

September 7, 2021

VIA EMAIL ONLY

Mark K. Thompson
MKT Law, PLC
4927 34th Ave S
Minneapolis, MN 55417
mkt@mktlawoffice.com

VIA EMAIL ONLY

Therese Skarda
St. Paul City Attorney's Office
400 City Hall & Courthouse
15 W Kellogg Blvd
Saint Paul, MN 55102
Therese.Skarda@ci.stpaul.mn.us;
shawn.mcdonald@ci.stpaul.mn.us

Re: *In the Matter of the Cigarette/Tobacco License held by Zakariya Abukhudeer d/b/a The One Stop Market, LLC, for the premises located at 1541 Maryland Avenue in Saint Paul License ID # 20190001624 OAH 60-6020-37157*

Dear Counsel:

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

If you have any questions, please contact me at (651) 361-7874, michelle.severson@state.mn.us, or via facsimile at (651) 539-0310.

Sincerely,



MICHELLE SEVERSON
Legal Assistant

Enclosure

cc: Docket Coordinator

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF ST. PAUL

In the Matter of the Cigarette/Tobacco License held by Zakariya Abukhudeer d/b/a The One Stop Market, LLC, for the premises located at 1541 Maryland Avenue in Saint Paul

**RECOMMENDATION AND ORDER
ON
MOTION FOR SUMMARY
DISPOSITION**

License ID # 20190001624

This matter is pending before Administrative Law Judge James E. LaFave on the City of St. Paul's Motion for Summary Disposition (Motion).¹

Therese Skarda, Assistant St. Paul Attorney, represents the City of St. Paul (City). Mark K. Thompson, MKT Law PLC, represents Zakariya Abukhudeer d/b/a The One Stop Market, LLC (Respondent).

The City filed its Motion on April 26, 2021. Respondent requested and was granted until May 26, 2021, to respond. Oral argument on the Motion was heard on May 28, 2021. Thereafter, the Administrative Law Judge granted Respondent until June 7, 2021, to supplement his response in opposition to the Motion to address the City's requested deviation from the presumptive penalty. Respondent filed a supplemental memorandum addressing the issue of penalty on June 7, 2021, and the Motion record closed on that date.

Based upon the parties' arguments and the record, and for the reasons explained in the accompanying Memorandum,

IT IS HEREBY RECOMMENDED THAT:

1. The City's Motion for Summary Disposition be **GRANTED** with respect to the alleged violations of St. Paul Legislative Code § 324.07(a) and (f) relating to Respondent's sales of single cigarettes and flavored tobacco products on June 1, 2020, and July 20, 2020. The City may take disciplinary action against Respondent's license for these violations.

2. The City's Motion for Summary Disposition be **GRANTED** with respect to the alleged violation of Saint Paul Legislative Code § 310.06(b)(6)(a) relating to

¹ This adverse licensing action was initiated by and through the City's Department of Safety and Inspections (DSI).

Respondent allowing patrons to smoke within the licensed premises in violation of the Minnesota Clean Indoor Air Act. The City may take disciplinary action against Respondent's license for this violation.

IT IS HEREBY ORDERED THAT:

1. The City's Motion for Summary Disposition is **DENIED** with respect to Respondent's alleged violation of licensing condition #3 and Saint Paul Legislative Code § 310.06(b)(5) relating to the failure to provide a copy of surveillance video as requested by the City.

2. The City's Motion for Summary Disposition is **DENIED** with respect to the alleged violations of Saint Paul Legislative Code § 310.06(b)(5)-(8) and licensing condition #2 relating to Respondent's conduct on March 30, 2020, June 1, 2020, and July 20, 2020. These claims will proceed to an evidentiary hearing if necessary.

3. A prehearing conference will be held by telephone on **September 27, 2021**, at **11:00 a.m.**, to review the status of the case and to discuss whether the Respondent will seek to have the Administrative Law Judge certify the Motion to the St. Paul City Council pursuant to Minn. R. 1400.7600 (2021). At that time, please call **1-888-742-5095** and, when prompted, enter conference code **454 161 2416#**.

Dated: September 7, 2021


JAMES E. LAFAVE
Administrative Law Judge

MEMORANDUM

I. Background and Procedural History

Respondent is the owner and operator of The One Stop Market, LLC (One Stop), a convenience store located at 1541 Maryland Avenue East in St. Paul. One Stop is located next to and in the same building as a laundromat. One Stop and the laundromat share the building's parking lot.

The City granted Respondent a Cigarette/Tobacco license subject to the following conditions:

- (1) License holder will make sure that all refuse and trash that is on the premises and surrounding sidewalks is picked up on a daily basis.

