1981.”). See also Reply to Respondent’s Amended Memorandum in Support for Motion for Summary Disposition at 8 (Nov. 27, 2018) [“At the request of Respondent, Fire Safety Manager Wiese pulled and reviewed all of the Fire Certificates of Occupancy on file with DSI. She concluded that there were two Fire Certificates of Occupancy on the 79 Western property. One covered the Squash Club which included the Exercise Room (now the Western Dining Area) and the other covered the Condominiums and Commodore Restaurant (*as a secondary use*).”] (emphasis added). There is no evidence in the record that any fire certificate of occupancy issued to 79 Western Avenue identified a restaurant, a restaurant occupancy, or a restaurant use. The Administrative Law Judge is confused by the City Attorney’s representation (and the City’s apparent concession) that fire COO No. 15384 authorizes occupancy and use for restaurant, bar, or dining purposes.

<sup>120</sup> Wiese Aff. at ¶¶ 26; Exs. 56-41, 56-42, 56-43, 56-44, 56-46. It is unclear in the record why four of the fire certificates of occupancy issued to 79 Western Avenue for an “Amusement/Recreation Center” in 2015 were addressed to two different individuals and sent to three different addresses: Christopher Engelman (at two different addresses) and “John” (address is typed over). See Exs. 56-41, 56-42, 56-43, 56-44.

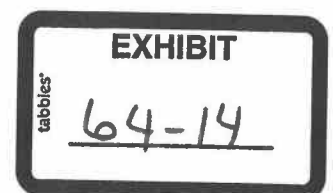
<sup>121</sup> Wiese Aff. at ¶¶ 26; Exs. 56-45 (2016), 56-47 (2018).

<sup>122</sup> Ex. 53-8.

<sup>123</sup> Exs. 23-3, 23-4; 56-52, 56-53.

<sup>124</sup> Ex. 23-6.

<sup>125</sup> Ubl Aff. at ¶¶ 62-64.



The Building Permit for the 2012 project remains open and has not been "finalized."<sup>126</sup> Until "finalized," no certificate of occupancy will be issued by the City.<sup>127</sup>

#### **E. F. Whiskey A Go-Go Event September 13, 2016**

On September 13, 2016, The Commodore hosted a "Whiskey A Go-Go" event.<sup>128</sup> DSI Inspector Thomas Ferrara was assigned to attend the event.<sup>129</sup> Mr. Ferrara was instructed to investigate how The Commodore was using the Western Dining Area.<sup>130</sup>

Mr. Ferrara witnessed that the Western Dining Area was being utilized for the "Whiskey A Go-Go" event and was open to members of the public who purchased tickets to attend the private party.<sup>131</sup> Mr. Ferrara saw that the Western Dining Area was full of tables and chairs, and the room was at near seating capacity.<sup>132</sup> Mr. Ferrara also observed a cash bar in the corner of the room and alcohol being served to guests.<sup>133</sup>

Licensee does not deny that the Western Dining Area was being used for the "Whiskey A Go-Go" event on September 13, 2016.<sup>134</sup> Licensee further admits that the Western Dining Area is currently being regularly used for restaurant, dining, and bar purposes as part of The Commodore bar and restaurant.<sup>135</sup>

#### **G. Notice of Violation and Adverse Action**

On January 19, 2017, the City sent Licensee a Notice of Violation and Intent to Impose License Conditions.<sup>136</sup> The Notice stated that the City was seeking to: (1) impose a \$700 penalty; and (2) add the following condition to Licensee's liquor and entertainment licenses:<sup>137</sup>

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

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<sup>126</sup> *Id.* at ¶ 47(f).

<sup>127</sup> *Id.* at ¶ 47(g).

<sup>128</sup> Affidavit of Thomas Ferrara (Ferrara Aff.) at ¶ 25.

<sup>129</sup> *Id.* at ¶ 22.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at ¶ 25.

<sup>132</sup> *Id.* at ¶ 26.

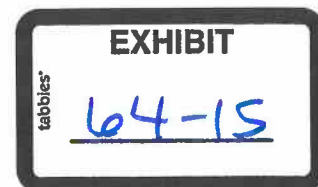
<sup>133</sup> *Id.* at ¶¶ 26-27.

<sup>134</sup> See statements of John Rupp, Digital Recording of Oral Argument (Aug. 21, 2019) (on file with the Minn. Office Admin. Hearings). See also, Respondent's Memorandum in Response to Petitioner's Revised Memorandum of Law in Support of City's Motion for Summary Disposition at 11 (Nov. 27, 2018).

<sup>135</sup> See statements of John Rupp, Digital Recording of Oral Argument (Aug. 21, 2019) (on file with the Minn. Office Admin. Hearings). See also, Respondent's Memorandum in Response to Petitioner's Revised Memorandum of Law in Support of City's Motion for Summary Disposition at 11 (Nov. 27, 2018).

<sup>136</sup> Ex. 61.

<sup>137</sup> *Id.*



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.

The Notice alleged violations of St. Paul Legislative Code (St. Paul Leg. Code) §§ 310.06(b)(3), (5), (6)(a), (6)(c), and (8).<sup>138</sup>

Licensee timely filed a request for an appeal on January 27, 2017.<sup>139</sup>

#### **F. H. Commencement of Administrative Action**

On April 5, 2017, the City issued a Notice and Order for Prehearing Conference, thereby commencing this administrative action.<sup>140</sup> The City issued an Amended Notice and Order for Prehearing Conference on May 31, 2017 (Amended Order for Hearing).<sup>141</sup>

The Amended Order for Hearing identified the following as violations:<sup>142</sup>

**Issue 1:** Licensee's actions in allowing occupancy of, and the sale of alcohol in, the Western Dining Area on September 13, 2016, violated St. Paul Leg. Code (St. Paul Leg. Code) § 409.08.

**Issue 2:** Licensee's actions in allowing occupancy of the Western Dining Area without a Certificate of Occupancy, without obtaining the necessary permits for work performed within the Western Dining Area, violated St. Paul Leg. Code § 310.05(m)(5), because it amounts to a commission of a crime other than a felony on the premises by the Licensee.

**Issue 3:** Licensee's actions in allowing occupancy of the Western Dining Area without a Certificate of Occupancy, and without zoning approval, violated St. Paul Leg. Code § 310.06(b)(3).

**Issue 4:** Licensee's actions in allowing occupancy of the Western Dining Area without a Certificate of Occupancy violated Condition 9 of its liquor and entertainment licenses in violation of St. Paul Leg. Code § 310.06(b)(5).

**Issue 5:** Licensee actions in finishing the Western Dining Area without the required permits, failing to obtain zoning approval for the space, and

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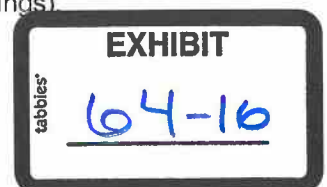
<sup>138</sup> *Id.*

<sup>139</sup> Ex. 62.

<sup>140</sup> Notice and Order for Prehearing Conference (Apr. 5, 2017).

<sup>141</sup> Amended Notice and Order for Prehearing Conference (May 31, 2017).

<sup>142</sup> *Id.*, as clarified by the Administrative Law Judge at the Oral Argument on June 28, 2018. See Digital Recording of Oral Argument (June 28, 2018) (on file with the Minn. Office of Admin. Hearings).





allowing occupancy of the Western Dining Area without a Certificate of Occupancy violated St. Paul Leg. Code § 310.06(b)(6)(a).

**Issue 6:** Licensee's continued use and repeated occupancy of the Western Dining Area without a Certificate of Occupancy for that space violated St. Paul Leg. Code § 310.06(b)(6)(c).

