THOMPSON HALL
SANTI CERNY & KATKOV

February 17, 2016

RE: Imperial Vapor, LLC Condemnation

Dear St. Paul City Council,

The undersigned law firm has been retained to represent Imperial Vapor LLC ("Imperial") in relation to the condemnation proceedings initiated by the city of St. Paul (the "City") at the subject property at 841 Grand Ave., St. Paul, MN 55105 (the "Premises"). Imperial has a leasehold interest at the Premises.

I. Introduction and Procedural Background

Imperial sells empty vaporizer devices and batteries. Based on erroneous advice from a City employee, Imperial applied for a zoning variance requesting a variance of the separation requirement between tobacco products shops in order to receive a license pursuant to SPLC §324.01. The zoning code requires a tobacco products shop to be located at least one-half mile from another tobacco products shop. The Premises was within 1,281 feet from an actual tobacco products shop on Grand Avenue. The variance was denied.

Imperial proceeded with opening of its vaporizing business without a license or zoning variance since it did not believe it fell within the definition of a "tobacco products shop" as defined in SPLC § 65.535.

On January 4, 2016, the City attempted to enforce the alleged zoning violation and delivered a "Correction Notice – Complaint Inspection" from Fire Inspector A.J. Neis ("Correction Notice") to Imperial. The Correction Notice listed three enforcement actions, namely, a condemnation under SPLC § 34.23, a revocation of the Fire Certificate of Occupancy under SPLC § 40.06, and an alleged non-conforming use under SPLC § 65.535. Each of these actions stems from an alleged violation of SPLC § 65.535 (re. proximity of tobacco products shops). The Correction Notice also demands access to the entire building for a Fire Certificate of Occupancy renewal inspection under SPLC § 34.19. Imperial appealed the Correction Notice.

At the appeal of the Correction Notice on January 19, 2016, a hearing officer ruled that the City's attempted enforcement of Imperial's alleged zoning violation was, in fact, improper because during an appeal process all enforcement actions must be held in abeyance pursuant to SPLC § 34.25(2). The hearing officer did, however, furnish a resolution and recommendation to the City Council stating (1) Imperial is a tobacco shop within the definition of the City's zoning code; (2) The Board of Zoning Appeals previously determined the issue of whether Imperial is a tobacco

products shop, that determination is no longer appealable, and that determination provides the basis for the findings in the license enforcement action; and (3) the enforcement action under Section 34 (Minimum Property Maintenance Standards) and Section 40 (Fire Certificate of Occupancy) was proper.

Imperial is now present before the City Council to request rejection of the hearing officer's resolution and recommendation based on the following arguments.

II. The City Cannot Maintain Its Condemnation Proceeding Against Imperial Vapor Because Its Bases Is Not Supported by the Record, Nor Does Imperial Vapor Fall Within Definition of "Tobacco Products Shop."

A. *The Alleged Violation of SPLC § 324.01 is Not Properly Before the City Council.*

The City has articulated that Imperial is unlawfully operating its business because 1) Imperial is in violation of the City's zoning requirements and 2) Imperial needs a license to sell tobacco. Imperial objects to the City Council's consideration regarding the latter because Imperial's alleged violation of SPLC § 324.01 by not obtaining a license was not raised in the Correction Notice. Nevertheless, even if the licensing issue is properly before the City Council, Imperial is still able to operate its business because it is doing so legally.

B. *Imperial Is Not a "Tobacco Products Shop" Per the City's Definition.*

The City also argued that Imperial is unlawfully operating its business because it did not obtain a variance to SPLC § 65.535, which requires at least one-half mile between "tobacco products shops." Pursuant to SPLC § 65.535, a "tobacco products shop" is defined as a,

> retail establishment with a principal entrance door opening directly to the outside that derives more than ninety (90) percent of its gross revenue from the sale of loose tobacco, plants, or herbs and cigars, cigarettes, pipes, and other smoking devices for burning tobacco and related smoking accessories and in which the sale of other products is merely incidental. "Tobacco products shop" does not include a tobacco department or section of any individual business establishment with any type of liquor, food, or restaurant license.

In other words, in order to be considered a "tobacco products shop" under this definition, a business would have to be:

(1) a retail establishment with a principal entrance door opening directly to the outside;
(2) that is operating within one-half mile (2,640 feet) of another tobacco products shop;
(3) that derives more than ninety (90) percent of its gross revenue from the sale of:
    a. loose tobacco, plants, or herbs;
    b. cigars, cigarettes, pipes, and other smoking devices for burning tobacco; and,
    c. related smoking accessories; and,
(4) in which the sale of other products is merely incidental.

Imperial does not meet the § 65.535 definition and therefore does not need a zoning variance in order to operate lawfully. Imperial sells vaporizers, which do not "burn" or "smoke" tobacco in the way it is traditionally consumed. While this technology is somewhat new and unfamiliar, it

cannot simply be lumped in with "tobacco products." Moreover, when interpreting statutes conjunctions can be decisive when assigning meaning. In this instance, it is important to note the conjunctive use of "and" throughout § 65.535 creating a requirement that the business must sell items in each of categories (3) a-c above, which Imperial does not. The hearing officer's determination to the contrary is erroneous. The hearing officer based her conclusion that Imperial fell within the definition of a "tobacco products shop" on the Board of Zoning Appeals' ("BZA") previous determination of such inclusion. However, the BZA analyzed the factors for granting a variance without ever addressing whether Imperial constituted a "tobacco products shop." Nothing in the minutes of that hearing indicate that the BZA made any specific findings as to whether Imperial is a "tobacco products shop." In sum, since Imperial is not a "tobacco products shop" it does not require a variance to § 65.535.

III. Conclusion

Because Imperial does not fall within the meaning of "tobacco products shop" and its business practices are lawful, there are no grounds for condemnation. Imperial respectfully requests that the City Council enter an order 1) dismissing the enforcement actions, 2) ordering immediate removal of the condemnation notice, 3) reinstating the fire certificate of occupancy, 4) finding that Imperial is not a tobacco products shop, 5) finding that Imperial does not need a license to sell tobacco, and 6) for any other further relief that is just and equitable.

Best Regards,

Jeff Upin, Esq.
jupin@thompsonhall.com
612-466-0010