



Application for Appeal
 Department of Safety and Inspections
 375 Jackson Street, Suite 220
 Saint Paul, MN 55101
 General DSI Line: 651-266-9008

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SEP 20 2018

By: City of St Paul DSI

Zoning office use only

File # 18-106236

Fee \$462

Tentative hearing date:

Appellant

Name Association for Nonsmokers - MN; Jeanne Weigum
 Address 2395 University Ave West, Suite 310
 City Saint Paul St. MN Zip 55114 Daytime phone 651-646-3005
 Name of owner (if different) _____

Property Location

Address 1724 University Ave West
 Zoning file name #18-092702 Little Norway
 Legal description: Howard Park lots 10-13

 (attach additional sheet if necessary)

Type of Appeal: Application is hereby made for an appeal to the:

- Planning Commission**, under the provision of Chapter 61, Section 701, Paragraph C of the Zoning Code, of a decision made by the Planning Administrator or Zoning Administrator
- City Council**, under the provision of Chapter 61, Section 702, Paragraph A of the Zoning Code, of a Decision made by the Planning Commission
- Board of Zoning Appeals (BZA)**, under the provisions of Chapter 61, Section 701, Paragraph C of the Zoning Code, to appeal a decision made by the BZA on 9/10/18 File Number #18-092702
 (date of decision)

Grounds of Appeal: Explain why you feel there has been an error in any requirement, permit, decision or refusal made by an administrative official, or an error in fact, procedure or finding made by the Planning Commission, City Council, or BZA.

The BZA was in error when it concluded that all six findings required to allow for a zoning variance were met.

Appellant's signature Kate Engman Date 9/20/18 City agent MG



September 20, 2018

City of Saint Paul
Department of Safety and Inspections Zoning Section
375 Jackson St, Suite 220
Saint Paul, MN, 55101

Dear Department of Safety and Inspections,

This is an appeal of the zoning variance granted on Sept. 10, 2018 by the St. Paul Board of Zoning Appeals (BZA) for the property at 1724 University Avenue West, which is currently operating as a convenience store called Little Grocery. The variance would allow for the convenience store to be converted into a tobacco products shop. The variance would allow one tobacco retailer to circumvent the City of Saint Paul's (City) zoning laws that specifically require all tobacco products shops to be located at least ½ mile (2,640 feet) from all other tobacco products shops. There is an existing tobacco products shop currently located at 681 Snelling Avenue, which is 2,600 feet from the property at 1724 University Avenue. Therefore, allowing a tobacco products shop to operate at 1724 University Avenue is in direct violation of the distance requirement in the City's zoning code.

A) The BZA was in error when it concluded that all six findings required to allow for a zoning variance were met.

According to the BZA information sheet titled, "Board of Zoning Appeals Information," the BZA is required to strictly enforce the City's zoning code. Variances are only granted if each of the six articulated findings are met, without exception. The BZA was in error when it concluded that all six findings were met as it relates to Little Grocery's application. Guidance on variance requests from the BZA document titled, "Boarding Zone of Appeals Information" is as follows:

"The BZA and the planning commission shall have the power to grant variances from the *strict enforcement* of the provisions of this code if they determine that all of the required findings listed below are met:

1. The variance is in harmony with the general purposes and intent of the zoning code.
2. The variance is consistent with the comprehensive plan.
3. The applicant has established that there are practical difficulties in complying with the provision and that the property owner proposes to use the property in a reasonable manner not permitted by the provision. Economic considerations alone do not constitute practical difficulties.

4. The plight of the landowner is due to circumstances unique to the property not create [sic] by the land owner.
5. The variance will not permit any use that is not allowed in the zoning district where the affected land is located.
6. The variance will not alter the essential character of the surrounding area.

In granting a variance, the board or commission shall make written findings stating the grounds upon which the variance is justified. Inadequate access to direct sunlight for solar energy systems constitutes a practical difficulty in finding (3) above.” (Board of Zoning Appeals Information) (emphasis added)

1) The BZA was in error in granting Little Grocery’s variance request because finding #1 cannot be met.