**Issue 7:** Licensee's occupancy and use of the Western Dining Area without completing the required plan review, without obtaining the required building permits, without completing the required building inspections, without obtaining a Certificate of Occupancy, and without obtaining required zoning authority violated St. Paul Leg. Code § 310.06(b)(8).

The parties' cross motions for summary disposition followed as more fully described above.

## II. Standard of Review

Summary disposition is the administrative law equivalent of summary judgment.<sup>143</sup> A motion for summary disposition shall be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law.<sup>144</sup> The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition of contested case matters.<sup>145</sup>

The function of the Administrative Law Judge on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine factual issues exist.<sup>146</sup> In other words, the Administrative Law Judge does not weigh the evidence; instead, the judge views the facts and evidence in a light most favorable to the non-moving party.<sup>147</sup>

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.<sup>148</sup> A fact is material if its resolution will affect the outcome of the case.<sup>149</sup> If the moving party meets the initial burden, then the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.<sup>150</sup> A genuine issue is not a "sham or frivolous" one and it cannot rely on mere allegations or

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<sup>143</sup> *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); see also Minn. R. 1400.5500(K) (2017).

<sup>144</sup> See *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985).

<sup>145</sup> Minn. R. 1400.6600 (2017).

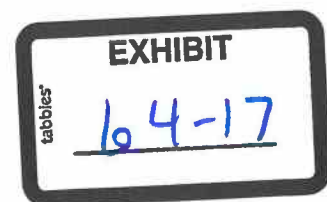
<sup>146</sup> See, e.g., *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

<sup>147</sup> See *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

<sup>148</sup> See *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

<sup>149</sup> See *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996) (citing *Zappa v. Fahey*, 245 N.W.2d 258, 259-260 (Minn. 1976)).

<sup>150</sup> See *Thiele*, 425 N.W.2d at 583.



denials.<sup>151</sup> Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.<sup>152</sup>

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.<sup>153</sup> Thus, summary disposition is only proper when no fact issues need to be resolved.<sup>154</sup>

When parties file cross motions for summary disposition, they tacitly agree that no genuine issues of material fact exist.<sup>155</sup> However, if genuine issues of material fact do exist, the parties' cross motions will not obviate the need for a hearing on the factual questions.<sup>156</sup> As a result, in cross motions for summary disposition, each party is both a moving party and a non-moving party.<sup>157</sup> Thus, each party has the burden to show the absence of any genuine issue of material fact, and each party is entitled to have the facts and evidence viewed in a light most favorable to it.<sup>158</sup>

### III. Analysis

The parties have brought cross motions for summary disposition, both claiming that there is no dispute of material fact and that an application of law to those facts warrants summary disposition. The City's Amended Order for Hearing sets forth seven alleged violations, all of which are based (for purposes of the parties' motions) on whether Licensee had a valid certificate of occupancy permitting use and occupancy of the Western Dining Area on September 13, 2016.

#### A. VIOLATION #1: Violation of St. Paul Leg. Code § 409.08 Sale of Alcohol in, and Occupancy of, Western Dining Area

The first violation set forth in the Amended Order for Hearing alleges that Licensee's actions in allowing occupancy of, and the sale of alcohol in, the Western Dining Area on September 13, 2016, violated St. Paul Leg. Code § 409.08. The City argues that Licensee lacked a certificate of occupancy for the Western Dining Area as of September 13, 2016, and, because Licensee has admitted to the sale of alcohol to the public in the Western Dining Area on September 13, 2016, there is no dispute of material fact that Licensee violated St. Paul Leg. Code § 409.08.

Licensee agrees that summary disposition is appropriate on this violation. Licensee, however, claims that the Western Dining Area was, in fact, subject to valid and unrevoked certificates of occupancy applying to the Western Dining Area at the time of

<sup>151</sup> See *Highland Chateau, Inc. v. Minnesota Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984) (citing *A & J Builders, Inc. v. Harms*, 179 N.W.2d 98, 103 (Minn. 1970)).

<sup>152</sup> See Minn. R. Civ. P. 56.05.

<sup>153</sup> See *Sauter*, 70 N.W.2d at 353.

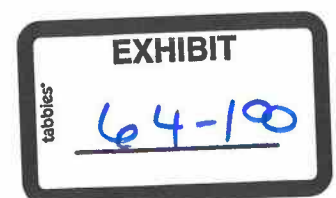
<sup>154</sup> See *id.*

<sup>155</sup> See *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 610 (Minn. 2012).

<sup>156</sup> See *AAA Striping Servs. Co. v. Minnesota Dep't of Transp.*, 681 N.W.2d 706, 718 (Minn. Ct. App. 2004) (citation omitted).

<sup>157</sup> See *Home Mut. Ins. Co. v. Snyder*, 356 N.W.2d 780, 783 (Minn. Ct. App. 1984).

<sup>158</sup> *Id.*



the alleged violation. Therefore, Licensee asserts that, as a matter of law, it was not in violation of Section 409.08 and the violation should be summarily dismissed.

### 1. Applicable Law

St. Paul Leg. Code § 409.08(3) provides, “[no] sale [of alcohol] shall be made in any place or in part of a building where such sales are prohibited by state law or this chapter.” Section 409.08 applies to Licensee’s on-sale liquor licenses.<sup>159</sup>

Minnesota law requires that a building or structure have a certificate of occupancy before it can be used or occupied.<sup>160</sup> According to Minn. R. 1300.0220, subp. 1:

*No building or structure shall be used or occupied and no change in the existing occupancy classification of a building, structure, or portion of a building or structure shall be made until the building official has issued a certificate of occupancy for the building or structure under this part. Issuance of a certificate of occupancy is not approval of a violation of the code or other ordinances of the municipality. Certificates presuming to give authority to violate or cancel the code or other ordinances of the municipality are not valid.*<sup>161</sup>

Consequently, occupancy of a building or structure without a certificate of occupancy is unlawful and a violation of the State Building Code.<sup>162</sup>

An exception to this rule exists, however, for uses and occupancies that predate the adoption of the State Building Code. According to Minn. R. 1300.0220, subp. 2, “[t]he legal occupancy of any structure existing on the date of adoption of the [Minnesota State Building Code<sup>163</sup>] shall be permitted to continue *without change*.”<sup>164</sup> Consequently, no certificate of occupancy is required for buildings that existed prior to the adoption of the State Building Code unless there has been a change in the legal occupancy of the property<sup>165</sup> or to the occupancy classification of the property.<sup>166</sup>

The rule further states that “[c]hanges in the character or use of an existing structure must comply with chapter 1305 or 1311.”<sup>167</sup> Chapter 1305 adopts the International Building Code (IBC). Chapter 1311 adopts the International Existing Building Code, applying to the rehabilitation of buildings existing prior to the adoption of the IBC. This means that, when there is a change in the character or use of an existing structure, the structure must be brought into compliance with the current building codes.

<sup>159</sup> See St. Paul Leg. Code § 409.05.

<sup>160</sup> Minn. R. 1300.0220, subp. 1 (2019).

<sup>161</sup> Emphasis added.

<sup>162</sup> Minn. R. 1300.0140 (2019).

<sup>163</sup> See Minn. R. 1300.0070, subp. 8 (2019) (defining the word “code” for purposes of Minn. R. 1300.0220).

<sup>164</sup> Minn. R. 1300.0220, subp. 2 (emphasis added).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at subp. 1.

<sup>167</sup> *Id.* at subp. 3.



## 2. Parties' Arguments

The City relies on Minn. R. 1300.0220, subp. 1 in bringing this action. Because Rule 1300.0220 references the “building official” as the individual issuing the certificate of occupancy, the type of certificate of occupancy required by Rule 1300.0220 is a *building* certificate of occupancy, not a fire certificate of occupancy. The difference between the two types of certificates of occupancy are discussed, in detail, below.

