

LAND USE DECISION APPEAL

APPELLANT INFORMATION

1. Appellant

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DECISION BEING APPEALED

1. Decision appealed: DONH-COA-00403.

2. Property address of decision being appealed: The Butterworth Building, 1921 First Avenue Seattle, WA 98101.

3. Elements of decision being appealed: Appellant is appealing the Pike Place Market Historical Commission's denial of the application for a certificate of approval to operate The Chapel Lounge.

APPEAL INFORMATION

1. What is your interest in this decision? (State how you are affected by it)

Olivia Vermaak is the authorized representative of McAleese Properties LLC (together, the "Applicant" or "Appellant") and applicant who applied for a certificate of approval to operate The Chapel Lounge. McAleese Properties is the property owner and landlord on whose behalf Ms. Vermaak submitted the application. Under SMC 25.24.070, Appellant applied for a certificate of approval for the operation of The Chapel Lounge. The Chapel Lounge is a bar and nightclub whose clientele includes diverse members of the community, including members of the LGBTQ+ community. The Chapel Lounge is located in the historic Butterworth Building and the

space has long been used as a bar and nightclub. McAleese Properties recently performed extensive renovations to refurbish and restore the structural integrity of the historic building.

Prior to becoming The Chapel Lounge and undergoing structural renovations, the space was occupied by the Starlight Lounge and before that Cafe Sophie, Avenue One, Market Thai Restaurant, and Fire & Ice, just to name a few. The Chapel Lounge has, at all times during its operation, maintained a valid liquor license and received regular visits from the Liquor Board in order to make sure that it complies with all regulations. The Liquor Board has consistently provided positive feedback regarding The Chapel Lounge's operations and has never issued any type of warning, much less a violation. The Chapel Lounge has a history of working with other business in the Pike Place Market and currently offers food from neighboring Kells and is looking to expand its food offerings to include other Market businesses.

The Pike Place Market Historical Commission (the "Commission") conducted a public meeting on December 8, 2021 to consider the application for a certificate of approval to operate The Chapel Lounge. During that meeting, the Commission, which lacked 7 of its 12 Commissioners, passed a motion by a 4-1 vote to deny the application. On December 15, 2021, the Commission issued a written decision denying the application for approval to operate The Chapel Lounge (the "Decision"). A copy of the Decision is attached as Exhibit A. This Decision leaves The Chapel Lounge unable to operate its business and unable to apply for permits from the City of Seattle Department of Construction and Inspections.

2. What are your objections to the decision? (List and describe what you believe to be the errors, omissions, or other problems with the decision.)

The Commission denied the Appellant's application under the authority granted to it under SMC Chapter 25.24 because the application did not conform to the Pike Place Market Historical Commission's Guidelines (the "Guidelines").

In the Decision, the Commission relied on guidelines 1.4, 1.6, 2.1.3 and 2.7.1 (a-c) for denying the application. Below is a summary of some of the errors committed by the Commission, but it is not intended to be an exhaustive or complete list of all errors committed.

Appellant reserves her right to raise any additional legal and factual issues at the appeal hearing as appropriate.

A. The Commission violated Guideline 1.4 when it issued the Decision.

The Commission erred by finding that McAleese Properties violated Guideline 1.4. Guideline 1.4 grants the Commission discretionary power to interpret and apply the Guidelines. Guideline 1.4 states that: “The Guidelines should simulate harmonious and orderly development, while allowing gradual adjustment to varying and changing market activities.” The Commission admitted at the hearing that the space currently occupied by The Chapel Lounge has been used as a lounge, restaurant, bar, or some combination thereof, many times before. Slight adjustments to the use is allowable under Guideline 1.4 and is not a valid basis for denying a certificate of approval.

Guideline 1.4 also provide that the Guidelines generally are to be considered in light of historical precedent. The Commission spent a substantial amount of time discussing their concerns that The Chapel Lounge was seeking retroactive approval and had been operating without Commission approval since earlier in the year. It was evident that this fact was the driving force behind the Commission’s Decision and its denial of the application. This Decision ignored historical precedent where the Commission has approved prior retroactive applications.

