

LICENSE HEARING MINUTES
The Lexington, 1096 Grand Avenue
Thursday, November 15, 2012, 2:00 p.m.
330 City Hall, 15 Kellogg Boulevard West
Nhia Vang, Deputy Legislative Hearing Officer

The hearing was called to order at 2:00 p.m.

Staff Present: Larry Zangs, Department of Safety and Inspections (DSI)

Applicant: Michelle Hickey and Jenni Ryan, owners/applicants

Others Present: Jeff Roy, Summit Hill Association (SHA); Maureen Flahaven, 1073 Lincoln Avenue; Alice Medley, 1089 Lincoln Avenue; Chrissy Ames, 1093 Lincoln Avenue; Dave Burns, 1056 Lincoln Avenue; and Jenna Bowman, Grand Avenue Business Association (GABA); Joe Spencer, Mayor's Office

The Lexington: Request to add a Liquor Outdoor Service Area (Patio) license to the existing Restaurant (5) - 151 and over, Liquor On Sale - 181-290 Seats, Liquor On Sale - Sunday, Restaurant (D) Add-on (Bar Only), Entertainment (A), and Sidewalk Cafe licenses

Ms. Vang stated that this was an informal legislative hearing for a license application. This particular license required a Class N notification which means the neighborhood was notified and people had the chance to voice their concerns. The City received two (2) letters of concern which triggered the hearing. There were three possible results from this hearing: 1) recommend the City Council issue this license without any conditions; 2) recommend the City Council issue this license with agreed upon conditions; or 3) recommend the City Council not issue this license but refer it to the city attorney to take an adverse action on the application, which could involve review by an administrative law judge. The applicant will be required to sign a Conditions Affidavit demonstrating the understanding of the conditions.

DSI staff will explain their review of the application and state their recommendation. Ms. Vang said she will then ask the applicant to discuss their business plan. At the end of the hearing, she will make a recommendation for the City Council to consider. Her recommendation will be on the Consent Agenda; the City Council is the final authority on whether the license is approved or denied.

Mr. Zangs stated that the existing license conditions were as follows:

1. Sidewalk seating area is limited to a maximum of 18 seats.
2. Each year prior to the placement of table(s) and/or chair(s) in the public right-of-way (i.e., sidewalk), the licensee agrees to obtain a new Obstruction Permit from the Department of Public Works. Licensee agrees to maintain the sidewalk café in accordance with the conditions placed on an approved Obstruction Permit, acknowledges that an Obstruction Permit is effective on April 1 and expires on October 31 of each year, that table(s) and/or chair(s) may not be placed in the public right-of-way before or after

the effective/expiration dates, and that a failure to comply with this condition will result in adverse action being taken against all of their licenses.

3. No outdoor food and/or beverage preparation is allowed on a public sidewalk without prior approval and additional licensing from DSI.
4. No liquor sales and/or service is allowed on a public sidewalk without prior approval and additional licensing from DSI.
5. Per City of Saint Paul Legislative Code 411.02, the definition of Entertainment A is, "Amplified or nonamplified music and/or singing by performers without limitation as to number, and group singing participated in by patrons of the establishment." (includes karaoke). Entertainment A license does not allow for patron and/or performance dances.

The department was not recommending any additional license conditions for this application. The Summit Hill Association/District 16 Planning Council submitted a letter of support with a recommendation that a condition be placed on the license stating: Liquor service on the rooftop patio shall end at 9:00 p.m. Sunday through Thursday nights; and end at 11:00 p.m. Friday and Saturday nights.

Ms. Vang asked the applicants to explain their business plan.

Ms. Hickey stated they had a very successful business hosting events during the holidays and cold-weather months; however, when the weather turned warm, their business dropped dramatically as she believed most people preferred to dine outside. They had obtained a sidewalk cafe license to accommodate outdoor diners; however, their license did not allow them to serve any alcohol outdoors. They were proposing to expand their restaurant to the roof area of the building to accommodate outdoor dining which would include serving alcohol to their patrons. At this point in time, they had not developed any architectural plans and were only seeking licensing approval from the city before deciding whether or not to move forward with their plans. Their current hours of operation were 11 a.m. to 1 a.m. Monday through Saturday, and on Sunday they were open for brunch at 10:30 a.m. and closed at midnight.