- (2) The licensee shall take reasonable steps to discourage loitering in front of or on the property of the licensed business.
- (3) The license holder shall maintain video surveillance cameras inside and outside the establishment in accordance with Saint Paul Police Department (SPPD) recommendations. The video recording shall be kept by the license holder for at least thirty (30) days and shall be available for viewing by the SPPD immediately upon request. In addition, if the SPPD responds to a call at the licensed premises, and due to the crime, requests that a copy of the surveillance footage be immediately provided, the license holder shall have technology available to make the copy at the time of the request and shall have it for the police without delay. In other cases, if the SPPD or the Department of Safety and Inspections (DSI) requests copies of the surveillance tapes, licensee shall have a 48-hour period in which to provide such copies.
- (4) Signage placed on the inside and/or outside of the window shall not take up more than 30% of the window space and shall not be placed in the area between four (4) and seven (7) feet above the adjacent ground level. Shelving and/or displays shall not be placed [sic] in front of the window.²

On September 10, 2020, the City issued a Notice of Violation to Respondent alleging violations of license conditions and city ordinances related to the operation of Respondent's business.³ The City cited Respondent with violating license conditions #2 and #3 by failing to take reasonable steps to discourage loitering and by failing to provide a copy of surveillance footage as requested.⁴ The City also cited Respondent with violating city ordinances by selling single cigarettes and flavored tobacco products, and by operating the business in a manner that creates a serious danger to public health or safety, or permits conditions that unreasonably annoy the comfort or repose of the public.⁵ The City requested an upward departure from the penalty matrix to a \$2,000 fine and a 10-day suspension of all licenses with imposition of additional conditions.⁶

On October 21, 2020, the City issued a Notice of Prehearing Telephone Conference to consider whether adverse action should be taken against Respondent's license for the alleged violations.⁷ The prehearing conference was held on December 9, 2020, and an order setting a schedule for discovery and the filing of dispositive motions issued on December 22, 2020.⁸

² Exhibit (Ex.) 1-14.

³ Ex. 1-1.

⁴ *Id.*

⁵ Notice of Prehearing Telephone Conference (Oct. 21, 2020).

⁶ *Id.* See St. Paul Legis. Code § 310.05(m) (penalty matrix).

⁷ Notice of Prehearing Telephone Conference (Oct. 21, 2020).

⁸ *Id.*

On April 8, 2021, the City filed an Amended Notice of Violation and Request for Upward Departure to Revocation (Amended Notice).⁹ The City stated that further review of surveillance footage resulted in the identification of additional incidents of sales of single or flavored cigarettes, as well as incidents of patrons and employees smoking within the licensed premises.¹⁰ Based on the newly identified licensing violations, the City revised its penalty recommendation to request revocation of Respondent's license.¹¹

II. Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment.¹² The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition.¹³ A motion for summary disposition may be granted when no genuine issue of material fact exists.¹⁴ A genuine issue is one that is not a sham or frivolous, and a fact is material if resolving it will affect the result or outcome of the case.¹⁵

The moving party must initially show the absence of a genuine issue of material fact.¹⁶ To successfully resist a motion for summary disposition, the responding party must show that there are specific facts in dispute which have a bearing on the outcome of the case.¹⁷ Facts at issue must be established by substantial evidence, and the parties may not rest upon general averments or denials.¹⁸ Evidence offered to support or defeat summary judgment must be such evidence as would be admissible at trial,¹⁹ though the evidence presented need not be in a form that would be admissible.²⁰ "Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial."²¹

When considering a motion for summary disposition, the evidence must be viewed in the light most favorable to the nonmoving party, and doubts and factual inferences must be resolved against the moving party.²² The trial court's function is not to decide the facts at issue, but to determine whether a genuine dispute of fact exists.²³

⁹ Amended Notice (Apr. 8, 2021). The Amended Notice was filed with the Office of Administrative Hearings on April 8, 2021, but is dated March 2, 2021.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); see also Minn. R. 1400.5500(K) (2021).

¹³ See Minn. R. 1400.6600 (2021); Minn. R. Civ. P. 56.

¹⁴ *In re Gillette Children's Specialty Healthcare*, 883 N.W.2d 778, 785 (Minn. 2016).

¹⁵ *Highland Chateau, Inc. v. Minn. Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984), review denied (Minn. Feb. 6, 1985).

¹⁶ Minn. R. Civ. P. 56.01; *Anderson v. Dep't of Natural Res.*, 693 N.W.2d 181, 191 (Minn. 2005).

¹⁷ *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

¹⁸ *Id.* at 70-71.

¹⁹ *Hopkins v. Empire Fire & Marine Ins., Co.*, 474 N.W.2d 209, 212 (Minn. Ct. App. 1991).

²⁰ *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. Ct. App. 1989).

²¹ *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995).

²² *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 661 (Minn. 2015).

²³ See *id.* at 664 (citing *DLH*, 566 N.W.2d at 70).

