The Hearing Examiner
Hearing Date: Thursday, September 13, 2018 at 1:00 PM

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: DOUG WAUN Denial for a Marijuana Business License issued by the Director, Regulatory Compliance & Consumer Protection Division, Department of Finance and Administrative Services,	Civil Case No.: L-18-007 DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION AND RELIEF REQUESTED

This is an appeal of a marijuana business license denial issued by the Department of Finance and Administrative Services ("FAS"). The basis for the denial was non-compliance with a City of Seattle Land Use Code section 23.42.058(C)(5) which requires dispersion of marijuana retail businesses to avoid clustering in one neighborhood. Appellant Waun is the owner of Seattle Cannabis and applied for a City marijuana business license where there were already at least two existing major marijuana activities in the area. Based on SMC 23.42.058(C)(5), this is not allowed and therefore the license was denied. Here, there are no factual disputes, and this appeal turns solely on the interpretation of the phrase "existing major marijuana activity." FAS brings this motion to resolve that legal issue and asks the Examiner to affirm the denial of the license.

Peter S. Holmes
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

II. UNDISPUTED FACTS

On **March 2, 2018**, the Washington State Liquor and Cannabis Board (WSLCB) issued a Notice of Marijuana License Application to the City of Seattle notifying the City that the Seattle Cannabis Company wanted to move into Ballard.[1] The Notice is commonly known as a Local Authority Notice or LAN which WSLCB is required to send to the local jurisdiction when there is an application for a Washington State license in their jurisdiction. In this case, Marigold Products Inc. aka Seattle Cannabis Co. (SC), through their owner and appellant herein, Douglas Waun, was applying to change locations from SODO to 1713 NW Market Street in Ballard. On **March 2, 2018** there were two, and in fact three, WSLCB-licensed marijuana businesses in that part of Ballard. The two marijuana licenses near SC's desired location are owned by Washington OG, LLC ("WA OG"), Suites A and B. On March 2nd WA OG was not open for business and had not finished their construction permits with Seattle Department of Construction and Inspections at their location at 5300 17th Avenue Northwest. WA OG had a state marijuana license but did not yet have a City marijuana license. Also, just south of WA OG, there was another marijuana retailer, Lux, that had been open for business since August 26, 2015.

