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CITY CLERK
DEPARTMENT
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August 7, 2015

City Clerk
c/o Irene Casper
304 City Hall
350 S. 5th St.
Minneapolis, MN 55415

Re: License application of Kim Yi's, LLC

Dear Ms. Casper:

Please find enclosed herein for consideration by the City Council's Community Development and Regulatory Services Committee the license applicant's objections to the findings and recommendation of the hearing officer in the above-described matter.

Please be advised that, because of a previously scheduled conflicting court appearance at the same date and time, neither Yong Green, the owner of Kim Yi's, nor I will be able to attend the committee hearing. This does not mean that either of us is waiving our objections to the hearing officer's findings or our intent to seek judicial review, if necessary, before the Minnesota Court of Appeals.

Yours truly,

Randall Tighe
Attorney at Law

Enclosure

C: Joel Fussy, Assistant City Attorney (via email)

CITY OF MINNEAPOLIS

DEPARTMENT OF REGULATORY SERVICES

In Re: Denial of Massage and Bodywork License Application for Kim Yi's, LLC

OBJECTIONS TO HEARING OFFICER'S FINDINGS AND RECOMMENDATION

License applicant Kim Yi's, by the undersigned, hereby makes the following objections to the findings and recommendation of Hearing Officer Fabian Hoffner, dated July 27, 2015:

found. The city's inspector conceded on cross examination that she had no evidence that Kim Yi's had not complied with this requirement.

I. THE HEARING OFFICER'S FINDINGS IGNORE THE FACT THAT THE CITY IS BARRED FROM USING THE PROSTITUTION ARREST AS A BASIS FOR LICENSE DENIAL BECAUSE IT HAS UNLAWFULLY SPLIT ITS CAUSE OF ACTION.

Upon the prostitution arrest occurring on Kim Yi's premises, the city could have both sought an administrative penalty for the conduct and simultaneously taken adverse action against the license application.¹ However, the city chose only to pursue an administrative fine. It subsequently brought an action against the license, arising out of the same incident.

It is clear that, in so doing, the city has unlawfully split its cause of action. As noted in *Myhra v. Park*, 193 Minn. 290, 258 N.W. 515 (1935):

The decision of the questions [res judicata] involves the elementary rule that a single cause of action cannot be split or divided and independent actions brought upon each separated part. The rule is well established by the courts and is strictly followed and applied. [Citations omitted.] In actions for tort or personal injuries, like the case at bar, each item of injury must be included in one suit, and, if voluntarily omitted, no further action can be maintained thereon.

¹ See Minneapolis Code of Ordinances Sec. 280.110 and 280.100.

Subsequently, in *Hauser v. Mealy*, 263 N.W. 2d 803, 807 (Minn. 1978), the Minnesota Supreme Court stated that “a plaintiff may not split his cause of action and bring successive suits involving the same set of factual circumstances.”

Similarly, in *Gulbranson v. Gulbranson*, 408 N.W.2d 216, 218 (Minn. App. 1987), the court held that “res judicata as merger or bar forbids a party from withholding a claim from the initial action, where it could be joined as easily adjudicated, in order to retain a cause of action for later lawsuit.”

While there do not appear to be any cases applying the prohibition on splitting a cause of action to administrative proceeding, the law is clear that the legal basis for such a prohibition is the doctrine of res judicata. Equally clear is the fact that Minnesota appellate court have held that res judicata effect is to be given to quasi judicial administrative proceedings. See, for example, *State by Friends of the Riverfront v. City of Minneapolis*, 751 N.W. 2d 586 (Minn. App. 2008) *pet. for rev. denied* (Minn. Sept. 23, 2008).

The sole basis advanced at the hearing for the city’s failure to join the administrative fine proceeding with an action against the license was a purported desire to accord due process rights to Kim Yi’s. In order to prove the underlying prostitution charge, Kim Yi’s would have to be accorded due process rights, whether as part of a single proceeding or separate proceedings.

Here, it is clear that the city, by not joining the license action and the administrative fine action in a single proceeding, unlawfully split its cause of action, barring the present license action under res judicata.

In rejecting this argument, the hearing officer relied upon Minneapolis Code of Ordinances Sec. 2.30, which provides, in pertinent part, “The administrative enforcement and hearing provided for in this chapter shall be **in addition** (emphasis in original) to any other legal

or equitable remedy available to the city for Code violations.” While this provision may be present in the city code, it is irrelevant to the license applicant’s argument. The fact that the city may have multiple remedies available to it does not mean it may bring multiple actions to enforce those remedies. The fact that a civil litigant may have available both a damage remedy and a remedy for an injunction does not mean that litigant may split its cause of action, seeking only an injunction in the first action and damages in the second action. It must seek both remedies in a single action or it waives the remedy it does not seek in the first action.

II. THE FAILURE TO PRODUCE RECORDS OF THE WORKERS AT THE PREMISES DOES NOT JUSTIFY DENIAL OF A LICENSE.

A. THE CITY’S REQUIREMENT THAT A MASSAGE ESTABLISHMENT PRODUCE EMPLOYEE RECORDS UPON DEMAND IS UNCONSTITUTIONAL UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

A second basis for the Hearing Officer’s recommendation for denial of the license was the applicant’s failure to produce, upon demand of the city, records of employees to prove that they were over 18 years of age. It is now clear that such a requirement to produce records upon demand is unconstitutional under the Fourth and Fourteenth Amendments to the U.S. Constitution. See *City of Los Angeles v. Patel*, 576 U.S. ___, 135 S. Ct. ___ (June 22, 2015).

B. EVEN ASSUMING THAT THE CITY’S REQUIREMENT WERE CONSTITUTIONAL, THE UNDISPUTED EVIDENCE AT THE HEARING PLAINLY DEMONSTRATES THAT THE APPLICANT DID NOT HIRE ANYONE UNDER THE AGE OF 18.

Notwithstanding the applicant’s failure to comply with the city’s unconstitutional requirement that it produce records upon demand, the undisputed evidence before the hearing officer demonstrated that the applicant absolutely complied with the purpose underlying the record-keeping requirement, to-wit: to assure that no one under the age of 18 worked at the establishment. The identifications of all Kim Yi’s workers were introduced into evidence at the

hearing. Not only did they show that no one under the age of 18 ever worked at the establishment; they showed that no one under the age of 50 ever worked at the establishment.

III. EVEN ASSUMING THE PROSTITUTION INCIDENT WERE TO BE CONSIDERED, THERE WAS NO EVIDENCE THAT LICENSE DENIAL WOULD BE THE APPROPRIATE REMEDY.

Assuming, *arguendo*, that the prostitution incident could be properly considered, there is no basis for the conclusion that capital punishment, in the form of license denial, is the appropriate remedy. The prostitution act was performed by an employee of the premises, who told the undercover officer, "Don't tell anyone," prior to committing the act, plainly indicating that she did not want her boss to know what she was doing. Prior to this incident, Yong Green operated the establishment for 15 years, without incident.

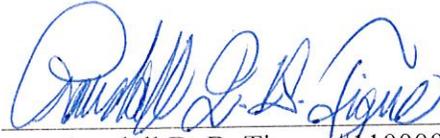
She now proposes to operate without employees and to install surveillance cameras in the massage rooms. No showing was made that such a solution would be inadequate to satisfy the city's needs.

CONCLUSION

For all of the foregoing reasons, the findings and recommendation of the hearing officer should be rejected, and Kim Yi's license application should be granted.

Respectfully submitted,

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Dated: August 7, 2015