DEPARTMENT OF SAFETY AND INSPECTIONS
Ricardo X. Cervantes, Director

CITY OF SAINT PAUL
Christopher B. Coleman, Mayor

375 Jackson Street, Suite 220
St Paul, Minnesota 55101-1806

Telephone: 651-266-8989
Facsimile: 651-266-9124
Web: www.stpaul.gov/dsi

February 17, 2016

Council President Russ Stark
Councilmember Dai Thao
Councilmember Rebecca Noecker
Councilmember Chris Tolbert
Councilmember Amy Brendmoen
Councilmember Dan Bostrom
Councilmember Jane Prince
Rooms 310/320
Saint Paul City Hall
15 West Kellogg Blvd.
Saint Paul, MN 55102

Re: AGENDA ITEM 51: RLH CO 16-2, Appeal by Mark Santi, d/b/a Imperial Vapor, LLC. 841 Grand Avenue

Dear Council Members:

As Zoning Administrator, I write to you regarding the matter noted above and ask that you affirm the Legislative Hearing Officer's decision to uphold the enforcement action taking by the department of safety and inspections in light of Imperial Vapor's violation of the Saint Paul Zoning Code.

Before the Legislative Hearing Officer ("LHO"), Imperial argued that the City's enforcement actions were wrong because, according to Imperial, it is not a tobacco products shop. Imperial insisted its operation at 841 Grand Avenue was not a zoning issue. Imperial also urged the LHO to ignore its previous application for a zoning variance as that process was nothing more than a "red herring." I urge the Council to bear in mind that the City's Zoning processes are always relevant to land use issues and cannot be dismissed simply because Imperial urges you to do so. In this matter, the outcome of Imperial's variance application is directly relevant to Imperial's illegal business operation at 841 Grand Avenue as explained below.

As noted by the LHO, Imperial had previously applied to the Board of Zoning Appeals ("BZA") for a zoning variance in order to operate a retail use specifically listed and regulated as a "tobacco products shop" under Leg. Code § 65.535. Imperial sought to vary Leg. Code § 65.535(a)'s distance requirement which states: "no tobacco product shop shall be located with one-half (1/2) mile (2,640 feet) of another tobacco product shop." The BZA denied Imperial's application because 841 Grand Avenue is too close to an existing tobacco product shop. Notwithstanding the denial of its variance application, Imperial elected to open and operate a tobacco products shop at 841 Grand Avenue which lead to the City's enforcement action now under the City Council's consideration.

The continuing relevance of Imperial's variance application to the matter now before the city Council is contained in Imperial's "red herring" argument to the LHO. According to Imperial "the only relevant inquiry pertains to the type of business that Imperial currently conducts at the Premises." It is important that the City Council understand that Imperial's argument misunderstands the continuing application of the Zoning Code - not only as it was applied by the BZA to Imperial's variance application - but also as to

its continuing relevance to the present enforcement action against Imperial for conducting business in violation of the Zoning Code.

Under the Zoning Code, at Leg. Code § 66.101(c), it states that any land use not listed therein as a "permitted use" or "conditional use," or any land use "not determined to be substantially similar to a listed permitted or conditional use shall be prohibited in that district." As applied, this language means any proposed land use not listed in the Zoning Code as a permitted or conditional use, or was not determined to be "substantially similar" to a use listed in the Zoning Code, is prohibited as a matter of law and cannot be established or operated lawfully. The two components of Leg. Code § 66.101(c): (1) legal land uses are permitted only if listed either as permitted or conditionally permitted uses; or, (2) have been determined to be "substantially similar" to a listed permitted or conditional use, are the regulatory underpinnings of Leg. Code § 60.105's requirement that "no use of any building or land shall be made except in conformity with the provisions of the Zoning Code."

Imperial's "red herring" argument implies that Leg. Code § 66.101(c)'s first regulatory component should not be applied because Imperial applied for a variance only upon "erroneous advice received from a City employee." This argument ignores the fact that the Zoning Code does not list as a permitted or a conditional use, a land use that Imperial describes in its own words as selling "only electronic cigarettes and their components, as well as the liquid that the cigarettes vaporize." It is ironic that Imperial's argument that its business is not listed as a permitted or conditionally permitted use actually results in an admission by Imperial that its business is a prohibited use. The outcome of adopting this argument from Imperial would mean that Imperial must now shut down as ordered.

