BOARD OF APPEALS, CITY & COUNTY OF SAN FRANCISCO

Appeal of
SHUAI WU DBA "ARCO/HAO'S AUTO,")
Appellant(s))
)
vs.)
)
DEPARTMENT OF PUBLIC HEALTH,)
Respondent

Appeal No. **15-138**

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN THAT on October 09, 2015, the above named appellant(s) filed an appeal with the Board of Appeals of the City and County of San Francisco from the decision or order of the above named department(s), commission, or officer.

The substance or effect of the decision or order appealed from is the DENIAL on September 30, 2015, of a Tobacco Sales Establishment Permit (pursuant to the San Francisco Health Code prohibition on new tobacco sales permits in Supervisorial Districts where the total number of existing permits in the District exceeds 45) at 1200 Geneva Avenue.

APPLICATION NO. SM 15-16

FOR HEARING ON December 16, 2015

Address of Appellant(s):	Address of Other Parties:
Shuai Wu dba "ARCO/Hao's Auto," Appellant 1200 Geneva Avenue San Francisco, CA 94112	N/A

Date Filed: BOARD OF APPEALS

OCT 09 2015

APPEAL # 15-138

CITY & COUNTY OF SAN FRANCISCO
BOARD OF APPEALS

PRELIMINARY STATEMENT OF APPEAL

I / We, **Shuai Wu dba "ARCO/Hao's Auto"**, hereby appeal the following departmental action: **DENIAL** of **Tobacco Sales Establishment Permit SM 15-16** by the **Department of Public Health** which was issued or became effective on: **September 30, 2015**, for the property located at: **1200 Geneva Avenue**.

BRIEFING SCHEDULE:

The Appellant may, but is not required to, submit a one page (double-spaced) supplementary statement with this Preliminary Statement of Appeal. No exhibits or other submissions are allowed at this time.

Appellant's Brief is due on or before: **November 25, 2015**, **(no later than three Thursdays prior to the hearing date)**, up to 12 pages in length, double-spaced, with unlimited exhibits, with eleven (11) copies delivered to the Board office by 4:30 p.m., and with additional copies delivered to the other parties the same day. In addition, an electronic copy should be emailed to: boardofappeals@sfgov.org if possible. SW

Wednesday, because of Thanksgiving

Respondent's and Other Parties' Briefs are due on or before: **December 10, 2015**, **(no later than one Thursday prior to hearing date)**, up to 12 pages in length, doubled-spaced, with unlimited exhibits, with eleven (11) copies delivered to the Board office by 4:30 p.m., and with additional copies delivered to the other parties the same day. In addition, an electronic copy should be emailed to: boardofappeals@sfgov.org if possible.

Only photographs and drawings may be submitted by the parties at hearing.

Hearing Date: **Wednesday, December 16, 2015, 5:00 p.m., City Hall, Room 416,** One Dr. Carlton B. Goodlett Place.

All parties to this appeal must adhere to the briefing schedule above, however if the hearing date is changed, the briefing schedule MAY also be changed. Written notice will be provided of any change to the briefing schedule.

In order to have their documents sent to the Board members prior to hearing, **members of the public** should submit eleven (11) copies of all documents of support/opposition no later than one Thursday prior to hearing date by 4:30 p.m. Please note that names and contact information included in submittals from members of the public will become part of the public record. Submittals from members of the public may be made anonymously.

Please note that in addition to the parties' briefs, any materials that the Board receives relevant to this appeal, including letters of support/opposition from members of the public, are distributed to Board members prior to hearing. All such materials are available for inspection at the Board's office. You may also request a copy of the packet of materials that are provided to Board members at a cost of 10 cents per page, per S.F. Admin. Code Ch. 67.28.

If you have any questions please call the Board of Appeals at 415-575-6880

The reasons for this appeal are as follows:

See attached statement.