III. Alleged Violations and Argument

Under the Saint Paul Legislative Code, the city council may take adverse action against a City-issued license if the licensee violates a statute or ordinance related to the licensed activity, or if the licensee violates conditions placed on its license.²⁴ The City alleges Respondent violated the following ordinances governing its license:

- (1) Saint Paul Legislative Code § 324.07(a) prohibits the sale of a cigarette outside of its original packaging containing health warnings satisfying the requirements of federal law. No cigarette shall be sold in packages of fewer than 20 cigarettes.
- (2) Saint Paul Legislative Code § 324.07(f) prohibits a licensee from selling, offering for sale, or otherwise distributing any flavored tobacco products.
- (3) Saint Paul Legislative Code § 310.06(b)(5) supports adverse action when the licensee fails to comply with any condition of the license.
- (4) Saint Paul Legislative Code 310.06(b)(6)(a) supports adverse action where a licensee, or any person whose conduct may by law be imputed to the licensee, has violated . . . any statute, ordinance, or regulation reasonably related to the licensed activity, regardless of whether criminal charges have or have not been brought in connection with such activity.
- (5) Saint Paul Legislative Code § 310.06(b)(6)(c) supports adverse action 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.
- (6) Saint Paul Legislative Code § 310.06(b)(7) supports adverse action when the activities of the licensee in the licensed activity create a serious danger to the public health, safety, or welfare.
- (7) Saint Paul Legislative Code § 310.06(b)(8) supports adverse action when the way in which a licensed 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 maintains that it is entitled to judgment as a matter of law on the license violations it cited. The City asserts that undisputed facts in the record support finding Respondent: (1) repeatedly sold single cigarettes and flavored tobacco products; (2) allowed patrons and employees to smoke cigarettes within the licensed premises; (3) permitted uncontrolled and dangerous behavior both inside and outside of the licensed premises; (4) failed to take reasonable steps to discourage loitering in front of the licensed premises; and (5) failed to maintain video surveillance cameras and failed to comply with

²⁴ St. Paul Legis. Code §§ 310.05(m), 310.06(a), (b)(6)(a).

the DSI's request for copies of surveillance footage. Each alleged violation will be discussed below.

A. Sale of Single Cigarettes and Flavored Tobacco

The City contends Respondent violated Saint Paul Legislative Code § 324.07(a) and (f) by selling single cigarettes and flavored tobacco products. The City maintains that surveillance video footage from June 1, 2020, demonstrates that between approximately 8:10 p.m. and 10:00 p.m. One Stop employees repeatedly sold single cigarettes and flavored tobacco products to patrons.²⁵ According to the City, DSI Licensing Manager Eric Hudak's review of the June 1, 2020, footage revealed approximately nine transactions involving the sale of single cigarettes and approximately 23 transactions involving the sale of flavored tobacco products.²⁶ In addition, during that same period of time, the City states there were four separate instances where either a One Stop employee or a customer was smoking a cigarette within the licensed premises.²⁷

On June 17, 2020, DSI Licensing Manager Hudak and representatives from SPPD met with Respondent to discuss the sales of single cigarette and flavored tobacco products shown on the June 1, 2020, video footage.²⁸ The City states that it arranged the meeting with Respondent to provide Respondent a chance to comply with licensing regulations.²⁹

The City asserts that approximately one month after the meeting, on July 20, 2020, officers from SPPD used a confidential reliable informant (CRI) to successfully purchase two Newport menthol-flavored cigarettes from a One Stop employee.³⁰ The City maintains that the officers pat-searched the CRI before he entered the One Stop to make sure he did not have any cigarettes or money on his person.³¹ According to the police report, the officers then gave the CRI an undisclosed amount of money and observed him from the time he left their custody until the time he returned from the One Stop with two single cigarettes.³² The police report indicates that the CRI told the officers he was able to purchase two Newport menthol cigarettes from Respondent's employee.³³

The City argues it is entitled to summary disposition on Respondent's alleged sales of single cigarettes and flavored tobacco products that occurred on June 1 and July 20, 2020. The City contends that the video evidence of the sales on June 1, 2020, and the SPPD report regarding the alleged July 20, 2020, sale, render the material facts undisputed and establish the violations. Moreover, the City asserts that it is Respondent's responsibility to know which tobacco products may be sold and which are prohibited.

²⁵ Exs. 1-13; 2-42 – 2-43.

²⁶ Exs. 6-18 – 6-24; 2-42 – 2-43.

²⁷ Exs. 6-15 – 6-16; 2-13 – 2-18.

²⁸ Amended Notice at 3; Ex. 1-11.

²⁹ City's Motion at 12; Ex. 1-11.

³⁰ Exs. 2-110 – 2-111.

³¹ Exs. 2-110 – 2-111.

