

August 20, 2009

Mr. William J. Mueller,
Village President, and
Board of Trustees
Village of Lombard

**Subject: PC 09-17: Text Amendments to the Lombard Zoning Ordinance
PC 09-18: 1221 S. Main (Lux Chateau)**

Dear President and Trustees:

Your Plan Commission transmits for your consideration its recommendation regarding the above-referenced petitions. Relative to PC 09-17, the petitioner requests a text amendment to Section 155.417(G)(2) of the Lombard Zoning Ordinance (and other sections where needed for clarity) allowing “Smoking Establishments” to be listed as a conditional use within the B4A – Roosevelt Road Corridor District. Relative to PC 09-18, the petitioner requests that the Village grant a conditional use, pursuant to Section 155.417(G)(2) of the Zoning Ordinance to allow a Smoking Establishment within the B4A – Roosevelt Road Corridor District.

After due notice and as required by law, the Plan Commission conducted a public hearing for this petition on July 20, 2009.

Chairperson Ryan noted that PC 09-17 will be combined with PC 09-18, but will have two separate votes.

Russell Rasche, 638 Olesen Drive, Naperville, IL, attorney for the petitioner, presented the petitions. Mr. Rasche stated that the testimony is appropriate for both so he is glad to see both petitions together. The legal issues are covered adequately in the paperwork that each Commissioner has. He added that there are two letters – one with his opinion on the compliance of the request, one with the process and also staff’s comments. He will give the history of the business in order to bring some perspective to what this is all about.

The petitioner actually has been in business in this community for some time – a couple of years now - and there was a similar type of establishment there prior to that. What has brought this all about is the Illinois Clean Air Act, which became

effective 1/1/08. At that point the requirements for smoking establishments changed. The State said smoking is prohibited everywhere except a couple of exempt locations, one of which is a retail tobacco shop. The Act said as of that date, any new shops had to be freestanding/single-use facilities. A lot of those establishments could be grandfathered in; this is one of those facilities.

Prior to the Act they served prepared food. One of the requirements for smoking in a tobacco shop is that you can neither prepare food nor serve alcohol. So at that time, while they were operating under a food service license, they stopped the preparation of food. They never did serve alcohol. They maintained themselves strictly as a tobacco location and offer soft drinks for their customers, but it is primarily a hookah lounge. Staff felt that the current statutory provisions were not proficient and felt that this is a different sort of operation, therefore, a special use and text amendment are required to cover this sort of activity. This is the purpose for us being here today. We're looking to work with the Village. To a large extent this use is similar to a cigar lounge, which is somewhat popular.

Mr. Rasche then described the cigar lounge experience. He gave his experience of how he went to a hookah lounge to check to see what his son was doing and he found it to be a gathering place for college kids. They come in groups; everyone is carded; there is adult supervision; and, as a parent, found this to be a fairly benign activity. It was an attractive place because of the supervision. They are popular on college campuses. Everyone is carded and has to be 18 to come in. It is supervised to make sure that nobody is bringing in alcoholic beverages. This establishment has operated for several years with absolutely no problems with the police, any arrests, or accusations or charges against them. It is a nice establishment with a lot of repeat customers.

They brought a hookah and the tobacco that is used with the hookah (shishah). He discussed the hookah in detail while the shishah was passed around to the Commissioner so they could see and smell it. He stated that the shishah is very fruity and sweet - not what you'd expect from a tobacco product. The hookah is shared by 2 - 4 people, each with their own mouthpiece and hose for hygiene. If you have ever tried one of these, they are very light and are nothing like cigars or cigarettes. It is not inhaled and is a very sweet experience. The establishment attracts groups and gets a lot of people in visiting. It's a social experience.

The Village felt they needed to encapsulate this use into the statutes. Since the new State law passed and no other businesses can operate outside of a freestanding facility, it is his opinion that you won't see a bunch of these springing up. The financial aspects of the business are such that it is not financially feasible to have a stand alone building nor is it a high volume business. The chances of having another business such as this are fairly remote. It is more likely you might see a cigar lounge rather than another hookah lounge. It's a gathering place, it's safe, it's supervised and everyone is carded. This is not creating legions of hookah smokers it is really just a trendy thing.

Chairperson Ryan then opened the meeting for public comment.

There was no one to speak in favor or against the petition.

Bill Hall, 12 E 13th Street, stated he lives behind the business. Mr. Hall asked if the address is going to be in unit 1235. Mr. Rasche replied, no.

Mr. Hall asked what the hours of operation are. Chairperson Ryan requested that the petitioner address the Commission and the petitioner will answer the questions at the end.

