

**MINNEAPOLIS CITY COUNCIL
PUBLIC SAFETY AND REGULATORY SERVICES COMMITTEE**

In the Matter of Las Americas, Inc.,

Respondent.

**RESPONDENT'S EXCEPTIONS
AND ARGUMENT, AND MOTION**

OAH No. 1-6010-14421-3

Respondent, Las Americas, Inc., takes the following exceptions to the Findings of Fact, Conclusions of Law and Recommended Decision by Administrative Law Judge George A. Beck, dated June 12, 2002:

1. **Finding of Fact #2** at page 2, recognizes that Las Americas' owner, Selwin Ortega was involved in efforts to remove drug dealers and prostitutes from the Central Neighborhood, and that the presence of the business increased the presence of legitimate customers, reduced crime, and thereby encouraged other legitimate businesses in the previously dilapidated area. It should also be noted that numerous residents, activists and business owners from the Central Neighborhood community testified at the hearing before the ALJ that Las Americas was instrumental in improving the neighborhood. The Ortegas first opened a grocery store at 401 East Lake Street in 1992 because they could not find any commercial tenant for the vacant property that they had renovated. The high volume of trafficking in drugs and prostitution discouraged any businesses from renting space. Neighborhood activists agreed that the presence of the Las Americas grocery stores and the new legitimate traffic from predominantly Hispanic customers, was the critical stimulus for other businesses to open in what is now a thriving area. Mr. Ortega was also personally active in the Central Neighborhood Improvement Associations and contributed time and resources to neighborhood activities.

2. **Finding of Fact #4** at page 3. The statement that “The sanitarians generally have either a bachelor’s or master’s degree in health science and a state certification,” is inaccurate. Many, if not most of the inspectors who testified at the hearing or were responsible for inspections of Las Americas stores did not have formal education in food science or food sanitation. For example Inspector Laura Huseby had no education in food sanitation. Inspector Tim Jenkins was studying for his degree in public health while he was performing inspections. Some of the inspectors, such as Huseby and Jenkins, lacked state certification during most the time that they were inspecting Las Americas stores. Although not addressed in the Findings, it should be noted that licensing inspector Lean Selander, who participated in most of the food inspections during the spring of 2001, has no formal education or training in food science. This issue is relevant because it means that the inspections underlying case were often not based on insight and understanding of food safety, but at best, a mechanistic application of the food code regulations and at worst, reflective of a political agenda against Selwin Ortega.

3. **Finding of Fact # 5** at page 3. The ALJ’s description of the city’s procedures for addressing unresolved food code violations merits a fuller explanation. The ALJ notes that if a violation is not corrected on reinspection, “the compliance officer issues a written order and the matter may proceed to an administrative hearing with the Environmental Health Division.” The ALJ fails to note that this procedure was never followed with Las Americas - no written orders were ever issued regarding food code violations, and no internal hearings were ever scheduled. The ALJ also mentions that the city can issue a misdemeanor citation to be heard in court, but does not address the implications that this procedure was never used with Las Americas. The ALJ also does not mention that the City has the option of temporary closing a food establishment

that poses a threat to public health, but never had a basis for taking this action with Las Americas. The failure of the City to use procedures that would have placed Las Americas on notice that it may be subject to adverse action and provide it with a chance for a formal determination of whether the violations were accurate, is a significant part of Las Americas defense that the ALJ failed to address. The evidence established that inspection reports themselves do not in any way constitute a legal finding of wrongdoing, but are used to educate a business on what improvements should be made. These less severe and more simple remedies should have been used before initiating license revocation proceedings.

4. **Finding #7** at page 3. This finding states that notice of Spanish food manager certification courses were sent to "Spanish language establishments" but fails to address Las Americas' contention that it did not receive the notices of earlier classes. The City failed to present any specific evidence that it sent such notices to Las Americas. The City did not refute Mr. Ortega's testimony that he enrolled his employees in these classes as soon as he was advised that they were being offered.

5. **Findings #10-12** at page 4. This finding describes the large number of employees that Las Americas sent to take the food manager certification exam, but that many of them failed the exam. The ALJ fails to mention the testimony of environmental health supervisor Betty Packer that many Spanish speaking employees from various businesses were failing the exam because the classes did not address the reading abilities of most of the immigrants who took the courses.

6. **Finding #15** at page 4, describes inspectors being told that there was no person in charge at Las Americas stores. The ALJ fails to address the explanation by Mr. Ortega that because his employees did not speak English, when they were asked for the person in charge.

they contacted Mr. Ortega or his assistant who spoke English. Finding #4 mentioned that only one sanitarian spoke any Spanish.

7. **Findings #16-18** at page 5, refer to violations relating to “toilet and handwashing facilities.” A review of the evidence would indicate that there were no violations alleged with respect to toilets.