It is undisputed that the Original Hotel Building, including the Original Restaurant, predates the State Building Code, which was initially adopted in 1972.<sup>168</sup> Therefore, the Original Restaurant would only require a building certificate of occupancy under Rule 1300.0220 if there was a change to the “occupancy classification”<sup>169</sup> or if there were changes to the character or use of the structure.<sup>170</sup> The Original Restaurant is not at issue in this case and, therefore, the Administrative Law Judge need not determine whether a building certificate of occupancy was required for the Original Restaurant after the completion of renovations in 2015.

In contrast, the Western Addition was first built in 1976 and reconstructed in the early 1980s. Therefore, the Western Addition, including the Western Dining Area, is required to have a certificate of occupancy issued by a building official pursuant to Minn. R. 1300.0220, subp. 1.

The City does not dispute that the Western Addition was reconstructed in the early 1980s using the 1976 City-approved plans. Those plans identify the Western Dining Area as a “future dining room.” When the reconstruction of the Western Addition was completed, a building certificate of occupancy was issued for that building (i.e., the 1981 Certificate of Occupancy). The 1981 Certificate of Occupancy authorizes the occupancy of the building for use only as “racquet ball courts.”

The City asserts that, while the 1981 Certificate of Occupancy was issued to the Western Addition (including the “future dining area”), it did not authorize any part of the addition for use as a restaurant or bar, or for dining purposes; it only authorized the occupation of the structure for “racquet ball courts.” According to the City, at the time of issuance of the 1981 Certificate of Occupancy, the Western Dining Area was merely “raw space” that remained unfinished and unoccupied, awaiting completion and occupation at a future date.<sup>171</sup> The City argues that, because the use and occupancy of the Western Dining Area has substantially changed since the issuance of the 1981 Certificate of

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<sup>168</sup> 1971 Minn. Laws ch. 561, § 2 at 1019 and § 4 at 1020 (effective July 1, 1972). See also *Cullen v. City of Minneapolis*, 2010 WL 1541220 \* 2 (Minn. Ct. App. 2010) (declaring that “[t]he State Building Code was adopted in 1972.”). The State Building Code was adopted statewide in 1977 with mandatory adoption by all municipalities in 1978. See 1977 Minn. Laws ch. 381, § 2 at 848-49; Minn. Stat. § 16.851, subd. 1 (1976). See also <https://www.dli.mn.gov/sites/default/files/pdf/code-adoption.pdf> (describing the history of the State Building Code).

<sup>169</sup> Minn. R. 1300.0220, subp. 1.

<sup>170</sup> *Id.* at subps. 2, 3.

<sup>171</sup> Ubl Supp. Aff. at ¶¶ 12, 13.



Occupancy, a new building certificate of occupancy is required before it can be used as a restaurant dining room ancillary to the Original Restaurant.

Licensee agrees that the 1981 Certificate of Occupancy was issued to the entire Western Addition, including the Western Dining Room. Licensee adds that the 1981 Certificate of Occupancy has not been revoked. As a result, Licensee claims that the Western Dining Area was, therefore, covered by the 1981 Certificate of Occupancy on September 13, 2016, and no violation occurred.

Licensee further asserts that there has been no change in use or occupancy of the Western Dining Area since issuance of the 1981 Certificate of Occupancy. According to Licensee, the 1976 plans indisputably identify this space as a "future dining area" and it remains a dining area to this date. Licensee contends that use of the Western Dining Area as an exercise room -- or a restaurant -- was never "legally established" over the years. Consequently, Licensee maintains that the use and occupancy of the space as a "dining area" has not changed, and a new building certificate of occupancy is not required.

In addition, or in the alternative, Licensee argues that the Western Dining Area was covered by unrevoked fire certificates of occupancy as of September 13, 2016. According to Licensee, the fire certificates of occupancy apply to the Western Dining Area, therefore, negate the violation asserted by the City.

### 3. Analysis

As set forth above, it is undisputed that, when the Western Addition was reconstructed in the early 1980s, the Western Dining Area was identified as a "future dining area," consistent with the 1976 approved plans. It is further undisputed that a building certificate of occupancy was issued for the structure when the Western Addition was completed (i.e., the 1981 Certificate of Occupancy). The 1981 Certificate of Occupancy identified the occupancy of the structure as "racquet ball courts." It did not identify any use or occupancy for dining, restaurant, or banquet purposes.

The unrefuted evidence further establishes that the Western Dining Area, while historically labelled as a "future dining area," was not actually being used as a restaurant dining space until its renovation was completed in 2015. While originally intended to be a "future dining area," the space had other uses or intended uses over the years.

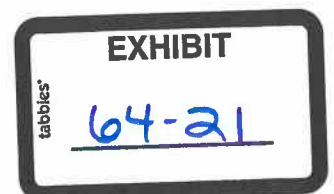
The remodeling plans submitted to the City in 1987 label the Western Dining Room as an "exercise room."<sup>172</sup> These plans also depict a solid wall between the Western Dining Area and the Original Restaurant.<sup>173</sup> Pictures from 2000 are consistent with the 1987 plans and show the space being used as an exercise room.<sup>174</sup> By 2004, the use of the

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<sup>172</sup> Exs. 57-1, 57-2.

<sup>173</sup> Exs. 57-1, 57-2; Ubl Supp. Aff. at ¶ 14.

<sup>174</sup> Ubl Aff. at ¶ 26; Ex. 13.



space had changed. Pictures in a 2004 Certificate of Survey depict an empty room, with no finished ceiling, and describe it as a “Proposed Banquet Room Parcel.”<sup>175</sup>

Licensee has presented no evidence that the Western Dining Area was ever actually used as a restaurant dining room until after the renovation was completed in 2015.<sup>176</sup> Licensee only contends that the space remained a “future dining room” in the years prior to renovation.

Whether the room remained vacant as a “future dining room” or “proposed banquet room” -- or whether it was an exercise room -- the material fact is it was not being used as an actual dining room or restaurant space in 1981 when the building certificate of occupancy was issued. The 1981 Certificate of Occupation only authorized occupation of the Western Addition for “racquet ball courts.”

The International Building Code (IBC), as adopted in the State Building Code, sets forth occupancy classifications.<sup>177</sup> Restaurants, cafeterias, dining facilities, banquet halls, bars, and taverns are all A-2 occupancy classifications.<sup>178</sup> Amusement centers and indoor tennis courts are A-3 occupancy classifications.<sup>179</sup>

When the 1981 Certificate of Occupancy was issued to the Western Addition, the authorized occupancy for the entire addition was “racquet ball courts,” which is an A-3 occupancy classification. While the “future dining area” was included in the Western Addition building, for which the 1981 Certificate of Occupancy was issued, the certificate did not authorize occupancy for any portion of the building (including the “future dining area”) to be used for dining, restaurant, bar, or banquet purposes.

Once the renovation was completed in 2015, the use and occupancy of the Western Dining Area substantially changed and the space began being used as a bar, restaurant, dining area, or banquet space -- all of which fall under an A-2 occupancy classification. Thus, instead of being a vacant, “future dining area” in a building authorized only for A-3 (“racquet ball courts”) occupancy, the Western Dining Area became an actual dining and restaurant space open to the public. This change in use of the Western Dining Area resulted in a change in occupancy classification for that portion of the building, thus

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<sup>175</sup> Ex. 14 (Survey in entirety).

<sup>176</sup> In its Response to the City’s Revised Motion, Licensee asserts that “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.” See Respondent’s Memorandum in Response to Petitioner’s Revised Memorandum of Law in Support of City’s Motion for Summary Disposition at 16 (Nov. 27, 2018). Contrary to the citation given for this proposition, the First Affidavit of John Rupp paragraph 33 does not state that Mr. Rupp has continuously used the Western Dining Area as part of his restaurant or catering business. Indeed, there has been no evidence presented that the Western Dining Area was being used as an operating dining room or as part of the The Commodore restaurant at any time prior to the renovation that began in 2012.

