## Request for City Council Committee Action
## From the City Attorney's Office

Date: January 19, 2006
To: Zoning & Planning Committee
Referral to: None

**Subject:** In the Matter of 22nd Avenue Station, 2121 University Avenue NE, Minneapolis, MN 55418; OAH Docket No. 12-6010-16747-3 (administrative law proceeding regarding amortization of an adult use business)

**Recommendation:** That the City Council adopt the attached Administrative Law Judge's Findings of Fact, Conclusions of Law and Recommendation in the above-entitled matter.

**Previous Directives:** On June 23, 2005, the Zoning & Planning Committee referred this matter to the state Office of Administrative Hearings.

Prepared by: Erik Nilsson, Assistant City Attorney Phone: 673-2192

Approved by: _____
Jay M. Heffern
City Attorney

Presenter in Committee: Erik Nilsson, Assistant City Attorney

**Financial Impact** (Check those that apply)
_X_ No financial impact - or - Action is within current department budget.
(If checked, go directly to Background/Supporting Information)
___ Action requires an appropriation increase to the Capital Budget
___ Action requires an appropriation increase to the Operating Budget
___ Action provides increased revenue for appropriation increase
___ Action requires use of contingency or reserves
___ Other financial impact (Explain): Payment of $8,000.00 from Fund /Org. 690 150 1500 6660
___ Request provided to the Budget Office when provided to the Committee Coordinator

**Community Impact:**
City Goals: Build Community

### Background/Supporting Information

Under an amendment to the Adult Entertainment Ordinance passed on April 13, 2002, adult entertainment centers, like 22nd Avenue Station, located outside of the B4, B4S and B4C zoning districts were declared to be non-conforming uses and were given until May 1, 2003, to terminate

the adult entertainment center uses. Pursuant to Minneapolis Code of Ordinances (MCO) §549.360(d), the owner of 22nd Avenue Station, Glenn Peterson, applied for an extension of the termination date. The City agreed not to enforce the termination date of May 1, 2003, pending the City Council's decision on 22nd Avenue Station's application for an extension. In the meantime, the City Attorney's Office requested that 22nd Avenue Station furnish documentation to support their application. The City Attorney's Office submitted the documentation to retained expert accountants for analysis, and set the matter for hearing by the State Office of Administrative Hearings based upon a referral from the Zoning & Planning Committee of the City Council on June 23, 2005.

The attached Findings of Fact, Conclusions of Law and Recommendation is the result of that proceeding. Staff recommendation is to adopt the same.

12-6010-16747-3

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF MINNEAPOLIS

In the Matter of 22nd Avenue Station,
2121 University Avenue NE, Minneapolis,
MN 55418

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Steve Mihalchick, acting as a hearing officer for the Minneapolis City Council, at the Office of Administrative Hearings. The record closed upon receipt of briefs from both parties on November 22, 2005.

Larry F. Cooperman, 2717 Ensign Ave. No., Minneapolis, Minnesota 55427, and Erik Nilsson, Assistant Minneapolis City Attorneys, 333 South 7th Street, Suite 300, Minneapolis, Minnesota 55402-2453, appeared on behalf of the City of Minneapolis ("City"). Randle D. B. Tigue, Randall Tigue Law Offices P.A., 3960 Minnehaha Avenue South, Minneapolis, Minnesota 55406, appeared on behalf of 22nd Avenue Station, Inc. ("22nd Ave. Station" or "Respondent").

## NOTICE

This Report contains a recommendation and not a final decision. The final decision will be made by the Minneapolis City Council, which may affirm, reject, or modify the Findings and Conclusions contained herein. The Council will consider the evidence in this case and these recommended Findings of Fact and Conclusions, but will not consider any factual testimony not previously submitted to and considered by the Administrative Law Judge. The Licensee will have an opportunity to present oral or written arguments alleging error on the part of the Administrative Law Judge in the application of the law or interpretation of the facts and may present argument related to the recommendation. To ascertain when the Council will consider this matter, the parties should contact the City Clerk, Council Information Division, 350 South Fifth Street, Room 304, Minneapolis Minnesota 55415-1382; telephone number 612-673-3136.

## STATEMENT OF ISSUE

Whether the amortization period the City provided to Respondent is reasonable to reimburse Respondent for termination of its nonconforming use.