8. **Finding #19** at page 5, describes alleged violations with respect to temperatures at which foods were stored. The ALJ fails to address Mr. Ortega’s explanation that during some inspections, the temperatures of coolers were above normal because they had recently been opened to stock food, and that there is no way to avoid that the coolers would temporarily warmer under such circumstances.

9. **Finding #22** at page 6, acknowledges that with respect to the complaints by inspector Selander about trash outside Las Americas stores mostly during March and April, 2001, “the situation is not uncommon as this time of year. Some of the trash problem was attributable to neighbors of the Las Americas stores.” This is an understatement because the evidence established that most of the trash belonged to other business. In addition, Mr. Ortega established that trash depicted in photographs of 401 East Lake Street was on another property that had a fence, so that Las Americas employees would be trespassing if they attempted to remove it.

10. **Finding #26** at page 7. Las Americas objects to the inclusion of the issue of the unrefrigerated truck addressed in October, 2001. This is not one of the issues raised in the original Notice provided by the City. As the finding mentions, Mr. Ortega addressed the issue within a couple of weeks of being approached by city inspectors.

11. **Finding #38** at page 10, recites the time line of the City Council’s rejection of a

proposed compliance agreement and referral of this matter to an ALJ in April, 2001, and the initiation of the ALJ proceeding in the end of July, 2001. The ALJ fails to explicitly state that the City waited for more than three months after the City Council's action to begin the ALJ proceedings. The City did not initiate the proceedings until shortly after the Brian Herron indictment and guilty plea became public. (See Findings 37-38). In his subsequent conclusion that Las Americas failed to prove a connection between the Herron scandal and this proceeding, the ALJ misses the obvious inference supported by this time line. The City did not act on its decision to proceed with this matter before an ALJ, and apparently did not intend to do so until the Herron case became public. If Mr. Ortega simply acceded to Herron's extortion, this matter would have ended. The action against Las Americas' license, however, continued because of the exposure of corruption. Las Americas is effectively being punished for its whistle blowing activity.

12. **Conclusion #8.** Las Americas takes exception to the conclusion that it has failed to comply with food manger certification requirements. The evidence established that it tried diligently to train certified food managers as soon as it was notified of courses offered in Spanish. When many of its employees failed to the exam after taking classes through the City, Las Americas enrolled dozens of employees in a privately-arranged course which most passed. There is no dispute that Las Americas now has at least one certified food manager in every store.

13. **Conclusion #10.** Las Americas takes exception to the conclusion that it has failed to comply with person in charge rules. The City failed to refute Mr. Ortega's testimony that he always had a person in charge of each store. This could not be communicated to city inspectors when they inspected the stores because the employees only speak Spanish. All of the city

inspectors alleging that there was no person in charge only spoke Spanish.

14. **Conclusion #12.** Las Americas takes exception to the conclusion that it failed to properly maintain dumpster areas and improperly stored trash and debris. The evidence established that most of the dumpsters and trash did not belong to Las Americas. Furthermore, the licensing division specifically sent an inspector out to Las Americas stores during the Spring of 2001 to find trash problems which were common throughout the city due to the recent melting of snow and ice.

15. **Conclusion #14.** Las Americas takes exception to the conclusion that it did not properly maintain toilet facilities. There is no report of improperly maintained toilet facilities.

16. **Conclusion #18.** Las Americas takes exception to the conclusion that it failed to comply with the rules relating to rodents. The evidence was undisputed that Las Americas has continuously employed pest control contractors to take all possible efforts to remove rodents.

17. **Conclusion #20.** Las Americas takes exception to the conclusion that it failed to comply with ordinance requirements regarding trash and debris. This appears to be repetitive of Conclusion #12. The evidence established that most of the dumpsters and trash did not belong to Las Americas. Furthermore, the licensing division specifically sent an inspector out to Las Americas stores during the Spring of 2001 to find trash problems which were common throughout the city due to the recent melting of snow and ice.

18. **Conclusion #22.** Las Americas objects to the consideration of the incident of the unrefrigerated truck because it was not part of the original basis for this adverse action. In addition, Las Americas promptly remedied this problem by properly registering a refrigerated truck.

19. **Conclusion #26.** The licensee suggests that there is sufficient circumstantial evidence that this action was motivated by personal and political animus. As previously explained, the City did not act on its decision to refer the matter to an ALJ for more than three months, and right after the Herron scandal became public. The City has not provided evidence that Las Americas stores are worse than many other food establishments that have not been subject to any adverse action, and in many cases are not even regularly inspected. The inspectors were specifically sent to Las Americas stores during the spring of 2001 to find violations after the PSRS committee decided to refer this matter to an ALJ. The ALJ also failed to address the compelling testimony presented by Emad Abed, Las Americas' landlord at 4751 Nicollet Avenue, that inspector Huseby specifically told him that the City's reason for numerous inspections of Las Americas stores was to keep Mr. Ortega busy so that it could not open any new stores. Given that corrupt motives are exceedingly difficult to prove, and that extensive corruption by a city council member indisputably influenced prior actions toward Las Americas, the City Council should err of avoiding any appearance of impropriety and dismissing this action.

