STATE OF IOWA
BEFORE THE DEPARTMENT OF COMMERCE
ALCOHOLIC BEVERAGES DIVISION

IN RE: DIE, Inc.
d/b/a Lot 33 Coffee Bar and Lounge
3701 Ingersoll
Des Moines, Iowa 50312

PROPOSED DECISION

Liquor License No. LC-39011

On April 8, 2013, the Des Moines City Council (local authority) denied the renewal application for Class C Liquor License LC-39011, filed by DIE, Inc., d/b/a Lot 33 Coffee Bar and Lounge (licensee). The licensee filed a timely Notice of Appeal with the Iowa Alcoholic Beverages Division (division). A Notice of Hearing was issued on May 14, 2013, which scheduled the hearing for June 25, 2013. On June 11, 2013, the licensee’s attorney requested a continuance, which was granted.

The hearing was held before the undersigned administrative law judge on July 9, 2013. Assistant City Attorney Doug Philiph represented the local authority. The licensee was represented by attorney Andrea Flanagan. At the start of the hearing, Ms. Flanagan requested a second continuance to allow additional time for the licensee’s landlord to resolve the zoning issues pertaining to the licensee’s premises. The local authority objected, and the continuance request was denied as untimely.1

THE RECORD

The record includes the licensee’s electronic renewal application; Local Authority Roll Call #13-05-36; Division’s Notification to the Licensee of the Denial; Notice of Appeal; Notice of Hearing; Licensee’s Continuance Request (by email) and Continuance Order; Local Authority Exhibits 1-6; and Licensee Exhibit A. In

1 185 IAC 10.17(1)“a” requires continuance requests to be made at the earliest possible time and no less than three days before the hearing except for a good cause showing.
addition, the local authority presented the testimony of its Neighborhood Inspection Zoning Administrator SuAnn Donovan. The licensee presented the testimony of Aaron Hubbard, who is the attorney for EdCo Credit Union.

ISSUE

Whether the local authority properly denied the licensee’s renewal application based on the following zoning violations: failure to meet Des Moines Municipal Code Chapter 134 zoning requirement for parking, failure to screen the parking, failure to enclose the dumpster, and failure to provide a site plan?

DECISION

This proposed decision finds that the decision of the local authority to deny the license renewal was proper under the relevant statutes and rules and should be affirmed by the Division.

FINDINGS OF FACT

1. DIE, Inc., d/b/a Lot 33 Coffee Bar and Lounge (licensee) was initially issued Liquor License LC-39011 for the premises located at 3701 Ingersoll in Des Moines, Iowa in February 2012. Rajan Devan is the 100% owner of DIE, Inc. At all times relevant to this appeal, DIE, Inc. leased the property at 3701 Ingersoll from the property’s owner, Lee Family Enterprises. Andrew Lee is the registered agent for Lee Family Enterprises. (Electronic Liquor License Application; Local Authority Exhibit 5; Testimony of SuAnn Donovan)

2. The licensee’s premises at 3701 Ingersoll is located in an NPC (Neighborhood Pedestrian Commercial) District within the city of Des Moines. The property at 3701 Ingersoll is a single real estate parcel that has four tenants operating as separate business entities. (Testimony of SuAnn Donovan; Local Authority Exhibit 5)

The city of Des Moines has several zoning ordinances that pertain to the licensee’s premises:

a) Des Moines Municipal Code Section 134-1377(a)(23) requires restaurants, taverns, and nightclubs to provide one parking space for each 150 square feet of gross floor area. Des Moines Municipal Code Section 82-214
specifies the “design guidelines within NPC districts” and states that parking spaces are to be provided in compliance with section 134-1377 of the zoning chapter, subject to certain modifications. For example, the minimum number of off-street parking spaces required in the NPC district is 60 percent of the number of spaces otherwise required by Section 134-1377(a). See Section 82-214(b)(7)(a). In addition, shared parking among or between businesses is allowed, provided a shared parking plan is presented at the time of the application and signed by the property owners, ensuring nonduplication of parking. The shared parking must be within 300 feet of the business or dwelling. See Section 82-214(b)(7)(d). (Local Authority Exhibits 1, 4; Testimony of SuAnn Donovan)