³² Exs. 2-110 – 2-111.

³³ Exs. 2-110 – 2-111.

Respondent asserts that it was under the understanding that the sales of single cigarettes and flavored tobacco products observed on the June 1, 2020, video footage were discussed and fully addressed during the June 17, 2020, meeting with DSI staff. Respondent also argues that the ordinance prohibiting the sale of flavored tobacco products is unconstitutionally vague because the similar packaging of allowable and prohibited products makes it difficult for the average person to discern what is unlawful conduct.³⁴ Respondent further maintains that the blurry nature of the video footage and screen shots submitted by the City do not adequately demonstrate the alleged violations.

Respondent also disputes the alleged sale of flavored tobacco to the CRI on July 20, 2020. Respondent argues that the only evidence submitted in support of this claim is a police report that misidentifies the name of the store and fails to identify the amount of money allegedly paid for the cigarettes. Respondent argues that this evidence is insufficient to support the allegation that single or flavored cigarettes were sold by a One Stop employee on July 20, 2020.

The City has sufficiently demonstrated that it is entitled to summary disposition with respect to Respondent's sale of single cigarettes and flavored tobacco products on June 1 and July 20, 2020. The City has established through the video footage that Respondent violated Saint Paul Legislative Code § 324.07(a) and (f) by selling single cigarettes and flavored tobacco products on June 1, 2020.³⁵ The video footage and screen shots clearly demonstrate that Respondent's employees engaged in numerous sales of single cigarettes and flavored tobacco products between a two-hour period on June 1, 2020.³⁶ The Administrative Law Judge also finds that the police report and supporting affidavit are sufficient to establish that Respondent sold single cigarettes to a CRI on July 20, 2020. The fact that the police report incorrectly refers to the One Stop as the "Sana's Market," which was the former name of the business, is not enough to raise a genuine issue of material fact requiring an evidentiary hearing on this claim.³⁷

Therefore, as further discussed in the Penalty section below, the City may take disciplinary action against Respondent's license for the violations of Saint Paul Legislative Code § 324.07(a) and (f) that took place on June 1 and July 20, 2020. Respondent's argument that the ordinance banning flavored tobacco products is unconstitutionally vague is noted and preserved. Administrative law judges, however, are without authority to declare a law or ordinance unconstitutional on its face. Such a power is within the exclusive province of the judicial branch.³⁸

³⁴ See Amended Declaration (Decl.) of Zakariya Abukhudeer at ¶ 5.

³⁵ Exs. 1-13; 2-45 – 2-97.

³⁶ *Id.*; Exs. 2-45 – 2-97.

³⁷ See Ex. 6-26 (Affidavit of Eric Hudak).

³⁸ See, e.g., *In the Matter of Rochester Ambulance Service*, 500 N.W.2d 495, 499-500 (Minn. Ct. App. 1993) ("In this case, however, neither the ALJ nor the Commissioner had the power to declare Minn. Stat. § 144.802 unconstitutional. Thus, the issue could not have been addressed in the proceedings below.").

B. Allowing Employees and Patrons to Smoke Cigarettes Within Licensed Premises in Violation of the Clean Indoor Air Act

The City asserts that DSI Licensing Inspector Eric Hudak's review of the surveillance footage from June 1, 2020, shows four separate instances where One Stop employees either smoked cigarettes inside the licensed premises themselves or permitted patrons to smoke cigarettes inside the licensed premises.³⁹ St. Paul Legislative Code § 310.06(b)(6)(a) supports adverse action where a licensee has violated "any statute reasonably related to the licensed activity." The Clean Indoor Air Act prohibits smoking in public places or places of employment.⁴⁰ The City argues that, by allowing employees and patrons to smoke within the licensed premises, Respondent violated the Clean Indoor Air Act and, therefore, violated section 310.06(b)(6)(a).

Respondent maintains that the surveillance footage and screen shots are too blurry to establish that patrons or employees were smoking within the One Stop on June 1, 2020, as alleged. Respondent contends that the images at best show something white in individuals' hands and at worse show nothing.

The Administrative Law Judge agrees with Respondent that two images relied on by the City to support its allegation are not sufficiently definitive to support finding a violation. The surveillance video footage and screen shots of the video from June 1, 2020, however, clearly demonstrate two instances of patrons smoking cigarettes within the store.⁴¹ On one occasion Respondent's employee lights a patron's cigarette and allows the patron to remain in the store smoking.⁴² Therefore, the City has demonstrated it is entitled to summary disposition on the allegation that Respondent allowed patrons to smoke cigarettes within the One Stop premises and thereby violated section 310.06(b)(6)(a) and the Clean Indoor Air Act.⁴³ The City may take disciplinary action against Respondent's license for this violation.

