ST. GEORGE CITY COUNCIL MINUTES
REGULAR MEETING
JULY 18, 2013
CITY COUNCIL CHAMBERS

PRESENT:
Mayor Daniel McArthur
Councilmember Jon Pike
Councilmember Gail Bunker
Councilmember Jimmie Hughes
Councilmember Gil Almquist
Councilmember Ben Nickle
City Manager Gary Esplin
City Attorney Shawn Guzman
City Recorder Christina Fernandez

OPENING:
Mayor McArthur called the meeting to order and welcomed all in attendance. The Pledge of Allegiance was led by Mayor McArthur and the invocation was offered by Pastor Jimi Kestin.

Mayor McArthur mentioned the events that will be happening to celebrate Pioneer Day. He also mentioned the unveiling of the distracted driving campaign sign that will take place at Mathis Bridge.

AIRPORT HANGAR LEASE:
Consider approval of an airport hangar lease with Paul Proctor of Scandia Development.

City Attorney Shawn Guzman advised the lease is still under review at this time.

AWARD OF CONTRACT:
Consider approval of a contract with Kim Campbell to provide architectural services for the remodeling of the East Annex.

City Manager Gary Esplin explained this project is included in the budget and will include the reception area and offices for Leisure Services.

MOTION: A motion was made by Councilmember Bunker to award the contract to Kim Campbell not to exceed $49,950.00.
SECOND: The motion was seconded by Councilmember Pike.

Councilmember Pike inquired if the contact is for the design.

Leisure Services Director Kent Perkins explained the contract includes design, engineering and construction.

Councilmember Almquist stated he would like to see the openings and rooms to be large.

VOTE: Mayor McArthur called for a vote as follows:

Councilmember Pike - aye
Councilmember Bunker - aye
Councilmember Almquist - aye
Councilmember Nickle - aye
Councilmember Hughes - aye

The vote was unanimous and the motion carried.

FEE WAIVER:
Consider approval of a special event permit fee waiver for a yard sale to benefit Solomon's Porch Foursquare Fellowship homeless dinner program. Neal Smith, applicant.

Jimi Kestin, representing Solomon's Porch Foursquare Fellowship, explained all proceeds will benefit their Sunday noon meal they serve to the homeless in the area.

MOTION: A motion was made by Councilmember Hughes to approve the fee waiver.
SECOND: The motion was seconded by Councilmember Bunker.
VOTE: Mayor McArthur called for a vote as follows:

Councilmember Pike - aye
Councilmember Bunker - aye
Councilmember Almquist - aye
Councilmember Nickle - aye
Councilmember Hughes - aye

The vote was unanimous and the motion carried.

SALE OF CITY PROPERTY:

Consider sale of City property west of Lot 44 of Creekside Homes 2nd Amendment and east of the Santa Clara River. Donald Campbell, applicant.

City Manager Gary Esplin explained this was a lot in Creekside that had a home that was lost in the floods. The City purchased the lot, for $20,000.00, to make sure no new dwelling would be built on it. A request to purchase this property by the adjacent property owner in Pinebrook Estates has been received. The applicant would like to expand his yard and install a swimming pool. There are details to be worked out with the other adjacent owner as well as the HOA for Creekside. If all details can be worked out, it looks like a good use of the property as long as there is a deed restriction on no dwelling and a liability release.

Todd Jacobsen stated that is this is approved, the applicant will request to merge the lots.

MOTION: A motion was made by Councilmember Pike to approve the sale of the City property as been discussed at a price close to what the City paid.
SECOND: The motion was seconded by Councilmember Nickle.
VOTE: Mayor McArthur called for a vote as follows:

Councilmember Pike - aye
Councilmember Bunker - aye
Councilmember Almquist - aye
Councilmember Nickle - aye
Councilmember Hughes - aye

The vote was unanimous and the motion carried.

INTERLOCAL AGREEMENT:

Consider approval of an interlocal agreement for the cost and use of Spillman software and hardware.

City Manager Gary Esplin explained Spillman is the data management system used by the Police Department and shared with other agencies within Washington County. This agreement formalizes the shared responsibility for the system.

MOTION: A motion was made by Councilmember Hughes to approve the interlocal agreement as outlined.
SECOND: The motion was seconded by Councilmember Almquist.
VOTE: Mayor McArthur called for a vote as follows:

Councilmember Pike - aye
Councilmember Bunker - aye
Councilmember Almquist - aye
Councilmember Nickle - aye
Councilmember Hughes - aye

The vote was unanimous and the motion carried.

CLOSED SESSION:

MOTION: A motion was made by Councilmember Bunker to adjourn to a closed session to discuss the pending litigation.
SECOND: The motion was seconded by Councilmember Nickle.
VOTE: Mayor McArthur called for a roll call vote as follows:

Councilmember Pike - aye
Councilmember Bunker - aye
Councilmember Almquist - aye
Councilmember Nickle - aye
Councilmember Hughes - aye

The vote was unanimous and the motion carried.

Mayor McArthur invited a Scout in the audience to introduce himself.

RECONVENE:

MOTION: A motion was made by Councilmember Pike to reconvene.
SECOND: The motion was seconded by Councilmember Bunker.
VOTE: Mayor McArthur called for call vote as follows:

Councilmember Pike - aye
Councilmember Bunker - aye

Councilmember Almquist - aye
Councilmember Nickle - aye
Councilmember Hughes - aye

The vote was unanimous and the motion carried.