Ms. Vang asked whether they had considered the type of lighting they planned to install as well as what type of sound barriers would be necessary to block the noise from the roof traveling throughout the neighborhood. Ms. Hickey responded that they had not considered anything that may need to be installed as far as lighting or sound barriers since they were in the preliminary phase of their plans. She did not believe noise would be an issue since the current air conditioning unit on the roof emanated more noise than any noise of conversations from patrons ever could.

Ms. Vang asked the district council representative to testify. Mr. Roy, SHA, explained that the role of the district council was to balance the concerns of the residents as well as to support the businesses in the neighborhood. The district council was very supportive to the success of the business and wished to see it prosper. In reviewing the license application, there was concern by the residents along Lincoln Avenue regarding noise being generated from the rooftop with the

proposed expansion of outdoor dining with liquor service. City staff had reviewed the petitions submitted and the number of signatures received in support of the proposed license appeared to be less than the 60 percent required. At the meeting held to discuss the proposed license, neighbors raised concerns about late night noise, parking issues, and loud music if the license were approved. One of the applicants of the business, Ed Ryan, was present at the meeting, and since it was believed they had failed to receive the required number of signatures in support, the district council recommended conditions on the hours for liquor service. Those conditions were that liquor service end at 9 p.m. Sunday through Thursday and 11 p.m. on Friday and Saturday. At the meeting, Mr. Ryan agreed to those conditions.

Ms. Vang asked Mr. Zangs what percentage of neighborhood support the applicant had obtained for the license application. Mr. Zangs explained that another staff member was responsible for calculating the number of signatures required on petitions. On the day of the district council meeting, Mr. Roy had contacted him and that person was out of the office; to the best of his calculations, it appeared that the applicant had not met the number of required signatures to meet the 60 percent threshold. When the staff member returned, the petition was again reviewed and it was determined that the applicant had indeed obtained the 60 percent of required signatures. Unfortunately, the district council had already conducted their meeting and had recommended approving the license with the stated conditions. [Discussion ensued as to how the applicants obtained the necessary signatures.]

Ms. Vang then asked Mr. Zangs how the department would enforce the ending time for liquor service if dining was allowed to continue with a later ending time. Mr. Zangs responded that the department would have no way to enforce separate times for ending liquor and dining service.

Ms. Hickey stated that when they presented the petition to the neighbors for signature, it was implied that the closing time would be the same as it is for the restaurant. [Discussion ensued as to the understanding on the part of the neighbors and the applicants as to the end of service time on the patio.]

Ms. Flahaven, a resident of the neighborhood, stated that she and her husband had lived in their home for the past 40 years. They had always supported the restaurant as a local business; however, they had specific concerns about the proposal to add a rooftop patio. She said that most patios on Grand Avenue were at the front of the building facing the avenue and not at the rear abutting residential homes. She presented a petition signed by 16 neighbors who live on Lincoln objecting to service extending past 9 p.m. (*said petition is made a part of this record*). She had attended two meetings at the restaurant, at the invitation of the owners to the neighbors, to discuss their plans to expand service to the roof. It was her understanding at those meetings that rooftop service and music would stop at 9 p.m. where patrons could then move to the inside restaurant. It was also her understanding that service would be limited to 40 customers on the roof. Many of the homes in the neighborhood were over 100 years old and did not have central air conditioning; her home did not have air conditioning so they depended upon leaving their windows open during the summer months. She had signed the petition in support of the restaurant's expansion and now wished she could take her signature back since the owners were now presenting that they did not want any limitation on hours of service on the rooftop patio.

Ms. Hickey responded that at no time had they ever indicated that the hours of service would be limited to any closing time nor had they restricted the number of people that could be served on the rooftop patio. Ms. Hickey presented a copy of their petition in support of their proposal which was signed by the residents of the neighborhood (*said petition is made a part of this record*).

Ms. Vang asked Mr. Zangs whether music was allowed on outdoor patios. Mr. Zangs responded that music was not permitted on any outdoor patio service. As far as the level of noise that would be allowed during specific hours, the noise ordinance prevailed which restricted noise to a certain level between the hours of 10 p.m. to 7 a.m.