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. Under a September 21, 1981, contract for deed (CD), Donald and Shirley Moore sold and Rahim A. and Mathilde Amirani purchased property located at 2121 University Avenue N.E., Minneapolis, Minnesota. The purchase price was $395,000.[1] The CD provided that the Amiranis would pay $35,000 down and monthly payments of at least $3,000 with interest at the rate of 10% per annum for 30 years.[2] The CD further required additional $5,000 principal payments on the first, second and third anniversaries of the contract.[3]

2. Glenn Peterson is the president and shareholder of O&P, Inc. ("O&P").[4] O&P was initially owned by Robert Olson and Peterson.[1] Following Olson's death, Peterson brought Olson's interest and assumed full ownership and responsibility for O&P.[5]

3. On December 10, 1982, O&P agreed to purchase the property at 2121 University Avenue N.E., Minneapolis, Minnesota, by CDs for $395,000 from the Amiranis.[6] The building on the property has a bar now known as 22nd Avenue Station (the "bar") on the ground floor and two apartments on the upper floor.[7] One apartment is used as an office.[8] The other apartment is rented.[9] There is a parking lot next to the building. The terms of sale required O&P to pay $20,126.06 down to the Amiranis, assume payment of the balance of the Moore CD, $354,873.94, and pay an additional $20,000 to the Amiranis, which was payable either in one lump sum or in four annual payments of $5,000 each plus interest at 12 percent, pursuant to a second CD.[10]

4. The terms of the sale compelled O&P to make substantially higher payments to Moore and the Amiranis during the first years after the sale. By December 10, 1983, the end of the first year of operation, O&P was obligated to pay at least $46,000 on the two CDs. This consisted of $36,000, payable in 12 monthly payments of $3,000 per month, plus $5,000, representing the second anniversary payment principal payment, for the assumed Moore CD, and an additional $5,000 payment for the Amirani CD.[11] During the second year of operation of the bar, O&P was again obligated to pay $46,000 in CD payments.

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[1] Ex. 1, pp. 15-19.
[2] Ex. 1. There was testimony about CD dates and terms that differed from those stated in the documents. The information in the documents is relied upon in these Findings.
[3] Ex. 1, p. 15.
[4] *Id*.
[5] Testimony of Glenn Peterson.
[6] *Id*.
[7] *Id.*
[8] Testimony of G. Peterson.
[9] *Id.*
[10] Ex. 1, p. 4. Ex. 1, the CD documents were not submitted to the City for review by its CPA prior to the hearing. Testimony of G. Peterson' Ex. 13, App. A.
[11] The 1st anniversary principal payment was due on September 2, 1982, prior to O&P's assumption of the Moore CD. Ex. 1, p. 15.

In 1985 and 1986, the third and fourth years of operation, O&P's CD obligations decreased to $41,000 per year because the Moore CD no longer required additional principal payments.[12] By December 1986, the end of the fourth year of operation, the Amirani CD was to be paid in full.[13] Beginning in January 1987, the fifth year of operation of the bar, O&P's annual CD payments decreased to $36,000 per year.[14]

5. At some point, O&P changed its name to 22nd Avenue Station, Inc. ("22nd Ave. Station").[15] Peterson is the president, only officer and share holder of 22nd Ave. Station.[16]

6. The bar has had a Class A liquor license from the City since December 1982 which enables it to sell alcohol and have live entertainment.[17] The business offers a hamburger menu. Most of the bar's income has been derived from the sale of alcohol.[18] During the initial two years of operation, 22nd Ave. Station relied primarily upon live bands to attract patrons.[19] This business model proved unprofitable.[20]

7. There were two or three efforts to cancel the CDs during the early years of operation of the bar.[21] 22nd Ave. Station was able to avoid cancellation.[22]

8. In 1984, 22nd Ave. Station started featuring entertainment in the form of a few hours of dance performances by female dancers who were topless.[23] This was subsequently expanded to full-time female topless dancing after Peterson determined that it was more profitable than live bands.[24] 22nd Ave. Station does not require patrons to pay a cover charge for admission to the bar.[25] The topless female dancers are paid solely by tips from patrons.[26] Peterson and 22nd Ave. Station derive no income directly from the dancers, nor do they pay the dancers.[27]

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[12] Ex. 1, p. 15.
[13] Ex. 1, p. 4.
[14] Ex. 1. p. 4.
[15] *Id.*
[16] *Id.*
[17] *Id.;* Testimony of Grant Wilson.
[18] Testimony of G. Peterson
[19] *Id.*
[20] *Id.*
[21] Testimony of G. Peterson.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*

9. Prior to 1986, Peterson believed that the City was overtaxing 22nd Ave. Station.[28] This was resolved with a reduction in the taxes paid by Respondent. The excess taxes had contributed to 22nd Ave. Station's financial problems during the 1980s.[29]

