On May 24, 2012 the Des Moines City Council (hereinafter “local authority”) notified the Alcoholic Beverages Division that it had denied the application filed by USA Petroleum LLC, d/b/a Super Stop (hereinafter “applicant”) for a Class E Liquor License. The reason provided for the denial was the local authority’s moratorium on all new Class E Liquor Licenses. The applicant filed a timely Notice of Appeal with the Iowa Alcoholic Beverages Division (Division). The appeal hearing was held before the undersigned administrative law judge on July 12, 2012 at 1:00 p.m. Assistant City Attorney Doug Philiph represented the local authority. The applicant was represented by attorney Alfredo Parrish. The applicant filed a Hearing Brief on July 12, 2012. The record was held open until July 23, 2012 for further briefs from both parties and for one additional exhibit.

THE RECORD

The record includes the applicant’s electronic Class E liquor license application with attachments; the applicant’s April 23, 2012 Request for Relief from City’s Moratorium; the May 2, 2012 Decision and Order of the City of Des Moines Zoning Board of Adjustment Continuing the Hearing on the applicant’s Request for a Conditional Use Permit; the Division’s Notification of the Denial; Notice of Appeal; correspondence between applicant’s attorney and the Division concerning the applicant’s active Class C Beer Permit; Notice of Hearing; Local Authority Exhibits 1-4; Applicant’s Exhibits A-I; Applicant’s Brief; Local Authority’s Hearing Brief; and Applicant’s Supplemental Hearing Brief. The
local authority presented the testimony of Deputy Zoning Enforcement Officer SuAnn Donovan. The applicant presented the testimony of Harmala Dassan.

FINDINGS OF FACT

Operational and Licensure History for the BP Gasoline Station at 727 SE 14th Street in Des Moines

Tony Dassan is the 100% owner of a limited liability company - USA Petroleum LLC - which is the liquor license applicant in this case. USA Petroleum LLC (hereinafter, “applicant”) owns and currently operates a British Petroleum (BP) gasoline station that is located at 727 SE 14th Street in Des Moines, Iowa. The applicant has owned this property since 2002 but initially leased the property to two different tenant(s) who operated the BP gas station. The applicant took over operation of this BP station late in October 2011, after the property’s tenant breached his lease. The applicant also owns and operates another BP gas station in Altoona, as well as several convenience stores in Des Moines. Harmala Dassan, who is Tony Dassan’s spouse, assists him in the operation of his businesses and also manages the Altoona BP station. (Electronic License Application; Testimony of Harmala Dassan)

The applicant currently holds a Class C Beer Permit (BC-29801) for its BP station on SE 14th Street. The beer permit is not at issue; this appeal only concerns the applicant’s request for a Class E liquor license. A Class E liquor license authorizes the sale of alcoholic liquor and high alcoholic content beer, both for consumption off the licensed premises and to other liquor control licensees.1 Prior to a statutory change that took effect on July 1, 2011, state law did not permit the issuance of a Class E liquor license for premises at which gasoline was sold.2 After the law changed, the applicant obtained a Class E liquor license for its Altoona BP station, and the applicant’s tenants obtained Class E liquor licenses for the BP station on SE 14th Street in Des Moines. (Testimony of Harmala Dassan; Division Letter dated 5/30/2012 to Alfredo Parrish)

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1 Iowa Code section 123.30(3)(e)(2011).
City of Des Moines Zoning Ordinance Requires Conditional Use Permits for Certain Liquor Licenses

Pursuant to a zoning ordinance (Sec. 134-954), which was adopted by the local authority and amended effective October 24, 2011, applicants for a Class E liquor license for a gas station or convenience store located within the city of Des Moines must obtain a conditional use permit from the Zoning Board of Adjustment. (Testimony of SuAnn Donovan; Local Authority Exhibits 1, 3)

Section 134-954(a) of the Des Moines City Code provides, in relevant part, that the sale of alcoholic liquor, wine and beer at gas station/convenience stores is only allowed subject to certain conditions. The sale of alcoholic liquor is allowed subject to:

- Receipt of a conditional use permit from the board of adjustment, as provided in subsection (b);
- A 150 foot separation from any church, school, public park or licensed child care center as defined by Iowa Code chapter 237A (this separation requirement does not apply in the C-3, C-3a, C-3B, C3-r or D-R downtown river district); and
- No more than 40% of gross receipts being from the sale of liquor, wine, beer or tobacco products.

