

MINUTES
BOARD OF ZONING APPEALS
15 W KELLOGG BLVD, ROOM 330
ST PAUL, MINNESOTA, NOVEMBER 5, 2018

PRESENT: Mmes. Bogen, Maddox and Trout-Oertel; Messrs. Clarksen, Miller and Saylor of the Board of Zoning Appeals; Mr. Warner, City Attorney; Mr. Benner II, Mr. Diatta and Ms. Crippen of the Department of Safety and Inspections.

ABSENT: Luis Rangel Morales*, Danielle Swift

*Excused

The meeting was chaired by Gloria Bogen, Chair.

M and A Hark Inc (#18-113695) 589 Dale Street North: The applicant is requesting a variance of the separation requirement between tobacco products shops in order to operate a new tobacco products shop. The zoning code requires a tobacco products shop to be located at least one-half mile (2,640 feet) from another one. The proposed tobacco product shop would be 2,311 feet from the existing shop for a variance request of 329'.

Mr. Benner showed slides of the site and reviewed the staff report with a recommendation for denial, based on findings 3 and 4.

Six e-mails were received opposing the variance request.

No correspondence was received from District 7 regarding the variance request.

PATRICK SMITH, 375 Jackson Street, Attorney for the applicant, with **GEORGE HARK - M & A HARK INC**, 417 Main Street NE, MPLS, were present. Mr. Smith stated that this business has been operating since 1993 by the applicant, and they have not had any violations in the 25-years, that he has possessed a tobacco license. He stated that the harmony mentioned in the Comprehensive Plan supports the idea of two businesses operating on the same lot. Nothing new is going into this site, M & A is not creating a new tobacco shop it already possesses a tobacco license, they are already selling the proposed products. The new tobacco store will be regulated with the intent of the new ordinance and that is that no minors will be allowed into the new store. He contended that the owners are active in the community and use off-duty police officers.

Mr. Hark stated that by separating the store from the convenience store, as shown on the site plan the corner they are using is about 350-square feet. All their tobacco products will be moved to that location, they would cancel their tobacco license at the gas station, move all the tobacco into the new section and that would be the only area that would have any marketing for tobacco or any price displays. The policy of the store will be that anyone under the age of 18 now or 21 if the age limit raises will be able to walk into the store. Especially the fruity flavors for vaping because they attract minors, none of that will be available in the gas station, so kids coming into the store will only purchase what they are supposed to, pop, candy, snacks, etc., they will not be subjected to any of the tobacco marketing that is involved that is very effective and we have been fighting for the last 30-40 years. They will not be selling anything new, the product mix that they have on the shelves prior to the ordinance going into effect on November 1st, they will keep the same product mix and not adding to it. They are not using this opportunity to open a tobacco shop to take advantage of the new ordinance, or trying to take all the sales for themselves, because some other place could no longer sell tobacco. If they do have a tobacco store they will not be putting tobacco price signs on the gas price sign. Their intent is to keep the business going as it has been

going. He stated that the store clerk is in attendance and he can testify to the Board what kind of difficulties he has already come across, in the five days since the ordinance went into effect, with a large amount of the product not being available for sale. It is more than just the product that is being sold, it is more of the service and all the line of products that bring the customers into the store to purchase gas. They purchase the newspaper, coffee and the tobacco sales all group together, losing this they lose more than just the tobacco sales by itself. Mr. Hark stated that he has prepared some figures on their losses since the ordinance went into effect, and he has had to revise those numbers to reflect what has been lost, the affect that they have had is much worse than he predicted. The staff recommendation did not give them credit for any financial hardship, he knows that financial hardship cannot be the sole reason for granting a variance, however, it is a big part, if the variance is not granted their rental contracts will change, their fuel contracts will change because of a decline in sales. They will not be reaching the fuel volumes and will have losses there. They are trying to keep with the intent of the new code and what it is trying to achieve.

Mr. Peterson stated that he understands the measurement as the crow flies, however, the only way to get to the other shop is going down Dale Street to University and east on University Avenue West from Dale Street, that distance is 3,555 feet, which is 900 feet above a half mile and he does not know how someone would walk like a bird, it cannot be done.

Johnny Mouhanna, 2560 Hamline Avenue North, stated he is the current operator of the gas station. He has run the store since 2009, they want to continue providing the neighborhood easy access for adults to come and get whatever they need. He is hearing a lot of his customers have been inconvenienced, having to go to several different places and make several different stops for something they will get anyway. Moving all the tobacco products into the new store will keep it away from minors.

Ms. Bogen asked if the new area is already built out? Mr. Mouhanna replied not yet. Ms. Bogen asked if there will be a separate door to the outside and asked if there will be an interior door leading to the convenience store? Mr. Mouhanna replied there will be one door from the tobacco shop leading outside, there will not be any interior doors connecting the tobacco shop to the convenience store.