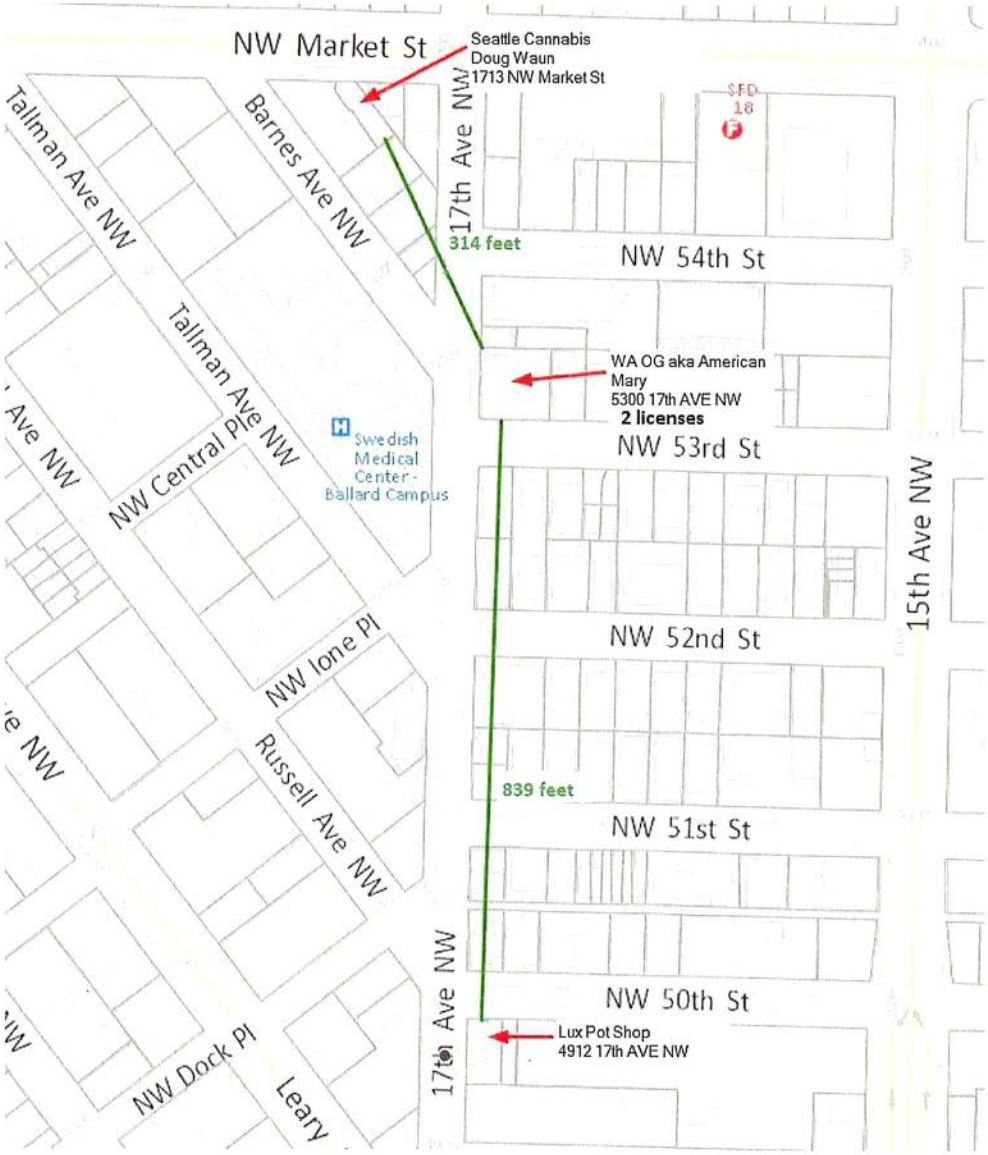
Because of these other businesses, on March 19, 2018, the City objected to Seattle Cannabis's state application for the Ballard location.[2] Despite the City's objection, WSLCB planned to grant SC a state license.[3] The City reconsidered its objection to WSLCB and decided WA OG would not be considered "existing major marijuana activities" and on April 12, 2018, FAS informed SC that their store licensing process could continue.[4] Seattle Cannabis submitted a complete application to FAS for a Marijuana Business License on June 6, 2016. After many weeks of reconsideration by City, an Order

---

[1] Declaration of Stephanie Dikeakos, Exhibit A, March 2, 2018 WSLCB Notice of Marijuana License Application.
[2] Dikeakos Declaration, Exhibit B, March 19, 2018 Objection Letter from FAS to WSLCB.
[3] Dikeakos Declaration, Exhibit C, April 12, 2018 letter from WSLCB.
[4] Dikeakos Declaration, Exhibit D, Email from Cherie MacLeod dated April 12, 2018.

Peter S. Holmes
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

of the Director denying the business license was issued July 20, 2018.[5] The basis for the denial was noncompliance with a City law regarding dispersion, SMC 23.42.058(C)(5). The proposed location for SC was 1713 NW Market Street. There were already two licenses at 5300 17th Avenue NW which is just 314 feet away and Lux, another marijuana retailer, was just down the street at 4912 17th Avenue NW. Given the presence of these 3 existing major marijuana activities, the license had to be denied.



[5] Dikeakos Declaration, Exhibit E, Order of the Director July 20, 2018

Peter S. Holmes
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

The business currently known as Lux Pot Shop (formerly Ballard Stash) has been open since August 26, 2015. The two licenses owned by Washington OG were not open for business on March 2, 2018 (the date WSLCB issued a Notice of Application to the City for Seattle Cannabis) as they were still working on their construction permits with the Department of Construction and Inspections.

III. ISSUE PRESENTED

Should the denial of a marijuana business license be affirmed as Seattle Cannabis did not comply with SMC 23.42.058(C)(5) which requires that any new major marijuana activity be more than 1,000 feet from the two existing major marijuana activities?

IV. EVIDENCE RELIED UPON

FAS relies on the Declaration of counsel, Stephanie P. Dikeakos and the attached exhibits thereto.

V. ARGUMENT AND AUTHORITIES

A. Hearing Examiner Rules and Summary Judgment Standard.

This motion is brought pursuant to Hearing Examiner Rule 2.16. Although HE Rule 2.16 is a general motion rule and does not specifically address summary judgments, HE Rule 1.03 provides that "The Hearing Examiner may look to the Superior Court Civil Rules for guidance." Based on that, the standard for a summary judgment motion is set out in Civil Rule 56(c). A summary judgment should be granted if the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue concerning any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *McKee v. American Home Products*, 113 Wn.2d 701, 705 (1989).