Appellant or Agent (Circle One):

Signature: Shuai Wu

Print Name: SHUAI WU

Dear Officer,

My name is Shuai Wu, I am the current business owner of Arco Gas Station located at 1200 Geneva Ave. On September of 2014, the previous owner, Way L. Chin and I discussed about how to buy and sell the business. I also inquired about his last three years financial document analysis of the business including tabacco products. On Mar. 2015, we signed a purchase agreement on the Arco Gas station including the convenient store and Tabaco products. On Jun 18. 2015, we open escrow. We finished the final deposit through Law Offices of Frankie Yeung on July 7, 2015. On August 4th , we went to the health department to apply for the tabacco license. Later on, we received an email stating that our application of Tabaco license has been denied because the city created a new law starting 2015. On September 24, we received a formal document through email that indicate the rule and regulations for the retail tobacco permit program article 19H of the San Francisco Health Code. The document's date is August 12, 2015 which is after we bought the business. According to Larry Kessler from health department, he stated that he sent a formal letter to introduce the new law to previous owner on July 20, 2015. But at that point, we already finish our business transaction before the date. All the formal notice is after we bought the business. We don't want to challenge the law, but in fact, the majority of people don't know the law including community members and business owners. Since we are no longer sell cigarettes, old customers are starting to believe that our station sold tobacco to minors or did something illegal against the law. We are trying to explain to our tobacco customers, but no one believes us. Our business reputation is severly impacted. In addition, we hold a lot of tobacco inventory from the previous owner, we are looking for a better solution to deal with those inventory.

City and County of San Francisco
Edwin M. Lee
Mayor

San Francisco Department of Public Health

Barbara A. Garcia, MPA
Director of Health

BOARD OF APPEALS

OCT 09 2015

APPEAL # 15-138

September 30, 2015

Director's Hearing Case #: SMK 15-16
RE: 1200 Geneva Ave, 94112
DBA: ARCO/Hao's Auto
Owner Name: Hao's Auto, Inc.

Mr. Shuai Wu
Hao's Auto, Inc.
1200 Geneva Avenue
San Francisco, CA 94112
Email: shuai.wu6136@gmail.com

Re: San Francisco Department of Public Health Retail Tobacco Sales Permit Denial

Dear Mr. Wu,

Effective January 18, 2015, San Francisco Health Code (SFHC) Article 19H – Permits for the Sale of Tobacco prohibits new permits for the sale of tobacco products, including electronic or e-cigarettes, in an establishment where:

- The total number of existing permits in the Supervisorial District exceeds 45
- The business location will be within 500 feet of a school
- The business location will be within 500 feet of another location that is permitted to sell tobacco under 19H.

SFHC Article 19H also prohibits new permits for the sale of tobacco products, including e-cigarettes, in restaurants, bars, tobacco shops, or in any location that was not previously occupied by a business establishment with a valid San Francisco Department of Public Health (SFDPH or Department) retail tobacco permit.

On the basis of the facts presented at the SFDPH Director's Hearing on September 30, 2015, it was determined that your application for a permit to sell tobacco products is denied for the following reasons:

1) San Francisco Tax Collector's records indicate that Hao's Auto, Inc. ownership of an ARCO gas station with an auto repair and snack shop located at 1200 Geneva Ave in San Francisco started on July 31, 2015 after the SFHC 19H amendments went into effect;
2) Hao's Auto, Inc. submitted the SFDPH Application for the Sale of Tobacco Products on August 4, 2015 after the SFHC 19H amendments went into effect;
3) Hao's Auto, Inc. located at 1200 Geneva Ave is in Supervisorial District 11, which has more than 45 existing permits (as of August 4, 2015, District 11 had 59 establishments with active tobacco permits.);
4) SFHC Sections 19H.4(f)(5) and 19H.5 requires that no new tobacco permit is issued in any Supervisorial District that has 45 or more establishments with valid tobacco sales permits;
5) Hao's Auto, Inc. located at 1200 Geneva Ave is within 500 feet of two establishments that have valid SFDPH tobacco sales permits;
6) SFHC Section 19H.4(f)(4) requires that no new permit is issued if the Applicant is located within 500 feet of an establishment with a valid tobacco sales permit; and
7) Hao's Auto, Inc. does not qualify for any exceptions under SFHC 19H.6(a) because the previous owner never operated a retail food grocery store or tobacco shop at the 1200 Geneva Ave location.

You may appeal this decision through the Board of Appeals located at 1650 Mission Street, Room 304 (Telephone #: (415) 575-6880), San Francisco, as prescribed in Article 1 of the San Francisco Business and Tax Regulation Code. **You must file an appeal within 15 calendar days of receipt of this decision letter – no later than close of business on Friday, October 23, 2015.** If an appeal is not filed by October 23, 2015, the decision to not issue a tobacco sales permit to Hao's Auto, Inc. shall be deemed final.