b) Article V of the Des Moines Municipal Code pertains to site plan review for proposed improvements to properties within specified zoning districts. Section 82-214 of the Des Moines Municipal Code (Design Guidelines within NPC districts) requires the plan and zoning commission to apply the design regulations in 82-213 and 82-214 in acting upon any site plan for property located within an NPC neighborhood pedestrian commercial district for the purpose of preserving the community character of the commercial corridor within the district. Nevertheless, the commission may approve a site plan that does not comply with the design guidelines under certain circumstances. Section 82-214(a). (Local Authority Exhibit 1; Testimony of SuAnn Donovan)

c) Section 134-952 requires a ten foot yard to be maintained whenever any permitted use in a commercial district abuts a residential (R) district. It further requires an opaque screen, at least four feet in height, to be installed and maintained along the residential district boundaries. An opaque screen of three feet shall be installed and maintained along each street side of a corner lot where the premises is across from any R district. (Local Authority Exhibits 1, 2; Testimony of SuAnn Donovan)

d) Section 134-1276(t) requires screening of refuse collection containers and mechanical equipment for all commercial properties. (Local Authority Exhibit 3; Testimony of SuAnn Donovan)

3. On April 25, 2012, Neighborhood Inspection Zoning Administrator SuAnn Donovan sent a letter to Lee Family Enterprises and its Registered Agent, Andy Lee, concerning the four businesses operating on the real estate parcel at 3701 Ingersoll Avenue. The businesses were identified as:
Donovan’s letter addresses the real estate parcel’s non-compliance with city zoning requirements related to: parking, submission of a site plan, enclosure of the dumpster, and screening from residential property. (Local Authority Exhibit 5; Testimony of SuAnn Donovan)

Parking and Site Plan Issue

In her April 25, 2012 letter, Ms. Donovan notes that the property arguably had some legal non-conforming rights to insufficient parking, which were lost when the Ingersoll Dinner Theater closed in 2004. She further states that the property was now in violation of Section 134-1377(a)(23) of the Des Moines Municipal Code, which sets out the required number of parking spaces as one parking space per 150 square feet of gross floor area for the uses in the businesses, subject to the NPC design guidelines.

Ms. Donovan’s letter also provides a brief review of the city’s communications with Andrew Lee concerning the parking issues. In 2007, the city was contacted by a potential tenant requesting information for opening a business in the space previously occupied by the Ingersoll Dinner Theater. Pre-application meeting minutes for October 23, 2007 and November 6, 2007 indicated that Lee Family Enterprises, LLC would need to submit a minor site plan to the Community Development Department showing how it would comply with the parking requirements, unless it could provide proof of required onsite parking with or without an offsite shared parking arrangement. This same requirement was mentioned in the pre-application minutes issued for the reopening of the coffee bar at 3701 Ingersoll.

The letter further states that city staff attempted to assist Lee Family Enterprises with its site and parking arrangements. The city drafted a simple site plan and

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2 At hearing, Ms. Donovan further explained that the space previously occupied by the Ingersoll Dinner Theater and now occupied by Marquee was vacant for over a year. It is the city’s contention that this vacancy caused the property to lose its legal non-conforming rights. (Testimony of SuAnn Donovan)
established a parking calculation of 45 parking spaces to allow Lee to obtain offsite parking in order to reopen the old Ingersoll Dinner venue. The letter states:

You were to take this rough draft and get a site plan drafted showing parking configuration on the lot and how parking would be provided in compliance with section 82-214 of the Municipal Code of the City of Des Moines. This was never accomplished. Staff has continued to work with you to get a site plan submitted and you continue to fail to comply with this request.

(Local Authority Exhibit 5, p. 2)

Ms. Donovan’s letter also notes that a parking agreement with H. Ronald Walker at 3706 Ingersoll had expired, and the entire site now lacked the required parking. It was city staff’s estimation that the site had sufficient parking to meet the requirements of Greenwood Lounge, Manhattan Deli, and the new coffee-bar Lunar when the three businesses were considered alone, but not when the requirements of the Marquee were added.