B. The Commission violated Guideline 1.6 when it issued the Decision.

The Commission erred by finding that McAleese Properties violated Guideline 1.6 which states that landlords should require all tenants to adhere to the terms of the Certificates of Approval. During the hearing, the Commission noted that failure to adhere to Guideline 1.6 is not an automatic ground for dismissal. The Commission further noted that it had granted retroactive approvals in the past, and that there were other retroactive approvals currently under consideration. Similar to its violation of Guideline 1.4, the Commission failed to consider historical precedent when it issued the Decision.

C. The Commission violated Guideline 2.1.3 when it issued the Decision.

The Commission erred by finding that McAleese Properties violated Guideline 2.1.3. Guideline 2.1 provides general guidance regarding the goals of the Commission in relation to new or changing uses in the Market. Guideline 2.1.3 states that the Market should be: “A place where persons with low and moderate incomes can find affordable food, goods and services, and residences.” Absolutely no evidence was presented that The Chapel Lounge did not comply with this Guideline. In fact, The Chapel Lounge presented evidence that demonstrated its conformance with this Guideline by providing pricing for its sample menu. The Chapel Lounge’s pricing is substantially lower than many other businesses in the Market, including the Pink Door across the alley, Sushi Kashiba (one of the most expensive restaurants in the City), Le Pichet, Virginia Inn, Maximilien and Matt’s in the Market. The Commission relied solely on rank speculation based upon independent researched performed by a single Commissioner who introduced personal bias and evidence that was not part of the public record. Prior to the public hearing, Commissioner Lauren Rudeck went online and found a statement that The Chapel Lounge had a dress code. Commissioner Rudeck then speculated that having a dress code would exclude people with low and moderate incomes. This conclusion was reached without discussing what the dress code even entailed. Again, The Chapel Lounge provided unrebutted evidence that it offers reasonably priced drinks, provides food options from neighboring market restaurants, and hosts a weekly “industry and market night” where market locals are able to enjoy “specials” at a reduced price. This all, strongly infers that its price points are supported by the Guidelines.

D. The Commission violated Guideline 2.7.1 when it issued the Decision.

The Commission erred by finding that McAleese Properties violated Guideline 2.7.1, which states that:

2.7.1 Permitted Uses. A permitted use is one that conforms to the Market Zones and the Styles & Methods sections of these Guidelines. The Commission has the discretion not to approve applications for a permitted use in which:

- (a) The operation of the new business causes adverse physical impact (such as noise, odors or congestion) to an existing business or otherwise unduly interferes with other activities in the Market; or,
- (b) The use will result in an undesirable mix or concentration of similar uses within the District; or,

- (c) The proposed use is a significant change in the historic use of a location which the Commission views as an undesirable alteration to the character of the Market.

The Commission relied heavily on Guideline 2.7.1(a) in denying the application because it was alleged that The Chapel Lounge creates excessive noise, even though The Chapel Lounge has operated since April 2021, and has not received any noise complaints, much less a citation from the City. In reaching that conclusion, the Commission relied on three separate public comments that complained about noise and alleged drunken behavior of people congregating on the street outside The Chapel Lounge. Many of these public comments included false allegations regarding the status of The Chapel Lounge's liquor license, disorderly conduct of people in front of the building and contained derogatory language and racially charged language about the behaviors and "type" of clientele visiting this establishment. This was especially apparent in the public comment from the Pink Door where concerns over the nationality of the owner of The Chapel Lounge were raised. These public comments were accepted as fact by the Commission despite their factual inaccuracies and racial undertones. Each of the unsubstantiated allegations in the public comments were rebutted by the Applicant.