HD 12/16/15

FILE

BOARD OF APPEALS
NOV 24 2015
APPEAL # 15-138

Dear Officer,

My name is Shuai Wu, I am the current business owner of Arco Gas Station located at 1200 Geneva Ave. On September of 2014, the previous owner, Way L. Chin and I discussed about how to buy and sell the business. I also inquired about his last three years financial document analysis of the business including tobacco products. On March 2015, we signed a purchase agreement on the Arco Gas station including the convenient store and tobacco products. On Jun 18, 2015, we open escrow. We finished the final deposit through Law Offices of Frankie Yeung on July 7, 2015 (Exhibit 1). On August 4, 2015, we went to the health department to apply for the tobacco license. Later on, we received an email stating that our application of tobacco license has been denied because the city created a new law starting 2015. In addition, one of the denial reason for our business is our health permit type is H 01(Exhibit 2). However, the previous owner showed me his last 5 years permit type is H31 which is TOBACCO SALES W/O BOA SURCHARGE that issued by City & County of San Francisco (Exhibit 3). According to table of license fees of city and county of San Francisco, type H01 candy store's inventory should be under $1,000. In fact, our store inventory is higher than $1,000. We are confused why the city treats the same businesses differently.

The previous owner operated the business and sold Tabaco products since 1990. Starting August 26, 2015, we posted two signs informing customers we no longer sell tobacco products. Many people complained that our convenience store is not convenient anymore and some of our customers even temporary Park their vehicle in our gas station and run across the street to buy tobacco products (Exhibit 4). This behavior not only affects our business, but is also a traffic safety concern. In addition, in our particular location, especially at night time, there are higher criminal activities. Our station is well lit and customers feel safer than other stores in the area.

On September 24, 2015 we received a formal document through email that indicates the rule and regulations for the retail tobacco permit program article 19H of the San Francisco Health Code. The document is dated August 12, 2015, which is after we bought the business. (Exhibit 5). According to Larry Kessler from health department, he stated that he sent a formal letter to introduce the new law to previous owner on July 20, 2015 (Exhibit 6). But at that point, we already finished our final closing statement before the date. All the formal notice are received after we bought the business. We do not want to challenge the law, but in fact, the majority of people do not know the law including community members and business owners. Since we can no longer sell cigarettes, old customers are starting to believe that our station sold tobacco to minors or did something illegal against the law. We are trying to explain to our tobacco customers, but no one believes us. Our business reputation is severely impacted.

In addition, we hold a lot of tobacco inventory from the previous owner and we made contact with the San Francisco Health Department to find a solution. They response was that "Inspector Kessler forwarded your question about how to deal with the cigarettes that the previous owner holds, and unfortunately I cannot offer a solution to that problem. The law under which we are denying the permit to you was passed unanimously by the Board of Supervisors last year, and we do not have discretion to grant a permit to a location that did not fit the criteria specified in the law." We are still looking for a solution to deal with our tobacco inventory.

We believe the law is fair. But in this case, we feel the denial of our retail tobacco permit is unfair for our business. We hope the commissioners can reconsider our application. We really appreciate it! Thank you All! Happy Holidays!

Sincerely,

Shuai Wu

NOV. 24. 2015

Shuai Wu

CFO and Secretary of Hao's Auto Inc.

Exhibit 1

LAW OFFICES OF FRANKIE F. YEUNG

1121 Vicente Street, San Francisco, CA 94116 Telephone: 415.632.6382 Email: frankie.yeung.esq@gmail.com

BUYER FINAL CLOSING STATEMENT

ESCROW #: 15-84120618-FAR
PROPERTY: GAS STATION/AUTO REPAIR SHOP AT 1200 GENEVA AVENUE, SAN FRANCISCO, CA 94112
SELLER: WAY L. CHIN
BUYER: HAO'S AUTO INC.
DATE: JULY 7, 2015

	DEBITS	CREDITS
Total Consideration	$600,000.00	
CA BOE Fixtures and Equipment Tax ($16,743@8.75%)	$1,465.01	
Deposit on 06/18/2015		$1,000.00
Deposit on 07/07/2015		$100,465.01
Promissory Note		$500,000.00
TOTALS	$601,465.01	$601,465.01

Exhibit 2

City and County of San Francisco

DEPARTMENT OF PUBLIC HEALTH

ENVIRONMENTAL HEALTH

Edwin M. Lee, Mayor

Barbara A. Garcia, MPA, Director of Health

Richard J. Lee, MPH, CIH, REHS

Acting Environmental Health Director

August 5, 2015

To: June Weintraub, Acting Manager

From: Larry Kessler, Senior Inspector, Retail Tobacco Program
Jarming Huang, Public Service Aide, Retail Tobacco Program

