

Board of Zoning Adjustment
Staff Report
November 21, 2022



Case No:	22-APPEAL-0012
Project Name:	Bardstown Road Smoking Retail Store Appeal
Location:	3333 Bardstown Road
Owner/Appellant:	Nigam Retail Complex, LLC
Representative:	Shunnarah Law Firm
Jurisdiction:	Louisville Metro
Council District:	26 – Brent Ackerson
Case Manager:	Chris French, Planning & Design Supervisor

REQUEST(S)

- Appeal of an administrative decision to deny a retail license for a Smoking Retail Store for non-compliance with the zoning requirements in the Land Development Code (LDC).

CASE SUMMARY/BACKGROUND

The Appellant submitted an application for a retail license for a smoking retail store, referred to as a tobacco ordinance application in the Accela permitting software, on June 28, 2022. This application type requires review by different agencies and the application process is managed by the Louisville Metro Department of Health and Wellness. As part of this review, Planning and Design Services conducts a review of the application to determine compliance with the zoning regulations related to the Smoking Retail Store use (LDC Sections 1.2.2 and 4.3.26). In review of the subject case, it was determined by staff that the proposed use met the definition of Smoking Retail Store and that its location did not meet the 1,000-foot distance requirement from a property with a religious building. Therefore, the application was denied for non-compliance with the LDC on July 6, 2022. The Appellant filed an appeal of the administrative decision on September 30, 2022.

STAFF ANALYSIS/FINDINGS

The following sections of the LDC are applicable to this case:

Section 1.2.2 Definitions

Smoking Retail Store – A store that primarily sells tobacco, tobacco products and/or electronic smoking devices. For the purposes of this definition primarily means that either store devotes 10 percent or more of floor area of the retail space and/or derives 51 percent or more of gross sales receipts from the sale of tobacco, tobacco products and/or electronic smoking devices.

Tobacco or Tobacco Products – Any cigarette, cigar, snuff, smokeless tobacco product, smoking tobacco, chewing tobacco, any kind or form of tobacco prepared in a manner suitable for chewing or smoking, or both, or any kind or form of tobacco that is suitable to be placed in a person’s mouth. *The definition of Tobacco Products also includes Tobacco Paraphernalia.* Tobacco or tobacco products excludes any tobacco product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product, as a tobacco dependence product, or for other medical purposes, and is being marketed and sold solely for such an approved purpose.

Tobacco Paraphernalia – Cigarette paper or wrappers, blunt wraps, pipes, holders of smoking materials of all types, cigarette rolling machines, or other instruments or things designed for the smoking or ingestion of tobacco products or any product containing or delivering nicotine or any other substance intended for human consumption. Tobacco Paraphernalia also includes an fitment, add-on, auxiliary or attachment type device that is designed to be utilized in conjunction with or during the usage of Tobacco Paraphernalia.

4.3.26 Smoking Retail Store

In the C-1, C-2, C-3, C-M, EZ-1, and PEC zoning districts. Smoking Retail Stores may be permitted in accordance with the following special standards:

A. No Smoking Retail Store shall be located within one thousand (1,000 feet) of the boundary of any parcel occupied by any of the following uses (as measured in a straight line from parcel boundary to parcel boundary):

1. Public or private early childhood, elementary, middle or high school
2. Park
3. Public Playground
4. Recreation (Use), Outdoor
5. Community Center
6. Child or Adult Care Center
7. Athletic Facility, Indoor and Outdoor
8. Libraries
9. Religious Buildings

B. No smoking Retail Store shall be located within six hundred (600) feet of a site occupied by another Smoking Retail Store, as measured in a straight line from parcel boundary to parcel boundary. This separation requirement is eligible for a waiver in accordance with Chapter 11, Part 8 of the LDC.