Here, there are no disputes at to the facts and the only issue is the interpretation of what constitutes an "existing major marijuana activity" as that phrase is used in SMC 23.42.058(C)(5).

B. The Applicant did not comply with all marijuana business license requirements.

Seattle Municipal Code Chapter 6.500 provides for the City's regulation of marijuana

Peter S. Holmes
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

businesses. In addition to this chapter, marijuana licenses are also subject to the provision of the new Seattle License Code in Chapter 6.202.[6] The FAS Director, or his designee, is authorized to investigate each license application and "may request that appropriate City departments confirm that an application is in compliance with City regulations."[7] The Director "**shall** deny a license. . . if the Director finds . . . the application does not meet the requirements of this Chapter 6.500. . . ."[8] One of the requirements of Chapter 6.500 is that "Applicants for a City license **shall** comply with all City and State laws."[9] The applicant in the instant case did not comply with the land use code SMC 23.42.058(C)(5) and was therefore denied a license.[10]

Under the Seattle Land Use Code – General Use Provisions, is a section which provides where major marijuana activity is allowed and prohibited. SMC 23.42.058. Aside from being in an allowed zone, the "activity and site" must meet the requirements of section 23.42.058(C). That section provides in part:

> 5. No more than two properties with major marijuana activity that includes the retail sale of marijuana products are allowed within 1000 feet of each other; where any lot lines of two properties with existing major marijuana activity that includes the retail sale of marijuana products are located within 1000 feet of each other, any lot line of another property with a new major marijuana activity that includes the retail sale of marijuana products must be 1000 feet or more from the closest lot line of the property containing existing major marijuana activity that includes the retail sale of marijuana products;
> 6. Whether a major marijuana activity complies with the locational requirements prescribed by subsections 23.42.058.C.2, 23.42.058.C.3, 23.42.058.C.4, or 23.42.058.C.5 shall be based on facts that exist on the date the Washington State Liquor and Cannabis Board issues a "Notice of Marijuana Application" to The City of Seattle.

SMC 23.42.058(5)-(6) (Emphasis added). There is no dispute that WSLCB issued a Notice regarding Seattle Cannabis on March 2, 2018 so the conditions that exist on that day are controlling. *See* SMC

---

[6] SMC 6.500.010. Application of other provisions.
[7] SMC 6.500.060(A) and (B). License – Applicant investigation.
[8] SMC 6.500.090(A)(1) Issuance of licenses (Emphasis added).
[9] SMC 6.500.050(E). License Applications (Emphasis added).
[10] Exhibit E, Order of the Director.

Peter S. Holmes
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

23.42.058(C)(6). Major marijuana activity is defined under the Seattle Land Use Code and means "any production, processing, or selling of marijuana, marijuana-infused products, usable marijuana, or marijuana concentrates." SMC 23.84A.025. Because there were already two Washington OG licenses in the area (within 314 feet) and a third license at Lux (839 feet away from Washington OG) any *new* major marijuana activity would have to be "1000 feet or more from the closest lot line of the property containing existing major marijuana activity." SMC 23.42.058(C)(5). Since SC is less than 1,000 feet from the lot containing WA OG, their license had to be denied.

C. **Applying the rules of statutory construction to SMC 23.42.058(C)(5), Washington OG and Lux were "existing major marijuana activities" on March 2, 2018.**

When construing a statute, the court's fundamental objective is to ascertain and carry out the legislature's intent. *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004). The court will look first to the statute's plain meaning. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). If the plain language is subject to only one interpretation, then the inquiry ends. *Id.,* 169 Wn.2d at 526. But if the statute is subject to more than one reasonable interpretation after analyzing the plain language, it is ambiguous. *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 456, 219 P.3d 686 (2009). If a statute is ambiguous, we consider the legislative history and circumstances surrounding the statute's enactment to determine legislative intent. *Lake*, 169 Wn.2d at 527. When interpreting a statute, the court will not add words where the legislature has chosen to omit them. *Lake,* 169 Wn.2d at 526. A provision should be considered in the context of the regulatory scheme. *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993). Municipal ordinances are construed according to the rules of statutory construction. *Ellensburg Cement Prods., Inc. v. Kittitas County,* 179 Wn.2d 737, 743, 317 P.3d 1037 (2014).