20. **Conclusion #27.** Las Americas objects to this conclusion that the City has demonstrated good cause for adverse action for all reasons stated above and below.

21. **Recommendation #1.** Las Americas objects to the closing of its stores for two days. The ALJ acknowledged the undisputed evidence that Las Americas has abated almost all violations. The above exceptions demonstrate that the ALJ missed compelling evidence negating many of the City's allegations of code violations. Las Americas can address any future violations through the normal inspection process. It is unnecessary and inappropriate to require it to close its stores.

22. **Recommendation #3.** It is unnecessary to require Las Americas to provide contracts for refrigeration maintenance and pest control. The evidence is undisputed that Las Americas has continuously employed contractors in these areas and provided evidence upon demand.

23. **Recommendation #5.** Las Americas objects to a prohibition on applying for licenses for new establishments in the future. It is undisputed that Las Americas has abated its violations and has demonstrated its ability to properly run new establishments. It is critical to note that Las Americas has already been effectively prevented from opening any new establishments for at least 16 months. After applying for a license for 4751 Nicollet Avenue, its application was put on hold pending this proceedings. Las Americas then had to sublet the premises in order to avoid substantial losses from having to pay monthly rent without any revenue. During this time, Las Americas obviously could not have received any other new licenses from the City and therefore did not attempt to apply. To the extent that this recommendation is accepted, it should be applied retroactively, based on the recognition that Las Americas has already been precluded from opening new establishments for well in excess of one year.

24. **Recommendation #6.** Las Americas objects to the administrative fine. It is ironic that the recommended find of \$10,000 is equal to the amount that Brian Herron extorted from Las Americas in connection with this same proceeding. It should be noted that Mr. Ortega Americas previously was asked to pay \$7000 to this city council member, and \$4000 of this sum was never repaid. The City has never offered to reimburse Mr. Ortega for this loss, but would now request an additional \$10,000 payoff. The ALJ's statement in his memorandum that this would not pose a hardship is also misplaced. Las Americas has lost substantial amounts of money from having to leave its store at 4751 Nicollet Avenue vacant for many months while this

proceeding is pending, and pay large costs to defend itself in these proceedings. Given the tainted background of these proceedings, combined with the mitigating factors acknowledged by the ALJ, requiring Las Americas to pay a fine is inappropriate.

25. **Memorandum at pages 13-15.** Las Americas disagrees with the ALJ's response to its analysis of the vague and limited legislative provisions for adverse licensing actions. The City Charter and Code suffers from failing to provide any clear substantive and procedural standards on what constitutes "good cause" for an adverse licensing action. There are not options or standards whatsoever for adverse action short of revocation. Given the vague provisions, a conclusion is warranted that criteria for adverse action against Las Americas' licenses cannot be met.

26. **Memorandum at 16.** The ALJ, while acknowledging that most food establishments have violations, states that Las Americas is set apart because of repeated violations. There was no evidence provided, however, that Las Americas has more violations than other food establishments that have not been subject to adverse action. While the City also failed to provide evidence to support that ALJ's conclusion that Las Americas has more re-inspections, even if this were true, the repeated reinspections are likely attributable to Las Americas being singled out.

CONCLUSION

The ALJ correctly recognized the contributions that Las Americas has made to stimulating business and reducing crime in the Central Neighborhood, its participation in the federal corruption investigation, and its extensive efforts to work with the City to comply with the food code and other regulations despite challenges posed by language barriers. At the same

time, the ALJ missed substantial evidence which refutes many of the City's claims of violations, and throws into question the propriety of these proceedings. Based on an application of the legislative provisions to the evidence in this case, Las Americas requests that the City Council determine that the City has failed to establish good cause for adverse action against Las Americas' business licenses, and reject any proposed sanctions.

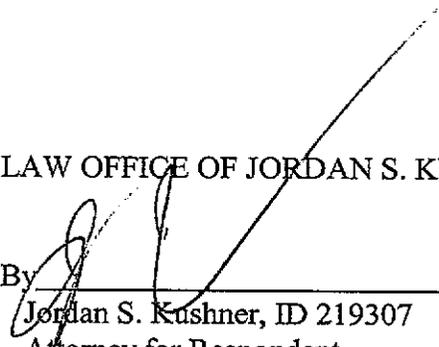
MOTION

In the event that the City Council does impose any sanctions against Las Americas, Las Americas hereby moves that the sanctions be stayed for a period of 60 days, and then, if applicable, until the outcome of a writ of certiorari or other option of appeal available to Las Americas.

Dated:

7/2/02

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