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## MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

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January 3, 2013

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

Re: *In the Matter of Abdul Abubaker Ali (Fa Khir d/b/a Fa Khir –  
2430 University Avenue; OAH 60-6020-30107*

Dear Mr. Moore:

Enclosed and served upon you by mail or courier service is the Findings of Fact, Conclusions and Recommendation in the above-entitled matter. Also enclosed is the official record. Our file in this matter is now being closed.

Sincerely,

  
JAMES E. LAFAVE  
Administrative Law Judge

Telephone No. (651) 361-7848  
Fax No. (651) 361-7936

JEL:njh

Enclosures

cc: Daphne Lundstrom  
Jeff Fenske

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

In the Matter of the Cigarette/Tobacco  
License held by Fa Khir, Inc. d/b/a Fa Khir  
for the premises located at 2330 University  
Avenue West in St. Paul.

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge James E. LaFave on December 4, 2012, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, MN 55101. The hearing record closed that day at end of the evidentiary hearing

Daphne Lundstrom, Assistant City Attorney, appeared on behalf of the City of St. Paul (the City). Jeffery Fenske, Attorney at Law, appeared on behalf of the Licensee, Fa Khir, Inc. (Licensee or Fa Khir).

**STATEMENT OF ISSUE**

1. Should regulatory action be taken against the licenses held by Fa Khir, because it failed to maintain the approved capacity for its establishment, in violation of sections 55.06 and 310.05 (m)(2) of the St. Paul Legislative Code?

As discussed more fully below, the Administrative Law Judge concludes that Fa Khir should be sanctioned for its failure to maintain the approved capacity for its establishment.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. Yusuf Ali owns 100% of the shares of Fa Khir, Inc. Fa Khir's tobacco shop is called the Hookah Warehouse and it is located at 2430 University Avenue in St. Paul, Minnesota.<sup>1</sup>

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<sup>1</sup> Testimony of Yusuf Ali.

2. The St. Paul Fire Marshall established the occupancy for the Hookah Warehouse.<sup>2</sup> When the Hookah Warehouse opened in October of 2009, the Fire Marshall determined the maximum occupancy for the premises to be 43 people. Mr. Ali was given a sign to post in the Hookah Warehouse stating the maximum occupancy of the room was "43 Persons."<sup>3</sup>

3. The City claims the Fire Marshall lowered the occupancy limit at the Hookah Warehouse to 34 on May 17, 2012.<sup>4</sup> One of the City's procedures when changing the occupancy limit is to remove the old sign listing the old occupancy limit and issue the licensee a new sign.<sup>5</sup>

4. Mr. Ali, however, stated no one ever told him the occupancy capacity was lowered. He retained the original sign from the St. Paul Fire Marshall setting the occupancy limit at 43. In addition, one of the City's own records, with the data entry made by Christine Rose, Deputy Director of Safety and Inspections, listed the occupancy for the Hookah Warehouse on July 8, 2012, as 43.<sup>6</sup>

5. The Administrative Law Judge finds the occupancy limit for the Hookah Warehouse on July 8, 2012, was 43 persons.

6. On October 16, 2011, Fa Khir exceeded the occupancy limit of 43 individuals and was fined \$500.<sup>7</sup>

### **The Events of July 8, 2012**

7. At approximately 4:00 a.m. on the morning of July 8, 2012, the St. Paul Police Department received a complaint that there were over 80 people at the Hookah Warehouse, located at 2430 University Avenue in St. Paul.<sup>8</sup>

8. Darin McDonald, an officer with the St. Paul Police Department responded to the call. When Officer McDonald pulled into the parking lot for the Hookah Warehouse he saw it was full, with cars double, triple, even quadruple parked. Not all the cars belonged to patrons of the Hookah warehouse. The parking lot was also used by an Asian pool hall, which was open at the time.<sup>9</sup>

9. Officer McDonald observed there were 30 people loitering in the parking lot. He saw that security for the Hookah Warehouse had blocked the back door to the building and people were struggling to get into the business.<sup>10</sup>

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<sup>2</sup> Test. Y. Ali; Testimony of Christine Rozek.

<sup>3</sup> See Ex. 12; Test. Y. Ali.

<sup>4</sup> See Ex. 5-3; Test. C. Rozek.

<sup>5</sup> Test. C. Rozek.

<sup>6</sup> See Ex. 3-1; Test. Y. Ali.

<sup>7</sup> See Ex. 6-1; Ex. 6-2; and Ex. 7.

<sup>8</sup> Testimony of Darin McDonald; Ex. 1-3.

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

<sup>10</sup> Test. D. McDonald.