Ms. Medley, a resident of the neighborhood, stated that she had been a resident of the neighborhood for the past 38 years. She believed that there had been a misunderstanding amongst the neighbors who had attended the meetings at the Lexington. Her husband, Louis Bartholome, had attended those meetings and when he explained the owners' proposal to her, he said it would be limited to approximately 40 people and the patio would not be open past 9 p.m. Several months later, she was informed that the plans were to include a bar along with dining to accommodate approximately 70 people and would be open without any restriction to closing time. She had gathered signatures from the neighbors on the petition presented by Ms. Flahaven and when she talked to her neighbors, they had been under the impression that seating would be limited to 40 people and the closing time would be at 9 p.m. She wished to support the business; however, groups of people who are eating and drinking tended to be boisterous and the sound would carry. She would only support a 9 p.m. closing time for the rooftop patio.

Ms. Ames, a resident of the neighborhood, stated that her home is directly behind the restaurant and she believed her family would be the most directly impacted by noise emanating from the roof. They were accustomed to the noise of traffic, and the sound from the air conditioning unit on the restaurant was not a bother; however, it was disturbing to hear the slamming of car doors and people talking loudly late at night who were coming or going from the restaurant. She believed the noise would be magnified by people allowed to drink on a rooftop patio later into the night. She also asked the applicants for some assurance that the patio-service clientele would not attract the type of problem crowd such as that of the Wild Onion. She said she did support the business and wanted them to succeed but believed it was in the best interest of the neighborhood to support an earlier closing time than 1:00 a.m.

Ms. Hickey responded that in order for their business to survive during the summer months, they needed to have the patio available for business without restriction to closing time. She believed it would be a deal breaker for them if their hours were restricted given the amount of investment required to build the rooftop patio and make the necessary upgrades and improvements. There also was no guarantee on what type of crowd they would attract, now or into the future, whether they owned the business or the business was sold to someone else.

Ms. Vang went on to explain that if the business were sold, any new owner would be required to go through the same notification wherein the neighborhood and district council would be given the opportunity to weigh in on their concerns in a hearing process. Given the numerous

objections, she asked the applicants to please consider compromising on the closing time of the patio. Ms. Hickey responded that they would possibly consider a compromise to close at 12 a.m.

Mr. Burns, a resident of the neighborhood, stated that he moved into his home approximately two years ago and loved living in the Grand Avenue neighborhood. He believed that the proposal to serve 70 patrons on the roof with no restriction on a closing time and where too many people were being serving too late into the night was problematic. He said he would only support a 9:00 p.m. closing time.

Ms. Bowman, GABA, stated that Ms. Hickey had attended the advocacy committee meeting of the association to present their plans to expand the business to a rooftop patio. After much discussion, the committee voted in support of the license application, whereby a recommendation was then forwarded to the board and full membership of the association. Ms. Bowman read a letter in support of the license application from the business association (*said letter is made a part of this record*).

Ms. Vang asked about the membership of the association and whether there was any neighborhood representation. Ms. Bowman responded that the members were predominately business owners; however, there was a representative from the district council who was a member of the association. She believed the representative from the district council was not present when the vote was made to support the license for The Lexington.

Mr. Spencer stated that he was well versed on the noise ordinance and the allowable sound decibel level was 65 during the day and 55 decibels between 10 p.m. to 7 a.m. Any outdoor event that offered music or entertainment was required to obtain a sound-level variance for each special event. He asked Mr. Zangs whether there was any recourse if a business violated the conditions of their license.

Mr. Zangs responded that the department could take adverse action against a license for confirmed violations of the conditions on their license. The result would be action before the City Council which could include monetary penalties, suspension of the license, and in extreme cases, revocation of the license.

The hearing was recessed from 3:15 to 3:40 p.m.

Ms. Vang stated that there were a few additional items which had not yet been discussed that she wished to address. She asked whether additional parking would be required with the addition of the patio license. Mr. Zangs responded that there were no additional parking requirements with this proposed license. Ms. Vang then asked about liquor liability insurance. Mr. Zangs responded that the liquor liability insurance the applicants currently had in place would cover the extension of service to the patio. SAC fees would then be addressed later when the license was issued.

