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 APPELLANT'S RESPONSE TO DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

The Seattle Department of Finance and Administrative Services ("FAS") attempts to justify its wrongful denial of a marijuana license through a grammatically tortured and nonsensical interpretation of the Seattle Land Use Code that disregards key Code language which prohibits FAS's decision. The relevant Code language is not, as FAS argues, "solely" the phrase "existing major marijuana activity." Rather, this appeal turns on whether, on March 2, 2018, there were "*two properties with* existing major marijuana activity *that includes the retail sale of marijuana products*" within 1000 feet of each other. It is undisputed that there were not two properties with ongoing retail sales in Ballard on March 2, 2018. FAS's denial of Seattle Cannabis's license therefore violates the Code and must be reversed as a matter of law.

I. RELIEF REQUESTED

Marigold Products Inc. d/b/a Seattle Cannabis Company ("Seattle Cannabis") asks the Hearing Examiner to deny FAS's motion for summary judgment, and grant summary judgment

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

in favor of Seattle Cannabis. In denying Seattle Cannabis's license application, FAS misinterpreted the City of Seattle Land Use Code section 23.42.058(C)(5) (herein the "Dispersion Rule"). FAS mistakenly concluded that inactive marijuana retail licenses registered to an address near Seattle Cannabis, but not engaged in retail sales of marijuana products, triggered the Dispersion Rule. Dormant businesses, however, do not trigger the Dispersion Rule: the Code's plain language requires any nearby locations to be open and selling marijuana for the Rule to apply.

II. STATEMENT OF FACTS

A single factual issue governs this appeal: whether on March 2, 2018, there was a property with existing retail marijuana sales activity within 1000 feet of Seattle Cannabis's proposed location. FAS agrees that there was no such retail sales activity on that date. Consequently, there are no material issues of fact and this appeal should be resolved as a matter of law. Seattle Cannabis highlights certain facts below simply to aid the Hearing Examiner's understanding of the context of this appeal.

Seattle Cannabis holds a Washington retail marijuana license, and operated a retail marijuana business in the SODO neighborhood of Seattle from 2015 to 2018. In January 2018, Seattle Cannabis endeavored to relocate its business to Ballard where market analysis indicated its sales would substantially increase. Dikeakos Decl. Ex. A. On March 2, 2018, the Washington State Liquor and Cannabis Board ("WSLCB") issued a Notice of Marijuana License Application (in this case also known as Local Authority Notice or "LAN") notifying FAS of Seattle Cannabis's proposed relocation. *Id.* The March 2, 2018, date is critical because the Code makes it the operative date to determine whether the facts trigger the Dispersion Rule. SMC 23.42.058(C)(6).

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

On March 2, 2018, there were two marijuana retail licenses registered to addresses within 1000 feet of Seattle Cannabis's proposed Ballard location at 1713 NW Market St.[1] The licenses were owned by Washington OG LLC (collectively "WA OG") and registered to suites A and B of 5300 17th Avenue NW.[2] WA OG registered at that location in February 2016 but never opened for business or conducted any marijuana sales at the property.[3] Duggan Decl. Ex. A. In fact, WA OG did not even possess the proper Seattle City business license to do so.[4] Indeed, by March 2018, WA OG had been actively working with FAS to relocate out of Ballard. Duggan Decl., Ex. G. FAS admits that the only property in Ballard where a business was conducting retail marijuana sales, doing business under the trade name Lux, is located more than 1000 feet from Seattle Cannabis's proposed location (but within 1000 feet of the dormant WA OG property).

Washington's recreational marijuana statutes provide the context for why WA OG was allowing its licenses to sit dormant at the 5300 17th Avenue NW location. Every marijuana license must be registered to a physical location. RCW 69.50.325. Because the total number of available licenses is capped, in the years from 2015 to 2017 it became common practice in the industry to "squat" or "park" licenses at physical locations temporarily without operating in order to either look for a more preferable retail location or speculate on rising license values. Duggan Decl. Ex. C. Allowing licenses to lay dormant in this manner became such a problem that in 2018 the WSLCB passed new rules mandating the eventual forfeiture of licenses that do

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[1] See Department's Motion for Summary Judgment, pp. 3.

[2] The fact that WA OG registered two licenses at this location is irrelevant to the Dispersion Rule analysis here. It is undisputed that one license was registered before the Rule was passed and is therefore grandfathered. For the purposes of this hearing WA OG may be thought of as a single entity registered to a single location.

[3] See Department's Motion for Summary Judgment, pp. 2, ln. 10-12.