HEARING ON APPEAL OF REVOCATION OF BUSINESS LICENSE:
Issue a ruling on the appeal of the revocation of the business license for Mike's Smoke, Cigar & Gifts located at 1973 West Sunset Boulevard.

City Attorney Shawn Guzman stated that the council for Mike's Smoke Shop indicated that they did not need to be notified of a subsequent meeting when the Council takes action, and that they would accept the decision in written form.

MOTION: A motion was made by Councilmember Pike to uphold the revocation of the business license for Mike's Smoke, Cigar & Gifts to take into effect at 4:00 p.m. on July 31, 2013 and accept the Findings.
SECOND: The motion was seconded by Councilmember Bunker.
VOTE: Mayor McArthur called for call vote as follows:

Councilmember Pike - aye
Councilmember Bunker - aye
Councilmember Almquist - aye
Councilmember Nickle - aye
Councilmember Hughes - aye

The vote was unanimous and the motion carried.

ADJOURN:
MOTION: A motion was made by Councilmember Bunker to adjourn.
SECOND: The motion was seconded by Councilmember Nickle.
VOTE: Mayor McArthur called for call vote as follows:

Councilmember Pike - aye
Councilmember Bunker - aye
Councilmember Almquist - aye
Councilmember Nickle - aye
Councilmember Hughes - aye

The vote was unanimous and the motion carried.

_____
Christina Fernandez, City Recorder

NOTICE OF REGULAR MEETING OF THE CITY COUNCIL OF THE CITY OF ST. GEORGE, WASHINGTON COUNTY, UTAH

Public Notice

Public notice is hereby given that the City Council of the City of St. George, Washington County, Utah, will hold a regular meeting in the City Council Chambers, 175 East 200 North, St. George, Utah, on Thursday, July 18, 2013 commencing at 4:00 p.m.

The agenda for the meeting is as follows:

Call to Order
Invocation
Flag Salute

1. CONSENT CALENDAR
   - A. Consider approval of an airport hangar lease with Paul Proctor of Scandia Development.

2. BID OPENINGS
   - A. Consider approval of a contract with Kim Campbell to provide architectural services for the remodeling of the East Annex.

3. PUBLIC HEARINGS - None scheduled

4. ORDINANCES - None scheduled

5. RESOLUTIONS - None scheduled

6. STAFF REPORTS
   - A. Consider approval of a special event permit fee waiver for a yard sale to benefit Solomon's Porch Foursquare Fellowship homeless dinner program. Neal Smith, applicant
   - B. Consider sale of City property west of Lot 44 of Creekside Homes 2nd Amendment and east of the Santa Clara River. Donald Campell, applicant.
   - C. Consider approval of an interlocal agreement for the cost and use of Spillman software and hardware.
   - D. Appointments to boards and commissions of the City.
   - E. Request a closed session.

7. MINUTES - None scheduled

8. ADJOURNMENT

Christina Fernandez
Christina Fernandez, City Recorder

July 16, 2013
Date

REASONABLE ACCOMMODATION: The City of St. George will make efforts to provide reasonable accommodations to disabled members of the public in accessing City programs. Please contact the City Human Resources Office, 627-4674, at least 24 hours in advance if you have special needs.

ADDENDUM TO THE CITY COUNCIL MEETING AGENDA
OF THE CITY OF ST. GEORGE,
WASHINGTON COUNTY, UTAH

Public Notice

Public notice is hereby given that the City Council of the City of St. George, Washington County, Utah, will hold a regular meeting at the St. George City Office, City Council Chambers, 175 East 200 North, St. George, Utah, on Thursday, July 18, 2013 commencing at 4:00 p.m.

The addendum to the agenda is as follows:

6. STAFF REPORTS

F. Issue a ruling on the appeal of the revocation of the business license for Mike's Smoke, Cigar & Gifts located at 1973 West Sunset Boulevard.

Christina Fernandez, City Recorder — July 17, 2013 Date

REASONABLE ACCOMMODATION: The City of St. George will make efforts to provide reasonable accommodations to disabled members of the public in accessing City programs. Please contact the City Human Resources Office, 627-4674, at least 24 hours in advance if you have special needs.

DRAFT

Agenda Item Number : **1A**

Request For Council Action

Date Submitted	2013-07-09 15:52:36
Applicant	Rich Stehmeier
Quick Title	Airport Hangar Lease - Scandia
Subject	Consider approval of a lease with Paul Proctor of Scandia Development for airport hangar #212.
Discussion	Mr. Proctor has been subleasing this hangar without a lease for approximately 1 year. He has now signed the lease, paid back fees and provided proper insurance.
Cost	$0.00
City Manager Recommendation	Recommend approval.
Action Taken	
Requested by	Larry H. Bulloch
File Attachments	Scandia, #212.pdf
Approved by Legal Department?	
Approved in Budget?	**Amount:**
Additional Comments	
Attachments	Scandia, #212.pdf