C. Permitting Dangerous Behavior and Loitering

The City asserts that on March 30, June 1, and July 20, 2020, Respondent violated license condition #2 by failing to discourage loitering. The City further contends that on these dates, Respondent likewise violated St. Paul Legislative Code § 310.06(b)(5)-(8), by operating the business in a manner that threatens public safety, health, or welfare. The City argues that by operating the business in a manner that routinely allowed violent conduct to occur on its premises, Respondent seriously endangered the public.

Saint Paul Legislative Code § 310.06(b)(5) supports adverse action when the licensee fails to comply with any condition of the license. Section 310.06(b)(6) supports adverse action when the licensee has engaged in or permitted a pattern or practice of conduct or failed to comply with laws reasonably related to the licensed activity or from

³⁹ Exs. 1-13; 2-13, 2-16, 2-17, 2-18.

⁴⁰ See Minn. Stat. § 144.414 (2020).

⁴¹ Exs. 1-13; 2-13, 2-18.

⁴² Exs. 1-13 (camera 1 at 21:02);. 2-13.

⁴³ See Ex. 1-13 (camera 1 at 21:02).

which an inference of lack of fitness or good character may be drawn. Section 310.06(b)(7) supports adverse action when the licensee's activity creates serious danger to public health, safety or welfare. And Section 310.06(b)(8) supports adverse action when the way in which the licensed 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 the public.

i. March 30, 2020

The City maintains that surveillance footage of the licensed premises taken on March 30, 2020, shows that between 4:46 p.m. and 4:51 p.m. several males were loitering outside the door of the One Stop while several other males were sitting inside of an SUV in the parking lot. The City contends that Respondent's store manager, who was standing nearby, made no effort to address either group of individuals or to discourage them from loitering.⁴⁴ The City further contends that at 4:53 p.m. two additional vehicles enter the One Stop parking lot and the passengers in these vehicles engage in a dispute with the passengers in the SUV.⁴⁵ While the dispute unfolds, a crowd begins to gather in the parking lot. At 4:59 p.m., two of the parties to the dispute fire handguns at each other.⁴⁶ The entire incident takes place over the course of eight minutes.

The City contends that Respondent's store manager, Abdulhafiz Abukhdeir Mohamad, made no effort to break up the dispute or disperse the crowd "until the dispute had effectively ended."⁴⁷ According to the City, Mohamad's failure to intervene when the dispute escalated violated license condition #2 and demonstrates that Respondent operates the business in a manner that endangers the public in violation of Saint Paul Legislative Code § 310.06(b)(5)–(8). The City asserts further that had Respondent's store manager taken action to disperse the individuals on March 30, 2020, the shooting incident "could very well have been avoided."⁴⁸

A review of the video footage from March 30, 2020, does not support the City's description of events.⁴⁹ Instead, it appears the altercation between the occupants of two SUVs begins at about 4:54:40 p.m. Respondent's store manager and an individual who appears to be another employee approach the cars at 4:55 p.m. and appear to direct them to move out.⁵⁰ One SUV does leave, but then returns at 4:58 p.m. The occupants exit both SUVs cars and start fighting at about 4:59 p.m.⁵¹ Again, Respondent's store manager approaches the individuals and physically intervenes in what appears to be an attempt to break up the fight.⁵² When shots are fired, Respondent's store manager runs

⁴⁴ City's Motion at 5 citing Exs. 1-23 – 1-24.

⁴⁵ Exs. 1-23 – 1-24.

⁴⁶ Exs. 1-23 – 1-24.

⁴⁷ City's Motion at 10.

⁴⁸ City's Motion at 13.

⁴⁹ Ex. 1-21 (parts 1 and 2; cameras 7 and 12).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

back into the store and comes out with a handgun. At that point, both SUVs exit the parking lot.⁵³

The report of Sergeant Rob Stanway, the SPPD officer assigned to DSI who viewed the video footage, likewise states that Respondent's store manager comes out of the store at 4:55 p.m. and walks towards the crowd as some cars leave.⁵⁴ After shots are fired at 4:59 p.m., Stanway reports that Mohamad retrieves his handgun from the store and comes back out of the store holding it in his right hand.⁵⁵ Stanway states that the remaining individuals then get in their vehicles and leave the premises.⁵⁶

The City has failed to show it is entitled to summary disposition on its claim that Respondent violated license conditions and City ordinances by not dispersing loitering and by operating the business in an unsafe manner on March 30, 2020. **Instead, the evidence demonstrates disputed factual issues as to what occurred at the One Stop on March 30, 2020, and what reasonable action was required on the part of Respondent in the eight minutes at issue.** The disputed facts preclude granting judgment in favor of the City as a matter of law. Therefore, the City's claim that Respondent violated licensing conditions and city ordinances with respect to the March 30, 2020, incident will proceed to an evidentiary hearing if necessary.