Peter S. Holmes
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

Interpreting "existing major marijuana activity" – Plain Meaning

Statutory interpretation begins with looking at the plain meaning of the code language. SMC 23.42.058(C)(5) requires a new marijuana business to be at least 1,000 feet away if there are already "two properties with existing major marijuana activity" in that area. Major marijuana activity is defined in the Land Use Code and "means . . . any production, processing, or selling of marijuana, marijuana-infused products, usable marijuana, or marijuana concentrates." SMC 23.84A.025. The word "existing" is not defined. The appellate courts apply the Webster's Third New International Dictionary to define ambiguous terms. *Sleasman v. City of Lacey*, 159 Wn. 2d 639, 643–44, 151 P.3d 990, 992–93 (2007). The word "existing" under Webster's Third refers us to "exist" and is defined:

> **ex·ist** *vi* -ED/-ING/-s . . . **1:** to have actual or real being whether material or spiritual: to have being in space and time . . . **2:** to have being in any specified condition or place or with respect to any understood limitation . . . **3:** to continue to be: maintain being . . . **4:** to have life or the functions of vitality : LIVE . . .**5: . . . .**[11]

Applying this definition, WA OG and Lux existed in their Ballard locations on March 2, 2018. In fact, there is no dispute that Lux was an "existing major marijuana activity." They had a presence in Ballard and occupied their respective spaces. Based on the definition of existing, WA OG "had actual or real being" and "had being in space and time" as they were occupying the location of 5300 17th Avenue NW and working on changes from an office to retail. They were also in the process of finishing the necessary construction under a Seattle Department of Construction and Inspections (SDCI) permit.[12] Those changes do not occur overnight and certainly there is great time and monetary investments in occupying a space to get it ready to open for business. Surely, all businesses would need time to make the necessary construction changes to pass final inspection with SDCI and obtain a certificate of

[11] Exhibit F to Dikeakos Declaration, Webster's Third New International Dictionary.
[12] Exhibit G to Dikeakos Declaration, City of Seattle Construction permit 6422721.

Peter S. Holmes
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

occupancy.[13] WA OG was not actively selling marijuana on March 2nd but was preparing the store for that purpose. Applying the plain meaning arguably works here to confirm that WA OG *was* an existing major marijuana activity as they had a state license, a presence in the building, and were working on their construction permit to get the property ready for marijuana sales. Yet the inquiry likely does not end there as there is continued ambiguity about what it means to be an existing activity.

Looking to the language of subsection 23.42.058(C)(5) compared to 23.42.058 in its entirety is instructive. Ordinance 124969 created the dispersion law and it also created new sections on buffering, that is the distance between marijuana activity and locations like parks, child care centers and libraries to name a few. SMC 23.42.058(C)(3) and (C)(4). Both of those subsections require that marijuana activity be a certain distance from these facilities as long as the "child care center; game arcade; library; public park; public transit center; or recreation center or facility;" are **"established and operating**." SMC 23.42.058(C)(3) and (4) (Emphasis added). While the drafters of the ordinance were clear that those types of facilities must be "established and operating" for the buffering rules to apply, they specifically chose not to use those words in subsection (5) when describing the dispersion requirements between marijuana retailers. We can infer from this that existing means something other than "established and operating." Since Appellant's main argument is that WA OG was not existing because it was not open for business, the absence of "established and operating" from the subsection on dispersion must mean that the WA OG did not have to be operating to be existing.

When the plain language is subject to only one interpretation, the inquiry stops there. Here, the phrase "existing major marijuana activity" is subject to more than one reasonable interpretation and is therefore ambiguous. *City of Seattle v. Winebrenner*, 167 Wn.2d at 456. When the statute is

---

[13] A certificate of occupancy is required before any building or structure may be used or occupied. Seattle Building Code §109.

Peter S. Holmes
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

ambiguous, we must look to the legislative history and circumstances of the statute's enactment to determine legislative intent. *Lake,* 169 Wn.2d at 527.

Legislative History of Ordinance 124969.

Ordinance 124969 was signed by former Mayor Ed Murray on January 12, 2016 and took effect immediately.[14] One of the recitals to that ordinances provides, "WHEREAS, buffering and dispersion provisions are necessary to ensure there are sufficient business locations, but no concentration of permitted marijuana businesses."[15] The Director of the former SDCI (Department of Planning and Development) submitted a Director's report supporting the ordinance and wrote:

> The separation requirements are intended to balance the public, health, safety and welfare interests in having sufficient areas within which these activities may locate and prevent concentration of these activities in any one area.