Re: 1200 Geneva Ave Retail Tobacco Permit Application- see attached

After a review of the files, and in accordance with the applicable laws, the following is a summary for your review regarding the attached application:

1. **The current use of this business is a gas station with a snack shop. Their current health permit is for a candy counter (H01), issued in 1993 . The seller has held their tobacco permit since 2004.**
2. **Exceptions under 19H.6(a) apply only to retail food stores and tobacco shops. Proposed regulations do not include snack shops (H01) as available for exceptions consideration.**
3. **Seller and buyer are not related.**
4. **No other exception listed in 19H.6 applies to this application for a permit.**
5. **Facility is District 11, which currently has 59 tobacco permits issued.**

In accordance with existing law I recommend disapproving this permit application, as there is no exception available to issue this permit.

SFDPH Environmental HEALTH
Improving environments protecting health

RETAIL TOBACCO PROGRAM
1390 Market Street, Suite 210 San Francisco, CA 94102
Phone 415-252-3841 Fax 415-252-3894

Exhibit 3

15-000757

City & County of San Francisco
Office of the Treasurer & Tax Collector

License Certificate

1 Dr. Carlton B. Goodlett P
City Hall, Room
San Francisco, CA 9

Business Account Number	Period Covered	Fee Paid
0197711	04/01/2015 - 03/31/2016	$285.00
Class Account	**Description**	
H31 - 000656	TOBACCO SALES	
Business Name	**Business Location**	**Permit Number**
FTI AUTO REPAIR-ARCO	1200 GENEVA AVE	000731

CHIN WAY L
1200 GENEVA AVE
SAN FRANCISCO CA 94112-3824

David Augustine
Tax Collector

José Cisneros
Treasurer

See reverse side for additional information
Please post conspicuously at the business location

14-000125

City & County of San Francisco
Office of the Treasurer & Tax Collector

License Certificate

1 Dr. Carlton B. Goodlett P
City Hall, Room
San Francisco, CA 94

Certificate Number	Period Covered	Fee Paid
197711	04/01/2014 - 03/31/2015	$282.00
Class Account	**Description**	
H31 - 000656	TOBACCO SALES	
Business Name	**Business Location**	**Permit Number**
FTI AUTO REPAIR-ARCO	1200 GENEVA AVE	000731

CHIN WAY L
% WHITFIELD MANAGEME
1200 GENEVA AVE
SAN FRANCISCO CA 94112-3824

David Augustine
Tax Collector

José Cisneros
Treasurer

See reverse side for additional information
Please post conspicuously at the business location

Exhibit 4

A man park his vehicle in our gas station and run across the street to buy tobacco products.

Exhibit 4

A woman park her vehicle in our gas station and run across the street to buy tobacco products.

Exhibit 5

City and County of San Francisco
DEPARTMENT OF PUBLIC HEALTH
ENVIRONMENTAL HEALTH

Edwin M. Lee, Mayor
Barbara A. Garcia, MPA, Director of Health
Richard J. Lee, MPH, CIH, REHS
Acting Environmental Health Director

Rules and Regulations for the Retail Tobacco Permit Program Article 19H of the San Francisco Health Code

August 12, 2015

Summary

On December 19, 2014, the San Francisco Board of Supervisors amended Article 19H of the San Francisco Health Code to cap the number of tobacco sales permits to 45 per supervisorial district effective as of January 18, 2015.

Subject to certain limited exceptions, **no New Permits for the sale of tobacco products, including e-cigarettes as defined in 19(N), will be issued for an establishment where the proposed location will be:**

1- **in a supervisorial district that already has 45 or more establishments that hold Valid Tobacco Sales Permits;**
2- **within 500 feet of a school;**
3- **within 500 feet of another business that holds a Valid Tobacco Sales Permit;**
4- **a restaurant, bar or tobacco shop, or any establishment without an existing Valid Tobacco Sales Permit;**
5- **in a site not previously occupied by a business that held a Valid Tobacco Sales Permit.**

The law does not affect annual permit renewals where payment of the annual renewal fee is made in a timely way. After a permit is closed or cancelled by San Francisco Department of Public Health (Department) or the Tax Collector (e.g. for non-payment of fees) or the permit holder, a New Tobacco Sales Permit would need to be applied for under 19(H).