<sup>177</sup> International Building Code § 303.3, adopted by Minnesota pursuant to Minn. Stat. § 326B.106 (2018) and Minn. R. 1305.0011, subp. 1 (2019).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* Indoor tennis courts with spectator seating are A-4 occupancy classifications.



triggering the need for a new building certificate of occupancy under Minn. R. 1300.0220, subp.1.

According to Minn. R. 1300.0220, subp. 1, “. . . no change in the existing occupancy classification of a building . . . or portion of a building . . . shall be made until the building official has issued a certificate of occupancy. . . .” Thus, a new building certificate of occupancy was required for the Western Dining Area before it could be used for that new, A-2 occupancy classification.

Consistent with the requirements of Minn. R. 1300.0220, the City’s designated Building Official has determined that a new building certificate of occupancy was required for the Western Dining Area before it could be used for restaurant dining, bar, or banquet hall purposes.<sup>180</sup> To date, the Building Official has refused to issue either a temporary or permanent building certificate of occupancy for the Western Dining Area.<sup>181</sup> Licensee may disagree with the Building Official’s determination, but the fact such determination has been made cannot be disputed.

The City’s Building Official is authorized to enforce the State Building Code and render interpretations of the Code.<sup>182</sup> Mr. Ubl has rendered a determination that a new building certificate of occupancy was required before the Western Dining Area could be used and occupied as a restaurant dining area.<sup>183</sup> To dispute that determination, Licensee must appeal to the City’s Board of Appeals or the State Building Code Appeals Board.<sup>184</sup> There is no evidence that Licensee filed such an appeal. Therefore, the Building Official’s determination stands as a final determination for purposes of this proceeding.

It is apparent that Licensee is seeking to utilize this administrative appeal to litigate whether the City has improperly denied the issuance of a building certificate of occupancy to the Western Dining Area. However, this is the wrong venue for such an action. The law specifically provides that challenges to a building official’s “determinations” related to the issuance of certificates of occupancy must be brought to the local or state board of appeals.<sup>185</sup> Therefore, if Licensee believes that it has been wrongly denied a building certificate of occupancy, it must follow the established procedure for challenging the building official’s determination. A licensing action is not the proper venue for such a contest and the Administrative Law Judge has no authority to require the City’s Building Official to issue a certificate of occupancy for the property.

Licensee has attempted to draw attention away from Minn. R. 1300.0220 by citing to various *fire* certificates of occupancy that have been issued to parts of the Commodore Complex over the last forty years, none of which were specific to the Western Dining Area. Fire certificates of occupancy issued under St. Paul Leg. Code Ch. 40 are different

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<sup>180</sup> Ubl Supp. Aff. at ¶¶ 2, 11

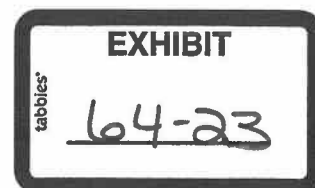
<sup>181</sup> Ubl Aff. at ¶¶ 62-64.

<sup>182</sup> Minn. Stat. § 326B.133, subd. 1 (2018); Minn. R. 1300.0110, subp. 1 (2019).

<sup>183</sup> Ubl Aff. at ¶¶ 62-64; Ubl Supp. Aff. at ¶¶ 11, 27.

<sup>184</sup> Minn. R. 1300.0230, subp. 1 (2019).

<sup>185</sup> *Id.*



and distinct from building certificates of occupancy issued under the State Building Code, Minn. R. 1300.0220.<sup>186</sup>

Building certificates of occupancy required under Rule 1300.0220 are documents:

. . . issued *by the city building official* under the authority of both state and city building codes indicating that a newly constructed *or substantially rehabilitated structure* is, at the time of inspection, code compliant, habitable, and otherwise meets all requirements *for its intended use*.<sup>187</sup>

As this provision states, building certificates of occupancy are: (1) issued by the building official; (2) upon initial construction or upon substantial rehabilitation of a structure; and (3) authorize a particular use and occupancy of the building or structure for the “intended use.”<sup>188</sup>

Fire certificates of occupancy, on the other hand, are: (1) issued by the fire code official;<sup>189</sup> (2) on a period or regular schedule;<sup>190</sup> (3) to certify that an existing building can *continue* to be used and occupied for the purposes *originally established* by the building certificate of occupancy.<sup>191</sup> If the use or occupancy of the building or portion thereof changes, the structure “must meet all requirements of law, *including the requirement of a [building] certificate of occupancy* before being used for such new or changed use.”<sup>192</sup> In other words, fire certificates of occupancy certify that, at the time of the periodic inspection, the existing structure complies with safety codes applicable to the use and occupancy *then existing*.<sup>193</sup> Once the use and occupancy classification of a building or portion thereof changes, both a new building and fire certificate of occupancy are required.<sup>194</sup>

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<sup>186</sup> See, St. Paul Leg. Code § 40.03, which defines the difference as follows:

*Certificate of occupancy.* A document issued by the city building official under the authority of both state and city building codes indicating a newly constructed or substantially rehabilitated structure is, at the time of inspection, code compliant, habitable and otherwise meets all requirements for its intended use.

*Fire certificate of occupancy.* A document or emblem issued by the department of safety and inspections indicating the existing structure complies with all state and local safety codes allowing its use as a commercial building or for residential occupancy. Buildings and dwellings cannot be occupied or used without a fire certificate of occupancy.

<sup>187</sup> St. Paul Leg. Code § 40.03 (definition of “certificate of occupancy”) (emphasis added).

<sup>188</sup> *Id.* (definition of “certificate of occupancy”).

<sup>189</sup> *Id.* (definition of “fire code official”).

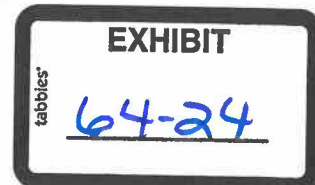
<sup>190</sup> St. Paul Leg. Code §§ 40.05(2) (approximately every three years for commercial property).

<sup>191</sup> St. Paul Leg. Code § 40.01(a) (“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.”) (Emphasis added.); St. Paul Leg. Code § 40.03 (definition of “fire code official”); St. Paul Leg. Code § 40.09(c).

<sup>192</sup> St. Paul Leg. Code § 40.09(c).

<sup>193</sup> St. Paul Leg. Code § 40.03 (definition of “fire certificate of occupancy”) (emphasis added).

<sup>194</sup> Minn. R. 1300.0220, subs. 1, 2; St. Paul Leg. Code § 40.09(c).





The City is only claiming a failure to comply with Minn. R. 1300.0220, which relates to building certificates of occupancy. Thus, whether or not Licensee had a fire certificate of occupancy applicable to the Western Addition, as a whole, is not dispositive to the issues presented in the City's Motion for Summary Disposition.

That being said, the undisputed facts establish that Licensee was required to have, but did not obtain, a fire certificate of occupancy to utilize the Western Dining Room as a restaurant, bar, or dining area as of September 13, 2016. The only use authorized by the fire certificates of occupancy were for recreation and amusement center purposes.