10. In 1986, 22nd Ave. Station filed for Chapter 11 bankruptcy.[30] Peterson credits increases in patronage from topless female dance entertainment as the sole factor that enabled the business to emerge from bankruptcy and become profitable thereby allowing it to continue making the CD payments.[31]

11. Respondent has renovated the bar to accommodate added food service and topless dancing.

12. Eight to ten years ago, Peterson obtained an $80,000 personal loan that he used to improve the financial condition of 22nd Ave. Station.[32] Peterson is repaying the loan at the rate of $1,000 per month.[33]

13. Between 1996 and 2004, 22nd Ave. Station paid Peterson a total of $87,510 in salary, and $341,992 as owner.[34] 22nd Ave. Station has also loaned Peterson $47,926 which has not been repaid.[35]

14. On February 21, 1992, nearly ten years after the 22nd Ave. Station commenced business, the City of Minneapolis amended Ordinance 549 to include establishments that were licensed to sell alcoholic beverages in the adult entertainment ordinance.[36] Adult entertainment centers located outside of the district became nonconforming uses. Because 22nd Ave. Station was located outside of the district and included topless female dancers, its operation was a nonconforming use. The 1992 Ordinance contained no provision for termination of the nonconforming use by amortization.[37]

15. 22nd Ave. Station again obtained a Class A liquor license from the City from 1992 through 1997.[38] Since 1998, 22nd Ave. has annually paid for a Class A license. Although the City has cashed Respondent's check, the City Council has taken no action on the application.[39] The City has not granted the

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[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] Testimony of G. Peterson.
[33] *Id.*
[34] Ex. 13, p. 13.
[35] Ex. 11, 22nd Ave. Station Balance Sheets; Testimony of Marshall Besikof.
[36] Ex. 7; Minneapolis Code of Ordinance, Section 549.340 (1992).
[37] Ex. 7.
[38] Testimony of G. Peterson; Testimony of G.Wilson.
[39] Ex. 2.

license to 22nd Ave. Station because of its nonconforming use.[40] However, until the City acts to deny the license, the Respondent has the right to continue licensed operations.[41]

16. On April 13, 2002, the City Council again amended Ordinance 549 to establish a one-year amortization period to discontinue nonconforming uses such as 22nd Ave. Station. The Ordinance also provided that an owner of a business classified as a nonconforming use could apply for an extension beyond the one year amortization period. The amended Ordinance reads as follows:

> (c) *Adult entertainment centers.* Adult entertainment centers existing on April 13, 2002, and not otherwise governed by an earlier amortization requirement, shall be permitted to operate as a nonconforming use in accordance with the provisions of Chapter 531, Nonconforming Uses and Structures, provided that the uses that do not conform to the zoning distances requirements of section 549.350 (a) shall become unlawful on and after May 1, 2003.
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> (d) *Extension of Time.* The city council may extend the date upon which a nonconforming use becomes unlawful under this section where it is established that the amortization period is unreasonable as applied to a particular use.
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> *(1)Procedure for requesting extension of time.* Any person with a legal or equitable interest in the use to be amortized may seek an extension by making a written request to the zoning administrator together with supporting information, such as purchase agreements, leases, property appraisals, evidence of costs of improvements to the property, or business records or tax returns that the applicant would like to be considered. The burden of proving that an amortization is unreasonable is on the applicant.
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> *(2) Determination.* In determining whether such date should be extended, the City Council may consider information relating to the useful life of the nonconforming use and any other factors or information relevant to the determination of reasonableness of the amortization period. Information relative to the useful life of the nonconforming use may include: The cost of the property and its improvements, the tax depreciation status of the property or use, the condition of the structures on the property, the potential for alternative use of the property and the potential cost to relocate the use

[40] Testimony of G. Wilson.
[41] Ex. 2.

or otherwise bring the use into compliance with the zoning district requirements.[42]

17. On August 15, 2003, 22nd Ave. Station was notified by the Minneapolis Zoning Inspector that its use as an adult entertainment center was a nonconforming use under Ordinance Section 549.340.[43] Respondent was given until September 14, 2003, to either cease the nonconforming use or apply for an extension of the amortization period under section 549.360.[44]