(Exhibit I to Dikeakos Declaration, City of Seattle Update to Marijuana Zoning Restrictions Report, page 5.) Mayor Murray transmitted the proposed Ordinance to City Council with a letter dated November 10, 2015.[16] In that letter, Mayor Murray wrote that the proposed ordinance, "will help ensure neighborhoods are not overburdened with clusters of cannabis retail stores and that patients in the new medical cannabis retail system will have access to stores through the city." While the final version of the ordinance was amended, the Mayor expressed that the ordinance was designed, in part, to address the concerns he had heard from residents throughout the City about clustering of medical cannabis dispensaries. The legislative history of Ordinance 124969 which added the dispersion requirement [SMC 23.42.058(C)(5)] addressed this concern about clustering of marijuana businesses in any one neighborhood, like Ballard. While there were already three licenses in that part of Ballard (established before the passage of the ordinance) any new retailer, like Seattle Cannabis, would be

---

[14] Exhibit H to Dikeakos Declaration, Excerpts of Ordinance 124969.
[15] Ordinance 124969, page 2 of text, lines 10-12.
[16] Exhibit J to Dikeakos Declaration, Letter from Mayor Murray dated November10, 2015 to City Council.

Peter S. Holmes
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

subject to the dispersion law. Again, compliance is determined on the date that WSLCB issued a Notice of Application to the City. SMC 23.42.058(C)(6). The legislative intent was to prevent too many marijuana businesses in one area. In other words, the intent of the ordinance was to prevent the new business from moving to an area where two marijuana activities already exist.

The result of Appellant's interpretation – Inconsistent with legislative intent

Interpreting "existing major marijuana activity" to mean that the business must be open and operating would undermine the legislative intent. It certainly does not mean "established and operating" which is a phrase used in other subsections of SMC 23.42.058(C) but specifically not used in SMC 23.42.058(C)(5). Appellant is expected to argue that an existing major marijuana activity must be open and operating. If we apply Appellant's interpretation of "existing" to a business like WA OG, that would mean that despite applying for and obtaining a state license and despite securing a lease on a building space and despite applying for and obtaining a construction permit and investing thousands on construction and before they had a chance to finish building out the space to get it ready to open, any number of other marijuana retailers could apply to open in that vicinity. They may have an easier building permit transition or barely any transition at all if they were converting a retail use to another retail use. There may be other factors involved such as funding and lease negotiations which may take longer for some businesses. Allowing Seattle Cannabis to obtain a City marijuana license and open ahead of WA OG would create a cluster of marijuana retailers in Ballard which is exactly what Mayor Murray expressed to the Council as one of the top concerns for Seattle residents. WA OG would eventually open also which would create the scenario the ordinance sought to avoid.

VI. CONCLUSION

SMC 23.42.058(C)(6) defines when the City must determine if the applicant (Seattle Cannabis) complied with the dispersion law. That date is March 2, 2018, the date WSLCB issued

Peter S. Holmes
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

Notice of the Seattle Cannabis application to the City. The decision to deny Seattle Cannabis their marijuana business license did not come lightly. It was decided after many weeks and careful consideration of the interpretation of the dispersion Land Use Code and the interpretation of the ambiguous phrase "existing major marijuana activity." Ultimately FAS denied the license because that decision is consistent with the legislative intent of preventing the clustering of marijuana businesses within 1,000 feet of a location where there are already two businesses there. The Department respectfully requests that the Hearing Examiner decide to affirm the denial for non-compliance with City Land Use Code applicable to Marijuana.

DATED this 5th day of September, 2017.

PETER S. HOLMES
Seattle City Attorney

By: 

Stephanie P. Dikeakos, WSBA #27463
Assistant City Attorney
Attorneys for Department of Finance and Administrative Services

Peter S. Holmes
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that, on this day, I caused to be served true and correct copies of the following documents:

1. Department's Motion for Summary Judgment;
2. Declaration of Stephanie Dikeakos with attached exhibits;

on the parties listed below and in the manner indicated:

Drew Duggan
Miller Nash|Graham Dunn
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121
Attorney for Appellant

(x) By Legal Messenger

the foregoing being the last known address of the above-named parties.

Dated this 5th day of September, 2018.

Ianne Santos

IANNE SANTOS

Peter S. Holmes
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200