The St. Paul Fire Code is clear:

If the use or occupancy of a fire certificate of occupancy premise[s] changes, it shall immediately be required to meet all requirements of law, including the requirement for a [building] certificate of occupancy before being used for such new or changed use. No change in the existing occupancy classification of a building or portion thereof shall be made, until the fire code official has issued a fire certificate of occupancy as provided herein.<sup>195</sup>

Upon discovering the change of use and occupancy of the Western Dining Area in 2015, the City has refused to issue or renew *any* certificates of occupancy *applicable to the Western Dining Area*.<sup>196</sup> While the City did renew a fire certificate of occupancy for the Western Addition in 2015 and 2018,<sup>197</sup> it only renewed them for use of the addition as an "amusement/recreation center assembly," an A-3 occupancy.<sup>198</sup> This allowed the Squash Club to continue operating in that building.<sup>199</sup> The City did not issue fire certificates of occupancy for any A-2 occupancy, which would be required before any portion of the Western Addition could be used as a restaurant, dining hall, or bar.<sup>200</sup>

Similarly, while the City did issue a temporary certificate of occupancy to the Original Restaurant on November 30, 2015, it specifically excluded the Western Dining Area from that certificate.<sup>201</sup> Mr. Rupp argues that he understood the temporary certificate

<sup>195</sup> St. Paul Leg. Code § 40.09(c).

<sup>196</sup> Exs. 23-3, 23-4, 25; Ubl Aff. at ¶¶ 62-64.

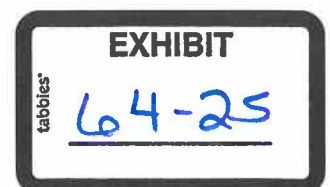
<sup>197</sup> Exs. 56-41 (2015), 56-42 (2015), 56-43 (2015), 56-44 (2015), 56-56-46 (2018); Wiese Aff. at ¶ 26.

<sup>198</sup> Exs. 56-41 (2015), 56-42 (2015), 56-43 (2015), 56-44 (2015), 56-56-46 (2018); Wiese Aff. at ¶¶ 26, 28, 29.

<sup>199</sup> Had the City not renewed the fire certificate of occupancy for the Western Addition (fire COO No. 76432), the Squash Club would not be able to continue operating out of the building while this matter proceeded. The 2015 and 2018 fire certificates of occupancy (fire COO No. 76432) authorize the Squash Club to continue operating out of the Western Addition because the Squash Club is an A-3 use permitted under both the 1981 Certificate of Occupancy and the fire certificates of occupancy allowing "amusement/recreation center" use.

<sup>200</sup> Like with the building certificate of occupancy, if Licensee seeks to challenge the City's refusal to issue a fire certificate of occupancy for the Western Dining Area, Licensee must follow the appellate process set forth in St. Paul Leg. Code Ch. 40. This proceeding is not the appropriate venue for such action.

<sup>201</sup> Ex. 23-6.



of occupancy for the Original Restaurant also applied to the Western Dining Area. However, the undisputed facts prove Mr. Rupp's understanding to be erroneous.

On May 25, 2016, the City clearly advised Mr. Rupp and Licensee that the Western Dining Area did not have the required certificates of occupancy to be used "for any purpose" and specifically instructed Mr. Rupp as to the steps required before the City would issue such certificates.<sup>202</sup> Licensee acknowledges receipt of this letter but took issue with the City's determinations.<sup>203</sup>

Despite the City's clear warning, Licensee used, occupied, and served liquor in the Western Dining Area on September 13, 2016, at a time when the Western Dining Area did not have a building or fire certificate of occupancy permitting such A-2 use. Licensee does not dispute its use and occupancy of the Western Dining Area to serve alcohol to the public on September 13, 2016. Accordingly, the undisputed facts establish that Licensee was in violation of Minn. R. 1300.0220 and St. Paul Leg. Code §§ 40.09(c) and 409.08(3) on September 13, 2016. The City's Motion for Summary Disposition on this issue is, therefore, **GRANTED**, and Violation #1 is **AFFIRMED**.

**B. VIOLATION # 2: Violation of St. Paul Leg. Code § 310.05(m)(5)  
Commission of a Misdemeanor Offense on the Licensed Premises by Licensee**

The second violation alleged in the Amended Order for Hearing asserts that Licensee committed misdemeanor offenses by: (1) allowing occupancy of the Western Dining Area on September 13, 2016, without having a certificate of occupancy for that portion of the building; (2) remodeling the Western Dining Area without obtaining the necessary permits for the work performed; and (3) allowing occupancy of the Western Dining Area in violation of the City's Zoning Code. According to the City, St. Paul Leg. Code § 310.05(m)(5) authorizes the City to take adverse action when a crime, other than a felony, is committed on the licensed premises by a licensee or employee.

**1. Applicable Law and City's Claims**

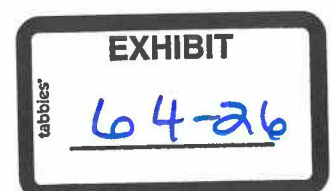
Minn. R. 1300.0150 (2019) provides that a violation of the Minnesota State Building Code is a misdemeanor offense. The City asserts that by allowing use and occupancy of the Western Dining Area on September 13, 2016, Licensee committed a violation of Minn. R. 1300.0220 (as set forth above) and has committed a criminal offense. However, there is no evidence in this case that the City has charged or convicted Licensee of this alleged misdemeanor offense.

St. Paul Leg. Code § 33.03 provides that "[n]o person shall construct, enlarge, *alter*, repair, move, demolish, or *change the occupancy* of a building or structure without

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<sup>202</sup> Ex. 25.

<sup>203</sup> Respondent's Memorandum in Response to Petitioner's Revised Memorandum of Law in Support of City's Motion for Summary Disposition (Nov. 27, 2018) at 11.



first obtaining a building permit from the building official. . . ."<sup>204</sup> Section 33.09 of the Code makes a violation Section 33.03 a misdemeanor offense.<sup>205</sup>

The City contends that Licensee altered and changed the occupancy of the Western Dining Area without first obtaining a building permit for the work and has, thus, committed a misdemeanor offense. It is undisputed that a Building Permit was issued on August 30, 2012. The City does not identify what particular work was performed by Licensee that required permits or what permits were not obtained. The City merely asserts that Licensee performed work on the Western Dining Area that was not specifically authorized in the Building Permit issued in this case. As a result, a genuine issue of fact exists as to whether the work performed on the Western Dining Area was included in the Building Permit issued. There is also no evidence or allegation that the City has charged or convicted Licensee of any misdemeanor offense.

St. Paul Leg. Code § 61.907 provides that a violation of the City's Zoning Code is a misdemeanor offense. The City asserts that Licensee has violated unspecified portions of the City's Zoning Code by allowing occupancy of the Western Dining Area for restaurant, bar, or banquet purposes on September 13, 2016, and, thus, committed a misdemeanor offense. The City has not identified which particular provision of the City's Zoning Code Licensee has alleged to have violated. In addition, there is no evidence that the City has charged or convicted Licensee of any misdemeanor offense.

## 2. Analysis

St. Paul Leg. Code § 310.05(m) sets forth a penalty matrix for violations – it does not establish a basis for taking adverse action against a license. The bases for adverse action are set forth in St. Paul Leg. Code § 310.06(b).

The City has not established that Licensee has committed a misdemeanor offense. There is no evidence that any criminal charge has been brought against Licensee or that Licensee has been convicted of a criminal offense. Therefore, the City's Motion for Summary Disposition on this claim is **DENIED** and Licensee's Motion is **GRANTED**. Violation #2 is **DISMISSED**.

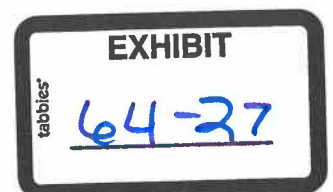
The Administrative Law Judge notes that the proper authority for the City's claims actually rests in St. Paul Leg. Code § 310.06(b)(6)(a) and is addressed in Section E below.