18. On September 4, 2003, Peterson applied for an extension to the amortization period.[45]

19. On August 4, 2004, the City's attorney requested information about 22nd Ave. Station in order to evaluate the request for extension of the amortization period.[46] The City requested a history of the operations of the business, including its use as an adult entertainment establishment, the manner of operation, hours of operation and employees, analysis of annual revenues by source, documentation related to the original purchase price of the property, tax returns, financial statements, property used in connection with the nonconforming use, cost of improvements, diagrams of the business, appraisals, and any expert reports regarding valuation of the adult entertainment use of the property, its useful life or reasonable amortization period.[47]

20. On January 19th and 25th, 2005, 22nd Ave. Station, by its attorney, provided tax returns, financial statements, an officer salary schedule, a depreciation schedule for the $360,000 loan and other business records to the City, including the CDs between O&P and Moore and Amirani.[48] The City was not provided with any information about when 22nd Ave. Station began providing adult entertainment. Respondent did not provide information showing the relationship between O&P and 22nd Ave Station. Respondent provided no information about any offers to purchase the business, and no information about improvement to the property other than reflected in the tax records. Respondent did not provide diagrams of the business nor did it provide the City with copies of any appraisals of the business.[49] Respondent provided no information about the relationship of revenues to the operation of the nonconforming use. None of the documents provided by Respondent showed any increased revenue attributable to topless dancing entertainment.

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[42] Ex. 7, Ordinance number 2002-0303, amending Ordinance 549.360.
[43] Ex. 8. The notice was directed to Spencer J. Sokolowski, a former owner of the property. Respondent admits that it received notice of the nonconforming use of the property.
[44] *Id.*
[45] Ex. 9.
[46] Ex. 4.
[47] *Id.*
[48] Testimony of M. Besikof; Ex. 13, Appendix A.
[49] *Id.*

21. Using the available information provided by Respondent, Marshall Besikof, a CPA hired by the City to provide an accountant's opinion, concluded that between 1996 and October 2004, 22nd Ave. Station had provide a 454% return on investment if the $47,926 unpaid loan to Peterson was ignored.[50] If the loan to Peterson was recognized as an asset of 22nd Ave. Station, the return on investment for the same period was 252%. Besikof noted that the 22nd Ave. Station building had been fully depreciated and that improvements that were capitalized in 2002 and in prior years had all been fully depreciated.[51] He also observed that from the descriptions of equipment on the tax depreciation schedules it did not appear that the assets were specifically utilized for the nonconforming use.[52]

22. Respondent has continued its nonconforming use of the property from April 13, 2002 until October 11, 2005, the date of the hearing.

Based upon the foregoing Findings of Fact, the Administrative Law Judges makes the following:

## CONCLUSIONS

1. The Minneapolis City Council and the Administrative Law Judge have authority to consider the application for an extension of the amortization period based on § 549.360 of the Minneapolis Code of Ordinances.

2. The City of Minneapolis received a timely and appropriate application for an extension of 22nd Avenue Station, Inc.'s nonconforming usage of their adult entertainment activities, as required by § 549.360(d)(1) of the Minneapolis Code of Ordinances.

3. Pursuant to § 549.360(d)(2) of the Minneapolis Code of Ordinances, the City Counsel of Minneapolis has the authority to determine the reasonableness of granting Respondents an extension to the amortization period.

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[50] Testimony of M. Besikof; Ex. 13, p. 7. The reported 454% return on investment, which is dependent upon treatment of the $47,926 loan to Peterson as additional income, appears to be a typographical error. The correct return on investment is 445%. The total income to owner is $341,992 + 47,926 (the loan) = $389, 918. Average total assets of the 22nd Avenue Station, Inc. are $135,491 – 47,926 = $87,565. $389,918 / $87,565 = 445%.

[51] *Id.*

[52] Testimony of M. Besikof; Ex. 13, p.10. At the time he prepared his analysis, Besikof did not have any information linking O&P, Inc.; the corporate entity listed on the CDs, with 22nd Avenue Station, Inc., the successor corporation. Instead of using the $395,000 purchase price listed in the CDs, Besikof used 22nd Avenue Station, Inc.'s tax returns; schedule L, to support a calculated purchase price of $257,521, which consisted of $224,021 for the building and $33,500 for the land. Testimony of M. Besikof. The return on investment calculations reflected in Exhibit 13 therefore understated Respondent's actual investment by $137,479. Mr. Besikof's return on investment calculations were not challenged by the Respondent. Despite the apparent problem with the return on investment calculations, Respondent still has not provided evidence that the amortization period was unreasonable.

4. Under Minneapolis Ordinance § 549.360(d) (1) Respondent has the burden of proving that the one year amortization period is an unreasonable period of time.

