



Legislation Text

File #: RES 19-384, **Version:** 1

Memorializing a City Council decision denying an appeal by the Association for Non-Smokers-Minnesota from a decision of the Board of Zoning Appeals granting a variance from the distance requirements for a proposed tobacco products shop at 1724 University Avenue West.

WHEREAS, on August 6, 2018, Mussie Embaye, d/b/a the "Little Grocery" (hereinafter "Applicant"), duly applied to the Board of Zoning Appeals (hereinafter "BZA") under BZA File No. 18-092702 for a variance from the strict application of the zoning code's separation requirements for tobacco products shops in order to open a tobacco product shop at property commonly known at 1724 University Avenue West (PIN No. 332923420005) and legally described as Howard Park, Lots 10 thru Lot 13 in the City of Saint Paul, Ramsey County, Minnesota; and

WHEREAS, the applicant's proposed tobacco product shop would be located 2,600 feet from an existing tobacco product shop. The zoning code requires 2,640 feet of separation between tobacco product shops. Based upon the distance between the existing shop and the applicant's proposed shop, the applicant requested a variance of 40 feet the separation standard; and

WHEREAS, on August 27, 2018, the BZA, pursuant to Legislative Code § 61.601, duly conducted a public hearing on the Applicant's variance request where, following a presentation by BZA's staff which recommended approval of the variance application but before any testimony was taken from the Applicant or any other persons favoring or opposed to the variance application, a discussion ensued between the BZA's commissioners and BZA staff regarding how the distance between the proposed use and the existing use was measured and, following that discussion, the BZA moved lay over the public hearing for two weeks so that BZA staff and the city attorney's office could discuss the BZA staff's interpretation of distance measurements between tobacco product shops; and

WHEREAS, on September 10, 2018, the BZA again took up the matter and received from BZA staff a report on its discussion with the city attorney's office regarding distance calculation and renewed its recommendation set forth in the BZA staff report dated August 20, 2018, to approve the Applicant's variance request whereupon the BZA heard from the Applicant as well as from persons who spoke for or against the variance, as set forth in the BZA's adopted minutes which are incorporated herein by reference; and

WHEREAS, the BZA, upon closing the public hearing and based upon all the records and testimony received duly moved to deny the applicant's variance request, which motion failed on a 2-4 roll call vote whereupon it was duly moved to approve the variance which passed on a vote of 4-2 roll call vote based upon the findings and recommendation contained in the BZA staff report which is incorporated herein by reference and as set forth in BZA Resolution No. 18-092702 which reads as follows:

1. *The variance is in harmony with the general purposes and intent of the zoning code.*

The zoning code defines a "Tobacco products shop" 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.

The existing convenience store is not a tobacco products shop as defined above. In November of 2017, the City Council passed an ordinance prohibiting the sale of menthol cigarettes at convenience stores. Consumers will only be able to buy menthol cigarettes at tobacco product shops as defined in Section 65.535 of the Zoning Code and in liquor stores, effective November 1, 2018.

The applicant's convenience store is within a multi-tenant building. The zoning code requires a tobacco products shop to be located at least one-half mile, 2,640 feet, from another tobacco products shop. This is determined by measuring the distance between the two closest points from property line to property line. Because there is an existing shop already operating 2,600 feet away from this site at 681 Snelling Avenue, the proposed shop cannot be established without the requested variance.

The intent of the T2, traditional neighborhood zoning district, is to foster and support compact, pedestrian-oriented commercial development that, in turn, can support and increase transit usage. This building is located along the Light Rail Transit (LRT) Green Line. This business serves the commuters traveling along the Green Line and residents from adjacent neighborhoods. The proposed use is in harmony with the general purposes and intent of the zoning code. This finding is met.

2. *The variance is consistent with the comprehensive plan.*

There are a number of businesses on this commercial stretch of University Avenue West. The Comprehensive Plan (Strategy 1.46) "encourages retail establishments located in close proximity to each other" because the concentration "creates a synergy that benefits all businesses", resulting in more opportunities to attract new businesses as well expand existing ones. The proximity of multiple businesses allows customers to walk between the different destinations without having to drive between them.