DRAFT

Agenda Item Number : 2A

Request For Council Action

Date Submitted	2013-07-08 12:59:47
Applicant	Kent Perkins
Quick Title	Architectural Services
Subject	Consider approval of contract with Kim Campbell to provide architectural services for the remodeling of the East Annex to accommodate offices for Leisure Services and the Recreation Division, in an amount not to exceed $49,950.
Discussion	Kim Campbell has designed the remodeling of the East Annex for IT and DEA and the Police. The next phase of remodeling will complete the common area and new offices for Leisure Services and the Recreation Division. Kim has submitted a proposal including fee and time line, which will allow for the project to be completed by January of 2014.The proposal covers mechanical, electrical, architectural, structural and construction admin. This value is a not to exceed.
Cost	$49,950
City Manager Recommendation	Seems logical since Kim is working on the current project. Recommend approval.
Action Taken	
Requested by	Kent Perkins
File Attachments	
Approved by Legal Department?	
Approved in Budget?	**Amount:**
Additional Comments	

DRAFT

Agenda Item Number : **6A**

Request For Council Action

Date Submitted	2013-07-10 10:17:26
Applicant	Neal Smith
Quick Title	St George Exchange Club Benefit Yard Sale
Subject	Request to waive the Special Event fee for a community wide yard sale in support of the Solomon's Porch Foursquare Fellowship Homeless Dinner operation.
Discussion	This event will be held on August 3 at the Hurst Parking Lot.
Cost	$0.00
City Manager Recommendation	Recommend approval.
Action Taken	
Requested by	Bill Swensen
File Attachments	
Approved by Legal Department?	
Approved in Budget?	**Amount:**
Additional Comments	

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St. George Exchange Club's Benefit Yard Sale

All proceeds raised will be donated to the Solomon's Porch Foursquare Fellowship for their Sunday noon meal they serve to the homeless in our area.

Time:
7:00 am—Noon

Date:
August 3, 2013

For more information please call:

Brett Labrum, Club President: 674-2221

Jimi Kestin of the Solomon's Porch Foursquare Fellowship: 669-9070

Neal Smith, Club Chairperson: 632-5456

We will be on the corner of St. George Blvd and Bluff street in the parking lot of Hurst Ace Hardware 160 N. Bluff.

DRAFT

Agenda Item Number : 6B

Request For Council Action

Date Submitted	2013-07-12 12:12:20
Applicant	Donald Campbell
Quick Title	Sale of City Property
Subject	Consider sale of City property west of Lot 44 of Creekside Homes 2nd Amendment and east of the Santa Clara River. This area contains 1,719 square feet.
Discussion	The Campbell's own the home located at Lot 28 of Pine Brook Phase 2.
Cost	$0.00
City Manager Recommendation	This property was a lot in Creekside that had a home that was lost in the floods. The City purchased the lot to make sure no new dwelling would be built on it. We have a request to purchase this property by the adjacent property owner in Pinebrook Estates. He would like to expand his yard and put in a swimming pool. There are details to be worked out with the other adjacent owner as well as the HOA for Creekside. If all details can be worked out it looks like a good use of the property as long as there is a deed restriction on no dwelling and a liability release.
Action Taken	
Requested by	Todd Jacobsen
File Attachments	Campbell.pdf
Approved by Legal Department?	
Approved in Budget?	**Amount:**
Additional Comments	The Campbell's would like to purchase this property along with Lot 44 of Creekside Homes 2nd Amendment and some of the common area from the HOA that is to the north, west, and south of said Lot 44 to increase the size of their backyard to put in a swimming pool and landscaping. Also, this parcel is protected by and located outside of the NRCS Rock Wall that was put in from the floods of 2005.
Attachments	Campbell.pdf

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DRAFT

Agenda Item Number : 6C

Request For Council Action

Date Submitted	2013-07-11 10:39:56
Applicant	Police Department
Quick Title	Spillman Local Agreement
Subject	Spillman local user group agreement
Discussion	Spillman is the data management system used by the police department, and shared with other agencies within Washington County. This agreement formalizes the shared responsibility for this system.
Cost	$0.00
City Manager Recommendation	Recommend approval.
Action Taken	
Requested by	Marlon Stratton
File Attachments	
Approved by Legal Department?	
Approved in Budget?	**Amount:**
Additional Comments	Signatures have been obtained from City Legal. Signatures are needed from City Recorder and Mayor.

INTERLOCAL COOPERATION AGREEMENT BETWEEN WASHINGTON COUNTY, THE CITY OF ST. GEORGE, THE CITY OF WASHINGTON, THE CITY OF LaVERKIN, THE CITY OF HURRICANE, THE CITY OF IVINS, THE CITY OF SANTA CLARA, THE TOWN OF SPRINGDALE, AND GARFIELD COUNTY REGARDING THE COST AND USE OF SPILLMAN SOFTWARE AND HARDWARE

This Interlocal Cooperation Agreement (this "Agreement") is made and entered into pursuant to the provisions of the Interlocal Cooperation Act, Title 11, Chapter 13 (the "Interlocal Act"), Utah Code Annotated 1953, as amended (the "Utah Code"), and shall be effective upon signature of the parties, by and between Washington County, the City of St. George, the City of Washington, the City of LaVerkin, the City of Hurricane, the City of Ivins, the City of Santa Clara, the City of Springdale (the "Cities"), and Garfield County, which are hereinafter individually referred to as a "Party", and collectively referred to as the "Parties."