Mr. Hall asked if liquor and prepared food would be provided. Mr. Rasche replied, no.

Mr. Hall asked if people would be carded. Mr. Rasche replied, yes.

Mr. Hall asked if liquids could be brought in. Mr. Rasche stated that liquids cannot be brought in and alcohol is not permitted on the premises.

Mr. Hall asked if drinks are served inside. Mr. Rasche stated that soft drinks, such as orange soda, grape crush, red bull and other standard types of soft drinks found in the supermarket would be available.

Mr. Hall asked if people would be allowed to go out the back door and smoke or have conversations. Mr. Rasche stated that they don't have tables out back nor is there an outdoor patio. He added that people don't enter or exit through the rear. The entrance is through the front. Mr. Rasche then stated that they won't allow people to walk out back with a hookah.

Mr. Hall asked if people can go out back to smoke a regular cigarette. Mr. Rasche stated that the whole point of the business is to be inside.

Referring to the actual hookah, Mr. Hall asked about the top part where the tobacco sits. He asked if it is made of clay or plastic. Matthew Rasche, 638 Olesen Drive, Naperville, IL, who was seated in the audience, stated that the top part is ceramic.

Mr. Hall stated that the obvious concern here is someone mixing hashish with the tobacco. Russell Rasche stated that won't happen because there is always adult supervision and they are in business to sell their own product. He added that if people wanted to do illicit drugs, they would buy them and do it in their own home. Mr. Rasche stated that it has tobacco in it and it consists of mostly fruits and sweeteners. He added that there is some tar in it, but it is minimal and that it wouldn't have the same results as hashish. He added that their primary business is a gathering place - something exotic and trendy where kids who are not old enough to drink will visit.

Mr. Hall stated that the only reason he mentioned the hashish is because he was in North Africa in Tripoli and hashish was very convenient there. Mr. Rasche stated that they won't be allowed to do that there because they don't want their business destroyed. He added that this

establishment has been there for several years and there has never been a complaint or any police action there so it is a very clean shop.

Chairperson Ryan asked the petitioner to address the hours of operation. Matthew Rasche stated that the hours are from 6 p.m. to 2 a.m. on weekends and from 6 p.m. to 12 a.m. on weekdays. Mr. Hall stated that he objects to these hours and asked if they could close at 10 p.m. Russell Rasche stated that won't happen.

Chairperson Ryan then requested the staff report.

William Heniff, Director of Community Development, indicated that staff has drafted the following IDRC reports to submit to the public record in their entirety.

PC 09-17

Mr. Heniff stated that the subject property is located at 1221 S. Main Street, within the Oxford Corners Shopping Center, within the B4A Roosevelt Road Corridor District. The petitioner is requesting that the Village Board, through the Plan Commission public hearing process, approve a text amendment to allow for smoking establishments (as described in the amendment) in the B4A District. As a companion to this request, the petitioner is also seeking conditional use approval for such an establishment). Should this petition be approved, the companion petition can be considered for approval as well.

In 2007, Lux Chateau applied for and received a Restaurant Food Handlers Business License and a Tobacco Dealer Business License. The petitioner applied for a CO/ZC for retail, restaurant and lounge. The text "hookah" or any reference to tobacco is not present in the application. Staff later received word from the property owner they are not going to open. Given this directive, the CO/ZC is no longer processed and it was presumed that the previous CO/ZC (for Sahara) was still in effect and no further actions were taken by staff until staff learned of the new business use.

In January, 2008, the Smoke Free Illinois Act provisions are enacted. Key elements of the Act are:

1. The State Statute sets significant limitations regarding tobacco use and consumption and prohibits smoking associated with any business with a food handler's license.
2. The State Statute allows for tobacco establishments (businesses in which 80% of their operating revenue is derived from the sale of tobacco products) to provide for smoking within their premises, provided that the operator meets the provisions set forth within the State Statute.
3. New retail tobacco stores must be within free-standing stores.

Staff notes that individuals may have been able to smoke in various establishments prior to January 1, 2008. Staff recognizes that the Smoke Free Illinois Act functionally created a new land use category, as the use could not be considered a coffee shop or a restaurant use. Therefore, if hookah use or other smoking activities was going to be the only activity on the premises, then it would be a principal use and function. Even if the petitioner's business establishment met the provisions set forth within the State Statute, the use would still be subject to the additional provisions included within the Lombard Zoning Ordinance, in order to legally operate.

With the Act provisions in place, the petitioner was informed by DuPage County of the requirement to cease serving food as part of their business activity. In subsequent discussions with the petitioner in later 2008 and early 2009, staff noted that restaurants and coffee establishments are listed as permitted uses within the Zoning Ordinance, hookah establishments as the principal use of the property (or for that matter any smoking establishments) are not listed as permitted or conditional uses. The Director made the interpretation that the petitioner's use is separate and distinct from the retail tobacco shop listing.