Section 134-954(b) further provides that the board of adjustment shall grant a conditional use permit only where the business, when operated in conformance with such reasonable conditions as may be imposed by the board, conforms to the following criteria:

1. The business conforms with the conditions identified in subsection (a) above.
2. The proposed location, design, construction and operation of the particular use adequately safeguards the health, safety and general welfare of persons residing in the adjoining or surrounding residential area.
3. The business is sufficiently separated from the adjoining residential area by distance, landscaping, walls or structures to prevent any noise, vibration or light generated by the business from having a significant detrimental impact upon adjoining residential uses.
4. The business will not unduly increase congestion on the streets in the adjoining residential area.
5. The operation of the business will not constitute a nuisance.

(Local Authority Exhibit 1; Testimony of SuAnn Donovan)

On October 25, 2011, the applicant applied for a Class E liquor license for its BP station on SE 14th Street. But that application, however, was never presented to the local authority for its approval because the applicant did not pay the required fee. The applicant subsequently withdrew that Class E liquor license application on February 22, 2012. (Local Authority Exhibit 2, pp. 1, 3; Testimony of Harmala Dassan; SuAnn Donovan)

**Applicant Files 2nd Application for Class E Liquor License for the SE 14th Street BP Station; Moratorium Adopted by Local Authority**

On April 5, 2012, the applicant filed a second application for a Class E liquor license for the BP gas station on SE 14th Street. (Electronic License Application; Testimony of SuAnn Donovan)

On April 9, 2012, the local authority adopted a Resolution (Roll Call Number 12-0572), which initiated “an amendment to the zoning ordinance to further regulate the allowed location of businesses engaged in the sale of alcoholic liquor for off-premises consumption” and imposed the following temporary moratorium:

No new business selling alcoholic liquors for off-premises consumption and upon the conversion of any existing business to one selling alcoholic liquors for off-premises consumption, from any business premises which is operated as a Limited Food Sales Establishment, Limited Retail Sales Establishment, Gas Station/Convenience Store or Liquor Store. The conversion of any Limited Food Sales Establishment, Limited Retail Sales Establishment, or Gas Station/Convenience Store from one at which alcoholic liquor is not sold, to one at which alcoholic liquor is sold, is a material change in use requiring a new certificate of occupancy. The City Staff shall not issue any approval, permit, license or

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3 Although the applicant’s tenant had a Class E liquor license prior to breaching the lease, the applicant was required to apply for a new liquor license in its own name because liquor licenses are personal privileges and are not assignable. See Iowa Code section 123.38(1)(2011).
certificate of occupancy for any development or business activities which are prohibited by this section.

The moratorium took effect immediately upon its adoption and was scheduled to expire on June 26, 2012, unless terminated or extended by further action of the local authority. The Resolution adopting the moratorium states, in part, that:

- 15 businesses, including eleven gas stations/convenience stores, had obtained licenses to sell alcoholic liquor for off-premises consumption in Des Moines since the state law became effective on July 1, 2011;
- The City Council made the sale of alcohol liquor by Limited Food Sales Establishments, Limited Retail Sales Establishments, Gas Stations/Convenience Stores, and Liquor Stores subject to receipt of a conditional use permit from the Zoning Board of Adjustment in an attempt to address the detrimental impact such businesses sometimes impose upon adjoining properties and the neighborhoods in which they are located;
- The City Council believes that the existing limitations on the sale of alcoholic liquors by Limited Food Sales Establishments, Limited Retail Sales Establishments, Gas Stations/Convenience Stores, and Liquor Stores have been inadequate to stop the proliferation of businesses engaged in the sale of alcoholic liquor, and the detrimental impact that the density of such businesses can have on adjoining property and neighborhoods where they are located; and
- It is necessary and appropriate to preserve the status quo until appropriate regulations can be considered and adopted to address the detrimental impact that the proliferation of such businesses is having within the City of Des Moines.