The amendments require assessment of the tobacco density cap every two years. For 2015-2017, the density cap is 45, and the Department has determined that **only Supervisorial District 7 (Inner Sunset) is below the density cap**. Tobacco retail permits may be available for issue in District 7 until the cap is reached, as long as the new location meets the other requirements of 19H and all other local, state, and federal laws.

San Francisco Tobacco Permits - 2014

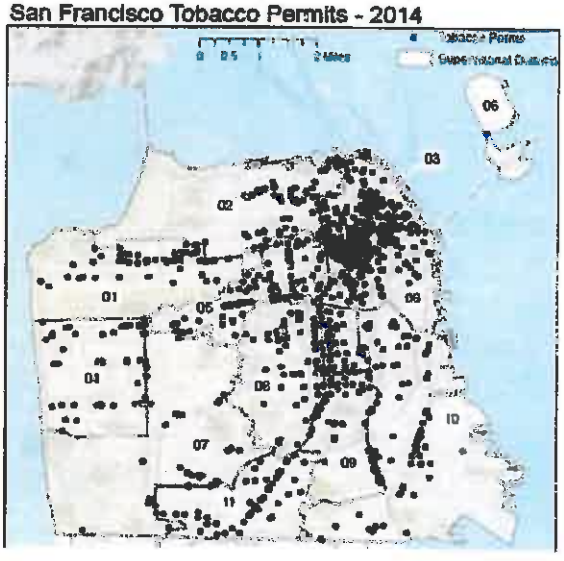

Exhibit 6

City and County of San Francisco

Edwin M. Lee, Mayor

DEPARTMENT OF PUBLIC HEALTH

Barbara A. Garcia, MPA, Director of Health

ENVIRONMENTAL HEALTH BRANCH

Richard J. Lee, MPH, CIH, REHS

Acting Environmental Health Director

Date: 7-20-15

DBA: Arco Snack Address: 120 Geneva Ave

According to San Francisco Department of Public Health (DPH) records, you obtained a permit to sell retail tobacco from the San Francisco Health Department on 6-7-04. Recent legislation enacted by the San Francisco Board of Supervisors restricts the future sales of retail tobacco products at your location if there is an ownership change. Please review San Francisco (SF) Health Code, Article 19H, regarding recent changes to the law.

Based solely on the date you obtained your retail tobacco permit to operate, the following may apply to future sales of retail tobacco at this location regarding an exception available under **SF Health Code Article 19H (6.[a]):**

1. Future sales of retail tobacco products at this location under new ownership are severely restricted.
2. A new owner will be allowed to sell retail tobacco, and must hold their active/valid permit for 10 years in order for the subsequent buyer to sell retail tobacco.
3. Other Future retail tobacco permit can only be issued to grocery store or tobacco shop

The purpose of this notice is to inform you whether or not you may qualify for that specific exception, based on the length of time you have held your SF retail tobacco permit. There are other factors and exceptions in article 19H that may be relevant to your individual situation. This notice serves only as a general notification to help you to make informed decisions in the future.

Jasmine Huang 2823843

DPH Employee Phone

SFDPH Environmental HEALTH
improving environments protecting health

RETAIL TOBACCO PROGRAM
1390 Market Street, Suite 210 San Francisco, CA 94102
Phone 415-252-3841 Fax 415-252-3894

DENNIS J. HERRERA, State Bar #139669
City Attorney
JULIE VAN NOSTERN, State Bar #103579
Lead Attorney, Health & Human Services Team
ANNE PEARSON, State Bar #201625
Deputy City Attorney
Fox Plaza
1390 Market Street, 5th Floor
San Francisco, California 94102-5408
Telephone: (415) 554-4250
E-Mail: anne.pearson@sfgov.org

Attorneys for Respondent,
SAN FRANCISCO DEPARTMENT OF PUBLIC HEALTH

BOARD OF APPEALS

CITY AND COUNTY OF SAN FRANCISCO

SHUAI WU dba ARCO/HAO'S AUTO, Appellant, vs. DEPARTMENT OF PUBLIC HEALTH, Respondent.	Appeal No. 15-138 RESPONDENT DEPARTMENT OF PUBLIC HEALTH'S BRIEF Hearing Date: December 16, 2015 Time: 5:00 p.m. Place: City Hall – Room 416

INTRODUCTION

Appellant Shuai Wu claims that Respondent Department of Public Health should have granted his application for a tobacco sales permit. But Appellant applied for a tobacco sales permit on August 4, 2015, more than six months after San Francisco's new "Density Cap" law went into effect. Under the Density Cap law, the Department of Public Health may not grant a new tobacco permit to an applicant if the applicant's place of business is in a supervisory district that already has at least 45 permitted tobacco sales establishments and/or is located within 500 feet of a permitted tobacco sales establishment. Appellant's place of business is located in District 11, which, as of August 4, 2015, had 59 permitted tobacco establishments. Applicant's place of business is also located within 500 feet of two other permitted tobacco sales establishments. For those two reasons, Respondent was without

legal authority to grant Appellant's application for a tobacco sales permit, and the permit denial should be upheld.