Robert Thompson, 397 Thomas Avenue, stated he has lived in this location for 20 years and he has known the merchants for those 20 years. He is retired and he is there often and watches people trying to be slick, when they are not of age to get tobacco, they have had conflicts with people asking why they cannot get what they want.

Anthony Semlya, 671 Lafond Avenue, stated he lives one street over, he is a father and also a smoker, he did not know that the other store existed so he goes to this store every day. He likes the idea of the tobacco being separated so that his son going into the store is not exposed to tobacco advertisement, but it is still within walking distance to him, so that he does not have to get into his car and drive there, the light rail is a nightmare to cross. People have died on it and all kinds of things.

There was opposition present at the hearing.

Latrisha Vetel, 2927 Washburn Avenue, stated that she is in attendance to support the staff recommendations that the variance for 589 Dale Street North be denied. Ms. Vetel stated that she works at North Point Wellness in North Minneapolis and she co-chaired the coalition of more than 50 local organizations that worked to pass the menthol tobacco restrictions. Tobacco kills more people in her community than anything else. Menthol is a big part of that because tobacco companies have targeted African Americans with menthol products for decades. By restricting the sale of menthol tobacco to adult

only stores their hope is that the next generation of youth are not addicted to tobacco. Staff is correct in stating that the need for the variance is not unique to the property, the plight of the applicant is self-created. The issue is about health disparities, poverty, race, sexual preferences and mental illness. This is because tobacco and menthol in particular have been promoted to disadvantaged groups, the tobacco industry has saturated our neighborhoods with advertisement and stores that provide little service except promoting and satisfying addiction the result is that her community, the LGBTQ, people of color, poor people and those that struggle with mental illness get sick and die at an earlier age than the broader community. One of the main reasons for that health disparity is tobacco. Menthol plays a huge role in addicting youth and keeping them addicted until adulthood. It makes it easier to start and harder to quit smoking. In response to those stark facts St. Paul City Council passed ordinances that put a cap on the number of tobacco licenses, restricted the sale of menthol and other flavors to adult only tobacco stores, then imposed a distance requirement, this variance seeks to negate those ordinances. Granting this variance may be a favor to the applicant, but it is not a favor to the groups that are victimized by tobacco. The applicants have not met all of the six requirements, please support the staff recommendation and oppose this variance. Ms. Vetal stated that she has the same objections to the 572 University Avenue West variance request.

Jack Amlm(sp?) 2395 University Avenue West, stated that he is with the Association for non-smokers. He submitted a map, it is titled 589 Dale Street and 572 University Avenue West. The address at the top of the page is 589 Dale Street. This store currently sells tobacco products, the only thing that they cannot sell, from now on are menthol tobacco products. The distance between the stores, the one to the east is 440 University Avenue West does not meet the requirement. That was defined and the ordinance adopted by the City Council, that requires one-half mile separation between tobacco products shops. The same standard applies to the second application at 572 University Avenue West, which requests a variance of 1,670 feet. Mr. Amlm stated that there are several tobacco stores around this area of 572 University Avenue West. There are about 3 stores around this second store at 572 University Avenue West, that sell tobacco, we do not need any more tobacco stores in this area. He supports the staff recommendation to deny the variance requests for both stores.

Mr. Amlm stated that he has a letter from Suzanne Nash who is with the Indigenous Peoples Task Force and is a resident of St. Paul, she is not able to be in attendance because of a household appliance breakdown that needed to be fixed. He read Ms. Nash's letter into the record: Chair Bogen and members of the BZA. My name is Suzanne Nash. I live at 1238 5th Avenue South St. Paul. I am speaking in support of the staff recommendation that the variance for 589 Dale Street North be denied. At the end of the day this issue is about health disparities. Those are disparities that impact my community the people I serve in my work, my family and friends. A broad coalition of individuals and organizations pulled together to attempt to slow the death and destruction caused by commercial tobacco. I was part of the coalition. It was not easy to convince the council that St. Paul should treat menthol flavors the same way we treat gummy bear cigars and grape vape liquid. Saint Paul has required that flavored tobacco be sold only through adult only stores to reduce the appeal to youth and their abilities to purchase it. It was very important to my community to include mint and menthol to those restrictions. Now some merchants are attempting to profit from that ordinance. They are trying everything they can think of to try to sell flavored tobacco and get the customers that formerly went to other stores. They are not doing my community a favor. Thank you.