[4] See Department's Motion for Summary Judgment, pp. 2, ln. 10-12.

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

not open and conduct business in a timely manner. RCW 69.50.325; WAC 314-55-055, effective June 30, 2018. Weeks after the operative March 2, 2018 date, on March 27, 2018, internal City emails describe WA OG's location a "squatter" license, and on April 6, 2018, the WSLCB slated WA OG's license for forfeiture in the coming months. Duggan Decl. Ex. C and D.

April 12, 2018, FAS notified Seattle Cannabis that its application did not violate the Dispersion Rule and it could continue its relocation process. Dikeakos Decl. Ex. C. However, on June 1, 2018, then Director of FAS Fred Podesta held a private meeting with a lobbyist acting on behalf of WA OG and its owner Donald Douglas. Duggan Decl. Ex. E. For context, Mr. Douglas also owns another very successful open and operating marijuana retail store called American Mary, located in the Wallingford neighborhood adjacent to Ballard. Duggan Decl. Ex. F. A new Ballard marijuana retailer would present market competition to American Mary. On July 20, 2018, FAS withdrew its approval, and Director Podesta issued an order denying Seattle Cannabis' business license for noncompliance with the Dispersion Rule because Seattle Cannabis's proposed location was less than 1000 feet from Washington OG's dormant location. On July 26, 2018, Seattle Cannabis timely filed this appeal of FAS's denial.

III. ARGUMENT

A. Summary Judgment Standard

This response to FAS's motion for summary judgment is brought pursuant to Hearing Examiner Rules 2.16 and 1.03, and is controlled by the standards for summary judgment set out in Civil Rule 56(c). Summary judgment may be granted when there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). Additionally, summary judgment may be granted in favor of the nonmoving party, Seattle Cannabis, if it becomes clear that the party is entitled thereto. See, e.g., *Rubenser v. Felice*, 58 Wn.2d 862,365 P.2d 320 (1961); *Impecoven v. Department of Revenue*, 120 Wn. 2d 357, 841

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

P.2d 752 (1992). Interpretation of the Seattle Land Use Code is an issue of law. *Colby v. Yakima Cty.*, 133 Wn. App. 386, 389, 136 P.3d 131, 133 (2006) (citing *Eugster v. City of Spokane*, 115 Wash.App. 740, 745, 63 P.3d 841 (2003)).

B. SMC 23.42.058(C)(5) applies only when there is "existing major marijuana activity *that includes the retail sale of marijuana products*"

Seattle Land Use Code – General Provisions SMC 23.42.058(C) (the Dispersion Rule) states in relevant 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). The Rule specifically allows two stores engaged in retail marijuana sales within any given 1000 foot radius. If there are two retail stores selling marijuana in a 1000 foot radius, a third store looking to locate in that area must be at least 1000 feet from the nearest of the other two. The language of the Rule is unambiguous. Its operative language is "properties with existing major marijuana activity that includes the retail sale of marijuana products." The date on which to determine how many properties are engaged in retail sales is equally clear: it is the date on which the WSLCB issues the LAN (here, March 2, 2018). The Rule speaks solely to the type of *activity* that is occurring on that date. It does not pertain to, or even address, the existence of marijuana *licenses* or marijuana *entities*. The Rule applies only if

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
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"retail sale of marijuana products" is occurring at two other locations within the proscribed 1000 foot area when the WSLCB issues a "Notice of Marijuana Application" to The City of Seattle.

C. Seattle Cannabis did not violate SMC 23.84A.025(5)-(6) because on March 2, 2018, there had not been any "retail sales of marijuana products" within 1000 feet of Seattle Cannabis' Ballard location

It is undisputed that on March 2, 2018, WA OG was not engaged in marijuana retail sales. WA OG did not even possess the business license required to engage in retail marijuana sales. Based on these facts alone, the Dispersion Rule was not applicable, and was not violated by Seattle Cannabis, because there were not two "properties with existing major marijuana activity which includes the retail sale of marijuana" within 1000 feet of Seattle Cannabis on March 2, 2018. There was not even one property with such activity within a 1000 foot radius of the Seattle Cannabis location.