(Local Authority Exhibit 3; Applicant Exhibit A; Testimony of SuAnn Donovan)

The moratorium further provided that any party may, by written application to the city clerk, request relief from the effect of the moratorium where necessary to avoid unnecessary hardship. The application shall identify the basis for the contention that the moratorium is causing unnecessary hardship. The application shall be presented for consideration by the City Council at its first regularly scheduled Council meeting more than ten days following the date such application is filed with the city clerk. If the City Council determines that the application of the moratorium is causing the applicant unnecessary hardship, the
City Council shall allow such relief from the moratorium as is necessary to remedy such unnecessary hardship. (Local Authority Exhibit 3; Testimony of SuAnn Donovan)

The local authority’s Resolution directed the Community Development Department and the Plan and Zoning Commission to diligently proceed with consideration of appropriate amendments to the Zoning Ordinance to address the identified concerns and to endeavor to complete their report and recommendation for receipt by the City Council no later than its meeting on June 11, 2012. (Local Authority Exhibit 3; Testimony of SuAnn Donovan)

**Applicant Requests a Conditional Use Permit From the Zoning Board of Adjustment and Asks The Local Authority for Relief from the Temporary Moratorium**

On April 23, 2012, the applicant filed a request for relief from the local authority’s moratorium on the basis of financial hardship. (See Exhibit D) On April 25, 2012, the applicant appeared before the Zoning Board of Adjustment to request a conditional use permit for a Class E liquor license for its BP station on SE 14th Street. The Zoning Board of Adjustment continued its public hearing, however, to allow the applicant an opportunity to ask the local authority for relief from the moratorium. (Testimony of SuAnn Donovan; Zoning Board of Adjustment Decision and Order entered May 2, 2012; Hearing Briefs).

On May 21, 2012, the local authority held its public hearing on the applicant’s request for relief from the temporary moratorium. At this hearing, the applicant presented documentation related to its claimed financial hardship. Similar documentation was submitted for this appeal. The applicant asserted that it was unable to pay the mortgage and property taxes on its property at 727 SE 14th Street without the additional revenue provided by the sale of liquor. Following hearing, the local authority adopted a resolution, on a vote of 4-3, which denied the application for relief from the temporary moratorium. The local authority concluded that the applicant had not demonstrated, to its reasonable satisfaction, that a gasoline station cannot be profitably operated at 727 SE 14th Street without the sale of alcoholic liquor. The local authority concluded that the moratorium was not causing the applicant an undue hardship under the unique circumstances of this case. (Applicant Exhibits C-G; Local Authority Exhibit 2; Testimony of Harmala Dassan; SuAnn Donovan)
On May 24, 2012, the local authority submitted the Class E liquor license application to the Alcoholic Beverages Division (Division) marked “license denied” on the page designated for the local authority’s endorsement. The reason given for the denial was “Moritorium (sic) on all new Class E Liquor Licenses.” (Electronic License Application). The applicant appealed, and the Division issued a Notice of Hearing, pursuant to Iowa Code section 123.32(7). (Electronic Liquor License Application; Notice of Appeal; Notice of Hearing)

On June 25, 2012, the local authority adopted a Resolution continuing the temporary moratorium until August 28, 2012. That Resolution states that continuation of the temporary moratorium is necessary to preserve the status quo while the recommended amendments to the Zoning Ordinance are considered for enactment by the Plan and Zoning Commission and the City Council. (Applicant Exhibit B)

At the July 12th appeal hearing before the Division, Harmala Dassan estimated that the applicant is losing between $8,000 and $9,000 each month by its inability to sell liquor. The business loses between $.01 and $.03 per gallon of gas due to high credit card fees and relies on sales from items inside the store to make a profit. Ms. Dassan maintains that all other inside sales decrease if they cannot offer customers one stop shopping by also selling liquor. In addition, when the applicant took over operation of the SE 14th Street BP station in late October 2011, it assumed ownership of the tenant’s remaining liquor inventory valued at approximately $8,000. The liquor inventory is currently stored in the Dassans’ garage, and they are unable to sell it without a liquor license. (Testimony of Harmala Dassan)

The applicant currently owes more than $17,000 in unpaid property taxes for its property at SE 14th Street. The applicant is current on its mortgage payments for the property but has had to use revenue from its Altoona BP station to make the mortgage payments. All of this information was presented to the local authority for its consideration at the May 21, 2012 public hearing. (Testimony of Harmala Dassan; Applicant Exhibit F; Local Authority Exhibit 4)
CONCLUSIONS OF LAW

I. **Summary of the Parties’ Legal Arguments**

In its Hearing Brief and at hearing, the applicant does not challenge the local authority’s adoption of the moratorium but asks the division to reverse the local authority’s decision denying the applicant relief from the temporary moratorium. Noting that the moratorium does not define “unnecessary hardship,” the applicant relies on standards established in Iowa Code section 414.12(3) and on case law, which govern variance decisions by boards of adjustment in cases of unnecessary hardship. The applicant asserts that under these standards, it is suffering an unnecessary hardship. In addition, the applicant also argues that allowing the applicant to regain a liquor license that had previously been issued for this same property would not prevent proliferation of licensed liquor establishments but would be a reduction in the number of licenses.