ii. June 1, 2020

The City argues that Respondent likewise failed to take reasonable steps to intervene when a large group of people began fighting within the licensed premises on June 1, 2020.⁵⁷ Based on surveillance video, the City asserts that Respondent's employees failed to attempt to break up the fighting or to remove those fighting from the premises. In addition, the City contends that the video demonstrates multiple instances where firearms were openly transferred between patrons and employees.⁵⁸

Respondent argues that the June 1, 2020, video footage does not reflect numerous fights or unsafe handling of firearms within the licensed premises.⁵⁹ Respondent also notes that June 1, 2020, was a night of great unrest throughout both the cities of St. Paul and Minneapolis in response to the killing of George Floyd. Respondent urges this tribunal to review the evidence in that context.

The City has failed to demonstrate that it is entitled to summary disposition on this claim. **Material issues of fact exist as to whether Respondent took reasonable steps to address the fighting within the licensed premises on June 1, 2020.** While the video footage of the chaotic fighting that broke out within the store is disturbing, Respondent's employees appear to have made attempts to remove people and to break up the fighting

⁵³ *Id.*

⁵⁴ Ex. 1-4.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Exs. 6-16 – 6-17; 2-19 – 2-28.

⁵⁸ Exs. 6-16 – 6-17; 2-19 – 2-28.

⁵⁹ Decl. of Z. Abukhudeer at ¶¶ 8-12, 21-37.

at various points. There are material issues of fact that preclude granting summary disposition on this claim. Instead, Respondent should be allowed to address the alleged violations at an evidentiary hearing if necessary.

iii. July 20, 2020

The City asserts that on July 20, 2020, SPPD officers observed a large group of males gambling and shooting dice on the west side of the property of the licensed premises in broad daylight.⁶⁰ The officers noted that these males could be easily viewed by Respondent's employees by "simply looking out a window."⁶¹

Respondent argues that, contrary to the City's claim and the affidavit of the SPPD officer, there are no windows on the west side of the building that a One Stop employee could have looked out of to view activity on the premises. Respondent submitted two photographs of the building that appear to support his claim.

Respondent has demonstrated that material issues of fact are in disputes with respect to the City's claim that Respondent failed to take appropriate action to disperse loitering and operated the business in an unsafe manner on July 20, 2020. The City is therefore not entitled to summary disposition on this claim. This alleged violation will proceed to an evidentiary hearing if necessary.

D. Failing to Comply with Requests for Surveillance Video

The City contends that on April 27, 2020, the DSI sent a letter to Respondent requesting copies of all video footage of the licensed premises from March 30, 2020, starting at 4:30 p.m. and ending at 5:30 p.m. DSI gave Respondent seven days, until May 4, 2020, to fulfill the request. The City maintains that on May 4, 2020, Respondent notified the DSI by email that the requested footage was not available due to "mistreatment" of Respondent's surveillance equipment by an SPPD employee on April 24, 2020. The City notes that it is a condition of Respondent's license that Respondent maintain the surveillance equipment and provide requested video. The City also notes that Respondent did not complain of or report any mistreatment of its surveillance equipment until after the footage was requested. The City argues that Respondent's failure to provide the video and to maintain the surveillance equipment in working order violated Respondent's license condition #3. The City asserts that it is entitled to summary disposition on this claim.

Respondent asserts that he timely responded to the City's request for the surveillance footage by email on May 4, 2020.⁶² Respondent explained in his email that he was unable to provide the video because his surveillance equipment had been mistreated by an SPPD employee on April 24, 2020, resulting in both of his hard drives failing.⁶³ Respondent states that the mistreatment of the equipment happened when the

⁶⁰ Exs. 2-105; 11-1-2.

⁶¹ Ex. 2-105.

⁶² Decl. of Z. Abukhudeer at ¶ 12, Ex. E.

⁶³ Decl. of Z. Abukhudeer at ¶¶ 12, 13; Exs. E, F.

SPPD employee came to the store to retrieve surveillance video from a different incident.⁶⁴ Respondent asserts that he replaced the hard drives the next day, but that, thereafter, it was unable to produce copies of videos prior to April 24, 2020.⁶⁵ Respondent advised the City in its email that the SPPD had a copy of the requested March 30 video footage, and suggested the City could obtain a copy from it.⁶⁶

Respondent also points out that the City was able to obtain a copy of the requested surveillance video from the SPPD by April 15, 2020, at least 12 days before DSI formally requested a copy from Respondent. Respondent notes that SPPD Sergeant Robert Stanway, who was assigned to the DSI, states in a report dated April 15, 2020, that he reviewed the video after obtaining a copy from the SPPD.⁶⁷ **Because Respondent provided the March 30 video to the SPPD and the City was able to ultimately obtain a copy of the footage from the SPPD, Respondent contends it did not violate license condition #3 by failing to provide the video as requested.**⁶⁸