Mr. Hark stated that they are not trying to profit from the tobacco ordinance, there is nothing that they gain, they are selling the same products that they sold prior to November 1st. There are no tobacco stores north of them, the testimony was that there are three tobacco stores north of 589 Dale Street North and there are not, they all probably fall below University Avenue. What they are trying to do is pretty much

what the City intended to do with the law. Mr. Saylor asked if this variance is not granted what tobacco products will he be able to sell? Mr. Hark stated currently based on their inventory prior to the ban, post ban they carry a little under 30% of what they sold prior to the ordinance taking effect. Well known brands like Marbors, Camels, and cigarettes, behind their counter now is just a lot of empty space, above and below the counter, a lot of product that they just cannot sell anymore. He asked what has been achieved here, it is all being sold on University Avenue? Mr. Saylor questioned that they will still be able to sell some tobacco products? Mr. Hark replied less than 1/3 of what they previously sold, actually less than 30%. Ms. Bogen stated less than 30% of what could be sold before the ordinance. She asked what specifically menthol cigarettes, vaping liquids and those kinds of things? Mr. Hark replied all vaping products, what is popular is chew, for employees that cannot go outside and smoke, office jobs and construction jobs, and it is all menthol and mint, wintergreen and it is not youth that are using it. They lose quite a bit there especially in the summer season and now with the deer hunting season, they cannot sell a lot of the products that crowd goes after. He stated that even if they get the variance they do not see that it will bring in a massive increase in sales, they would pretty much be at the same volume they were at prior to the ordinance taking effect.

Hearing no further testimony, Ms. Bogen closed the public portion of the meeting.

Ms. Bogen stated that the reasons for the half-mile separation, the thought was that anybody could walk ½ a mile, to get to another store. The 589 Dale Street store cannot have it because they can walk to 440 University Avenue and be able to get it there. She then has a problem with as the crow flies, because she does not know how anybody can cut through all the back yards on Lafond and Sherburne and all those streets. She asked if staff has looked at a direct route between stores? Mr. Benner replied to his knowledge no, that is not something that staff has considered. The actual way one would travel to a site, they would be hard pressed to cut through many yards and then try to find a way to hop over the lite rail on University Avenue. The crossing for the lite rail are at Western and at Dale street, staff has not looked at the route.

Mr. Miller stated that his thought on that was that ½ a mile was chosen to limit the possible number in the entire city. If going by walking distance it might as well be called ¼ mile, because a walking path could be found that is less than half a mile. He thought it was more about volume than convenience. Mr. Diatta stated that the intent is to limit the concentration of these kind of shops in any one particular area. When the study was done ½ mile was considered an appropriate separation between these stores. Not so much walking distance or something like that. The main reason was to limit the number of shops within any particular area.

Ms. Bogen questioned that this variance is for 329-feet? Mr. Benner replied yes, about 1 city block.

Mr. Clarksen stated that 330-feet would typically be a north-south block, from Sherburne to University, not the width of the block. He stated that his concern is if the Board approves this, the next item on the agenda is another tobacco shop, that would then be between to two shops in each direction that would both be less than ½ mile away. He asked what that means for the next application? He is not advocating for this variance, but his concern is by virtue of the next applicant's placement on the agenda, does this applicant gain an advantage, which would be an unfair consequence. Ms. Bogen questioned if this applicant applied for the variance first? Mr. Benner replied, yes, 589 Dale Street North applied did apply first. Mr. Miller asked when could the applications for these tobacco products shops start? As soon as the ordinance was passed or before that? Ms. Bogen stated that the Board has been dealing with these from before the ordinance took effect. Mr. Miller asked if they could have applied for this a year ago? Ms. Bogen asked when the City Council passed this ordinance? Mr. Benner replied November or 2017,

they have had one year. Mr. Diatta stated it went into effect on November 1, 2018. Mr. Benner stated it was adopted on November 1, 2017, with an effective date of November 1, 2018. Ms. Bogen asked if staff knew when the 440 University Avenue shop went in as a tobacco products shop? Mr. Benner stated to his knowledge that store has had a tobacco products shop license for quite some time, he does not know the exact time they opened under this license. Mr. Clarksen asked if the tobacco products shop license been around for quite a while now? Was it on the books before this ordinance was put into effect? Mr. Benner stated it was established in August of 2010 the City Council made an ordinance to define tobacco products shops. Tobacco products shop licenses became a type of commercial use in 2010. Ms. Bogen stated than a year ago the City Council changed the definition of that to only allow a tobacco products shop to sell flavored items. Mr. Benner replied correct.

Ms. Maddox stated if she had a habit or needed something she would find some way to get it, she thinks that this is too close.

Ms. Maddox moved to deny the variance and resolution based on findings 3 and 4.

Ms. Trout-Oertel stated that we have a law on the books that has taken effect and she feels that the Board is obligated to enforce the law. Ms. Bogen stated that the Board does give variances to the law, and the Board is here to vary the law in certain circumstances. Mr. Clarksen stated that the purpose of this body is the interpretation of some of this stuff and to exercise discretion when it makes sense for one outcome or another. This Board did something like that when hearing the Little Grocery, which was 40-feet short of the half mile required separation. He thinks that the half mile separation is kind of arbitrary, he lives in the St. Thomas neighborhood where they are oversaturated with student housing 100-feet apart. He thinks that this body is here to exercise discretion.

Mr. Miller seconded the motion, which passed on a roll call vote of 6-0.

Submitted by:

Approved by:

Jerome Benner II

Diane Trout-Oertel, Secretary