

**CITY OF BURNABY
RECONSIDERATION HEARING
PURE HOOKAH LOUNGE INC.**

To: Council, City of Burnaby
4949 Canada Way
Burnaby, BC V8W 9A4

**Written Submissions of Pure Hookah Lounge Inc. for the
Reconsideration Hearing of October 16, 2019**

The City of Burnaby (“**City**”) Chief Licence Inspector made a decision on July 3, 2019 to cancel a business licence held by Pure Hookah Lounge Inc. (“**Pure Hookah**”) for the hookah lounge located at 3863 Hastings Street, Burnaby, British Columbia (the “**Business**”) (the “**Decision**”).

Pure Hookah asks City Council (the “**Council**”) to reconsider and overturn the Decision and accordingly reinstate Pure Hookah’s business licence. Pure Hookah also asks Council to overturn any Bylaw Violation Notices (“**BVN**”) related to this matter, specifically:

- BVN number E001721, dated May 23, 2018; and
- BVN number L200879, dated May 6, 2019.

Background

1. Pure Hookah is a corporation incorporated pursuant to the *Business Corporations Act*, S.B.C. 2002, c. 57, and is the operator of the Business, which opened in 2017.
2. Since the Business opened, Pure Hookah has operated the Business with a valid business licence from the City (the “**Licence**”) under the *Burnaby Business Licence Bylaw 2017* (the “**Licence Bylaw**”). The Licence was granted by the City to Pure Hookah using the restaurant category, as the City did not have a separate category a hookah lounge. The only condition the City placed on the Licence was that the Business has a maximum occupancy of 30 seats.
3. The Licence was renewed by the City in 2018 and 2019 on the same terms.
4. The Business is family owned and operated by an East Indian family. It is the family’s main source of income.
5. The Business provides its visitors with a space to meet and use hookahs, a water-pipe for smoking herbat fruit molasses (non-tobacco). However, the lounge is not only a place for socialization and recreation, but an expression of Muslim, middle eastern and south Asian culture.
6. The Business typically operates seven days a week from 6:00 p.m. to 1:00 a.m., except for Fridays and Saturdays when its hours are extended to 3:00 a.m.

7. After the Business opened, it operated in the City without issue and was a valuable contributor to the City's business and cultural communities.
8. The City, however, alleges, that beginning in or about mid-2018, it has received numerous noise complaints about the Business to the City's licensing and engineering departments and to the RCMP.
9. The City has only issued a single Bylaw Violation Notice ("BVN") to Pure Hookah in relation to these alleged noise complaints, on or about May 23, 2018 for an alleged violation of s.4(a) of the *Burnaby Noise of Abatement Bylaw Number 7332* (the "**Noise Bylaw**") on or about May 19, 2018.
10. In March 2019, the City met with Pure Hookah to discuss the alleged noise complaints. Pure Hookah advised the complaints were untrue and unproven, but said they wanted to work with the City to alleviate its concerns, even offering to undertake action to confirm the complaints and precautions against noise regardless. The City, however, said the noise was not the real issue – the issue was that there had been too many complaints to the RCMP so they had to respond.
11. On or about April 3, 2019, the City amended Pure Hookah's Licence by restricting the Business' hours to between 7:00 a.m. and 11:00 p.m. per section 3.2 of the Licence Bylaw.
12. On May 6, 2019, the City issued a BVN against Pure Hookah for allegedly failing to comply with the conditions of their Licence under s.11.7(c) of the Licence Bylaw on April 7, 2019.
13. On July 3, 2019, the Decision was made and Pure Hookah's Licence for the Business cancelled under section 7.1(a) of the Licence Bylaw on the basis that the alleged noise complaints had continued and the Business was operating in breach of the conditions on operating hours for their Licence.

The Noise Complaints are Unproven

14. The Chief Licence Inspector made the Decision by concluding the noise complaints about the Business are true and in violation of the City's bylaws. This conclusion was also a factor in the April 2019 amendment of the License which led to the Decision. Pure Hookah, however, has serious concerns about the veracity of these allegations.
15. As noted, Pure Hookah is cognizant of the alleged noise issue and has taken measures to ensure they are not exceeding the Noise Bylaw:
 - a. Pure Hookah has been fully compliant with the City and other authorities whenever approached about a noise or other concerns from the operation of their Business. Pure Hookah easily resolved these concerns by advising the Business' patrons of the issue, turning down its music, and ensuring the premises are secure.