W I T N E S S E T H:

WHEREAS, Washington County has previously contracted with Spillman Technologies, Inc. to provide emergency responders (which includes both police and fire) to Washington County, the Cities, Garfield County, and various special service districts within Washington County; and

WHEREAS, pursuant to the Washington County's contractual arrangement with Spillman Technologies, Inc., Washington County receives bills for the annual support fee from Spillman Technologies, Inc.; and

WHEREAS, the Parties have informally worked together to use Spillman Software and Hardware ("Spillman"), and to pay for and share the expenses related to Spillman; and

WHEREAS, the Parties desire to solidify their informal working agreement regarding Spillman and enter into an Interlocal Agreement to define the responsibilities of each party regarding their share of the cost of Spillman, and to organize a Spillman Technical Committee to address issues related to the use of Spillman and the maintenance and upgrade of Spillman; and

WHEREAS, the Interlocal Act permits public agencies as defined in the Interlocal Act ("Public Agencies") to enter into agreements with one another for joint or cooperative action pursuant to the Interlocal Act; and

WHEREAS, the Parties are Public Agencies as defined by the Interlocal Act and are authorized to enter into this Agreement to act jointly and cooperatively as described herein.

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, and pursuant to the Interlocal Act, the Parties hereby agree as follows:

Section 1. Purpose. The purpose of this Agreement is define the responsibilities of the Parties regarding their share of the cost of Spillman, and to organize a Spillman Technical Committee to address issues related to the use of Spillman and the maintenance and upgrade of Spillman.

Section 2. Allocation of Spillman Costs and Expenses. The Parties shall pay the costs and expenses related to Spillman as follows:

1. The total costs and expenses related to Spillman shall be divided between the Parties based on their proportionate share of the total population of the Parties.

2. The population of each Party shall be based on the most recent population estimate made by the Utah Governor's Office.

Section 3. Spillman Technical Committee. A technical committee shall be formed by the Parties and shall be known as the Spillman Technical Committee ("Technical Committee"). The Technical Committee shall be comprised of one member appointed by each Party, and shall serve at the will of the appointing Party. The purpose of the Technical Committee is to meet regularly to determine data formats, procedures, hardware support, such as replacement parts and the purchase of new hardware, establish a sustainable hardware replacement program, deal with operating system support costs that are not included with Spillman software support, and deal with other matters related to the use and operation of Spillman.

Section 4. Termination. A Party may terminate its participation in the Agreement by giving ninety (90) days written notice to all of the other Parties.

Section 5. Duration. This Agreement shall take effect upon the execution by the Parties. Thereafter, as permitted by Section 11-13-216 of the Interlocal Act, this Agreement shall be and remain in force for fifty (50) years.

Section 6. Administrator. Pursuant to Section 11-13-207 of the Interlocal Act and other relevant provisions of the Interlocal Act, the Parties hereby designate the Mayors of the Cities and Chairs of the Washington County and Garfield County Commissions as the Administrators responsible to administer this Agreement and the accomplishment of the purposes of the cooperative action contemplated hereby and specified herein.

Section 7. Liability and Indemnification. The Parties are governmental entities under the Governmental Immunity Act of Utah, Title 63, Chapter 30d of the Utah Code. Consistent with the terms of this Act, it is mutually agreed that each party is responsible and liable for its own wrongful or negligent acts which it commits or which are committed by its agents, officials, or employees in carrying out or fulfilling its

obligations under this Agreement. None of the Parties waive any defenses otherwise available under the Governmental Immunity Act.

Section 8. Interlocal Cooperation Act Requirements. In satisfaction of the requirements of the Interlocal Act, and in connection with this agreement, the Parties agree as follows:

(a) This Agreement shall be authorized by resolution of the governing bodies of the City and the County in compliance with Section 11-13-202.5 of the Interlocal Act;

(b) This Agreement shall be reviewed as to proper form and compliance with applicable law by a duly authorized attorney on behalf of each Party, pursuant to Section 11-13-202.5 of the Interlocal Act;

(c) A duly executed original counterpart of this Agreement shall be filed with the keeper of records of each Party, pursuant to Section 11-13-209 of the Interlocal Act;

(d) Except as otherwise specifically provided herein, each Party shall be responsible for its own costs of any duty or obligation required of it pursuant to this Agreement, and for any financing of such costs; and

(e) No real or personal property shall be acquired jointly by the Parties as a result of this Agreement.

Section 9. Headings. The subject headings of the paragraphs and subparagraphs of this Agreement are included for purposes of convenience only and shall not affect the construction or interpretation of any of its provisions.

Section 10.Entire Agreement; Modification; Waiver. This Agreement constitutes the entire agreement between the Parties hereto pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements, representations and understandings of the Parties. No supplement, modification, amendment, or waiver of any obligation of this Agreement shall be binding unless executed in writing by all the Parties. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. Notwithstanding anything to the contrary herein, while any of the Bonds are outstanding, this Agreement may only be amended, modified or waived, if such amendment, modification or waiver does not materially impair the interests of the holders or beneficial owners of the Bonds.