The variance is not in harmony with the general purposes and intent of the zoning code. Allowing a variance from the zoning requirement that a tobacco products shop must be 2,640 feet away from another licensed tobacco products shop circumvents the goal of the City to minimize the concentration and proliferation of tobacco products shops in the City. The zoning code includes this very specific and intentional distance requirement between tobacco products shops to ensure that no neighborhood is oversaturated with tobacco products shops. As stated in the minutes of the Sept. 10 BZA meeting, it has been the “long-standing policy” that the Department of Safety and Inspections measures this distance from property line to property line in order to avoid oversaturation. One rationale for this approach is stated in the minutes of the September 10 BZA meeting: “if the measurement is made from the front doors, on a larger property the business could move within that site and either move into or out of compliance by changing their location in the building.” (p. 7) This “flexibility” would directly conflict with the general purposes and intent of the zoning code and therefore requirement #1 cannot be met.

Furthermore, the evidence shows that where there is a concentration of tobacco retailers in an area, tobacco use and initiation rates are significantly higher. The location and density of tobacco retailers influences tobacco use among residents living in those communities.¹ More than 40 percent of U.S. teens live or attend school near a tobacco retailer.² Youth who live or go to school in neighborhoods with the highest density of tobacco outlets or retail tobacco advertising have substantially higher smoking rates compared to youth who live or attend school in neighborhoods with fewer or no tobacco outlets.³ Young adults living in neighborhoods with greater tobacco retail density initiate use of non-cigarette combustible tobacco products (e.g., cigars, cigarillos, hookah) and experiment with cigarettes more so than young adults residing in neighborhoods with lower tobacco retail density.⁴ And for current adult smokers, living less than 1,641 feet from a tobacco retailer significantly decreases their chances of permanently quitting.⁵ Tobacco products shops like the one proposed by the applicant serves as a marketing avenue for the tobacco industry and an avenue for access to a variety of tobacco products. One could imagine that the Little Grocery is known by residents as a place that they can go to purchase grocery items (e.g., drinks and snacks), so it would be of no surprise that residents of all ages may frequent or pass by the shop and be exposed to the marketing and products, even if it was not their intention to have that experience.

Neighborhoods like Hamline-Midway, where this proposed tobacco products shop would be located, already have a high concentration of businesses that undermine the public health of the community, such as tobacco products shops and other licensed tobacco retailers (e.g., gas stations and corner stores). The Hamline-Midway neighborhood has a mix of both single and multi-family residential housing along with numerous community-serving nonprofits, and other youth-oriented facilities like the YMCA and Junior Achievement. The health of community members is undermined by this zoning variance which would allow for an additional tobacco products shop.

2) The BZA was in error in granting Little Grocery’s variance request because finding #2 cannot be met.

The variance is not consistent with the City’s current comprehensive plan. The variance granted for the proposed tobacco products shop conflicts with the following Comprehensive Plan strategies:

- **Strategy 1.7 “Permit neighborhood serving commercial businesses compatible with the character of Established Neighborhoods.”** The established neighborhood has a mix of housing (primarily single family homes) and commercial development that are not compatible with an adult-only tobacco products shop. Immediately across the street from the proposed tobacco products shop is the \$17.5 million redevelopment of the St. Alban’s School site for the new headquarters of Junior Achievement. Furthermore, the St. Paul Midway YMCA is located one block away, and several health care facilities are within a block or two of the location.
- **Strategy 1.48 “Support compatible mixed-use within single buildings and in separate buildings in close proximity.”** As noted above, the variance granted to an adult-only tobacco products shop is not compatible with the buildings in proximity to the proposed tobacco products shop including the youth-oriented health and education institution (YMCA), health care providers, and single-family and multi-family affordable housing.
- Finally, on page 14 of the comprehensive plan, there is a sidebar that outlines the Central Corridor Development Strategy, adopted by the City Council in 2007. One of the six principles outlined includes: **“Improve the image and quality of life along the Central Corridor.”** The addition of an adult-only tobacco products shop to this area would work against that principle by exposing the nearby children, youth, residents, passersby, surrounding businesses, and nonprofits to the addictive products for sale at the establishment.