In its submission in support of the motion, the City filed an Incident Report of City employee James Legierski.⁶⁹ In his report, Legierski states that he went to the One Stop on April 24, 2020, to collect surveillance video at the request of an SPPD officer.⁷⁰ Legierski asserts that the DVR was located approximately 16 feet up in the ceiling rafters and that while standing on a ladder, he pulled it down from the rafter causing it to hang by attached cables.⁷¹ Legierski was able to copy the video he needed but states he was unable to push the DVR back up onto the rafter. Instead, he left it hanging and states that he notified the store manager who told him that he would take care of it.⁷² Legierski's description of events on April 24, 2020, matches the photograph of the DVR submitted by Respondent.⁷³

The City has failed to demonstrate it is entitled to summary disposition on its claim that Respondent violated conditions of its license by failing to provide a copy of surveillance video and failing to maintain surveillance equipment. Instead, Respondent has raised sufficient issues of disputed material facts that preclude finding a violation of license condition #3 as a matter of law. Viewing the facts in the light most favorable to Respondent, it appears Respondent's surveillance equipment was damaged on April 24, 2020, causing it to be unable to produce the requested video. Respondent asserts that it immediately brought the equipment in for repair but that it is now unable to produce video footage prior to April 24, 2020. Respondent timely advised the City of that fact and suggested it obtain a copy of the footage from the SPPD. Based on this record, **the City has not shown as a matter of law that Respondent failed to properly maintain its**

⁶⁴ Decl. of Z. Abukhudeer at ¶¶ 12, 13; Exs. E, F. See also, Ex. 1-17 (Supplemental Offense/Incident Report of Sgt. Tina Kill).

⁶⁵ Decl. of Z. Abukhudeer at ¶ 13.

⁶⁶ *Id.* at ¶¶ 12, 13; Ex. E.

⁶⁷ Ex. 10-1-2.

⁶⁸ *Id.*

⁶⁹ Ex. 1-17.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Decl. of Z. Abukhudeer at ¶¶ 12, 13; Exs. E, F.

surveillance equipment or that it failed to provide a copy of requested video footage. This claim will proceed to an evidentiary hearing if necessary.

IV. Penalty

These are Respondent's first violations of the Saint Paul Legislative Code and under the City's penalty matrix, the presumptive penalty is a fine of \$500.⁷⁴ The Saint Paul Legislative Code provides that the city council may deviate from the presumptive penalty in the matrix where it determines there are "substantial and compelling reasons" to do so.⁷⁵ The Code also provides that the occurrence of multiple violations shall be grounds for departure from the presumptive penalties at the city council's discretion.⁷⁶

The requirement that the city council have "substantial and compelling reasons" to depart from the presumptive penalty provided in the matrix is similar to language found in the Minnesota Sentencing Guidelines that requires "substantial and compelling circumstances" to depart from the presumptive sentence for criminal convictions.⁷⁷

The Minnesota Court of Appeals noted that the City's ordinances "provides a penalty matrix for licensing violations that is akin to the presumptive sentences provided in the Minnesota Sentencing Guidelines."⁷⁸ While the Administrative Law Judge recognizes the significant differences between imposing a criminal sentence and imposing an administrative penalty for a municipal code violation, the concepts underpinning the legal standard of review are analogous and, therefore, instructive.

Minnesota courts have held that the presumptive sentence should only be exceeded if the enhanced penalty is deemed to be "more appropriate, reasonable or equitable than the presumptive [penalty]."⁷⁹ The decision maker should impose the presumptive penalty unless "'substantial and compelling circumstances' based on aggravating factors warrant an upward departure."⁸⁰ To properly impose a penalty that is an upward departure from the presumptive penalty in the sentencing guidelines, then, the decision maker must have a specific factual basis.⁸¹ "Substantial and compelling circumstances" are "factual circumstances that distinguish the case, making it atypical."⁸²

The Minnesota Supreme Court has also held that "generally in a case in which an upward departure in sentence length is justified, the upper limit will be double the

⁷⁴ St. Paul, Minn. Legis. Code § 310.05(m)(2).

⁷⁵ St. Paul, Minn. Legis. Code § 310.05(m).

⁷⁶ *Id.*

⁷⁷ Minn. Sent. Guidelines II.D (2019).

⁷⁸ *In the Matter of the Cigarette/Tobacco and Gas Station Licenses Held by Midway University & Hamline LLC d/b/a Midway Amoco BP for the premises located at 1347 University Avenue in St. Paul License ID # 2010000243*, 2021 WL 562416, at FN #1.

⁷⁹ *Dillion v. State*, 781 N.W.2d 588, 595 (Minn. Ct. App. 2010) (citing *State v. Bingham*, 406 N.W.2d 567, 570 (Minn. Ct. App. 1987).