- b. Pure Hookah measured the decibels of their Business, both inside and outside, and the Business's noise has not violated the Noise Bylaw. At their loudest, the noise levels were approximately 40 dBAs inside the Business and 25 dBAs outside, well under the Noise Bylaw limits for same. We note Pure Hookah has offered to provide the City with these results as well as conduct additional measurements to confirm if there is a noise issue, which is denied, however the City has at all times refused such offers.
 - c. Pure Hookah is on good terms with their landlord and the other tenants in the building where the Business resides. Pure Hookah has confirmed with these parties that they have no issues with noise from the Business or that any such issues were resolved. Again, we note Pure Hookah has provided the City with written evidence of this fact.
 - d. There are no neighboring buildings that could reasonably hear any music or other noise from the Business. The next closest building is approximately 280m away. It appears that some of the noise complaints against Pure Hookah are from more than two blocks away which not only would make it difficult for them to hear noise from the Business but would be particularly hard for them to confirm the noise they heard was actually from the Business.
16. Even if there were complaints about noise from the Business, that does not mean Pure Hookah has violated the Noise Bylaw. The purpose of the Noise Bylaw is to assist authorities in determining what levels of noise are acceptable within the City and what levels are not, per the limits set out sections 5-8 of the bylaw, and then if it is established that the noise is not acceptable take the appropriate action. These levels and limits are not open to interpretation. Noise alone is not evidence of the Noise Bylaw being breached. A complaint about noise is also not evidence. A person may be over-sensitive or find certain sounds unpleasant but that does not mean the Noise Bylaw has been breached.
 17. There must be actual evidence of noise in excess of the maximum decibels allowed at a given time and location, as set out in the Noise Bylaw. Pure Hookah has asked for this evidence however the City has not provided any such evidence. The City appears to be aware that this type of evidence is required to find a violation as we note the only complaint that resulted in a BVN being issued against Pure Hookah is the one where the City says it measured the noise levels. The City did not issue BVNs for the complaints where no one visited the Business to verify the complaint by measurements or otherwise, and rightly so.
 18. If there is no evidence demonstrating Pure Hookah has violated the Noise Bylaw, then any BVN issued accordingly is void. Similarly, any other City decision made on a violation without evidence is also void.
 19. Further, for the City to conclude that Pure Hookah has allowed the Business to violate some noise requirements such as to cancel its Licence, they must have been found guilty by a Court or similar authority of breaching the applicable law. A mere allegation that a party is violating the law is not enough. For example, if a violation of the Noise Bylaw is

alleged, then Pure Hookah must be ticketed, the ticket adjudicated, and the tickets found valid and enforceable for the City to conclude this wrongful activity has occurred. No such decisions have been made against Pure Hookah. The City's conclusions regarding the noise complaints for the Decision and those events leading up to it are therefore premature.

Duty of Procedural Fairness and Natural Justice

20. It is submitted that for the City to make a decision regarding the Licence on the basis of alleged bylaw violation without providing evidence that Pure hookah has been found in violation of the bylaw and allowing Pure Hookah a proper opportunity to contest this allegation is not only dishonest but against the principles of procedural fairness and natural justice.

21. Administrative decision makers, including Licence Inspectors, owe a duty of procedural fairness to those affected by their decisions as their powers are derived from statute and such power must be exercised in accordance to the rules of administrative law and natural justice.

Baker v. Canada (Minister of Citizenship and Immigration) (1999),
1999 CanLII 699 (SCC) 174 D.L.R. (4th) 193 [*'Baker'*], at para 20

22. The concept of procedural fairness is variable and its content is to be decided in the specific context of each case. The following non-exhaustive factors are relevant to determine the content of the duty of fairness:

- a. the nature of the decision being made and the process followed in making it.
- b. the nature of the statutory scheme and the terms of the statute pursuant to which the body operates.
- c. the importance of the decision to the individual or individuals affected.
- d. the legitimate expectations of the person challenging the decision.
- e. the choice of procedure made by the agency itself.