C. The hours of operation for a Smoking Retail Store shall be no earlier than six (6) A.M. and no later than ten (10 P.M., seven (7) days a week. This hours of operation requirement is eligible for a waiver in accordance with Chapter 11, Part 8 of the LDC.

The subject business is located at 3333 Bardstown Road, within a strip mall known as Medical Plaza. The store, which has not been granted the required license, appears to be open for business (as Puff N Joy) with signage installed and a website indicating it is in operation. This store is within 1,000 feet of a religious building on a parcel to the north - Debre Haile St. Gabriel Ethiopian Orthodox Tewahedo Church (2216 Goldsmith Lane). In addition, there is another Smoking Retail Store, Avail Vapor, on a parcel to the north (3325 Bardstown Road). The appellant does not dispute the finding that it is within 1,000 feet of a religious building in the basis of appeal and did not provide any documentation that the business would not meet the definition of a Smoking Retail Store.

The Appellant's basis of appeal includes two statements in support of overturning the decision:

LOUISVILLE METRO PLANNING AND DESIGN APPEAL
BOZA APPEAL

Puff and Joy
3333 Bardstown Road
Louisville, Kentucky 40218

Comes the Appellant Puff and Joy, by Counsel and hereby states the grounds for the appeal.

1. No notice of the time to Appeal or notice of method of Appeal was provided in violation of Appellants due process and Equal Protection rights; and
2. The shop was licensed as a tobacco shop prior to the passage of the tobacco ordinance that was used by the Louisville Metro to deny the application. Therefore, the location is subject to the grandfather exception.

Respectfully submitted,

s/ Nader George Shunnarah

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Counsel for Appellant

1. Regarding notice of the decision to deny the application, an email was sent on July 6, 2022 (see attachment 4) to the applicant notifying them that the tobacco license application was denied due to the fact that the proposed smoking retail store was within 1,000 feet of a property with a religious building (see attachment 5). Therefore, the applicant was notified of the denial, in writing, immediately following the final decision. Following the denial, the applicant contacted PDS regarding how to contest the decision.

Staff had to determine the appeal process and this led to a short delay. This license type is reviewed by multiple agencies and not all appeals are adjudicated by the BOZA. Following consultation with the Attorney's Office, it was determined that the subject denial was based solely on a zoning issue and the appeal would go to the BOZA. The appeal was accepted. In

fact, staff agreed to accept the appeal application after the conclusion of the 30-day appeal period due to the delay and researching and as a practical matter. There is not a provision in the LDC or Metro Code that prevents an applicant from immediately re-applying for this license type and as such the applicant could have re-applied yielding the same result, resulting in a new appeal period. As staff accepted the appeal, which notably was filed late, and scheduled the hearing in a timely manner in consultation with the appellant, staff is unaware of how any due process rights were violated.

2. The Appellant states that the site in question had been used by other retail stores selling tobacco products. This is effectively a claim of nonconforming rights. The Appellant did not submit a nonconforming rights application or provide any information supporting this claim, such as documentation related to uses that have existed on the property or where they were located within this multi-tenant building. The Smoking Retail Store amendment to the LDC was approved by Metro Council Ordinance 130, Series 2020 and was signed into law on November 3, 2020. Based on documentation available to staff, there was not a Smoking Retail Store use on the subject property when the LDC ordinance was signed into law. In order to be recognized as a lawful nonconforming use, a Smoking Retail Store must have been in operation on November 3, 2020. No evidence has been found or provided supporting nonconforming rights. Supporting this conclusion, staff found the image below on Google dated April 2019, showing the tenant space in question being used by PC Staffing:



In addition, we have no information that previous retail stores on the site that sold tobacco products met the threshold as defined in the code for a Smoking Retail Store.

Staff Conclusions

Based on the Appellant's basis of appeal and the information that was included in the tobacco license application, no error was made in determining that the proposed use was a Smoking Retail Store and

that the proposed use did not meet the 1,000 foot distance requirement to a property with a religious building. Therefore, staff recommends that the Board deny the appeal request.