⁸⁰ *Id.*

⁸¹ St. Paul, Minn. Legis. Code § 310.05(m)(ii).

⁸² *Dillion*, 781 N.W. 2d. at 595.

presumptive sentence length.”⁸³ The Court wrote: “Only in cases of ‘severe aggravating circumstances’ may the district court impose a greater-than-double departure from the presumptive sentence. Such cases, we have stated, are ‘extremely rare’”⁸⁴

Here, the City seeks to revoke the Respondent’s licenses. Revocation is a greater-than-double upward departure from the presumptive \$500 fine for a first violation provided in the penalty matrix. Therefore, following the guidance of Minnesota Supreme Court, the City must show that severe, aggravating, and factually atypical circumstances warrant such an upward departure from the presumptive penalty.

This tribunal applied this legal analysis in a recent case regarding Midway Amoco BP, a gas station in St. Paul, Minnesota.⁸⁵ The city council “unanimously adopted the findings of fact, conclusions of law and recommendation of the administrative law judge.”⁸⁶ In that case the city council found, based on the administrative law judge’s report, “that ‘severe aggravating circumstance support[ed] a greater-than-double upward departure from the presumptive penalty.’”⁸⁷ Those severe, aggravating circumstances included:

- gunfire,⁸⁸
- shots fired from the gas station parking lot into neighboring buildings on multiple occasions,⁸⁹
- neighbors who feared for their safety,⁹⁰
- large disruptive crowds repeatedly gathering in the early morning hours dancing and smoking marijuana,⁹¹
- drug deals in the parking lot,⁹²
- physical assaults,⁹³
- and ultimately a homicide.⁹⁴

⁸³ *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981).

⁸⁴ *State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005) (citing *State v. Spain*, 590 N.W.2d 85, 89 (Minn. 1999)).

⁸⁵ See *In re the Matter of the Cigarette/Tobacco and Gas Station Licenses Held by Midway University & Hamline LLC d/b/a Midway Amoco BP for the premises located at 1347 University Avenue in St. Paul License ID # 2010000243*, FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION (Minn. Office of Admin. Hearings Mar. 9, 2020).

⁸⁶ *Midway University & Hamline LLC d/b/a Midway Amoco BP*, 2021 WL 562416, at *1.

⁸⁷ *Id.* at *4.

⁸⁸ *Id.*

⁸⁹ Findings of Fact, Conclusions of Law and Recommendation at p. 14.

⁹⁰ *Id.* at p. 13.

⁹¹ *Id.* at p. 6.

⁹² *Id.*

⁹³ *Midway University & Hamline LLC d/b/a Midway Amoco BP*, 2021 WL 562416, at *4.

⁹⁴ *Id.*

In that case, the “licensee fostered this criminal actively by selling single cigarettes and drug kits.”⁹⁵ “Between late April 2019 and the end of June 2019, the SPPD received more than 100 calls for service to the gas station.”⁹⁶

The city council found these events amounted to one of those rare instances where the “severe, aggravating and **factually atypical** circumstances . . . supported a [greater-than-double upward] departure from the presumptive penalty.”⁹⁷ The Minnesota Court of Appeals affirmed the city council’s revocation of the cigarette/tobacco and gas station licenses.⁹⁸

In this case, Respondent violated Saint Paul’s legislative code by selling single cigarettes, selling flavored tobacco products, and allowing patrons to smoke within the licensed premise in violation of Minnesota’s Clean Air Act. **These multiple violations support an upward departure on the City’s penalty matrix.**⁹⁹ **But, while these violations are concerning, they are not the “severe, aggravating and atypical circumstances” that are required to support the revocation of Respondent’s licenses.**

Moreover, the remaining allegations, while more troubling, even if established at hearing, would not support revocation. The violations here are not as persistent, pervasive, or dangerous as those in the Midway Amoco BP case. **This recommendation should not be taken as condoning the actions of Respondent, but rather a reasoned judgment that the violations established together with the violations alleged, are not so severe, aggravating, atypical, and rare as to meet the high legal standard necessary for a greater-than-double upward departure in the City’s penalty matrix.**

It is recommended that an upward departure to the second penalty box, a \$1,000 fine, be imposed for Respondent’s multiple sales of single cigarettes and flavored tobacco products, and for allowing patrons to smoke cigarettes while inside the store. This matter will proceed to a prehearing conference as indicated in the Order to discuss the remaining violations and whether an evidentiary hearing is necessary.

J. E. L.

⁹⁵ *Id.*

⁹⁶ *Id.* at FN #4.

⁹⁷ *Id.* at *4 (emphasis added).

⁹⁸ *Id.*

⁹⁹ St. Paul, Minn. Legis. Code § 310.05(m).