Baker, at paras 23-27

Knight v. Indian Head School Division No. 19, 1985 2 S.C.R. 643, at p 682

23. It is well-settled in law that the duty of procedural fairness includes the rights for individuals affected by an administrative decision to have an opportunity to present their case fully and fairly, including knowing the case made against them, and have the decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision. These rights act as a safeguard for individuals in their interactions with the government and are based on the theory that a final decision is more likely to be reasonable if the procedure through which that decision was made is fair and just.

Baker, at para 28

24. Procedural fairness requirements in administrative decisions are not technical, but rather functional in nature. The question is whether, in the circumstances of a given case, the

party that contends it was denied procedural fairness was given an adequate opportunity to know the case against it and to respond to it.

Petro-Canada v. British Columbia (Workers' Compensation Board), 2009 BCCS 396, at para 65.

25. In this case, the duty of procedural fairness was breached in the following ways:

- a. If the Chief License Inspector had evidence to support his conclusion that the noise complaints against the Business were valid, which we say he did not, then he failed to disclose that evidence to Pure Hookah, and therefore give them an opportunity to respond, in making the Decision which is a breach of the duty of procedural fairness / natural justice principles. A business licence holder cannot properly respond to a complaint without knowing the full extent of that complaint. As noted before, receipt of a complaint alone is not evidence, neither are the opinions of City engineering staff or RCMP officers without something more. Pure Hookah has asked the City to provide this evidence but the City has refused.
- b. A higher level of duty of procedural fairness is owed by the Chief Licence Inspector to Pure Hookah in this case. The Decision is especially important to Pure Hookah as they have invested significant time and expense into developing the Business and the Business is its owners' primary source of income.
- c. The City has rules and procedures regarding licencing and bylaw infringement, and it should follow them. The City cannot ignore these rules simply because there is extra time or effort involved, nor can it circumvent them by making it difficult for a business to operate otherwise. The City should also not be bending to pressure from outside forces – it should only take action when a claim has been substantiated, which is not the case here.

26. It is arguable that the process used by the Chief Licence Inspector was neither fair, impartial, nor open as required under the duty of procedural fairness. The remedy for a breach of the duty of procedural fairness at law is reconsideration of the decision by the administrative decision maker in accordance with the duty. Pure Hookah submits that a consideration of their legitimate expectations in this case is a process that is conducted fairly, impartially, and openly, mandates that the Decision be overturned and its Licence be reinstated.

The Decision was Unreasonable

27. Decisions of administrative decision makers that involve mixed questions of fact and law are reviewable by the Courts on a standard of reasonableness. According to this standard, a reasonable decision is one which “falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law”.

Northland Properties Corporation v. British Columbia (Liquor Control and Licencing Branch),
2011 BCSC 160, at para 72

Dunsmuir v. New Brunswick, 2008 SCC 9 [*‘Dunsmuir’*], at paras 47 and 51

28. It would be unreasonable for a municipality to make a decision on a business licence on the basis of belief or suspicion of a bylaw breach.
Westfair Foods Ltd. v. Saanich (District) (1997), 1997 CanLII 3686 (BC CA), 49 B.C.L.R. (3d) 299, 46 M.P.L.R. (2d) 104 (C.A.)
29. In this case, the Decision was unreasonable because the Chief Licence Inspector considered the following irrelevant and impermissible factors and make the following improper and incorrect conclusions:
- a. The Chief Licence Inspector breach the law respecting his duty of procedural fairness to Pure Hookah; and
 - b. It has not been established to the standard required that the Business' activities violate the City's bylaws. The Chief Licence Inspector does not have evidence of any violations, as discussed.
30. While the cancellation of Pure Hookah's Licence is the decision begin reconsidered by Counsel, we note that the City has also acted unreasonably in the events that lead to this Decision. Again, the City made conclusions on noise complaints that were premature. The restriction imposed on the Business by the City in April 2019 was also unreasonable and arbitrary. The breakdown of the alleged noise complaints in the City's documents does not justify the particular condition imposed – a closure of the Business between 11:01 p.m. and 6:59 a.m. A Licence Inspector should only impose conditions “in appropriate circumstances”, meaning circumstances where the condition is just and reasonable in addressing the issue. Imposing a condition on a licence that is arbitrary or lacking “real-world justification” is not only inappropriate but unfair and subject to review. This is particularly so where Pure Hookah had offer alternative and better-suited means to resolve the allegations than the restricted operating hours.
(*Francis (Sisters Icee's Hemp .B.C.) v. Vancouver (City)*, 1999 CanLII 5571, para 26; *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.*, 2013 BCCA 55, para 131)
31. When a reviewing Court finds that an administrative decision maker has reached an unreasonable decision, the Court will remit that matter back for reconsideration, taking in consideration only appropriate factors and law. In extreme cases, the Court will reverse the decision itself. Pure Hookah submits that, in this case, the Decision was unreasonable.