Further, The Chapel Lounge presented evidence of efforts to lower noise levels of the lounge by placing additional insulation in the building. The Chapel Lounge also has a mobile and built-in decibel reader in order to ensure noise does not adversely impact its neighbors. And even though there was no scientific evidence of adverse noise impacts, The Chapel Lounge expressed a willingness to work with the Commission and the City of Seattle to perform further noise remediation, as needed. The Commission acknowledged that The Chapel Lounge is surrounded by other loud venues (e.g., Kells, Pink Door, White Horse, El Callejon, Alley Mic, and others) and that any noise complaint cannot be attributed to any one venue. It appears that the Commission reached its decision that The Chapel Lounge was too loud in violation of 2.7.1(a) strictly because it does not like The Chapel Lounge's clientele. One Commissioner went as far as to distinguish the difference between the patrons of The Chapel Lounge and the Pink Door,

calling the Pink Door's patrons, "high class." As a result, the Commission violated its own Guidelines by denying the application.

Guideline 2.7.1(b) is not applicable and was unreasonably relied on. The location of The Chapel Lounge has long been operated as a bar or restaurant, and its change of use did not add any additional bar or restaurant locations to the Market. The Commission noted during the hearing that this argument did not hold up, yet opted to cite to it anyway in their Decision.

Finally, Guideline 2.7.1(c) is not applicable and was unreasonably relied upon. The Commission acknowledged that the location of The Chapel Lounge has long been used as a bar and restaurant space. As a result, the change in use is not a significant change.

It should be noted that the Commission discussed providing The Chapel Lounge with conditional approval for the business on the condition that it worked to address the alleged noise issues. The Chapel Lounge provided evidence of its willingness to work on the noise issues. The Commission, however, ultimately decided to deny the application instead of granting a conditional approval because they apparently did not trust The Chapel Lounge to remediate any noise issues. The Commission supported this decision by stating that The Chapel Lounge has been operating for eight months already without approval and, as a result, the Commission felt that The Chapel Lounge could not be trusted to work with the Commission regarding soundproofing, if it was later determined to be needed. The Decision is not based on any Guideline, and completely ignores the economic impact that the Covid-19 pandemic had on small business owners and landlords.

E. The Commission erred by receiving *ex parte* communications, not revealing the substance of those communications, and not recusing themselves. The Commission violated, among other things, the Appearance of Fairness Doctrine, Chapter 42.36 RCW.

Several members of the Commission received *ex parte* communications regarding The Chapel Lounge and application for a certificate of approval after the application was submitted and prior to the public hearing. These *ex parte* communications are a clear violation of the Appearance of Fairness Doctrine. RCW Chapter 42.36. Under RCW 42.36.010, the Appearance

of Fairness Doctrine applies to quasi-judicial action of local land use decision making bodies regarding parties' rights, duties or privileges.

The *ex parte* communications were addressed at the beginning of the hearing. The Commissioners who received the *ex parte* communications, however, failed to disclose the substance of the communications. The failure to disclose the substance of those *ex parte* communications is an express violation of RCW 42.36.060, which requires that the substance of any *ex parte* communications be disclosed.

Quasi-judicial proceedings—Ex parte communications prohibited, exceptions.

During the pendency of any quasi-judicial proceeding, no member of a decision-making body may engage in *ex parte* communications with opponents or proponents with respect to the proposal which is the subject of the proceeding unless that person:

(1) **Places on the record the substance of any written or oral *ex parte* communications concerning the decision of action;** and

(2) **Provides that a public announcement of the content of the communication and of the parties' rights to rebut the substance of the communication shall be made at each hearing** where action is considered or taken on the subject to which the communication related. This prohibition does not preclude a member of a decision-making body from seeking in a public hearing specific information or data from such parties relative to the decision if both the request and the results are a part of the record. Nor does such prohibition preclude correspondence between a citizen and his or her elected official if any such correspondence is made a part of the record when it pertains to the subject matter of a quasi-judicial proceeding.