10. Officer McDonald went to the back door and spoke with the security officer. The security officer told him it was "extremely busy." Officer McDonald looked inside the Hookah Warehouse and saw it was wall-to-wall people. People were elbow-to-elbow.<sup>11</sup>

11. The security officer stated he had five incidents with customers on July 8, 2012, including an incident with seven women.<sup>12</sup>

12. Officer McDonald spoke with the owner, Mr. Ali. Officer McDonald decided to close the business that night for safety reasons.<sup>13</sup>

13. Security for the Hookah Warehouse began clearing the building. As the patrons left, Officer McDonald stayed by the back door. He estimated approximately 68 people exited the Hookah Warehouse. He is 100% confident there were over 50 people in the building.<sup>14</sup>

14. Officers McDonald, as part of his duties and as a result of his experience as an officer with the St. Paul Police Department, has experience in estimating crowds.<sup>15</sup>

15. At the evidentiary hearing, Mr. Ali and Mr. Demetrius Wilson, the security officer at the Hookah Warehouse, offered a very different version of events. Mr. Ali and Mr. Wilson testified that there were only 42 patrons and staff inside the premises in the early morning hours of July 8, 2012.<sup>16</sup>

Based upon these Findings, the Administrative Law Judge makes the following:

### CONCLUSIONS

1. This matter is properly before the City of St. Paul and the Administrative Law Judge pursuant to Minn. Stat. § 14.55 and St. Paul Legislative Code §§ 310.05 and 310.06.

2. The City gave proper notice of the hearing and has fulfilled all of the relevant substantive and procedural requirements of law and rule.

3. As the party proposing that certain adverse action be taken, the City has the burden of proving the facts at issue by a preponderance of the evidence.

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<sup>11</sup> *Id.*

<sup>12</sup> Testimony of Demetrius Wilson

<sup>13</sup> Test. D. McDonald.

<sup>14</sup> Test. D. McDonald; Ex. 1-4.

<sup>15</sup> Test. D. McDonald.

<sup>16</sup> Test. of Y. Ali; Test. of D. Wilson.

4. The occupancy limit for the Hookah Warehouse on July 8, 2012, was 43 persons.

5. The testimony of Officer Darin McDonald as to the events of July 8, 2012, and the number of persons inside the premises, was more credible than the versions offered by Messrs. Ali and Wilson.

6. The City has proven by a preponderance of the evidence that on July 8, 2012, the Licensee failed to maintain the approved capacity for its establishment, in violation of sections 55.06 and 310.05(m)(2) of the St. Paul Legislative Code.

7. This is a second offense for Licensee within the past year. The recommended penalty for a second offense is \$1,000 pursuant to the penalty matrix contained in St. Paul Legislative Code § 310.05 (m).

8. As to this violation, there are no substantial and compelling reasons in the record to justify a deviation from the application of the presumptive penalty.

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

#### RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge respectfully recommends that: the St. Paul City Council IMPOSE a \$1,000 fine for the Licensee's failure to maintain the approved capacity for his establishment on July 8, 2012.

Dated: January 3, 2013

  
JAMES E. LAFAVE  
Administrative Law Judge

Reported: Digitally recorded

#### NOTICE

This report is a recommendation, not a final decision. The St. Paul City Council will make the final decision after reviewing the record and may adopt, reject or modify the Findings of Fact, Conclusions and Recommendation contained herein. Pursuant to Section 310.05 of the St. Paul Legislative Code, the City Council's final decision shall not be made until this Report has been made available to the parties to the proceeding and the Licensee has been provided an opportunity to present oral or written arguments alleging error on the part of the Administrative Law Judge in the application of the law or the interpretation of the facts and an opportunity to present argument relating to any

recommended adverse action. The Licensee and any interested parties should contact Shari Moore, Saint Paul City Clerk, 290 City Hall, 15 West Kellogg Boulevard, St. Paul, MN 55102, to ascertain the procedure for presenting argument.

The St. Paul City Council is requested to serve notice of its final decision upon each party and the Administrative Law Judge by first-class mail.

### **MEMORANDUM**

There was conflicting testimony in this case. Officer McDonald, who arrived at the Licensee's premises on July 8, asserted there were approximately 68 people jammed into the Hookah Warehouse that night. By contrast, the Mr. Ali and his security officer, Mr. Wilson, maintain they scrupulously kept the number of patrons and staff to 42 or less.

The City and the Licensee agree this case boils down to a question of credibility. Officer McDonald is an experienced police officer. An important part of his job is estimating crowds. Officer McDonald is practiced and experienced at estimating crowds. Conversely, neither Mr. Ali nor Mr. Wilson has that training or experience. Mr. Wilson was using a clicker at the door to keep track of the head count, but it was extremely busy, he was turning people away at the door and he had to handle five incidents with patrons. His focus was not solely on estimating the number of people in the Hookah Warehouse. The testimony of Officer McDonald was more credible.

The hearing record supports the City's contention that the Licensee failed to maintain the approved capacity for his establishment on July 8, 2012.

**J. E. L.**