



Request for City Council Committee Action from the Department of Community Planning & Economic Development—Planning Division

Date: April 7, 2011

To: Council Member Gary Schiff, Chair, Zoning & Planning Committee and Members of the Committee

Referral to: Zoning & Planning Committee

Subject: Appeal of the decision of the Board of Adjustment denying the appeal of the Zoning Administrator's interpretation that the use of the property is a sexually oriented use (massage and sauna) and is in violation of the zoning code in the C1 Neighborhood Commercial District and PO Pedestrian Oriented Overlay District.

Recommendation: The following action was taken by the Board of Adjustment on March 3, 2011 (BZZ 5079):

2. 3747 Minnehaha Avenue (BZZ-5079, Ward 9)

Appeal: Cynthia Deslauriers has appealed the decision of the Zoning Administrator's interpretation that the use of the property located at 3745-47 Minnehaha is a sexually oriented use (massage and sauna) and is in violation of the zoning code in the C1 Neighborhood Commercial District and PO Pedestrian Oriented Overlay District.

Actions: The Board of Adjustment **adopted** the findings and **denied** the appeal of the decision of the zoning administrator's decision that the use of the property located at 3745-47 Minnehaha is a sexually oriented use (massage and sauna) and is in violation of the zoning code in the C1 Neighborhood Commercial District and PO Pedestrian Oriented Overlay District.

Ward: 9

Prepared by: Aly Pennucci, City Planner (612-673-5342) Approved by: Jason Wittenberg, Planning Manager Presenters in Committee: Aly Pennucci, City Planner
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Financial Impact

- No financial impact

Community Impact

- Neighborhood Notification: Longfellow Community Council neighborhood association was notified of the appeal application.
- City Goals: See staff report
- Comprehensive Plan: See staff report
- Zoning Code: See staff report
- End of 60/120-day decision period: On March 22, 2011, staff sent a letter to the applicant extending the 60 day decision period to no later than May 30, 2011.

Supporting Information

Cynthia Deslauriers has filed an appeal of the decision of the Board of Adjustment denying the appeal of the Zoning Administrator's interpretation that the use of the property is a sexually oriented use (massage and sauna) and is in violation of the zoning code in the C1 Neighborhood Commercial District and PO Pedestrian Oriented Overlay District. The appellant states that the zoning laws are too restrictive in regards to massage, that the use does not fit the definition of a sexually oriented use and that based on current and forecasted sales, the massage and sauna services are accessory to the fitness center and spa services. The appellant's statement of the reasons for the appeal is attached. The Board of Adjustment minutes and Planning Division staff report are also attached.

The appellant also submitted a revised business plan that is attached. The Zoning Administrator's determination and the decision of the Board of Adjustment are based on the set of facts before them at the time the applicant requested that a determination be made and not based on proposed future changes to the business.

Department of Community Planning and Economic Development – Planning Division
Appeal of the Decision of the Zoning Administrator
BZZ-5079

Date: March 3, 2011

Applicant: Cynthia Deslauriers

Address of Property: 3745-47 Minnehaha Avenue

Project Name: Appeal of the ZA determination regarding a sexually oriented use

Contact Person and Phone: Cynthia Deslauriers, (612) 876-1449

Planning Staff and Phone: Aly Pennucci, (612) 673-5342

Date Application Deemed Complete: January 31, 2011

End of 60-Day Decision Period: March 31, 2011

Ward: 9 Neighborhood Organization: Longfellow Community Council

Existing Zoning: C1 Neighborhood Commercial District and PO Pedestrian Oriented Overlay District

Zoning Plate Number: 27

Legal Description: Not applicable for this application

Proposed Use: Massage

Appeal of the decision of the Zoning Administrator: interpretation that the use of the property is a sexually oriented use (massage and sauna) and is in violation of the zoning code

525.170. Appeals of decisions of the zoning administrator. All findings and decisions of the zoning administrator, planning director or other official involved in the administration or the enforcement of this zoning ordinance shall be final subject to appeal to the board of adjustment, except as otherwise provided by this zoning ordinance. Appeals may be initiated by any affected person by filing the appeal with the zoning administrator on a form approved by the zoning administrator. All appeals shall be filed within ten (10) calendar days of the date of the decision. Timely filing of an appeal shall stay all proceedings in the action appealed, unless the zoning administrator certifies to the

board of adjustment, with service of a copy to the applicant, that a stay would cause imminent peril to life or property, in which case the proceedings shall not be stayed. The board of adjustment shall hold a public hearing on each complete application for an appeal as provided in section 525.150. All findings and decisions of the board of adjustment concerning appeals shall be final, subject to appeal to the city council as specified in section 525.180.

Background and Analysis: On November 2, 2010, zoning enforcement staff issued a notice of non-compliance against the subject site following an inspection of the premises on October 28, 2010. Following the inspection and a review of online advertisements for the subject site, zoning enforcement staff identified that the use of the property as a sexually oriented use (massage and sauna). Sexually oriented uses are regulated by Chapter 549, Article IV Sexually Oriented Uses of the Minneapolis zoning code. Following a re-inspection of the subject site on December 13, 2010, zoning enforcement staff issued a warning letter regarding the use of the property. Following these actions the applicant submitted a floor plan, business plan and a copy of the lease to the zoning administration office for a determination regarding the use of the property. The zoning administrator determined that the principal use of the property is a sexually oriented use.