Finally, the letter asked Lee Family Enterprises to submit, within two weeks from the date of the letter, a professionally drafted site plan for review by the city for a determination of the parking deficiency. The letter warned that if the required site plan was not submitted, the city would be forced to take further action, including court enforcement, and that one or more of the businesses may be forced to close. The letter notified Lee Family Properties of its right to file an appeal with the Community Development Department within ten days of the communication. (Testimony of SuAnn Donovan; Local Authority Exhibit 5)

There is no indication in this record that the letter was appealed.

**Enclosing of Dumpsters/Screening Business from Residential Areas**

Ms. Donovan’s April 25, 2012 letter also notified Lee Family Properties that the dumpsters at the property were not enclosed, which violated Section 134-1276(t) of the Des Moines Municipal Code. In addition, the letter stated that the parking lot at the rear of the businesses must be screened from the residential property to
the north. A portion of the fence was missing, which violated Section 134-952 of the Des Moines Municipal Code.\(^3\)

4. On or about January 15, 2013, the licensee filed a renewal application for Liquor License LC-39011 for Lot 33 Coffee Bar and Lounge. The application was submitted for zoning review. On March 13, 2013, SuAnn Donovan sent a letter notifying the licensee that:

- the property where the licensee’s business is located violates Section 134-1377(a)(23) because it lacks the required parking;
- additional zoning violations included failure to screen existing parking from residential uses, failure to enclose the dumpster, and failure to provide a site plan for review;
- the application would not receive zoning approval until the business had the required parking;
- the Community Development, Developmental Zoning Division planned to ask for denial of the license;
- the liquor license application would be considered by the Des Moines City Council on April 8, 2013;
- the licensee was allowed to appear at the council meeting, speak to the council, and be represented by an attorney; and
- the licensee had the right to appeal the determination to the Zoning Board of Adjustment within ten days of the communication.\(^4\)

There is no indication in the record that the licensee or the licensee’s landlord filed an appeal with the Zoning Board of Adjustment. (Electronic License Renewal Application; Local Authority Exhibit 6)

5. As of July 9, 2013, Lee Family Properties and the licensee were not in compliance with the local authority’s ordinances requiring adequate parking and a site plan. Ms. Donovan was unsure if the dumpsters had been enclosed or if the fencing had been repaired to provide the required screening. Ms. Donovan does not plan to send anyone out to further inspect the property until a proper

\(^3\) The letter also addressed an unapproved outdoor seating area that had been added to the east side of the coffee shop/bar. This issue was not cited by the city in support of its license denial and is presumably resolved. (Local Authority Exhibit 5).

\(^4\) The letter also addressed the licensee’s compliance with another zoning provision relating to the percentage of food sales for restaurants. This issue is still pending before the city and was not relied on by the city for this license denial. (Testimony of SuAnn Donovan).
site plan has been submitted. Rajan Devan has given the city a site plan, which Andrew Lee apparently provided to him. This site plan, however, was insufficient to meet the city’s requirements. In part, the site plan lacked the required notes on: setbacks, measurements, distances for parking spaces, and materials to be used for the dumpster enclosure and the screening (fencing). (Testimony of SuAnn Donovan)

6. Lee Family Enterprises, LLC (Lee) has been negotiating to purchase the EdCo Community Credit Union building located at 609 38th Street. This purchase would presumably enable the Lee and the licensee to meet the city’s parking requirements. An initial purchase agreement between Lee and EdCo was scheduled to close on April 15, 2013, but the deal fell through when Mr. Lee failed to show up for the closing. It appears that Lee and EdCo now have a new purchase agreement and a potential closing date of July 12, 2013. As of July 9, 2013, EdCo’s attorney was cautiously hopeful that the closing would occur as scheduled but there remained the possibility that the closing would be delayed or even fall through. (Testimony of Aaron Hubbard; Licensee Exhibit A)

CONCLUSIONS OF LAW

I. Administrator’s Authority to Review License Denials by Local Authorities

Local authorities shall either approve or disapprove the issuance of a liquor control license,...and shall endorse its approval or disapproval on the application and shall forward the application with the necessary fee and bond, if required, to the division.  