Therefore, finding #2 has not been met and the zoning variance should not have been granted.

3) The BZA was in error in granting Little Grocery’s variance request because finding #3 cannot be met.

Finding #3 pertains to property owners facing “practical difficulties in complying with the [zoning] provision” and the language of finding #3 specifically states that potential “economic considerations alone do not constitute practical difficulties.” Discussion at the BZA hearing on

Sept. 10th outlined concerns that the business owner may be economically harmed if the variance is not granted. However, potential economic considerations are expressly not allowed be a factor in the BZA's decision for this finding. The Little Grocery owner currently holds a tobacco license and may continue to operate as a convenience store selling tobacco products. The City of St. Paul adopted an ordinance to restrict the sale of flavored tobacco products specifically to discourage the use of such products by youth and young adults. The BZA may defer to the City Council's authority to address public health threats facing the city. The City Council considered the implications of the ordinance from different interest groups and decided that the sales restriction should be implemented in order to protect the community. As a response, the Little Grocery is asking the BZA to bend its own rules so that it can sell flavored tobacco products despite the City Council's decision to restrict those product sales.

While it is true that the Little Grocery will no longer be able to sell flavored tobacco products unless it is converted to an adult-only tobacco products shop, the City Council's decision to adopt an ordinance to restrict the sale of flavored tobacco products, including menthol, does not rise to the level of meeting the finding that the owner has "practical difficulties complying with the [zoning] provision." All tobacco retailers in the city face this same transition due to the City Council's action to protect the health of the City's youth and young adults. Little Grocery may continue to sell tobacco products except for flavored tobacco products. For the purpose of the Little Grocery being able to sell that narrow group of products, the BZA is being asked to allow another adult-only tobacco products shop to exist in violation of the St. Paul zoning code. These sales are not essential to the viability of the store and Little Grocery can continue to exist without selling them. However, even if they were, such economic arguments alone are insufficient reasons for granting a variance. Therefore, finding #3 is not met and the zoning variance should not have been granted.

4) The BZA was in error in granting a variance based on finding #4.

The BZA was in error if it concluded that the enactment and implementation of the ordinance restricting the sale of flavored tobacco products was the grounds for meeting finding #4 which states: "The plight of the landowner is due to circumstances unique to the property not create [sic] by the land owner." Every tobacco retailer in the city of St. Paul will need to comply with this new law, which is meant to promote public health. There is nothing unique to this property or this landowner that would satisfy this finding. In fact, the business is choosing to change its business model from selling a range of products as a convenience store to choosing to become a tobacco products shop and taking on the burden of the requirement that tobacco products must be no less than 90% of its sales. Therefore, finding #4 was not met and the BZA was in error to grant the variance.

5) The BZA was in error in granting a variance based on finding #6.

Finding #6 states that, "The variance will not alter the essential character of the surrounding area." Granting this variance allows for an adult-only tobacco products shop to be opened at this location which significantly alters the character of the surrounding area. This section of University Avenue has become a locus for youth-oriented nonprofits and health-focused

facilities. The St. Paul YMCA, less than two blocks from the proposed adult-only tobacco products shop, was opened in January 2016 but was in the works for 15 years prior to its opening. The \$16.4 million facility was built on the previous site of the YMCA which was built in 1951. Additionally, Junior Achievement of the Upper Midwest is relocating its headquarters and a new hands-on learning facility to 1745 University Avenue West, which is across University Avenue from the proposed adult-only tobacco products shop. They plan to open their new learning facility in January 2019 and will serve 34,000 students through this location annually. The location of this \$20 million investment is a key selling point in their case statement: “centrally located, state-of-the-art, experiential learning facility in the Midway area of St. Paul, located closer to student populations of greatest need who could benefit most from enhanced learning opportunities.” (Junior Achievement of the Upper Midwest Case Statement, p. 1.)