5. Respondent has failed to demonstrate that the one year amortization period was unreasonable.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

## RECOMMENDATION

IT IS HEREBY RECOMMENDED; That the Minneapolis City Council DENY 22nd Avenue Station, Inc.'s and Glen Peterson's application for an extension of the amortization period.

Dated: December 15, 2005

STEVE M. MIHALCHICK
Administrative Law Judge

Tape recorded (two tapes) not transcribed

## MEMORANDUM

O&P, Inc., the corporate predecessor to 22nd Ave. Station, Inc. (22nd Ave. Station), both of which are owned by Glenn Peterson, began operating a bar in the City of Minneapolis in December 1982. Beginning in 1984, 22nd Ave. Station began featuring live entertainment in the form of recorded music and topless female dancers. The business also serves alcoholic beverages and offers a hamburger menu.

In 1992, ten years after 22nd Ave. Station commenced business, the Minneapolis City Council adopted an ordinance creating an adult entertainment district. Since 22nd Ave. Station's was located outside of the district, its adult entertainment became a nonconforming use. On April 13, 2002, the City Council further amended the applicable ordinance to provide that businesses existing outside of the adult entertainment district had a one year amortization period in which to recoup their investment and seek other locations if they desired to continue to provide adult entertainment. On August 15, 2003, the City notified Respondent that its adult use violated the Ordinance, and it would have to cease providing adult entertainment or apply for an extension of the amortization period by September 15, 2003. Respondent timely applied for an

extension. On August 4, 2004, the City's attorney requested that Respondent provide financial information relevant to the request for an extension. Respondent provided some but not all the requested information in January 2005. After reviewing the information provided by the Respondent, the City determined not to extend the amortization period.

Respondent argues that because it was not financially viable during its initial years of operation, when it did not provide entertainment by topless female dancers, and because it has only become viable since it began featuring such entertainment, the value of the business and all of its assets are completely dependent upon providing adult entertainment. Therefore, according to the Respondent, the nonconforming use amortization period should be extended until the CD is paid in full. The argument is without merit.

The terms of the sale imposed significantly greater financial obligations on the Respondent during the first years of operation of the bar when it did not provide adult entertainment. Respondent's poor initial financial performance was further complicated by a tax dispute with the City which was ultimately resolved in Respondent's favor, and the death of a partner of O&P, Inc. For these reasons, it is not correct to attribute Respondent's improved financial performance and successful emergence from bankruptcy after 1987 solely to the introduction and expansion of adult entertainment since it occurred during the same period when Respondent's financial obligations were otherwise changing or decreasing.

Respondent's contention that the amortization period should be extended to coincide with the remaining term of the CD is not justified. The useful life of the nonconforming use, in this case entertainment by topless female dancers, has no direct relationship to the remaining term of the CD.[53] In addition to the bar, the CD included the sale of land, bar-related inventory and residential rental property, none of which have any relationship to the nonconforming use. Moreover, nothing in the CD obligates the Respondent to continue to operate a nonconforming use business.

Reasonable amortization provisions limit the duration of a nonconforming use.[54] Extending the amortization period requires the non-complying owner to provide evidence demonstrating that the one year period is unreasonable. The undisputed facts are that 22nd Ave. Station has provided 252% return on the investment during the eight year period from 1996 to 2004. The property is fully depreciated. Respondent has presented no evidence that would suggest that the amortization period was unreasonable.

Respondent also argues that by failing to process its liquor license, the City has prevented the Respondent from selling and relocating the business. This case concerns a zoning ordinance, not a liquor license. Because liquor licenses are not transferable, any prospective buyer of the bar would have to

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[53] *See AVR, Inc. v. City of St. Louis Park*, 585 N.W. 2d 411(Minn App. 1998).
[54] *Naegele Outdoor Advertising Co. of Minn. v. Village of Minnetonka*, 162 N.W.2d 206 (Minn. 1968).

obtain a license on their own behalf from the City. The real impediment to any sale of the bar as it currently operates is its location outside the adult entertainment district. Liquor licensing does not affect Respondent's nonconforming use; entertainment by topless female dancers creates the nonconformity.

Respondent has received not only the one year amortization period but has also had an additional period since May 1, 2003, approximately two and one half years. Thus the effective amortization period has been three and one half years.[55] Respondent's nonconforming use has been reasonably amortized. Respondent has not demonstrated that it is entitled to an extension of the amortization period.

**S.M.M.**

[55] *Klicker v. State*, 197 N.W. 2d 434 (Minn. 1972).