Sexually oriented uses are permitted only in the B4, B4S and B4C Districts, subject to the provisions of section 549.350 of the zoning code and may be allowed as a conditional use in the C4 General Commercial District, subject to the provisions of section 549.350 and Chapter 525, Administration and Enforcement of the zoning code. The subject site is zoned C1, Neighborhood Commercial District and PO Pedestrian Oriented Overlay District.

The appellant filed an appeal of the decision of the Zoning Administrator on January 31st, 2011, regarding the interpretation that the use of the property is a sexually oriented use (massage and sauna) and is in violation of the zoning code. The appellant states that the zoning laws are too restrictive in regards to massage, that the use does not fit the definition of a sexually oriented use and that based on sales forecasts, the massage and sauna services are accessory to the fitness center and spa services.

The appellant argues that the use of the property does not constitute a sexually oriented use. Under Chapter 549, Article IV Sexually Oriented Uses, section 549.340 of the Minneapolis zoning code, *sexually oriented use*, *massage parlor* and *sauna* are defined as:

Massage parlor. An establishment or place primarily in the business of providing massage services.

Sauna. An establishment or place primarily in the business of providing steam bath and massage services.

Sexually oriented use. An adult entertainment center, adults-only bookstore or video store, adults-only motion picture theater, massage parlor, rap parlor, sauna, or any other use that is distinguished or characterized by an emphasis on matters or conduct depicting, describing or relating to nudity, sexual conduct, sexual excitement or sadomasochism.

The appellant argues that the massage and sauna services are accessory to the fitness center and spa services based on a twelve month sales forecast. An accessory use must be incidental to and customarily associated with the principal use or structure served and must be subordinate in area, extent and purpose to the principal use or structure served. In the zoning code a *sports and health facility*, is defined as:

Sports and health facility, major. A facility, for profit or nonprofit, where members or nonmembers pay a fee to use equipment or space for the purpose of physical exercise. A major sports and health facility may include all activities conducted in a minor sports and health facility, and swimming, court games, jogging, and which includes locker rooms. A major sports and health facility may include as an accessory use personal services to patrons, including but not limited to therapeutic massage, tanning, saunas and whirlpools.

Sports and health facility, minor. A facility, for profit or nonprofit, where members or nonmembers pay a fee to use equipment or space for the purpose of physical exercise. A minor sports and health facility may include aerobics, weight training, muscular exercise programs, yoga, pilates or other similar activities. A minor sports and health facility shall not include shower facilities.

Findings:

1. Staff believes that that the principal use of this property is a massage parlor with sauna services and therefore is a sexually oriented use (see definitions above). The business plan submitted by the applicant demonstrates that massage is a primary focus of this establishment. The advertisements for this business indicate that the principal use of this property is a massage parlor. In addition, the lease between the applicant and the property owner specifies that the use of the premises is solely for the purpose of massage and massage therapy. Finally, massage parlors and saunas are defined only as sexually oriented uses in the zoning code therefore any establishment that is primarily in the business of offering massage or sauna services is considered a sexually oriented use.
2. An accessory use must be incidental to and customarily associated with the principal use or structure served and must be subordinate in area, extent and purpose to the principal use or structure served. Staff believes that the floor plans and business plan submitted by the appellant do not demonstrate that the massage and sauna uses are accessory to the fitness center and spa center. The information submitted by the applicant also does not demonstrate that this establishment meets the definition of a sports and health facility. Staff attempted to conduct a walk through of the facility but on all attempts the business was either closed, despite visiting during the posted hours of operation, or the door was locked with a note indicating that all therapists were occupied.

Forecasted sales into the future are not used to determine the current use of a property and are not sufficient to demonstrate that the massage and sauna use will be subordinate in area, extent and purpose to the fitness center. In addition, the photos taken by zoning

enforcement staff illustrate that the area designated as a fitness center is comprised of just four or five pieces of exercise equipment. Lastly, a review of advertisements for this establishment illustrates that the business is promoted as an establishment that primarily offers massage services and the majority of the advertisements do not mention the fitness center or other spa services.

Two of the rooms on the floor plan submitted by the applicant are identified as including waxing services. An esthetician, defined as any person who, for compensation, performs personal services for the cosmetic care of the skin, is required to be licensed by the Minnesota Board of Cosmetologist Examiners (BCE). Staff received correspondence from BCE staff confirming that neither the location nor the operators listed on the business plan and lease are licensed to provide such services.

3. The appellant states that the zoning laws are too restrictive in regards to massage. The duties of the zoning administrator are to interpret and administer the provisions of the zoning ordinance as the ordinance *as adopted*, pursuant to the authority granted to the municipality by Minnesota Statutes sections 462.351 through 462.365 and the Minneapolis City Charter, Chapter 13.

RECOMMENDATIONS

Recommendation of the Department of Community Planning and Economic Development – Planning Division for the appeal of the decision of the zoning administrator:

The Department of Community Planning and Economic Development – Planning Division recommends that the Board of Adjustment adopt the above findings and **deny** the appeal of the decision of the zoning administrator's decision that the use of the property located at 3745-47 Minnehaha is a sexually oriented use (massage and sauna) and is in violation of the zoning code in the C1 Neighborhood Commercial District and PO Pedestrian Oriented Overlay District..

Attachments:

- 1) Zoning Administrator decision in an e-mail dated January 19, 2011.
- 2) Statement of reason for the appeal submitted by the applicant
- 3) Zoning map
- 4) Business plan & Floor plans
- 5) Copy of lease agreement (truncated)
- 6) Photographs and correspondence from zoning enforcement staff
- 7) Advertisements obtained by staff
- 8) Correspondence from the Minnesota Board of Cosmetologist Examiners