BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of

DOUG WAUN

from Denial of Marijuana Business License, by the Director, Seattle Department of Finance and Administrative Services.

Hearing Examiner File:
L-18-007

ORDERS ON MOTIONS TO INTERVENE and FOR SUMMARY JUDGMENT

This matter concerns the appeal of a Seattle Department of Finance and Administrative Services Director's ("Director" or "City") decision that denied an application for Marijuana Business License ("Decision"). The appeal was filed by Doug Waun ("Appellant"). The City filed a motion to dismiss the appeal. The Appellant filed a response to the motion. The City filed a reply to the response. While the Appellant did not file a cross motion, the parties stipulated that the entire matter could be resolved by summary judgment based on the briefing for the City's motion.

Washington OG filed a Motion to Intervene on September 20, 2018. The City and the Appellant filed responses in opposition to the motion to intervene. A telephonic hearing on the Motion to Intervene was held and attended by the following representatives: Ryan C. Espegard for Washington OG, Stephanie Dikeakos for the City, and K. Michael Fandel and Drew F. Duggan for the Appellant. The motion to intervene was orally **GRANTED** in limited part to allow the Intervenor as a party only for purposes of preserving a right to appeal pursuant to HER 3.09, and to introduce supplementary evidence in support of the City's motion for summary judgment.

A hearing was held on October 1, 2018 for the limited purpose of allowing the Intervenor to introduce evidence, and to allow each of the parties an opportunity to present oral argument on the summary judgment.

The Hearing Examiner has reviewed the file in this matter including the motions documents. For purposes of this decision, all section numbers refer to the Seattle Municipal Code ("SMC" or "Code") unless otherwise indicated.

Quasi-judicial bodies, like the Hearing Examiner, may dispose of an issue summarily where there is no genuine issue of material fact. *ASARCO Inc.* v. *Air Quality Coalition,* 92 Wn.2d 685, 695-698, 601 P.2d 501 (1979). Rule 1.03 of the Hearing Examiner Rules of Practice and Procedure ("HERs") states that for questions of practice and procedure not covered by the HERs, the Hearing Examiner "may look to the Superior Court Civil Rules for guidance." Civil Rule 56(c) provides that a motion for summary judgment is properly granted where "the moving party is entitled to a judgment as a matter of law." The Hearing Examiner "must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if reasonable persons could reach only one conclusion." *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 832-833, 100 P.3d 791 (2004).

The parties agree that there are no material facts at issue in this matter. The Appellant submitted a complete application to the City for a Marijuana Business License on June 6, 2016. The Director denied the application on July 20, 2018, on the basis that there were two pre-existing businesses engaged in major marijuana activity located within 1000 feet of the Appellant's proposed location. Pursuant to SMC 23.42.058.C.6, the determination as to the presence of businesses engaged in major marijuana activity was determined by conditions on March 2, 2018, the date that the Washington State Liquor and Cannabis Board ("WSLCB") issued a notice of marijuana application to the City concerning Appellant's business. The parties agree that at least one of these pre-existing businesses, Washington OG, was not engaged in actual sales of marijuana on March 2, 2018, but that it did possess a WSLCB license for retail marijuana sales, leased the location of 5300 17th Avenue NW, and was making construction alterations to that space. Washington OG also introduced uncontroverted evidence that it had purchased marijuana for the purpose of future retail sales.[1]

This matter turns on the question of whether the provision in SMC 23.42.058.C.5 prohibiting more than two properties within 1000 feet of each other from conducting "major marijuana activity that includes the retail sale of marijuana products," requires actual sales of marijuana or not. The City argues that it does not, and that despite Washington OG not having made any sales as of March 2, 2018 the Decision was correct in considering it a "major marijuana activity that includes the retail sale of marijuana products," in the review of the Appellant's application. The Appellant argues that the same language requires that a business be actively engaged in the retail sale of marijuana products, that Washington OG did not meet this criteria as of March 2, 2018, and that its application should have been approved.

Municipal ordinances are governed by the rules of statutory interpretation. *Ellensburg Cement Products, Inc., v. Kittitas County*, 179 Wn.2d 737, 743, 317 P.3d 1037 (2014).

> We derive the legislative intent of a statute solely from the plain language by considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.
> If, after this inquiry, there is more than one reasonable interpretation of the plain language, then a statute is ambiguous and we may rely on principles of statutory construction, legislative history, and relevant case law to discern legislative intent. A statute is "not ambiguous simply because different interpretations are conceivable."
> . . . It is a well-established principle of statutory interpretation that we may not add words "to an unambiguous statute when the legislature has chosen not to include that language.

---

[1] Washington OG also introduced evidence that it had conducted some form of marijuana sales and paid associated taxes in February 2018 prior to the March 2, 2018 date. However, the legality of these sales was challenged by both the City and the Appellant, and the evidence submitted by Washington OG is not adequate for it to be considered as uncontroverted for purposes of summary judgment. As such, this evidence was not considered by the Hearing Examiner in reaching the decision herein.

State v. Dennis, 191 Wash.2d 169, 172-173, 421 P.3d 944 (2018) (citations omitted).

SMC 23.42.058.C.5, the contested section of the Code, provides:

> Major marijuana activity is allowed in all other zones if the activity and site meet the following requirements: . . .
>
> 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.

(emphasis added).