BACKGROUND

In December 2014, the City amended the San Francisco Health Code to impose a Density Cap on the number of tobacco sales permits available in each supervisorial district. This new law went into effect on January 18, 2015. As relevant here, the new law provides that: the City "may not issue a new [tobacco sales] permit in any supervisorial district that is at or above the Density Cap at the time of submission of the Application." (S.F. Health Code § 19H.5(a).) The number of permits allowed under the cap is 45 per District. (*Id.*) The new law further provides that "[n]o new [tobacco sales] permit shall be issued if the Applicant will be located within 500 feet of the nearest point of the property line of an existing Establishment as measured by a straight line from the nearest point of the property line on which the Applicant's Establishment will be located." (S.F. Health Code § 19H.4(f)(4).)

The Board of Supervisors passed the Density Cap after hearing extensive testimony on the impact of increased numbers of tobacco retail sellers on youth use of tobacco products. The density cap represents over two years of discussions between Supervisor Mar's office, the Youth Leadership Institute, the Tobacco Free Project among others, with the community of tobacco retail sellers, including trade associations such as the Arab American Grocer's Association.

Empirical research connects lower densities of retail outlets with lower consumption of tobacco, particularly among youth. Higher tobacco retail density encourages smoking by making cigarettes more accessible and available, by normalizing tobacco use, and through increasing environmental cues to smoke. Research has found a higher prevalence of current smoking and experimental smoking among students at schools in areas with a higher density of tobacco outlets. Prevalence of smoking is higher among students at schools in neighborhoods with five or more stores that sell tobacco than among students at schools in neighborhoods without any stores that sell tobacco.

California communities in lower socioeconomic areas with a higher concentration of convenience stores have significantly higher rates of smoking. Residents of these neighborhoods are more at risk for tobacco related disease and death. *Likewise, San Francisco's most disadvantaged neighborhoods are disproportionately impacted by high tobacco retail density.* The six supervisorial

districts with the highest proportions of tobacco retail sales by population (Districts 3, 5, 6, 9, 10, and 11) also have the lowest median household incomes in the City. District Six, with a median household income of $38,610, has 270 tobacco permits while District Two, with a median household income of $102,457, has only 51 tobacco permits. African American and Latino residents are more likely to live in districts with the highest number of tobacco retail outlets.

EVIDENCE

Filed herewith are declarations from Inspectors Larry Kessler and Janine Young of the San Francisco Department of Public Health. On August 5, 2015, Inspector Kessler and Inspector Young investigated Hao's Auto's eligibility for a tobacco sales permit and based on their investigation, recommended that the application be denied.

At the Director's hearing held on September 30, 2015, the Director upheld the denial of Appellant's application for a permit, finding that the facts presented at the hearing supported the conclusion that issuance of a permit was barred by Sections 19H.4 and 19H.5 of the Health Code.

ARGUMENT

Respondent Is Without Legal Authority to Issue Appellant a Tobacco Sales Permit Under Health Code Section 19H.5 as there are no Permits Available in Appellant's District.

Section 19H.5(a) of the Health Code provides that the Department of Public Health may not issue a tobacco sales permit to establishments in any supervisorial district that is at or above the Density Cap of 45 permits at the time of submission of the application.

Appellant applied for a tobacco sales permit for his place of business, ARCO/Hao's Auto ("Hao's Auto"), on August 4, 2015. (Kessler Dec. ¶ 2.) Hao's Auto is located at 1200 Geneva Avenue, which is in Supervisory District 11. (Kessler Dec. ¶ 3.) As of August 4, 2015, Supervisory District 11 had 59 permitted tobacco sales establishments - 14 more than the Density Cap of 45 permits per district. (*Id.*) Although there are several limited exceptions to the Density Cap that allow

Respondent to issue new tobacco sales permits[1], none of them are available here. (Kessler Dec. ¶¶ 7,8.) The Department is therefore without legal authority or discretion to grant Appellant's application for a tobacco sales permit.