### C. VIOLATION #3: Violation of St. Paul Leg. Code § 310.06(b)(3) Failure to Comply with Building and Zoning Codes

The third violation in the Amended Order for Hearing alleges that Licensee's actions in allowing occupancy of the Western Dining Area without a certificate of occupancy, and without obtaining zoning approval, violated St. Paul Leg. Code § 310.06(b)(3). In its Motion, the City expands its claim to argue that Licensee also

<sup>204</sup> Emphasis added.

<sup>205</sup> St. Paul Leg. Code § 33.09.



allowed occupancy of the Western Dining Area on September 13, 2016, without obtaining required permits and inspections for use of the space.

St. Paul Leg. Code § 310.06(b)(3) provides that adverse action may be taken against a licensee when the licensed premises “do not comply with applicable health, housing, fire, zoning, and building codes and regulations.” Licensee asserts that it had unrevoked fire certificates of occupancy for 79 Western Avenue in place at the time of the alleged violation (September 13, 2016): one for the Western Addition and one for the Commodore Condominium Building and Original Restaurant. According to Licensee, the fire certificates of occupancy establish, as a matter of law, that the two premises were in compliance with all applicable health, housing, fire, zoning, and building codes and regulations.

St. Paul Leg. Code § 40.01(a) provides that “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 general public.”<sup>206</sup> It is unclear in the record when the 2015 fire certificate of occupancy were issued to 79 Western Avenue. However, it is clear in the record that on October 26, 2015, Fire Inspector James Perucca inspected the property for the purposes of renewing the fire certificate of occupancy.<sup>207</sup> *At the time of inspection* on October 26, 2015, Inspector Perucca determined that he would not issue a fire certificate of occupancy for the Western Dining Area until four conditions were met, including obtaining zoning approval and additional permits for the Western Dining Area, because the occupancy and use of the space had changed since the prior inspection.<sup>208</sup> The conditions articulated by Inspector Perucca have not been met and, to date, the City has refused to issue or renew any certificates of occupancy for the Western Dining Area.<sup>209</sup> While a temporary “certificate of occupancy” was issued for The Commodore bar and restaurant on November 30, 2015, that certificate specifically excluded the Western Dining Area.<sup>210</sup>

But even if the fire certificates of occupancy issued to the Western Addition were in effect and not revoked as of September 13, 2016, as Licensee contends, those fire certificates of occupancy only authorized occupancy of the Western Addition for “recreation/amusement assembly” purposes, an A-3 occupancy under the State Fire Code.<sup>211</sup> Licensee was using the space for dining, bar, and restaurant purposes, A-2 uses/occupancies under the State Fire Code.<sup>212</sup> Accordingly, the fire certificates of occupancy did not authorize Licensee’s use of the Western Dining Room as a restaurant dining area on September 13, 2016.

As set forth above in relation to Violation No. 1, the undisputed facts in this case establish that new building and fire certificates of occupancy were required for the

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<sup>206</sup> Emphasis added.

<sup>207</sup> Exs. 23-3, 23-4.

<sup>208</sup> Exs. 23-3, 23-4.

<sup>209</sup> Ubl Aff. at ¶¶ 62-64.

<sup>210</sup> Ex. 23-6.

<sup>211</sup> Wiese Aff. at ¶ 28; Ex. 56-48.

<sup>212</sup> Wiese Aff. at ¶ 28; Ex. 56-48.



Western Dining Area before it could be used for restaurant, dining, or bar purposes. Licensee was, thus, in violation of the State Building Code, Minn. R. 1300.0220, subp. 1, on September 13, 2016, when he allowed occupancy of the Western Dining Area for restaurant/bar purposes. Consequently, the undisputed facts establish that Licensee was in violation of St. Paul Leg. Code § 310.06(b)(3). The City's Motion for Summary Disposition on this issue is, therefore, **GRANTED** and Violation #3 is **AFFIRMED**.

**D. VIOLATION #4: Violation of St. Paul Leg. Code § 310.06(b)(5)  
Violation of License Condition No. 9**

The fourth violation in the Amended Order for Hearing alleges that Licensee breached Condition No. 9 of its liquor licenses. Condition No. 9 provides, "There will be full compliance with City ordinances . . . ." The City asserts that Licensee violated City ordinances when it allowed occupancy of the Western Dining Room on September 13, 2016.

As set forth above, an application of law to the undisputed facts establishes that Licensee violated the State Building Code, Minn. R. 1300.0220, when it allowed use and occupancy of the Western Dining Area on September 13, 2016, at a time when that portion of the premises did not have a building certificate of occupancy permitting such use. St. Paul Leg. Code § 33.02 adopts the State Building Code. Thus, a violation of the State Building Code is a violation of City ordinances. Because Licensee was in violation of City ordinances on September 13, 2016, it also breached its Condition No. 9 of its licenses.

A violation of a license condition is a basis for the City to take adverse action against the license pursuant to St. Paul Leg. Code § 310.06(b)(5). Accordingly, the City's Motion for Summary Disposition on this issue is **GRANTED** and Violation #4 is **AFFIRMED**.

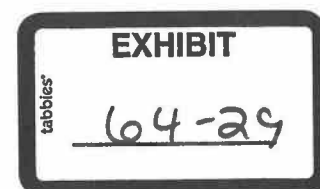
**E. VIOLATION#5: Violation of St. Paul Leg. Code § 310.06(b)(6)(a)  
Violation of Law Reasonably Related to Licensed Activity**

The fifth violation set forth in the Amended Order for Hearing alleges that Licensee violated St. Paul Leg. Code § 310.06(b)(6)(a) when it: (1) "finished the Western Dining Area without the required permits;" (2) failed to obtain zoning approval for use of the Western Dining Area as a restaurant/bar/dining room; and (3) allowed occupancy of the Western Dining Area without a valid certificate of occupancy. The City further asserts that each of these acts arises to a misdemeanor offense, as discussed in Section B above.

St. Paul Leg. Code § 310.06(b)(6)(a) provides that the City may take adverse action against a licensee who "has violated, or performed any act which is a violation of, any of the provisions 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.*"<sup>213</sup>

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<sup>213</sup> Emphasis added.



As explained in detail above, an application of the law to the undisputed facts establishes that Licensee violated Minn. R. 1300.0220 when it allowed occupancy and use of the Western Dining Area on September 13, 2016. Licensee's violation of law is directly related to the licensed activities conducted on the premises. Accordingly, the undisputed facts establish that Licensee is in violation of St. Paul Leg. Code § 310.06(b)(6)(a). The City's Motion for Summary Disposition on this violation is, therefore, **GRANTED** and Violation #5 is **AFFIRMED**.

**F. VIOLATION #6: Violation of St. Paul Leg. Code § 310.06(b)(6)(c)  
Pattern and Practice of Failure to Comply**

The sixth violation set forth in the Amended Order for Hearing alleges that Licensee violated St. Paul Leg. Code § 310.06(b)(6)(c) when it used and occupied the Western Dining Area after being informed "numerous times" that the space lacked a certificate of occupancy.

St. Paul Leg. Code § 310.06(b)(6)(c) authorizes the City to take adverse action against a Licensee when:

The licensee . . . has engaged in or permitted a pattern or practice of conduct or 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.<sup>214</sup>

The City asserts that it had advised Licensee "numerous times" prior to September 13, 2016, that the Western Dining Area could not be used and would not be granted certificates of occupancy until certain requirements were met. The City contends that, despite these warnings, Licensee opened the Western Dining Area to the public. By opening the space to the public, the City argues that Licensee engaged in "a pattern of conduct of failure to comply with the laws *from which an interference of lack of fitness or good character could be drawn.*"<sup>215</sup>

In its argument, the City expressly asks the Administrative Law Judge to make inferences about Licensee's fitness and character. The law is clear that, in a motion for summary disposition, all inferences shall be made in favor of the non-moving party.<sup>216</sup> To grant summary disposition on an issue that requires an inference, there must be no other inferences that could be drawn from the undisputed facts.