Staff notes that the principal use of the premises as a hookah establishment (a type of smoking establishment) is a use that is not expressly permitted or permitted through the conditional use process within the B4A District. Approval of the use can only be achieved through a text amendment to the Lombard Zoning Ordinance. The Director notes that the term "tobacco shop" is not specifically listed within the definitions within the Lombard Zoning Ordinance.

The petitioner states that the use is primarily a gathering place for people at least 18 years of age to enjoy the hookah experience. Based upon a visual inspection of the property and in review of the most recent building plans for the site, the business operation and floor plan consists of several tables and chairs arranged in a manner similar to a coffee house or restaurant.

the Director reviewed the B4A District provisions and noted that the Zoning Ordinance does make a distinction in the use lists regarding uses that are associated with purchasing products and consuming products. The following examples are offered:

1. Food stores, grocery stores, meat markets and delicatessens (the purchase of edible goods for consumption elsewhere) are listed and treated differently than restaurants (a business establishment within which food is offered for sale for consumption only within the structure on the premises).
2. Liquor stores, packaged goods is listed as one type of business establishment, while a bar/tavern use (an establishment where alcoholic liquor is sold to be generally consumed on the premises) is listed as a separate type of use.
3. Clubs and lodges, meeting halls recreation and community centers are also listed as separate and distinct land uses.

These analogous examples can also be applied to the application of the hookah use, a cigar bar or any other like establishment and as part of an assembly gathering function.

Staff has made the interpretation that the hookah use being operated by the proprietor is not clearly compatible with the listed uses (tobacco shop) in the following respects:

1. The use has much more in common with a restaurant or tavern use (congregations of individuals assembling for the purpose of consuming products on the premises).
2. If the principal function is to provide for the congregation of individuals, such a use is more similar to the aforementioned taverns, clubs and lodges and meeting halls and the like, which are listed as conditional uses, not permitted uses.
3. Given this listing, a conservative but fair interpretation can be made that the intent of the Zoning Ordinance is to distinguish between traditional mercantile and assembly uses.

In the crafting of the proposed text amendment and in applying the Zoning Ordinance, if a business was specifically for the consumption of cigarettes or cigars (a smoking Establishment), a similar assertion that it is not the same as the retail sales of tobacco products would be presented by the Director.

Staff notes that the smoking establishment use is not dissimilar to other types of conditional uses listed in the existing Zoning Ordinance, such as taverns and meeting halls. Therefore, staff recommends that the use be listed as a conditional use as well, for consistency.

It is important to note that should this text amendment be approved it would allow the existing establishment to continue its operation. It would also allow the use on all other B4A properties, provided that conditional use approval is granted by the Village. However, pursuant to the Smoke Free Illinois Act, future establishments would have to be located within single-occupant freestanding stores only. The references to the Smoke Free Illinois Act are referenced in the proposed definitions for tobacco shops and smoking establishments.

Staff finds that the standards for text amendments have been met. Furthermore, staff is recommending approval of PC 09-17.

PC 09-18

Mr. Heniff stated that the Smoke Free Illinois Act prohibits the establishment or operation of smoking establishments within strip centers. This provision was established to minimize impacts of second-hand smoke on employees and patrons of other establishments. However, in this case, an argument can be made that as the petitioner's establishment was operating on the premises prior to January 1, 2008 (albeit not legally established). Therefore, if the text amendment and the conditional use are approved, staff would be able to sign off on the Zoning Certificate.

The property is surrounded by commercial uses to the north, west and northeast. Residential uses are located to the southeast and south. The building is oriented toward the commercial properties to the west. The use operates completely within the confines of the existing strip-center building. The past operation of the use finds that the use has not presented a negative impact on adjacent properties, in the following respects:

1. The use operates outside the hours of many other uses within the retail center.
2. The use does not generate noise beyond levels associated with other types of retail establishments.
3. The use will not generate traffic levels at levels greater than other types of like uses.
4. The use will not generate excessive waste or deliveries.

For a conditional use to be approved, the standards for conditional uses must be met. The petitioner has provided a response to the standards for conditional uses and staff states that the use as proposed would meet the standards for conditional uses.

Staff finds that the standards for conditional uses have been met. Furthermore, staff is recommending approval of PC 09-18 subject to the 3 conditions noted in the staff report.

Mr. Hall asked if there would be entertainment that would be conducted at the business or if a television would be the only source of entertainment. Russell Rasche stated that there would be sporting events on television and music.