This section of University Avenue is in the process of revitalization due to the significant investment in these two youth-oriented facilities which are in close proximity to the proposed adult-only tobacco products shop. Allowing a new tobacco products shop renormalizes the use of tobacco products and, while the owner argues that the proposed tobacco products shop would not sell electronic cigarettes, there is nothing in the ordinance or variance that would restrict him from selling those products. This is particularly alarming given the significant rise in electronic cigarette use by Minnesota’s youth. A new tobacco products shop at this location not only dramatically changes the character of the surrounding area, it directly undermines the positive health and educational messages of the YMCA and Junior Achievement. The Little Grocery is asking the BZA to violate its own rules and procedures to accommodate its new business model. Therefore, finding #6 was not met and the BZA was in error in granting the variance.


B) The BZA made an error in fact by considering a method of measurement between the two tobacco products shops that has not been followed by DSI and, as such, does not strictly adhere to the zoning code.

The minutes reflect much discussion about DSI’s long-standing practice of measuring the distance between tobacco products shops from property line to property line. The BZA made an error in fact by considering a different method of calculating the distance between the existing tobacco products shop and the proposed tobacco products shop. As stated in the minutes of the September 10th BZA meeting, it has been the “long-standing policy” that the Department of Safety and Inspections measure this distance from property line to property line. Instead of this long-standing method of measurement used by DSI, the applicant used a different measurement and came to the conclusion that this alternative approach would put the two tobacco products shops at the acceptable distance apart. The September 10 minutes reflect that “this is not the way that DSI accepts the measurement as the correct way to measure.” While this different measurement did not ultimately form the basis of the BZA’s decision, it was clear from the minutes that it influenced the discussion and outcome. Despite direct contradiction with the long-standing accepted practice of measurement used by DSI, and with no other evidence that the method used by the applicant was reasonable or based on any other best practices or standards, the BZA decision to approve the zoning variance was influenced by this erroneous method of measurement. Therefore, the BZA made an error in fact by considering a method of measurement between the two tobacco products shops that has not

been followed by DSI and, as such, does not strictly adhere to the zoning code.

Thank for your consideration in this process,

Sincerely,


~~Jeanne Weigum~~
~~President~~ Katie Engman

¹ Novak et al., *supra* note 10, at 674-75; and Ying-Chih Chuang et al., *Effects of Neighbourhood Socioeconomic Status and Convenience Store Concentration on Individual Level Smoking*, 59 J. EPIDEMIOLOGY & COMMUNITY HEALTH 568, 570-71 (2005).

² A 2016 study of a nationally representative sample of US households found that 41 percent of 13-16 year olds lived within ½ mile of a tobacco retailer, and 44 percent attended a school within 1000 feet of a tobacco retailer. Nina Schleicher et al. Tobacco Outlet Density Near Home and School: Associations with Smoking and Norms Among Teens. PREVENTIVE MEDICINE. 91:287-293.

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5065244/>

³ Scott T. Leatherdale & Jocelyn M. Strath, *Tobacco Retailer Density Surrounding Schools and Cigarette Access Behaviors Among Underage Smoking Students*, 33 ANNALS OF BEHAV. MED. 105,106 (2007); McCarthy et al., *supra* note 8; and Joshua H. West, et al., *Does Proximity to Retailers Influence Alcohol and Tobacco Use Among Latino Adolescents?* 12 J. IMMIGRANT & MINORITY HEALTH 626, 631 (2010); Sharon Lipperman-Kreda et al, *Local Tobacco Policy and Tobacco Outlet Density: Associations with Youth Smoking*. J. ADOLESCENT HEALTH 50(6): 547-552 (2012).

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3360878/>

⁴ Jennifer Cantrell et al. Tobacco Retail Outlet Density and Young Adult Tobacco Initiation. NICOTINE & TOBACCO RESEARCH. 18(2): 130-137 (2016),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4830222/>.

⁵ Jennifer Cantrell et al. The Impact of the Tobacco Retail Outlet Environment on Adult Cessation and Differences by Neighborhood Poverty. ADDICTION. 110(1):152-161 (2015)

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4270891/>; Anna Pulakka et al. Association Between Distance from Home to Tobacco Outlet and Smoking Cessation and Relapse. JAMA INTERNAL MEDICINE. 176(10):1512-1519 (2016).

<https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2543750>