The fact that appellant may have been unfamiliar with the Density Cap at the time that he purchased the businesses is unfortunate, but has no bearing on the Department's lack of authority to grant a permit under the circumstances.

Respondent Is Without Legal Authority to Issue Appellant a Tobacco Sales Permit under Health Code Section 19H.4(f)(4) Because Appellant's Place of Business is within 500 Feet of Two Other Tobacco Sales Establishments.

Section 19H.4(f)(4) of the Health Code provides that a tobacco sales permit shall not be issued if the Applicant will be within 500 feet of another permitted tobacco sales establishment. Appellant's place of business is located at 1200 Geneva Avenue. (Young Dec. ¶ 3.) The Department's investigation, which included a review of Department records, review of Google Maps and visits to the site, confirmed that there are two other permitted tobacco sales establishments within 500 feet of that address: State Market and Cordova Market. (Young Dec. ¶ 4.) Although as noted above, there are several limited exceptions to the Density Cap that allow Respondent to issue new permits, none of them are available here. (Kessler Dec. ¶¶ 7,8.) The Department is therefore without legal authority or discretion to grant Appellant's application.

CONCLUSION

Since January 2015, City law has limited the number of tobacco sales permits available in each of the supervisorial districts to forty-five (45). City law further prohibits the issuance of new tobacco sales permits to establishments that are within 500 feet of existing tobacco sales establishments. Because Appellant's place of business is located in Supervisory District 11, within 500 feet of two

[1] Notwithstanding the Density Cap, new tobacco sales permits may be issued under limited circumstances, but only if the applicant business is a Grocery Store, Tobacco Shop, or Cigar Bar, or if the business is acquired by a spouse or domestic partner through divorce or death.

other tobacco sales outlets, Respondent had no choice but to reject Appellant's application for a tobacco permit and the Director upheld the Department's action. Respondent respectfully requests that the Board uphold the Director's decision in this case.

Dated: December 9, 2015

DENNIS J. HERRERA
City Attorney
ANNE PEARSON
Deputy City Attorney

By: _____
ANNE PEARSON

Attorneys for Defendant(s)
ATTORNEYS FOR RESPONDENT, DEPARTMENT OF PUBLIC HEALTH OF THE CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA, State Bar #139669
City Attorney
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Lead Attorney, Health & Human Services Team
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Deputy City Attorney
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1390 Market Street, 5th Floor
San Francisco, California 94102-5408
Telephone: (415) 554-4250
E-Mail: anne.pearson@sfgov.org

Attorneys for Respondent,
SAN FRANCISCO DEPARTMENT OF PUBLIC HEALTH

BOARD OF APPEALS

CITY AND COUNTY OF SAN FRANCISCO

SHUAI WU dba ARCO/HAO'S AUTO, Appellant, vs. DEPARTMENT OF PUBLIC HEALTH, Respondent.	Appeal No. 15-138 DECLARATION OF INSPECTOR JANINE YOUNG Hearing Date: December 16, 2015 Time: 5:00 p.m. Place: City Hall – Room 416

I, Janine Young, declare as follows:

1. I am an Inspector with the San Francisco Department of Public Health's Environmental Health Bureau. I have personal knowledge of the facts set forth herein. If called upon to testify, I could and would testify competently to the facts contained herein.

2. Hao's Auto is a 24-hour gas station located at 1200 Geneva Avenue. The business establishment also operates an auto repair shop and snack shop.

3. As part of my investigation, I conducted research to determine whether Hao's Auto was located less than 500 feet from any other licensed tobacco sales outlets. To do this research, I consulted Google Maps and on September 24, 2015, I conducted a site visit at Hao's Auto. Based on

my investigation, I concluded that Hao's Auto is located within 500 feet of two other tobacco sales outlets. Specifically, State Market is located directly across the street from Hao's Auto, and Cordova Market is located directly behind Hao's Auto.

I declare under penalty of perjury and the laws of the State of California that the foregoing is true and correct and that this document was executed on the 8th of December 2015 in San Francisco, California.