Impact of the Decision on the Community

32. Pure Hookah appreciates that the City has a role in ensuring the safety and health of its community, however the Decision does not further that purpose. Additionally, the Decision impacts the community's diversity and multiculturalism. For a body that has an explicit Multicultural Policy, it appears that on all matter regarding the Business, the City has put little effort into fulfilling this goal.
33. As a member of the City's business community, the Business brings a rare enterprise, so unique the City doesn't even have a business licence category for it, to a growing economy, it pays taxes, it hires locals and it helps support a local family. To allow the Decision to

stand would not only mean a loss to the business community but would result in letting go those local employees and deeply impact a owners' family financially with loss of its only income and investment.

34. In the above, it was noted that hookah lounges like the Business are important to the middle eastern, south Asian and Muslim communities. The City should be aware that hookah lounges are important centers of cultural gathering and exchange for those ethnicities and for Muslims are a deeply connected to spiritual reflection after evening prayers and the breaking of daily fast during Ramadan. Further, not only does the Business provide a place for these communities to engage in their own culture and religion, but it allows people of other cultures and religions to be exposed to this aspect of culture. A hookah lounge is an important contributor to multicultural exchange in the City which promotes education, diversity and tolerance.
35. Pure Hookah urges the City, in reconsidering the Decision, to consider the role that culture and cultural insensitivity plays in this issue. It may be a coincidence, but the fact that this is a hookah lounge run by an East Indian, frequented by Muslims, and has been the target of ongoing complaints when the Business is not in violation of any laws, raises the question of whether the complaints may have their motivation in ethnic or religious prejudices. If the City's Decision is influenced by these factors then Pure Hookah's rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter*") may be engaged, including the consequences that result if any of those rights are violated.

Conclusion

36. The Decision is unreasonable in consideration of the facts and law in these circumstances given that the complaints leading to the cancellation are unproven and there is no evidence of same. To conclude otherwise would not only be unfair but is a breach of the duty of procedural fairness and natural justice the City owes to Pure Hookah in making the Decision and for this reconsideration.
37. The Business is a valuable and desirable community asset. It not only contributes to the City's economy but brings greater diversity and performs an important culture function for the community. The Business plays a key role in helping members of the middle eastern, south Asian and Muslim communities practice their cultures and faith as they have a protected *Charter* right to do. The Business has become a community meeting space for those from all walks of life. The City should not be unfairly restricting such desirable businesses like Pure Hookah's but work with them to improve the services they provide and help the community to grow.
38. Pure Hookah strongly urges the City to reconsider its actions and allow the Business to continue operating. Pure Hookah wants to work with the City to meet its goals on health and security and be compliant and avoid complaints, but the City must understand that it also needs to be able to carry on with its business in a way that makes sense financially and for its patrons. Pure Hookah is certain they are not in violation of the City's bylaws, but are open to working with the City to find a way to resolve the alleged noise

allegations whether it be through installing noise-suppression methods or further testing to confirm the noise issue. Otherwise, the City should then allow its bylaw officers and the police to do their job and ask they attend the Business for bylaw enforcement if and when noise becomes an issue. Then, if a noise issue is found and proven, the City and Pure Hookah can engage in the proper adjudication of that issue including any changes to the License.

39. On the basis of the foregoing, Pure Hookah asks that Council reconsider and overturn the Decision and reinstate the Business' Licence.

All of which is respectfully submitted,



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