There is no definition of "retail sale" in the Code. While it may be tempting to simply apply a definition of common parlance indicating that this term should mean the actual sale of a product, in the context of the marijuana industry a business that engages in "retail sale" identifies a specific type of legally permitted marijuana business.

Under RCW 69.50.10:

> (dd) "Marijuana retailer" means a person licensed by the state liquor and cannabis board to sell marijuana concentrates, useable marijuana, and marijuana-infused products in a retail outlet.
>
> (qq) "Retail outlet" means a location licensed by the state liquor and cannabis board for the retail sale of marijuana concentrates, useable marijuana, and marijuana-infused products.

These are distinguished from the two other types of State licensed marijuana industry business types – producer and processor. *See e.g.* RCW 69.50.325.

Under the Code marijuana businesses are allowed to operate within City in certain areas as marijuana major activities. Under SMC 23.84A.025 "'Marijuana activity, major' means, . . . any production, processing, or selling of marijuana, marijuana-infused products, usable marijuana, or marijuana concentrates." These terms mirror the terms "producer, processor, or retailer" used by Washington State in licensing marijuana businesses.

Thus, the term "retail sale" as is used in SMC 23.42.058.C.5 has more than one reasonable interpretation of the plain language – either the common use term of sales of merchandise, or the marijuana industry reference to a type of business. Therefore, the Hearing Examiner turns to statutory construction and legislative history to discern legislative intent and interpret the Code at issue in this matter.

The City identifies legislative history showing that the City administration in efforts to advance the ordinance was seeking in part to limit clustering of marijuana retail facilities within the City. This supports the City's interpretation of SMC 23.42.058.C.5 that the goal was not to have the outcome sought here by Appellant that there would be more than two marijuana retail businesses operating within 1000 feet of one another in a single area.

In the context of SMC 23.42.058 retail sales appears to concern a particular type of marijuana business, and not be limited to the specific action of selling. For example, SMC 23.42.058.C.1 references the "operating" of a major marijuana activity that has been licensed. Thus, a "major marijuana activity" is used to refer to the marijuana business entity, and not just to the act of either producing, processing or retail sales. As a business "major marijuana activity" inherently includes all related business activity, and is not limited simply to the direct processing, production or sale of marijuana.

The language of the Code does not support the Appellant's conclusion that under SMC 23.42.058.C.5 retail sale is limited to mean only to the action of selling. Appellant argues that Washington OG must have been engaged in the retail sale of marijuana on March 2, 2018 in order for it to be considered in the dispersion analysis required for its application under SMC 23.42.058.C.5. This strict interpretation of Code would require that actual marijuana sales must have been undertaken on March 2, 2018. This interpretation of the Code would mean that depending on the business activity of March 2, 2018 even a fully operational marijuana retailer who was closed for a weekend, holiday, or other reason (e.g. vacation or damage to the property) or simply did not make any sales on that particular day, would not be considered for purposes of the dispersion analysis, and that the application for another business could be granted. At the hearing the Appellant distanced itself from this outcome, and indicated that this is not what it was seeking, but offered no language from the Code to demonstrate support for this broader meaning.

The tenants of statutory interpretation also require that "[c]ommonsense informs our analysis, as we avoid absurd results in statutory interpretation." *Seattle Housing Authority v. City of Seattle*, 3 Wash.App.2d 532, 538-539, 416 P.3d 1280 (2018). Clearly, it would be an absurd result for the dispersion analysis to exclude businesses that were otherwise engaged in actual sales of marijuana on dates other than the one on which the WSLCB issued a notice of marijuana application to the City just because they did not occur on that exact date.

In addition, SMC 23.42.058.C 3 & 4 restricts the locations of major marijuana businesses by specifically characterizing them as "established and operating." Whereas SMC 23.42.058.C.5 makes no such distinction as to retail marijuana businesses. If the Council had intended for SMC 23.42.058.C.5 to require that a marijuana retail business be established and operating as the Appellant argues, then the Council would have included that language.

Under SMC 23.42.058.C.5 "major marijuana activity that includes the retail sale of marijuana products" is used to distinguish between production, processing and retail businesses to ensure that the dispersion requirements of that section of the Code are only applied to retail marijuana businesses, and not those engaged in production and processing. It is not intended to require actual sales on the date of WSLCB notice to the City. Therefore, as a matter of law the Decision was correct when it included Washington OG in its dispersion analysis of the Appellant's application. Washington OG is, and was on March 2, 2018, a marijuana business entity licensed by the State of Washington to engage in the business of retail sale of marijuana, and was engaged in normal business activities as a retail sale business in preparation of actual sales.

The City's motion for summary judgment is **GRANTED** and the appeal is **DISMISSED**.

Entered this 19th day of October, 2018.

Ryan Vancil, Hearing Examiner
Office of Hearing Examiner
P.O. Box 94729
Seattle, Washington 98124-4729
Phone: (206) 684-0521
FAX: (206) 684-0536

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Orders on Motions to Intervene and For Summary Judgement** to each person listed below, or on the attached mailing list, in the matter of **Doug Waun**, Hearing Examiner File: **L-18-007**, in the manner indicated.

Party	Method of Service
Appellant Legal Counsel Drew Duggan drew.duggan@millernash.com	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
Department Legal Counsel Stephanie P. Dikeakos stephanie.dikeakos@seattle.gov	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
Intervenor Legal Counsel Ryan Espegard respegard@gth-law.com	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger

Dated: October 19, 2018

Bonita Roznos
Executive Assistant