An applicant for a liquor control license, wine permit, or beer permit may appeal the local authority’s disapproval of an application to the administrator of the Alcoholic Beverages Division. In the appeal the applicant shall be allowed the opportunity to demonstrate, in an evidentiary hearing conducted pursuant to chapter 17A, that the applicant complies with all of the requirements for holding the license or permit. Therefore, in this appeal the burden of proof is on the licensee to establish its compliance with the requirements for holding a liquor license.

5 Iowa Code section 123.32(2)(2013).
6 Iowa Code section 123.32(7)(2013).
II. Local Authorities May Regulate the Location of Licensed Liquor Establishments Within Their Jurisdiction Through Zoning Ordinances.

Local authorities may adopt ordinances or regulations for the location of the premises of retail wine or beer and liquor control licensed establishments.\(^7\) Liquor licensees are required to comply with all ordinances and resolutions enacted by the local authority, including ordinances related to zoning. No liquor license shall be issued for premises that do not conform to all applicable laws, ordinances, resolutions, and health and fire regulations.\(^8\) In addition, the Iowa Alcoholic Beverages Control Act requires all liquor licensees to be persons of “good moral character.”\(^9\) The statutory definition of “good moral character” requires the “person” to have “such financial standing and good reputation as will satisfy the administrator that the person will comply with this chapter and all laws, ordinances, and regulations applicable to the person’s operations under this chapter.”\(^10\)

III. Analysis

All licensed premises must be in compliance with local ordinances before a liquor license is issued or renewed. The local authority has enacted zoning ordinances that require the property where the licensee’s premises is located to submit a site plan, to meet minimum parking requirements, to have fencing or other screening between residential and commercial uses, and to enclose its dumpsters. The local authority is authorized, by state statute and by administrative rule, to deny the liquor license for a property that fails to conform to its zoning ordinances.

The licensee has failed to establish that its business premises is in compliance with the zoning ordinances enacted by the local authority. It is up to the local authority to determine whether the current zoning violations cited by the city and supported by the evidence in this record have been remedied. The existing license should not be renewed by the Division unless the local authority has determined that the licensee is in compliance with the zoning ordinances. The Alcoholic Beverages Division has neither the jurisdiction nor the expertise to

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\(^7\) Iowa Code section 123.39(2)(2013); 185 IAC 4.3.  
\(^8\) Iowa Code section 123.30(2)(2013).  
\(^9\) Iowa Code section 123.30(1)(a)(2013).  
\(^10\) Iowa Code section 123.3(34)(a)(2013).
resolve zoning disputes, which should be resolved between the parties or in the district court.

The parties are encouraged to promptly notify the Alcoholic Beverages Division if the zoning issues addressed at hearing have been resolved.

ORDER

The local authority was justified in denying the liquor license renewal application based on the licensee’s failure to comply with Sections 134-1377(a)(23), 134-952, 134-1276, and 82-214 of the Des Moines Municipal Code. IT IS THEREFORE ORDERED that the local authority’s denial of the renewal application for Liquor License LC-39011, issued to DIE, Inc. d/b/a Lot 33 Coffee Bar and Lounge is hereby AFFIRMED.

Pursuant to the administrative rules of the division, any adversely affected party may appeal a proposed decision to the Administrator of the Alcoholic Beverages Division within thirty (30) days after issuance of the proposed decision. In addition, the Administrator may initiate review of a proposed decision on the Administrator's own motion at any time within thirty (30) days following the issuance of a proposed decision. 185 IAC 10.27(1) and (2).

Requests for review shall be sent to the Administrator of the Alcoholic Beverages Division, 1918 S.E. Hulsizer, Ankeny, IA 50021. Unless otherwise ordered, each appealing party may file exceptions and briefs within thirty (30) days of the notice of appeal or order for review. Within thirty (30) days thereafter, any party may file a responsive brief. The Administrator may shorten or extend the briefing period as appropriate. The Administrator may resolve the appeal on the briefs or provide an opportunity for oral argument. 185 IAC 10.27(6). The administrator may affirm, reverse or modify the proposed decision.

A party who is adversely affected by the proposed decision shall not be deemed to have exhausted administrative remedies unless the adversely affected party files a request for review of the proposed decision within the time provided and the Administrator has reviewed the proposed decision and has affirmed, reversed, or modified the proposed decision.
DIA No. 13ABD018
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Dated this 22nd day of July, 2013.

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