Imperial's argument also implies that Leg. Code § 66.101(c)'s second regulatory component giving the City the discretion to determine whether an unlisted use may be "substantially similar to a listed permitted or conditional use" should not be applied. It is uncontroverted that the Zoning Code does not list as a permitted or conditional use one that sells "only electronic cigarettes and their components, as well as the liquid that the cigarettes vaporize." This argument by Imperial's urges that the "substantially similar" determination made by the BZA's staff for Imperial's variance application should now be ignored. The irony here is that without the BZA's staff's "substantially similar" determination, Imperial would have been unable to appear before the BZA to seek a variance from the separation standard applicable to tobacco products shops because Imperial's admitted use would have been a use "not listed" under the Zoning Code and therefore not permitted under Leg. Code § 66.101(c). It is interesting to note that when Imperial appeared before the BZA seeking a separation variance from another tobacco products shop, Imperial was not heard to contest its "substantially similar" classification as a tobacco products shop. Imperial only noted that it did not sell any "tobacco products" but admitted for licensing purposes that so called "e-cigarettes" were classified as "tobacco products."

There is no question then that "substantially similar" use classification given to Imperial as a tobacco products shop was based exclusively upon Imperial's own description of its business model. Recognizing that there is no listed land use that matched Imperial's description of its business model, BZA staff reasonably determined that Imperial's use was in fact "substantially similar" to a use that is listed as a permitted or conditionally permitted use. Leg. Code § 65.535 defines and regulates a "tobacco products shop" and Leg. Code § 66.421 states that a tobacco products shop is a permitted commercial use in a "BC" zoning district. Imperial unquestionably sought to benefit from the Zoning Code's "substantially similar" language in order to see whether it could open as a tobacco products shop at 841 Grand Avenue rather than risk being excluded from opening simply because it was not a listed use. Likewise, it is worthwhile to note that Imperial never appealed the BZA's "substantially similar" determination nor appealed the BZA's denial of its variance application.

Imperial now cannot have it both ways: the relevance of how the Zoning code has been previously applied to Imperial's business operation continues to the matter now before the City Council. But

Imperial persists in trying to have it both ways by urging the City Council to ignore the underlying circumstances of the BZA's variance decision. Imperial's argument to the City Council attempts to reshape the business model it represented at that time of the variance application before the BZA by now arguing that the "the only relevant inquiry pertains to the type of business Imperial *currently* conducts at the Premises." (Italics supplied).

Imperial's argument suggests that the City Council ignore the Zoning Code. But the Zoning Code cannot be ignored: at any point in time, the Zoning Code will require a finding regarding "the type of business Imperial currently conducts at the Premises." Thus Leg. Code § 66.101(c) continues to require that Imperial's business must either be listed as a permitted or conditional use in the zoning code, or there must be a determination that Imperial's current business is substantially similar to a listed permitted or conditional use. As noted above, any business operation that does not meet this standard cannot lawfully operate under Leg. Code § 60.105.

From the City's previous zoning determinations the Council should recognize that Imperial operated as a tobacco products shop because Imperial never challenged this determination. As a result, that determination remains in effect today. Although Imperial can argue that the Council may now reexamine Imperial's business operations and make its own determination regarding Imperial's *current* land use, this argument suggests that Imperial's business is now something other than what it was represented to be at the time Imperial applied for a variance. However, with all due respect, the City Council is bound by the previous land use determination made for Imperial at the time of its variance application before the BZA. The LHO also recognized that it was also bound by the BZA's land use determination when the LHO heard this matter on January 19, 2016.

Finally, the City Attorney's Office has advised me, in the context of this appeal, that the City Council would lack authority to make a "similar use determination" regarding Imperial's use of the 841 Grand Avenue property that is different from the previous determination as the Council has, in Leg. Code § 61.106, exclusively vested such decisions to the Zoning Administrator and that this decision was never challenged under the procedures specified in the Zoning Code for appealing land use decision under Leg. Code §§ 61.701-.702. Based upon this advice, it is the Zoning Administrator's position that a "substantially similar" determination was made and determined at the time of Imperial's variance request, that Imperial never appealed this determination, and that this determination cannot now be revised by the City Council in the context of this proceeding. If there is an argument that the City's previous "substantially similar" determination is not valid, the original determination nevertheless must be followed until the Zoning Administrator revises the previous determination. Whether the matter is resubmitted to the zoning administrator for a revised determination is up to Imperial.

In the meantime, the Zoning Administrator urges the City Council to adopt the LHO's recommendation regarding the zoning enforcement action taken by the department of safety and inspections.

Sincerely,

Wendy Lane
Zoning Administrator

cc: Marcia Moermond, Legislative Hearing Officer
Therese A. Skarda, Assistant City Attorney
Peter W. Warner, Assistant City Attorney