D. FAS's analysis omits the Dispersion Rule's operative language in order to change the Rule's meaning

In its motion for summary judgment, FAS quotes the Dispersion Rule as pertaining to "existing major marijuana activity" no less than eight times, but not once do they include the Rule's operative requirement that the kind of "existing major marijuana activity" the Rule addresses is activity that "includes the retail sale of marijuana." This omission is the foundation upon which FAS makes its tortured argument that the rule is ambiguous, and that the Hearing Examiner must therefore engage in extensive legislative analysis to determine what "existing" means. FAS argues that "existing" is a metaphysical term that must refer to the entity, WA OG, when in fact there is no mention of business entities anywhere in SMC 23.42.058(C)(5). "Existing" very clearly modifies the phrase "activity that includes the retail sale of marijuana." And whether such activity exists is based on what is occurring at the property location, not any particular entity. FAS's argument runs contrary the basic principles of statutory construction. The first principle, is to look at the plain language of the statute. "[A] court may not construe a statute in a way that renders statutory language meaningless or superfluous." *Ballard Square*

MILLER NASH GRAHAM & DUNN LLP
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T: 206.624.8300 | F: 206.340.9599
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Condo. Owners Ass'n v. Dynasty Const. Co., 158 Wn.2d 603, 610, 146 P.3d 914, 918 (2006). FAS's argument does not just render language of the Dispersion Rule meaningless, it depends on omitting key language entirely.

E. The best evidence of the City Council's intent is the Code language itself

FAS attempts to rescue its faulty grammatical argument by arguing that the Seattle City Council must have intended that businesses licensed but not yet open should be considered "engaged in retail sales of marijuana" at the time a new retail license application is received. But the Code says exactly the opposite. SMC 23.42.058(C)(6) unambiguously anticipates the very situation presented by this appeal. If a location is not engaged in retail sales "on the date" the LAN is issued, then it is not to be considered under the Dispersion Rule. In balancing the public health and welfare, the City reached the opposition conclusion from the one urged by FAS, protecting would-be retailers from the effects of licensee "squatters." The Council could have stated that any existing licensed business triggered the Rule, regardless of whether it was engaged in retail sales, but that is not what the Code says.[5] It is not for FAS to amend the Code to address a concern that the Council apparently does not share. If the Code is to be amended to read as FAS wants, then the Council can do it. But they haven't. Although FAS conjures up a parade of horribles where clusters of marijuana retailers beset the City, they cite not a single actual or even threatened example of such clusters.

IV. CONCLUSION

The Dispersion Rule is clear, if two "properties with existing major marijuana activity which includes the retail sale of marijuana" are within 1000 feet of one another, a third store looking to locate in that area must be at least 1000 feet from the nearest of the other two. It is

[5] The language "activity including retail sales of marijuana products" is actually more specific than the broader term "existing and operating." Merely existing and operating, without retail sales, does not implicate SMC 23.42.058(C)(5). FAS's argument that the use of more precise language creates ambiguity makes no sense.

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

undisputed that WA OG was not engaged in the retail sale of marijuana on March 2, 2018; there was "no existing major marijuana activity which includes the retail sale of marijuana" within a 1000 foot radius of the Seattle Cannabis location on that date. Therefore Seattle Cannabis's license application could not be denied under the Dispersion Rule. Because of this, and for the other reasons stated herein, Seattle Cannabis respectfully asks that the Hearing Examiner deny FAS's motion for summary judgment, and rule in favor of Seattle Cannabis by reversing the denial of Seattle Cannabis's license application.

DATED this 12th day of September, 2018.

MILLER NASH GRAHAM & DUNN LLP

By: *s/ Drew F. Duggan*

K. Michael Fandel, WSBA No. 16281
Drew F. Duggan, WSBA No. 50796
MILLER NASH GRAHAM & DUNN LLP
Pier 70 ~ 2801 Alaskan Way, Suite 300
Seattle, WA 98121
Telephone: (206) 624-8300
Fax: (206) 340-9599
Email: michael.fandel@millernash.com
Email: drew.duggan@millernash.com

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below I served the foregoing APPELLANT'S RESPONSE TO DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT and DECLARATION OF DREW F. DUGGAN IN SUPPORT OF SUMMARY JUDGMENT on:

Stephanie P. Dikeakos	☒	via Hand Delivery
Assistant City Attorney	☐	via U.S. Mail
Seattle City Attorney's Office	☐	via Facsimile
701 Fifth Avenue, Suite 2050	☒	via E-mail
Seattle, WA 98104	☐	via E-Service
Email: stephanie.dikeakos@seattle.gov		

Attorneys for Respondent

Under the laws of the state of Washington, the undersigned hereby declares, under the penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Executed at Seattle, Washington, this 12th day of September, 2018.

Gillian Fadaie, Legal Assistant

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121