Ms. Vang stated that there was a considerable amount of concern by the neighbors regarding sound emanating from the rooftop patio. In consultation with Mr. Zangs and department staff, it

was suggested a sound engineer be consulted to determine the best methods to diminish sound carrying from the roof. She asked Mr. Zangs if this could be made a part of the conditions.

Mr. Zangs responded that a condition could be added as part of the license that the applicants are required to hire an acoustical or sound engineer, to advise as to what remedies could be implemented to alleviate noise being carried from the roof into the neighborhood. This would be conditioned on whether the applicants were agreeable. Ms. Vang stated that she would support recommending this as a condition placed on the license to assure the neighbors that there was some sound mitigation plan.

Ms. Hickey responded that since there was a sound/noise ordinance in place that they must adhere to, they would not be agreeable to hiring a sound engineer. It was her contention that if the city had a concern with the sound from the roof, the city could hire a sound engineer. She did not believe they should have to bear the cost to hire such an expert since the cost was unknown.

Mr. Roy stated that another establishment in the neighborhood, The Wild Onion, had issues with sound carrying into the neighborhood. They had constructed barriers around the perimeter of the patio to help mitigate noise. He was unsure whether they had hired a sound engineer; however, he believed the design was nicely done and was a benefit in reducing the amount of noise being carried into the surrounding neighborhood.

Mr. Zangs clarified that he believed if they consulted an architect to design the patio, the architect should be familiar with how best to make a design that would mitigate sound from carrying.

Ms. Ryan stated that they did not want to move forward on investing any money towards hiring an architect until they had approval for the expansion of the liquor license. .

Ms. Vang stated that the other issue that needed to be resolved was the closing time for the patio. The neighbors were asking for a 9 p.m. closing and the applicants were saying midnight. She was looking for a compromise. She asked Mr. Zangs for further explanation of the noise ordinance regarding hours of limitation. Mr. Zangs responded that the general rule is noise/sound cannot be audible past the property line from 10 p.m. to 7 a.m. The construction of sound barriers would help alleviate some of the problems with sound traveling which was why it was important in the design of the structure.

Ms. Vang stated that she would be willing to accommodate the neighbors concerns by recommending an earlier closing time during the work week and a later time for the weekend. Since 9 p.m. was not reasonable to the applicants, she asked if 10 p.m. would be a reasonable closing time during the week Sunday through Thursday, and perhaps midnight on Friday and Saturday nights.

Ms. Ames responded that she believed midnight on the weekend would be too late as she enjoyed sitting out on her terrace with friends and family on the weekends during the summer month. She was agreeable to the patio closing at 10 p.m. every night of the week.

Ms. Hickey stated that she believed they had done their due diligence and they were not willing to compromise on a closing time especially since the weekends were their busiest times. They could not survive as a restaurant and were not agreeable to any conditions. *(At this time, Ms. Hickey and Ms. Ryan picked up their belongings to leave).*

Ms. Vang asked what their leaving meant. Ms. Ryan responded that this could go to the city council for an adverse action or whatever. Ms. Hickey said that they could not survive as a restaurant if they were forced to close the patio at 9 p.m. or 10 p.m.; the restaurant would close as they could not survive the summer months. [Conversations between the applicants and the audience took place that was not discernable.] Ms. Hickey and Ms. Ryan said the neighbors had spoken; they thanked staff for their time and left the hearing.

Mr. Zangs asked Ms. Vang if she would hold off on making any recommendation as he wished to discuss the matter with the deputy director to determine options. Perhaps there could be further dialogue with the applicants to see if they would be willing to come back to another hearing. He requested the hearing be continued for approximately two weeks.

The hearing was adjourned and continued per staff recommendation due to the unexpected departure of the applicants. If the applicants were unwilling to return to a hearing, Ms. Vang would then recommend to the city council to refer the matter for adverse action, denying the license application, which may require a hearing before an administrative law judge if the applicants appeal the recommendation. The council, again, is the final authority on whether the application is denied or approved. [Members of the audience asked more questions regarding the processes and next action.]

The hearing ended at approximately 4:00 p.m.