With respect to the City's motion, the Licensee is the non-moving party. Therefore, inferences made when considering the City's Motion shall be in Licensee's favor, not in favor of the City. Unless there is no possible alternative inference to be made from Licensee's actions, the Judge must deny summary disposition. Here, Licensee asserts

<sup>214</sup> Emphasis added.

<sup>215</sup> Revised Memorandum of Law in Support of City's Motion for Summary Disposition (Oct. 25, 2018) at 14.

<sup>216</sup> *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn.1981).



that an inference could be made that Licensee, in good faith, challenged the City's determinations and failed to understand its obligations.

But the Administrative Law Judge need not make any inferences to find a violation under St. Paul Leg. Code § 310.06(b)(6)(c). Section 310.06(b)(6)(c) authorizes adverse licensing action when "[t]he licensee . . . has engaged in or permitted a pattern or practice of conduct or 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."<sup>217</sup>

It is clear from the undisputed facts presented that Licensee opened the Western Dining Area to the public despite the City's warning that the space was not authorized for restaurant, bar, or dining purposes. On October 26, 2015, both Building Official Ubl and Fire Inspector Perucca sent Licensee letters advising Licensee that the City would not grant approval for occupancy of the Western Dining Area unless certain conditions were met.<sup>218</sup> It is undisputed that, to date, Licensee has not met those conditions.<sup>219</sup>

Licensee argues that it was confused because a Temporary Certificate of Occupancy was issued on November 30, 2015, and Licensee believed such Temporary Certificate of Occupancy also applied to the Western Dining Area. However, unrefuted evidence presented by the City shows that the Temporary Certificate of Occupancy was issued only to the Original Restaurant, not the Western Dining Area.<sup>220</sup>

But even if Licensee mistakenly understood, as of November 30, 2015, that the Temporary Certificate of Occupancy applied to the Western Dining Area, the City corrected such misunderstanding when, on May 25, 2016, the Deputy Director of the City's DSI, sent Licensee a letter specifically advising that the Western Dining Area lacked a certificate of occupancy and could not be used "for any purpose" until seven items were addressed or remedied.<sup>221</sup> Licensee acknowledges receipt of this letter and, to date, Licensee has not satisfied these conditions.<sup>222</sup>

It is undisputed that Licensee has continued to use and keep the Western Dining Area open to the public for restaurant, bar, and dining purposes continuously throughout the pendency of this action,<sup>223</sup> despite: (1) the City's clear admonition on May 25, 2016, that the Western Dining Area may not be used for such purposes;<sup>224</sup> and (2) the City's refusal to issue any certificates of occupancy authorizing such use of the space.<sup>225</sup>

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<sup>217</sup> St. Paul Leg. Code § 310.06(b)(6)(c) (emphasis added).

<sup>218</sup> Exs. R-11, 23-3, 23-4.

<sup>219</sup> See statements of John Rupp, Digital Recording of Oral Argument (Aug. 21, 2019) (on file with the Minn. Office Admin. Hearings).

<sup>220</sup> Ubl Aff. at ¶ 59, Ex. 23-6.

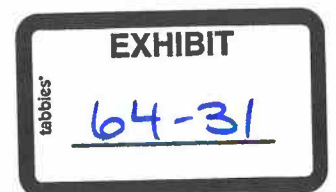
<sup>221</sup> Ex. 25.

<sup>222</sup> Respondent's Memorandum in Response to Petitioner's Revised Memorandum of Law in Support of City's Motion for Summary Disposition (Nov. 27, 2018) at 11.

<sup>223</sup> See statements of John Rupp, Digital Recording of Oral Argument (Aug. 21, 2019) (on file with the Minn. Office Admin. Hearings). See also Respondent's Memorandum in Response to Petitioner's Revised Memorandum of Law in Support of City's Motion for Summary Disposition (Nov. 27, 2018) at 11.

<sup>224</sup> Ex. 25.

<sup>225</sup> Ubl Aff. at ¶¶ 62-64.



Licensee's disagreement with the City's determination – even if such agreement is in good faith -- does not excuse its continued violation of law.

Because use and occupancy of the Western Dining Area for bar, restaurant, and dining (A-2) purposes violates the State Building Code (Minn. R. 1300.0220) and various provisions of the St. Paul Legislative Code (as set forth above), Licensee has engaged in a pattern or practice of failing to comply with the laws reasonably related to the licensed activity. It is, thus, unnecessary to make an inference as to whether Licensee's actions were the result of a lack of fitness or good character. The repeated nature of Licensee's violations (occurring over the course of years) is sufficient to establish a violation of St. Paul Leg. Code § 310.06(b)(6)(c). Accordingly, the City's Motion for Summary Disposition is **GRANTED** and Violation #6 is **AFFIRMED**.

**G. VIOLATION #7: Violation of St. Paul Leg. Code § 310.06(b)(8)  
Unreasonably Annoys, Injures, or Endangers the Public**

The final violation set forth in the Amended Order for Hearing alleges that Licensee violated St. Paul Leg. Code § 310.06(b)(8) when it opened the Western Dining Area to the public without a certificate of occupancy permitting such use. According to the City, the use of the space without a certificate of occupancy endangered the public.

St. Paul Leg. Code § 310.06(b)(8) authorizes the City to take adverse action against a license 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.

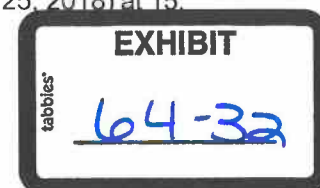
The City argues that the State Building Code sets out "minimum standards for safety."<sup>226</sup> Therefore, by violating Minn. R. 1300.0220, Licensee's actions necessarily endangered the public safety.

Licensee asserts that, as a matter of law, it did not violate Minn. R. 1300.0220 because the Western Dining Area was covered by a certificate of occupancy at all relevant times. As explained above, the Administrative Law Judge has rejected this argument.

In the alternative, Licensee argues that, even if a violation occurred, there is a dispute of fact as to whether the public was endangered by Licensee's action. The Administrative Law Judge agrees. The City has failed to establish any facts – let alone undisputed facts – to show that Licensee necessarily endangered the health, safety, morals, comfort, or repose of the public by opening the Western Dining Area to the public on September 13, 2016. Accordingly, the City's Motion is **DENIED** and Violation #7 shall proceed to a contested case hearing or may be dismissed by the City in the interest of efficiency.

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<sup>226</sup> Revised Memorandum of Law in Support of City's Motion for Summary Disposition (Oct. 25, 2018) at 15.





## H. Doctrine of Equitable Estoppel

Finally, in its Original Motion for Summary Disposition, Licensee argues that the City is estopped from taking action against Licensee because Licensee reasonably relied upon the City's issuance of the Building Permit in 2012 when it remodeled the Western Dining Area. Licensee contends that by, issuing a Building Permit that stated that there was "no change or expansion in use," the City is estopped from requiring new certificates of occupancy or taking adverse action against Licensee.

Licensee's argument fails as a matter of law.

To establish a claim of estoppel against a governmental entity, Licensee must prove that the City made representations or inducements upon which Licensee reasonably relied, and that Licensee will be harmed if the claim of estoppel is not allowed.<sup>227</sup> The undisputed facts in this case establish that the City made no representations or inducements to Licensee.