In its Hearing Brief, the local authority asserts that the division lacks jurisdiction to hear this appeal for the following reasons:

1) The local authority has not yet taken action to grant or deny the license application; and

2) The appeal essentially concerns the board of adjustment’s decision to “hold in abeyance” the issuance of a conditional use permit. Pursuant to Iowa Code section 414.15, the only recourse for persons aggrieved by a decision of a board of adjustment is to file a writ of certiorari with the district court.

The local authority also asserts that that the temporary moratorium is the functional equivalent of a zoning ordinance and is therefore no different from any other law, ordinance, resolution, or health or fire regulation with which applicants must comply prior to obtaining a liquor license.

In its Supplemental Hearing Brief, the applicant responds that the Division has jurisdiction over this appeal under the plain language of Iowa Code section 123.32 and that Iowa Code section 414.5 does not apply because the applicant is not appealing from a decision of the board of adjustment. The applicant restates
that it is appealing the local authority’s refusal to grant relief from the moratorium and, in turn, a liquor license.

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

The Iowa Alcoholic Beverages Control Act (Iowa Code chapter 123) is an exercise of the police power of the state, for the protection of the welfare, health, peace, morals, and safety of the people of the state, and all its provisions shall be liberally construed for the accomplishment of that purpose. It is declared to be public policy that the traffic in alcoholic liquors is so affected with a public interest that it should be regulated to the extent of prohibiting all traffic in them, except as provided in chapter 123.  

“Local authority” means the city council of any incorporated city in this state, or the county board of supervisors of any county in this state, which is empowered by Iowa Code chapter 123 to approve or deny applications for retail beer or wine permits and liquor control licenses; empowered to recommend that such permits or licenses be granted or issued by the division; and empowered to take other actions reserved to them by Iowa Code chapter 123. In this case, the local authority is the Des Moines City Council.

Liquor license applications are filed with the city council if the premises for which the license or permit is sought are located within the corporate limits of the city. The local authority shall either approve or disapprove the issuance of the liquor 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 may appeal from the local authority's disapproval of an application for a license or permit to the administrator. 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.

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5 Iowa Code section 123.3(21)(2011).
6 Iowa Code section 123.32(1)(2011).
7 Iowa Code section 123.32(2)(2011).
8 Iowa Code section 123.32(7)(2011).
When the local authority denied the applicant relief from the temporary moratorium, it effectively denied the applicant’s liquor license application. Moreover, the local authority submitted the pending application to the Division marked “License Denied” and indicated on the application that the moratorium was the reason for the denial. The applicant appealed, and the Division set the case for hearing. Based on this procedural history, the Division has jurisdiction to conduct a hearing and to determine if the local authority had a legal basis for denying the pending liquor license application. The burden is on the applicant to establish that it complies with all licensure requirements for the issuance of a Class E Liquor License.

III. Local Authorities May Regulate the Location of Licensed Liquor Establishments Within Their Jurisdiction Through Zoning Ordinances.

In Iowa Grocery Industry Association v. City of Des Moines,9 the Iowa Supreme Court held that, subject to a handful of exceptions, the general assembly reserved in itself the power to regulate Iowa’s alcoholic beverage industry.10 However, the Court recognized that the general assembly has given some limited regulatory power to local authorities.11 The Court cited several examples of the regulatory power granted to local authorities, two of which are implicated in this case:

Section 123.30(2) allows the local authority to refuse to issue the license or permit for premises which do not conform to all applicable laws, ordinances, resolutions, and health and fire regulations.