Standard of Review

Pursuant to LDC 11.7.3 and KRS 100.257, the BOZA shall have the power to hear and decide cases where it is alleged by the applicant that there is error in any order, requirement, decision, grant, or refusal made by an administrative official in the enforcement of the zoning regulation.

The Board must determine if an error was made in the determination that the proposed use as a smoking retail store did not meet the smoking retail store use requirements as listed in LDC Sections 1.2.2 and 4.3.26.

RELATED CASES

LIC-TOBA-22-00247 – Tobacco Ordinance Application

INTERESTED PARTY COMMENTS

Staff has not received any interested party comments.

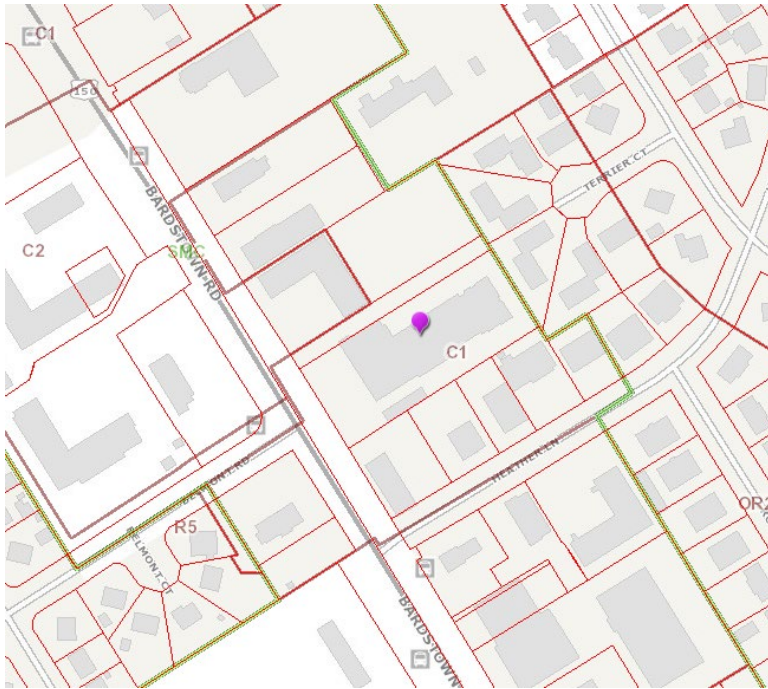
NOTIFICATION

Date	Purpose of Notice	Recipients
11/04/2022	Notification of appeal of an administrative decision	Adjoining property owners and GovDelivery for Council District
11/08/2022	Notice of appeal hearing	Sign Posting
11/11/2022	Legal ad for notification of appeal of an administrative decision	Courier Journal - published in paper by Appellant

ATTACHMENTS

1. Zoning Map
2. Aerial Photograph
3. Site Photos

1. **Zoning Map**



2. **Aerial Photograph**



3. Site Photos



4. License Denial Email

Importance Normal Sent 07/06/2022 16:10:16 Status Sent

Event LIC_TOB_DENIED

From On Behalf of Louisville KY [noreply@louisville.gov]
To handasupplies@gmail.com
Cc

Bcc

Title Your application LIC-TOBA-22-00247 has been denied.

Attachment(s)

Content Hello Ruby Asif,

We regret to inform you that your application LIC-TOBA-22-00247 has been denied during Planning Review due to: Smoking retail store established after LDC 4.3.26, C-1 zoning, allowable use. However, does not meet the separation requirements from Debre Haile St. Gabreil Ethiopian Orthodox Church. Within 100 feet.

Please feel free to apply again when the reason is resolved.

If you feel this message is a mistake please call, you will still need to reapply if a mistake has been found.

Comments

Form Name: Communication Manager Email View

5. Distance to Property with Religious Building



Subject property is less than 200 feet from property with religious building.