Licensee submitted a Permit Application without answering the question of whether the remodel would result in a "change or expansion of use."<sup>228</sup> The Permit Application represented that the value of work to be done was \$10,000, indicating a minor remodel.<sup>229</sup>

The Original Plans submitted with the Permit Application clearly marked the Western Dining Area as "Area of Future Work."<sup>230</sup> After filing its Permit Application, Licensee changed its Original Plans to remove the notations of "Area of Future Work" and did not amend its Permit Application to increase the value of the work.<sup>231</sup> Nor did Licensee amend its Permit Application to notify the City that it intended to change and expand the use of the Western Dining Area – a portion of a building only approved for occupancy as an A-3 use (amusement/recreation assembly).<sup>232</sup>

If anything, the facts in this case show that Licensee made arguably misleading representations to the City in its Permit Application and 1<sup>st</sup> Revised Plans. Regardless, the Building Permit, on its face, only authorized work that would not change or expand the existing use of the space – as it existed at the time of the issuance of the Building Permit in 2012, before the start of construction.<sup>233</sup> The use of the space at the time of the issuance of the Building Permit in 2012 was for a "future dining area," as the occupancy load table on the Approved Plans showed.<sup>234</sup>

The City never authorized any change or expansion in use of the Western Dining Area by issuing the Building Permit. Accordingly, there are simply no facts to establish

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<sup>227</sup> See *Brown v. Minnesota Department of Public Welfare*, 368 N.W.2d 906, 910 (Minn. 1985).

<sup>228</sup> Ex. 16.

<sup>229</sup> *Id.*

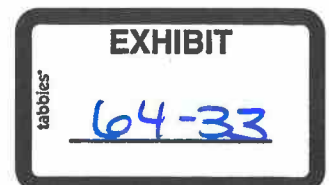
<sup>230</sup> Exs. R-1 and 18.

<sup>231</sup> Ex. R-21, Ex. 16.

<sup>232</sup> Ex. 16.

<sup>233</sup> Exs. 17-1, 17-2.

<sup>234</sup> Ex. 19-14.



that the City made any representations or inducements to Licensee upon which the Licensee relied to its detriment. To the contrary, the representations the City made in issuing the Building Permit were that there was to be no change or expansion in use.

Licensee knew the scope of its intended construction. Licensee knew or should have known the existing occupancy classification of the Western Dining Area, as set forth in the 1981 Certificate of Occupancy and subsequent fire certificates of occupancy. And Licensee knew how it intended to use the space.

There are no facts to support a claim that the City induced Licensee to change the use and occupancy of the Western Dining Area. Nor is there any evidence that the City induced Licensee to open that space to the public despite the City's clear warning not to utilize the Western Dining Area until certain conditions were met.

There is an old adage that states, "It is better to ask forgiveness than permission." In this case, the adage is proven wrong. Had Licensee, in 2012, clearly advised the City, in its Building Permit Application, that it intended to significantly remodel of the Western Dining Area, make it a part of The Commodore restaurant, and change its use to an A-2 occupancy, Licensee may have been able to obtain the approvals it needed to operate the dining area lawfully. Instead, Licensee attempted to obscure the facts at the time of its Permit Application, proceeded with costly renovation, and hoped the City would forgive its expansion of use and occupancy. The City has shown that it does not intend to "forgive" Licensee's actions.

Licensee has failed to establish any facts, let alone undisputed facts, to support a defense of equitable estoppel in this case. Accordingly, Licensee's Motion for Summary Disposition on this defense is **DENIED**, the City's Motion to Dismiss the defense is **GRANTED**, and Licensee's defense of equitable estoppel is **DISMISSED**.

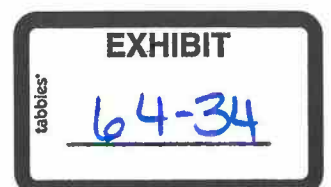
#### I. Imposition of Adverse Action

Given the undisputed facts establishing Violation #1, #3, #4, #5, and #6, the City is authorized to impose adverse action against Licensee's liquor and entertainment licenses. St. Paul Leg. Code § 310.05(m) sets forth a "penalty matrix" for violations.

It is undisputed that this is Licensee's first licensing violation. According to the City's penalty matrix, "violation(s) of conditions placed on the license" and "violation(s) of provisions of the legislative code relating to the licensed activity" have a presumptive fine of \$500. A violation related to the "commission of a crime other than a felony on the premises by a licensee or employee" has a presumptive \$700 fine.

The City seeks the imposition of a \$700 fine in this case.<sup>235</sup> However, as set forth in Section III B of this Memorandum, the City has not established that Licensee committed a crime on the premises. An allegation that some of the license violations could subject Licensee to a misdemeanor criminal charge, does not establish that a crime actually occurred. The burden of proof for a criminal offense (proof beyond a reasonable doubt)

<sup>235</sup> See Ex. 61 (Notice of Violation and Intent to Impose License Conditions).



is significantly higher than the burden of proof in this action (preponderance of the evidence). Also, a criminal action can only be brought in federal or state court, not an administrative action. Accordingly, the City does not have a legal basis, under its penalty matrix, to impose a \$700 fine unless a crime has been established. The City does, however, have reasonable basis to impose a \$500 fine.

Because the undisputed facts establish (1) a violation of Condition No. 9 of Licensee's liquor and entertainment licenses and (2) violations of the St. Paul Legislative Code relating to the licensed activity, the City is authorized to impose a \$500 fine for first-time violations. Therefore, the Administrative Law Judge recommends that the City impose a \$500 fine.

As for conditions, St. Paul Leg. Code § 310.06(c) provides that:

When a reasonable basis is found to impose reasonable conditions and/or restrictions upon a license issued or held under these chapters, any one (1) or more such reasonable conditions and/or restrictions may be imposed upon such license for the purpose of promoting public health, safety and welfare, of advancing the public peace and the elimination of conditions or actions that constitute a nuisance or a detriment to the peaceful enjoyment of urban life, or promoting security and safety in nearby neighborhoods.

The reasonable conditions that the City may impose include, but are not limited to:

- (1) A limitation . . . on particular types of activities conducted in or on said business or establishment;
- (2) A limitation or restriction as to the location within the licensed business or establishment where particular type[s] of activities may be conducted;

\* \* \*

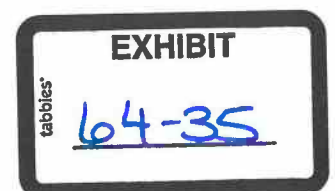
- (6) Any other reasonable condition or restriction limiting the operation of the licensed business or establishment to ensure that the business or establishment will harmonize with the character of the area in which it is located, or to prevent the development or continuation of a nuisance.<sup>236</sup>

The City seeks to impose the following condition(s) on Licensee's liquor and entertainment licenses:<sup>237</sup>

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.

<sup>236</sup> St. Paul Leg. Code § 310.06(c).

<sup>237</sup> Ex. 61 (Notice of Violation and Intent to Impose License Conditions).



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.

The Administrative Law Judge finds that the City is authorized to impose reasonable conditions that restrict uses and occupancies in the Western Dining Area, but finds that the proposed condition may expand beyond the issues set forth in this case. For example, there is no allegation that Licensee is improperly utilizing the courtyard or roof of the building. Moreover, to require "walling off" of the Western Dining Area may be extreme if there are doors that can be shut to separate the space from the Original Restaurant.

While the City is authorized to impose conditions, any conditions imposed should be to the type of conditions and/or restrictions set forth in Section 310.06(c). Specifically, the City can: (1) impose limitations on the type of activities allowed in the Western Dining Area; (2) prohibit A-2 use of the Western Dining until fire and/or building certificate(s) of occupancy are issued specific to the space and which authorize A-2 occupancies; and (3) limit operation of restaurant, bar, and dining to the Original Restaurant. The City is encouraged to make the condition specific enough for the City to enforce and for the Licensee to comply with. Because conditions are within the purview of the City, the Judge will not attempt to modify the conditions proposed by the City.

**A. C. O.**