... Section 123.39(2) allows the local authority to “suspend any retail wine or beer permit or liquor control license for a violation of any ordinance or regulation adopted by the local authority.” It also allows local authorities to adopt ordinances or regulations for the location of the premises of retail wine or beer and liquor control licensed establishments.12

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9 712 N.W.2d 675 (Iowa 2006).
10 Id. at 679.
11 Id.
12 Id. at 679-680.
The city of Des Moines adopted a zoning ordinance, effective October 24, 2011, which restricted the location of businesses holding Class E liquor licenses. Section 134-954 of the Des Moines City Code provides that an applicant for a Class E liquor license for a gas station or convenience store must obtain a conditional use permit from the Board of Adjustment. In order to qualify for the conditional permit, the business must satisfy a number of criteria relating to its location and its effect on adjoining or surrounding residential areas. (Local Authority Exhibit 1) Section 134-954 is clearly a zoning ordinance.

On April 9, 2012, the city of Des Moines adopted its temporary moratorium, which prohibits the commencement of any new business selling alcoholic liquor for off-premises consumption and the conversion of any existing business to one selling alcoholic liquors for off-premises consumption. (Local Authority Exhibit 3) The moratorium was later extended until August 28, 2012 and remains in effect. (Applicant Exhibit B)

The applicant filed its Class E liquor license application on or about April 5, 2012. This was nearly six months after the local authority adopted its zoning ordinance requiring a conditional use permit for Class E liquor licenses but several days prior to the local authority’s adoption of the temporary moratorium. Nevertheless, the applicant did not go before the Zoning Board of Adjustment to request a conditional use permit until April 25, 2012, which was after the temporary moratorium went into effect. The temporary moratorium essentially prevents the Zoning Board of Adjustment from issuing a conditional use permit to the applicant. The matter was continued so that the applicant could apply to the local authority for relief from the temporary moratorium. On May 21, 2012, following a public hearing, the local authority adopted a Resolution (Roll Call Number 12-0822), which denied the applicant’s request for relief. (Local Authority Exhibit 2)

The applicant has repeatedly stated that it is not challenging the moratorium but rather is challenging the local authority’s denial of relief from the temporary moratorium. The Supreme Court and the Iowa Alcoholic Beverages Act both recognize that local governing bodies are entitled to enact and enforce zoning

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13 The Iowa Supreme Court has held that in enacting a moratorium until a revised zoning ordinance could be reviewed, a city was performing a traditional legislative function that is not reviewable by the courts. The Court noted that to the extent that a party disagreed with the city’s exercise of its legislative function, the recourse was “review by the electorate at the next election.” Geisler v. Cedar Falls, 769 N.W.2d 162, 166 (Iowa 2009).
ordinances concerning the location of licensed liquor establishments within their jurisdiction.\textsuperscript{14} The local authority in this case has enacted such a zoning ordinance, i.e. Section 134-954 of the Des Moines City Code. That provision requires the applicant to obtain a conditional use permit as a prerequisite to the Class E liquor license. The local authority has also enacted the moratorium prohibiting new Class E liquor licenses, in order to preserve the status quo until it can consider and adopt further appropriate regulations. Due to the impact of these two zoning measures, the applicant is unable to meet its burden to establish that it conforms to all of the local authority’s applicable laws, ordinances, and resolutions governing its application for a Class E liquor license.\textsuperscript{15}

The local authority’s moratorium does allow liquor license applicants the opportunity to ask for relief based on unnecessary hardship. The local authority considered but rejected the applicant’s claim of financial hardship due to the moratorium. The applicant now makes the same claim of financial hardship to the Division. It would be inappropriate, however, for the Division to substitute its own judgment for a judgment made by the local authority in the course of enforcing its duly enacted ordinances and resolutions. The Division has previously decided that it cannot resolve local zoning issues and that local authorities should be given deference when construing their own zoning ordinances.\textsuperscript{16} The local authority is entitled to similar deference from the Division in this case.

ORDER

IT IS THEREFORE ORDERED that the decision of the Des Moines City Council denying the application for a Class E Liquor License, filed by USA Petroleum LLC d/b/a Super Stop, 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

\textsuperscript{14} Iowa Grocery Industry Association \textit{v. City of Des Moines}, 712 N.W.2d 675 (Iowa 2006); Iowa Code sections 123.30(2); 123.39(2).
\textsuperscript{15} Iowa Code Section 123.30(2).
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.

Dated this 30th day of July, 2012.

Margaret LaMarche
Administrative Law Judge
Department of Inspections and Appeals
3rd Floor, Wallace State Office Building
Des Moines, IA 50319

CC: See Attached Mailing List
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