Additionally, the applicant's proposed business is locally owned and operated. The Economic Strategy of the Comprehensive Plan includes creating a climate conducive to economic self-sufficiency and growth by fostering economic development activities and attracting businesses to Saint Paul. This request is in keeping with Strategy 1.46 of the Comprehensive Plan and its goal to support local businesses. This finding is met.

3. *The applicant has established that there are practical difficulties in complying with the provision, 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.*

Currently, the applicant's existing convenience sells tobacco products, including the sale of menthol cigarettes. The applicant's store has legally sold menthol cigarettes at this location for several years. This convenience store is within a multi-tenant building and it is not located near the property line where the separation measurement was taken from.

The zoning code requires that a tobacco products shop is 2,640 feet from an existing one. This is determined by measuring from closest points between the properties. Under this application, the closest distance between

each property line measured from the northeast corner of the proposed shop to the southwest corner of the existing shop at 681 Snelling, is 2,600 feet. This provision of the zoning code does not dictate how the distance between each property should be computed; it has been a long-standing policy of the zoning staff to measure the closest distance from property line to property line.

The certified survey provided by the applicant indicates the proposed shop would be 2,716 feet from the existing shop at 681 Snelling. The measurement on the survey is taken from the front door of the proposed shop to front door of the existing one. It would be reasonable to allow the proposed shop to operate because its location meets the intent of the zoning code to discourage a concentration of tobacco products shops. This finding is met.

4. The plight of the landowner is due to circumstances unique to the property not created by the landowner.

As stated above, the City of Saint Paul passed an ordinance prohibiting the sale of menthol cigarettes in convenience stores, such as the applicant's, effective November 1, 2018.

As a result, the applicant will have to cease the sale of menthol cigarettes beginning on the effective date. The applicant is not proposing to sell anything different than what he already has been selling for many years on this property. The ordinance that passed could potentially impact the applicant's business in a detrimental way.

Furthermore, this property is already within 2,640 ft. of another business that currently sales menthol cigarettes. It would be a plight to the landowner to cease the sale of one of his products and let the other business owner continue. The location of the convenience store in relation to the existing tobacco products shop is a circumstance unique to the property not created by the landowner. This finding is met.

5. The variance will not permit any use that is not allowed in the zoning district where the affected land is located.

This property is zoned T2, traditional neighborhood zoning district. If granted, this variance will not allow a use that is otherwise not permitted. This finding is met.

6. The variance will not alter the essential character of the surrounding area.

This section of University has a variety of commercial uses. This proposed tobacco shop would not alter the essential character of this neighborhood. This finding is met.

WHEREAS, on September 20, 2018, the Association for Non-Smokers-Minnesota (hereinafter "Appellant") did, pursuant to Legislative Code § 61.702(a), duly file with the City Clerk an appeal from the BZA's determination under BZA Resolution No. 18-092702 and requested a hearing before the City Council for the purpose of considering the actions taken by the BZA; and

WHEREAS, on October 17, 2018, the City Council, pursuant to Legislative Code § 61.702(b) and upon notice to affected parties, duly conducted a public hearing on the said appeal where all interested persons were given an opportunity to be heard; and

WHEREAS, at the close of the said public hearing, the City Council moved to lay the matter over for further consideration until October 24, 2018; and

WHEREAS, on October 24, 2018, the City Council, having heard the statements made and having considered the applicant's variance application, the report of staff, the BZA's Resolution, the appeal application and all the records, minutes, and testimony submitted during the October 17, 2018 public hearing; DOES HEREBY

RESOLVE, that the Council of the City of Saint Paul upholds the decision of the BZA in this matter as the Council finds that the Appellant has failed to meet its burden to demonstrate that the BZA erred in its facts and findings in this matter in approving the Applicant's request for a variance from the distance separation requirement for tobacco products shops; AND BE IT

FURTHER RESOLVED, based upon the finding above regarding Appellant's failure to show an error on the part of the BZA in reaching its decision as set forth in BZA Resolution No. 18-092702, the Council hereby denies the Appellant's appeal and, in support of this decision, the Council hereby adopts as its own the BZA's facts and findings as set forth above and in BZA Resolution No. 18-092702; AND BE IT

FINALLY RESOLVED that the City Clerk shall mail a copy of this resolution to the Applicant, the Appellant, the Zoning Administrator, the building official, the Planning Commission and the Board of Zoning Appeals.