JANINE YOUNG

DENNIS J. HERRERA, State Bar #139669
City Attorney
JULIE VAN NOSTERN, State Bar #103579
Lead Attorney, Health & Human Services Team
ANNE PEARSON, State Bar #201625
Deputy City Attorney
Fox Plaza
1390 Market Street, 5th Floor
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Telephone: (415) 554-4250
E-Mail: anne.pearson@sfgov.org

Attorneys for Respondent,
SAN FRANCISCO DEPARTMENT OF PUBLIC HEALTH

BOARD OF APPEALS

CITY AND COUNTY OF SAN FRANCISCO

SHUAI WU dba ARCO/HAO'S AUTO, Appellant, vs. DEPARTMENT OF PUBLIC HEALTH, Respondent.	Appeal No. 15-138 DECLARATION OF INSPECTOR LARRY KESSLER Hearing Date: December 16, 2015 Time: 5:00 p.m. Place: City Hall – Room 416

I, Larry Kessler, declare as follows:

1. I am an Inspector with the San Francisco Department of Public Health's Environmental Health Bureau. I have personal knowledge of the facts set forth herein. If called upon to testify, I could and would testify competently to the facts contained herein.

2. On August 4, 2015, ARCO/Hao's Auto ("Hao's Auto") submitted an Application for the Sale of Tobacco Products Permit. I personally investigated Hao's Auto's eligibility for a Tobacco Sales Permit through a review of our Department's files, the documents submitted as part of Hao's Auto's application, and the other steps described below.

3. Hao's Auto is a 24-hour gas station located at 1200 Geneva Avenue. The business establishment also operates an auto repair shop and snack shop.

4. According to the San Francisco Tax Collector's Offices records which I consulted, Hao's Auto became the owner of 1200 Geneva on July 31, 2015.

5. Hao's Auto is located in Supervisory District 11. The Department of Public Health maintains records about every tobacco sales permit that is issued in San Francisco, and is able to determine how many permits have been issued per Supervisory District. According to the Department's records, as of August 5, 2015, Supervisory Distract 11 had 59 tobacco permits issued.

6. Under the new "Density Cap" law enacted by the Board of Supervisors in December 2014, the Department of Public Health may not issue new tobacco sales permits to businesses that are located in supervisory districts that have more than 45 permitted establishments, and/or to businesses that are located within 500 feet of another permitted tobacco sales establishment. There are very limited exceptions to this rule that are available only to Grocery Stores, Tobacco Shops (which are stores that primarily sell tobacco products), Cigar or Smoking Bars, and businesses that are acquired by a spouse or domestic partner through divorce or death.

7. I determined that Hao's Auto was not eligible for a permit through any of the exceptions because: (a) as a gas station, Hao's Auto does not meet the definition of a Grocery Store; (b) as a gas station, Hao's Auto does not meet the definition of Tobacco Shop; (c) Hao's Auto does not qualify as a Cigar or Smoking Bar; and (d) the new owner of Hao's Auto (Shuai Wu) did not acquire the business from a spouse or domestic partner through death or divorce.

8. Because my investigation determined that Hao's Auto was ineligible for a tobacco sales permit I recommended disapproval of the permit application to my supervisor, June Weintraub.

I declare under penalty of perjury and the laws of the State of California that the foregoing is true and correct and that this document was executed on the 8th of December 2015 in San Francisco, California.

LARRY KESSLER

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BOARD OF APPEALS

CITY AND COUNTY OF SAN FRANCISCO

SHUAI WU dba ARCO/HAO'S AUTO, Appellant, vs. DEPARTMENT OF PUBLIC HEALTH, Respondent.	Appeal No. 15-138 PROOF OF SERVICE Hearing Date: December 16, 2015 Time: 5:00 p.m. Place: City Hall – Room 416

PROOF OF SERVICE

I, ANA JIMENEZ, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Fifth Floor, San Francisco, CA 94102.

On December 10, 2015, I served the following document(s):

1. **RESPONDENT DEPARTMENT OF PUBLIC HEALTH'S BRIEF**
2. **DECLARATION OF INSPECTOR LARRY KESSLER**
3. **DECLARATION OF INSPECTOR JANINE YOUNG**

on the following persons at the locations specified:

SHUAI WU
shaui.wu6136@gmail.com

Via Electronic Mail

in the manner indicated below:

☐ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☒ **BY ELECTRONIC MAIL:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the person(s) at the electronic service address(es) listed above. Such document(s) were transmitted *via* electronic mail from the electronic address: ana.jimenez@sfgov.org ☒ in portable document format ("PDF") Adobe Acrobat or ☐ in Word document format.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed December 10, 2015, at San Francisco, California.

ANA JIMENEZ