Section 11.Counterparts; Filing. This Agreement may be executed simultaneously in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

Section 12.Notices. All notices, requests, demands and other communications under this Agreement shall be in writing and shall either be delivered personally or sent

by first-class mail, postage prepaid, and properly addressed to the Parties at the following addresses:

Washington County, Utah
Attn: Commission Chair
197 East Tabernacles
St. George, UT 84770

Garfield County, Utah
Attn: Commission Chair
55 South Main Street
P.O. Box 77
Panguitch, UT 84759

Washington City, Utah
Attn: City Manager
111 North 100 East
Washington, UT 84780

St. George City, Utah
Attn: City Manager
175 East 200 North
St. George, UT 84770

LaVerkin City, Utah
Attn: City Manager
435 North Main
LaVerkin, UT 84745

Hurricane City, Utah
Attn: City Manager
147 North 870 West
Hurricane, UT 84737

Ivins City, Utah
Attn: City Manager
55 North Main
Ivins City, UT 84738

Santa Clara City, Utah
Attn: City Manager
2603 Santa Clara Drive
Santa Clara, UT 84765

Township of Springdale, Utah
Attn: City Manager
118 Lion Blvd.
Springdale, UT 84763

Section 13.Null or Void Provisions; Interpretation. If any part or parts of this Agreement shall be held to be null or void, or otherwise unenforceable, such shall not affect the validity and enforceability of the rest of this Agreement. Where the context requires, the singular shall include the plural and the plural shall include the singular.

Section 14.Governing Law. This Agreement shall be construed in accordance with and governed by the laws of the State of Utah.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

Attest: WASHINGTON COUNTY, UTAH

By: _____ By: _____
County Clerk Commission Chairman

Approved as to form and compatibility with Utah Law:

By: _____
County Attorney

Attest: GARFIELD COUNTY, UTAH

By: _____ By: _____
County Clerk Commission Chairman

Approved as to form and compatibility with Utah Law:

By: _____
County Attorney

Attest:

CITY OF ST. GEORGE, UTAH

City Recorder

Mayor

Approved as to form and compatibility with Utah Law:

By: 6-13-13
City Attorney

Attest:

CITY OF WASHINGTON, UTAH

City Recorder

Mayor

Approved as to form and compatibility with Utah Law:

By: _____
City Attorney

Attest:

CITY OF LaVERKIN, UTAH

City Recorder

Mayor

Approved as to form and compatibility with Utah Law:

By: _____
City Attorney

Attest:

CITY OF ST. HURRICANE, UTAH

_____
City Recorder

_____
Mayor

Approved as to form and compatibility with Utah Law:

By: _____
City Attorney

Attest:

CITY OF IVINS, UTAH

_____
City Recorder

_____
Mayor

Approved as to form and compatibility with Utah Law:

By: _____
City Attorney

Attest:

CITY OF SANTA CLARA, UTAH

_____
City Recorder

_____
Mayor

Approved as to form and compatibility with Utah Law:

By: _____
City Attorney

Attest:

TOWNSHIP OF SPRINGDALE, UTAH

_____
City Recorder

_____
Mayor

Approved as to form and compatibility with Utah Law:

By: _____
City Attorney

COPY

SHAWN GUZMAN, # 7392
PAULA HOUSTON, # 5239
175 East 200 North
St. George, UT 84770
Telephone: (435) 627-4000
Facsimile: (435) 627-4260
shawn.guzman@sgcity.org
paula.houston@sgcity.org

IN THE CITY COUNCIL MEETING OF THE CITY OF ST. GEORGE
COUNTY OF WASHINGTON, STATE OF UTAH

IN THE MATTER OF **MIKE'S SMOKE, CIGAR & GIFTS** ADDRESS OF SUBJECT PROPERTY: 1973 W Sunset Boulevard St. George, UT 84770	**FINDINGS OF FACT, CONCLUSIONS AND ORDER**

The above-entitled matter came before the St. George City Council, the appeal board, on an appeal from an order of revocation for the business license for Mike's Smoke, Cigar & Gifts (Mike's Smoke Shop) which is located at 1973 W. Sunset Boulevard in St. George, Utah. The City of St. George (City) appeared by and through its attorney of record, Paula Houston, and Mike's Smoke Shop appeared by and through its attorney of record, Ryan Holdaway, on April 4, 2013 for the hearing. The City Council having heard and reviewed the proffered evidence of both parties and being otherwise fully advised enters the following findings and order:

FINDINGS OF FACT

The City Council makes the following findings of fact:

1. Mike's Smoke Shop is located at 1973 W. Sunset Boulevard in St. George, Utah. This business is licensed by the City to sell cigarettes, cigars, tobacco pipes, lighters, oil burners, incense, flavored tobacco, sports memorabilia, novelty items, perfume and calling cards. Christie Best and Michael Connors are the owners of the business. Kyle Best, the son of owner Christie Best, is the manager of the St. George location.

2. The City business license officer sent an order of revocation to the owners of Mike's Smoke Shop on January 28, 2013, revoking the business license and ordering the owners to stop conducting business in St. George. On February 1, 2013, the owners filed an appeal of the decision and requested a hearing on the revocation. The City allowed Mike's Smoke Shop to continue doing business during the appeal period.