(emphasis added)

Under the Appearance of Fairness Doctrine, *ex parte* communication is explicitly forbidden unless the person who received the *ex parte* communication places the substance of the communication on the record and gives a public announcement of the content and gives the party the right to rebut the substance of the communication. Here, the Commissioners failed to divulge the substance of the *ex parte* communications and failed to allow the Applicant to address the substance of the communications. The Commissioners then proceeded to participate in the hearing and ultimately denied the application for a certificate of approval. The Commission's decision to deny the application clearly violates the Appearance of Fairness Doctrine and the decision should be invalidated.

F. The Commission performed independent research that was not based upon the public record. This independent research injected bias and conjecture into the public meeting and was a basis for the Commission denying the application.

As detailed above, prior to the public meeting Commissioner Rudeck performed independent research that was not based on the public record. Commissioner Rudeck researched, among other things, social media, and other sources of information related to The Chapel Lounge. In addition, Commissioner Rudeck researched SDCI's permitting website and made the allegation during the public hearing that The Chapel Lounge was the subject of a violation. This research that was conducted outside the public hearing warrants reversal of the Decision.

G. The Commission lacked a quorum and did not have authority to conduct the hearing and deny the application. In addition, one Commissioner left her video cameras off during the entire meeting so it is unknown if she was present during the entire meeting, and another Commissioner left his computer at various times during the meeting.

The following six Commissioners were present during the roll call at the beginning of the hearing: Michael Hammond, Grace Leong, Golnaz Mohammadi, Lauren Rudeck, Christine Vaughan and Lisa Martin. After roll call, the Chair, Lisa Martin, confirmed that there was a quorum. But shortly after the meeting began, Commissioner Leong left the meeting, never returned and did not vote on the motion to deny the application. Even before Commissioner Leong left the meeting, however, there was not a quorum present.

Guideline 1.5.3 requires that the full Commission, which is comprised of 12 members, to be present for the public meeting.

The application will be considered at public meetings of the Review Committee and the full Commission. The applicant must attend both meetings.

Because there were only five Commissioners present, the Commission lacked authority to conduct the hearing and deny the application.

In addition to the lack of quorum, Commissioner Mohammadi left her video camera off the entire meeting and it is impossible to know whether she was present during the entire meeting. And Commissioner Hammond left his video screen at various times during the hearing and it is unknown whether he was participating in the hearing.

H. The Decision does not comply with SMC 25.24.050 because it does not provide the reasoning for why the application was denied.

SMC Chapter 25.24 governs the Pike Place Market Historical District and create the Commission. This ordinance also governs the application for certificate of approval and the public meeting. The Commission's Decision denying the application failed to comply with this ordinance.

SMC 25.24.050 governs the Commission's procedures and provides, in part, that:

The Commission shall adopt rules and regulations for its own government, not inconsistent with the provisions of this chapter or any other ordinance of the City. Meetings of the Commission shall be open to the public and shall be held at the call of the Chairman and at such other times as the Commission may determine. All official meetings of the Commission shall keep minutes of its proceedings, showing the action of the Commission upon each question, and shall keep records of its proceedings and other official actions taken by it, all of which shall be immediately filed in the Department of Neighborhoods and shall be a public record. **All actions of the Commission shall be by resolution which shall include the reasons for each decision.** A majority vote shall be necessary to decide in favor of an applicant on any matter upon which it is required to render a decision under this chapter.

(emphasis added)

The Decision is devoid of any analysis whatsoever for why the Commission denied the application. The Decision begins with a brief overview of the application and public hearing, states the Guidelines that were applied in order to render the Decision, and then abruptly ends. Because the Decision does not state the reasons for why the application was denied, the Decision must be reversed.

3. What relief do you want? (Specify what you want the Examiner to do: reverse the decision, modify conditions, etc.)

The Appellant requests that the Hearing Examiner reverse the Commission's Decision and direct it to issue a certificate of approval for The Chapel Lounge. In the alternative, the Hearing Examiner should reverse the Decision and direct the Commission to issue a certificate of approval with conditions that The Chapel Lounge to take reasonable steps to mitigate noise, if any, that impacts its neighbors.

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DATED this 28th day of December, 2021.

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