Mr. Hall asked if there would be belly dancing. Mr. Rasche stated that belly dancing is not a regular part of their business. He added that he can't speak to the future but belly dancing is not a regular part of their business.

Mr. Hall asked if the noise level was going to be monitored. Mr. Rasche asked Mr. Hall if he has ever heard them before. Mr. Hall replied that he has heard them. Mr. Rasche asked when. Mr. Hall replied that he heard them when it was the Sahara. Mr. Rasche responded by stating that was a different owner. He added that you won't have a problem with these guys because they won't have bands or anything else of the sort. People are just sitting there talking, which is why people go there. He stated that all the business activities are to the front of the building and there are other businesses in the strip center that could generate noise.

Chairperson Ryan then opened the meeting for comments among the Commissioners.

Commissioner Sweetser stated that when a motion is made to pass or approve, it includes the IDRC comments. She stated Fire and BIS IDRC comments are subjunctive. In regard to the

ventilation system outlined in the IDRC Report, she asked if they are saying something has to be there or might be there. Mr. Heniff stated that the business is in compliance with the Smoke Free Act and the second comment was items that could be done to clean the air. One reason the Illinois Smoke Free Act doesn't not allow smoking establishments in multi-tenant buildings is because they can sometimes share ventilation systems. The comments made in the report were recommended as ways or mechanics so that the smoke from the business establishment could be mitigated on the site itself. It was not mandated but rather offered as a comment. It is good information to have so if an abutting property owner has an issue, they could reconcile the ventilation issue.

Commissioner Nelson asked if the minimum age is 21. Russell Rasche replied that the minimum age is 18; however, there are individuals over 21 who still come here for the experience. He again added that the minimum age is 18.

Referring to the hookah device, Commissioner Nelson asked if you would get a separate mouthpiece. Mr. Rasche stated that there are units with multiple hoses. He added that the plastic mouthpiece fits into the wooden end and everyone has their own.

Commissioner Cooper wanted clarification as to why it's okay for this establishment to be in a multi-tenant building but a new business could not. Russell Rasche explained that they are grandfathered in.

Commissioner Cooper asked if this was a hookah bar before that. Russell Rasche stated that this was a hookah bar before that. Mr. Heniff stated that for clarification purposes, staff did have counsel review this issue. The language states that any business established operating prior to 1/1/08 could continue to operate. Mr. Heniff stated that they do not have a Certificate of Occupancy. He added that they did receive a license prior to the Act and it says that anyone operating prior to the deadline, it doesn't say that it has to be "lawfully established". He added that if the zoning comes through, it can be considered as a legal nonconforming tenant space.

Commissioner Cooper questioned the ventilation asking if the use was approved would it cover a future tobacco use, such as a cigar lounge. Mr. Heniff replied that the approval would apply only to this particular location.

Commissioner Cooper asked if the ventilation would have to be changed. Mr. Heniff replied that the issue would have to be reviewed by the tenant/landlord. George Wagner, Village Attorney, mentioned that any new smoking use would have to be located in a freestanding building.

Chairperson Ryan confirmed that if another business wanted to open up a cigar shop in one of the other tenant spaces it couldn't because of the State law which states it has to be in a freestanding building. Mr. Rasche and Mr. Heniff both responded, yes.

Chairperson Ryan then stated they would take two separate votes, one for each petition.

After due consideration of the petition and the testimony presented, the Plan Commission found that the proposal complies with the standards required by the Lombard Zoning Ordinance and therefore moved that the Plan Commission find that the findings included as part of the Inter-departmental Review Report be the findings of the Plan Commission and therefore by a roll call vote of 4 to 0 recommends to the Corporate Authorities approval of **PC 09-17**.

After due consideration of the petition and the testimony presented, the Plan Commission found that the proposal complies with the standards required by the Lombard Zoning Ordinance; and, therefore, moved that the Plan Commission find that the findings included as part of the Inter-departmental Review Report be the findings of the Plan Commission and therefore, by a roll call vote of 4 to 0, recommends to the Corporate Authorities approval of the zoning actions associated with **PC 09-18** subject to the following conditions:

1. The petitioner shall apply for and receive a Certificate of Occupancy/Zoning Certificate for the proposed business establishment.
2. The conditional use approval is solely and exclusively for the tenant space located at 1221 S. Main Street within the Oxford Corners Shopping Center.
3. The business shall operate pursuant to the provisions set forth within Smoke Free Illinois Act and applicable Village, County and state statutes.

Respectfully,

VILLAGE OF LOMBARD

Donald Ryan, Chairperson
Lombard Plan Commission

c. Petitioner
Lombard Plan Commission