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3. Complaints were received and a number of cases were investigated by the Washington County Drug Task Force (Task Force) for the possible distribution of a substance commonly known as "spice" which is regulated by the Utah Controlled Substance Act and the Imitation Controlled Substance Act. In the course of these investigations, the Task Force investigated Mike's Smoke Shop for possible violations. Employees of Mike's Smoke Shop told Task Force officers they did not sell spice because it was illegal but they did sell products they referred to as "aroma therapy". Undercover purchases of the "aroma therapy" products were made at Mike's Smoke Shop by the Task Force in March and April of 2012. A search warrant was obtained and executed by the Task Force in April 2012. During the execution of the search warrant, a detective interviewed Kyle Best. Kyle Best told the detective that the "aroma therapy" products had been tested and that Mike's Smoke Shop consulted with their attorney about the law. Kyle Best said he was familiar with the different compounds of spice. He said he has been told to call the product "aroma therapy" and he tells customers that if they smoke it they will go to jail. He said he only sells it to people 19 years of age and over and it comprises approximately 40% of their daily sales. In July 2012 another purchase was made by the Task Force of four more "aroma therapy" packets. Additional purchases were made by the Task Force in December 2012 and January 2013. During these transactions, the "aroma therapy" product, which is called "Reborn", was behind the counter, out of the public view. The packets of "Reborn" did not have barcodes like the other products in the store. The employee scanned a sticker on the side of the cash register's monitor to enter the price of the packet of "Reborn" when selling it to a customer. Based on this information, a search warrant was obtained and executed by the Task Force in January 2013. Multiple packets of "aroma therapy" product called "Reborn" were seized from behind the counter, out of view of the public, and also from a safe in the back room. During the officers' interview with Kyle Best, when asked if it was safe to say that no matter what name the spice was called, "Reborn" or "aroma therapy", it was camouflage to skirt the law enforcement investigations, and he said "Yeah".

4. The following illegal distribution and possession with intent to distribute cases occurred at Mike's Smoke Shop after the 2012 Utah State Legislature amended U.C.A. 58-37-2 and 58-37-4.2 in HB 254 which became effective May 8, 2012:
   - July 10, 2012 – Case # **12T0334** –The Utah Bureau of Forensic Services (State Crime Lab) **tested** the substance and found that Evidence 1-4 contained XLR11, a structural analog of AM-694 which is a listed controlled substance in U.C.A. 58-37-4.2.
   - January 2, 2013 - Case # **13T0001** - The State Crime Lab **tested** the substance and found that both packets contained XLR11, a structural analog of AM-694 which is a listed controlled substance in U.C.A. 58-37-4.2.
   - January 11, 2013 – Case # **13T0001** – The State Crime Lab **tested** products (8 items), all products contained XLR11, a structural analog of AM-694 which is a listed controlled substance in U.C.A. 58-37-4.2.

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5. The State Crime Lab is an accredited forensic crime lab which holds an additional accreditation for forensic testing and analysis of drug chemistry including controlled substances and general chemical testing. Terry Lamoreaux, the forensic scientist that analyzed the products described herein, is a certified criminalist with a degree in Chemistry and over 35 years of professional employment dealing with analytical chemistry and toxicology. His extensive experience and training, as identified in his curriculum vitae, qualifies him as an expert in analyzing controlled substances and determining if a substance is an analog of a listed controlled substance. No evidence was presented by Mike's Smoke Shop to call into question the Lab's accreditations or procedures, or the skills or qualifications of Lamoreaux. Lamoreaux has testified in numerous court proceedings and his findings have been accepted by courts on prior cases. Lamoreaux examined the samples in the above cases and found that the samples contained XLR11, a structural analog of AM-694. XLR11 is an analog of AM-694 because it has a substantially similar chemical structure of the controlled substance AM-694 due to a common core structure with a single point of divergence. Mike's Smoke Shop did not dispute the fact that the product sold or possessed with intent to distribute contained XLR11. Identification of the chemical structure of the substance was made solely by the State Crime Lab.

6. Mike's Smoke Shop presented statements from Karl De Jesus, Ph.D., and Owen Michael McDougal, Ph.D., along with their curriculum vitaes. De Jesus, in his opinion letter dated July 18, 2012, referred to the former instead of the current State law. The former law required a showing that the substance is structurally similar to a listed controlled substance and that the substance had "substantially similar effects on the central nervous system". Based on the former law he stated the following: that XLR11 is a synthetic cannabinoid; that the structure was substantially different from AM-694; that the effect on the nervous system was less potent with decreased hallucinogenic effects; and therefore, in his opinion, the product should not be considered an analog of a controlled substance. In McDougal's opinion letter, Utah law was not addressed. McDougal discussed the structural compound of AM-694 and XLR11 and the chemical effects of the substance. The experts for Mike's Smoke Shop did not test or analyze the actual products. They merely stated that in their opinion XLR11 should not be considered an analog of AM-694.

7. Kyle Best admitted that he knew the product they sold as "aroma therapy" was being ingested by at least some of the people that purchased it. This despite the fact that Mike's Smoke Shop marketed it as "aroma therapy" and not for human consumption. He also admitted to smoking it himself on at least one occasion. Kyle Best told the police officers that a company called "GOS" manufactured the "Reborn" product but he didn't know where GOS was located. When the police officer asked for a copy of the test results for "Reborn", Kyle Best provided a report from AIBio Tech. The test results were for 36 chemicals; however the product was not tested for any analogs and did not identify the chemical makeup of the product. The lab report was addressed to a business listed as "DVS" with a St. George address; however no such business existed at that address and no business called "DVS" had a business license with St. George. Kyle Best stated that he had offered "Reborn" for sale in the store for at least 6 months. He said he moved the "Reborn" under the counter behind the cash register because people were stealing it and that people have broken into the store to steal it. He said Mike's Smoke Shop in St. George sells the "Reborn" for $10 a packet and they sell 50 to 60 packets a day. Kyle Best said that he does the ordering and that the owners

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are aware of and approve items that are offered for sale and that he was told to sell this product. He also stated that he wouldn't sell the product if the person asks for "spice" and that about a 1/3 of his sales are "Reborn". When asked why the "Reborn" was hidden if it was such a hot seller, he responded that he didn't have room for the "Reborn" out front, that it made it easier to grab, and that it would get stolen. When asked why he didn't put it in the glass display case, he responded that it had been but he moved it. He agreed other businesses would display their hot selling items out front. He also stated that customers have to ask for it by name to get it. Kyle Best said that he knew customers smoke it or ingest it like marijuana including one old man who smokes it for his cancer and comes in every other day. He also admitted that he has used it in the past. When asked what effect the "Reborn" had, he said it made him sick. When asked if it was safe to say that no matter what name the "spice" was called, whether it was called "Reborn" or "aroma therapy", it was camouflage to skirt the law enforcement investigations, Kyle Best said "Yeah". He said that people will find ways to get high.

Christie Best, the owner, told Task Force officers that she wasn't "dumb" and that she knew what people were doing with the "aroma therapy". She also said customers had told her that they smoke it. Christie said that she comes to the St. George store two to three times a week to do paperwork, pay bills and sign checks. She said the "Reborn" product was kept behind the counter and in the safe and that she left the testing of the product up to Kyle Best. She said that when the store is broken into the first thing the thief steals is the "Reborn".

The manager of the Washington City store, Christina Best, daughter of the owner, also admitted to seeing people smoke the "aroma therapy" in the parking lot, that people admitted they smoked it and that she had smoked it once. She also kept the product hidden behind the counter in the Washington store and said that the customer had to know about it and request it or they wouldn't sell it to the customer.

Michael Connors, one of the owners, said they got their "aroma therapy" from a male he only knows by a first name and he asks Kyle Best if it is legal, if the paperwork is in order and if the attorneys have cleared it. Connors said he hides the "aroma therapy" behind the register because if he displays it, it becomes illegal. He also said he puts it out of view so kids can't get it.

CONCLUSIONS

Based on the facts presented at the hearing including all submitted materials, the City Council makes the following conclusions:

1. In examining the evidence presented, the Council must determine whether the evidence supports the business license officer's revocation of Mike's Smoke Shop's business license. The Utah Supreme Court stated that "Substantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. This standard does not require or specify a quantity of evidence but requires only such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *WWC Holdings Co., Inc. V. Public Service Commission of Utah*, 44 P.3d 714,

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2001 UT 23 (2002). Put simply, the decision cannot be arbitrary or capricious; it must be based in fact.

2. The plain language of the Utah state statute is clear and should be applied as written. In *State v. Jeffs,* the Utah Supreme Court stated when "interpreting a statute, we look to its plain language. We read statutory provisions literally, unless such a reading would result in an unreasonable or inoperable result." *State v. Jeffs,* 243 P.3d 1250 (Utah 2010). This decision is supported by a review of House Bill 254 which was adopted by the 2012 Utah Legislature. The State Legislature amended the law to clarify the definition of a controlled substance analog and eliminated the requirement to prove two elements before a substance could be classified as an analog. Prior to this amendment, the prosecutor in a criminal case had to prove that a substance had a chemical structure substantially similar to the chemical structure of a controlled substance or a listed controlled substance AND that it had a substantially similar effect OR was represented or intended to have a substantially similar effect. The 2012 amendments removed this two step approach from Utah law. Mike's Smoke Shop argues the language still requires this two step approach arguing that the elements should be read in the conjunctive even though they are separated by an "or" instead of an "and". However, the Legislature would not have removed the clear language using the word "and" which clearly required two steps and changed it to three separate paragraphs using the disjunctive format of "or" if it really wanted to keep the requirement for two steps. Such an interpretation is nonsensical and unreasonable.

The relevant changes are as follows:

HB 254:

(g) (i) "Controlled substance analog" means:

(A) a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in Schedules I and II of Section 58-37-4 , a substance listed in Section 58-37-4.2 , or in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513[~~:~~];

[~~(A)~~] *(B) a substance* which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances [~~in the schedules set forth in Subsection (1)(f), or a substance listed in Section 58-37-4.2 ; or~~] *listed in Schedules I and II of Section 58-37-4 , substances listed in Section 58-37-4.2 , or substances listed in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513; or*

[~~(B)~~] *(C) A substance* which, with respect to a particular individual, is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances [~~in the schedules or list set forth in this Subsection (1)~~] *listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I and II of the federal Controlled Substances Act, Title II,*

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P.L.
95 91-513.

Excerpt from enrolled copy of House Bill 254 enacted by the 2012 General Session of the Utah Legislature.

It is clear from the changes that were made that the Legislature intended the statute to be disjunctive as "or" is normally read, rather than "conjunctive" as argued by Mike's Smoke Shop. The Council concludes that the current law, especially with its history, is very clear and should be applied in the disjunctive as it is written. When applied to the facts of this case it does not create an unreasonable or inoperable result.

3. The product sold at Mike's Smoke Shop contained XLR11, an analog of AM-694. The Council concludes that the evidence provided by the State Lab and Mr. Lamoreaux is credible and reliable. It is reasonable to rely on the determination made by the State Lab that the product sold or possessed by Mike's Smoke Shop with the intent to distribute, contained XLR11 which has a chemical structure substantially similar to the chemical structure of the listed controlled substance AM-694 and that the chemical had a common core structure with a single point of divergence. In *United States v. Saffo*, 227 F.3d 1260, 1263 (10th Cir. 2000), the government's expert witnesses testified that the substance in that case had a substantially similar chemical structure to the listed controlled substance because there was only one difference in the chemical structure between the substance in question and the listed controlled substance. The defendant's expert witnesses in *Saffo* claimed the substance did not have a substantially similar chemical structure because their functional groups were different. The court stated that experts need not agree in order to affirm a criminal conviction under the analog statute.

   Based on this conclusion and the findings of fact stated above, the Council concludes the evidence establishes that XLR11 is an analog of AM-694, a listed controlled substance, and that Mike's Smoke Shop sold and possessed product with the intent to distribute that contained XLR11 in violation of U.C.A. 58-37-8.

4. The Council finds that Mike's Smoke Shop had notice that the product they sold was a controlled substance that was illegal to distribute and the City is not required to prove intent on the part of Mike's Smoke Shop.

   The case before the Council is a civil business license revocation. Civil business license revocations do not require an intent element. The mere fact that a sale of an illegal substance was made at the business is sufficient to justify the revocation of the business license. Owners and operators are responsible for the activities that occur at their businesses. It is their responsibility to ensure compliance with the law. Assuming arguendo that the City had to prove intent, the standard of proof used to measure an individual's level of mens rea in a criminal case would be whether the individual had a "reasonable cause to believe" or reason to know that their actions are illegal. This can be shown by the subjective facts surrounding the event in question which demonstrates that the person had reason to know their acts were illegal.

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In another criminal case, *United States v. Washam*, 312 F.3d 926, 929 (8th Cir. 2002), the defendant, in an attempt to circumvent the banned chemicals, found a chemical, 1,4 Butanediol, to sell that was not on the controlled chemicals list, but that had similar effects to those illegal chemicals when ingested. The defendant also had "not for human consumption" placed on the packaging of the chemical, in hopes of persuading law enforcement that the chemicals were not intended to be used in the same manner as the listed controlled chemicals GHB and GLB. The court concluded in *Washam* that while the chemical 1,4 Butanediol did not have the exact same chemical structure, and even though the packaging had a label stating "not for human consumption," the surrounding facts proved that the defendant knew the chemical was substantially similar to the listed controlled chemicals, and the defendant knew that the analogous chemical would be consumed by those who purchased the chemical, even if the packaging advised otherwise. Similarly, the *Saffo* court held that the defendant could not claim lack of notice because her behavior and activities showed she knew selling the product was illegal.

In the case at hand, the facts are similar to *Saffo* and *Washam*. "Reborn", a product which contained the analog of a listed controlled substance, was sold or possessed with the intent to distribute at Mike's Smoke Shop located at 1973 W Sunset Blvd, St. George, Utah. It was marked "not for human consumption", it was sold for $10 a packet from a hidden location distinct from the legal inventory, it was rung up by scanning a tag on the monitor instead of marking the product, the customer had to specifically request it to buy it, and the owners and employees knew that the customers were smoking or ingesting it. If a customer asked for spice they would be told that the store does not sell spice, but that they sell "aroma therapy". The employees' and owners' conduct demonstrates an understanding of the illegality of the product, and that the customers buying the product were not using it for its advertised use of aroma therapy. Kyle Best, the manager of the store, even stated that these acts were to mislead law enforcement. The totality of these facts, in addition to those listed above in the findings of fact, establishes there is "reasonable cause to believe" the owners, the manager and the employees knew the product was illegal. This is the standard for a criminal conviction, a much higher standard than is necessary for a business license revocation. In addition, the Fifth District Court held a hearing to determine if there was sufficient evidence to proceed on criminal charges against Kyle Best for distributing a controlled substance stemming from the events which occurred in January 2013, and the Court ruled that there was sufficient evidence for a criminal prosecution. The criminal case against Kyle Best is based on the same facts as this revocation.

The Council concludes that based on the totality of the facts, there is substantial evidence that Mike's Smoke Shop, its owner and employees, had the requisite knowledge and intent to commit a violation of the law by distributing, or possessing with the intent to distribute, analogs of an illegal substance. This evidence goes far beyond what is required for a business license revocation, but is demonstrative of the weight of the evidence supporting the decision to revoke Mike's Smoke Shop's business license.

The City has authority under its business license ordinance to revoke a license when it finds that the licensee/owner/operator is in violation of Section 3-1-19 of the St. George Municipal Code by violating any drug related offense or by finding that an employee while on the business's premises violates any laws related to controlled substances. No criminal

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conviction or charge is required. The City is simply required to show by substantial evidence that there was a violation. Substantial evidence is "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *14th St. Gym, Inc. v. Salt Lake City Corp.*, 2008 UT App 127, 183 P.3d 262, 265.

ORDER

Based on all the facts in this case, the Council hereby upholds the business license officer's decision to revoke the business license for Mike's Smoke Shop as a result of the business being in violation of Section 3-1-19 of the St. George Municipal Code, and hereby ORDERS Mike's Smoke Shop to cease conducting business in the City of St. George and shall cease operations at 1973 W. Sunset Boulevard in St. George, Utah no later than 4:00 p.m. on July 31, 2013. Pursuant to Section 3-1-20 of the St. George Municipal Code, a business that has had its license revoked shall not be granted a business license for six months following the revocation. Any subsequent business license application shall be subject to all applicable Municipal Codes at the time of the application.

DATED this 18th day of July, 2013.

CITY: City of St. George

Daniel D. McArthur, Mayor

CITY OF ST. GEORGE SEAL UTAH

ATTEST:

Christina Fernandez, City Recorder