

PUBLIC HEARING – RECONSIDERATION OF APPEAL File #16-001CU

JULY 5, 2017

The public hearing a reconsideration of appeal submitted by Terry Lowenberg to allow lottery machines was called to order at 7:00 pm by Mayor Matt Brown. Members present were Mayor Brown, Councilors Cockrum, Jesse, Lorain and Smith, City Administrator Chad Sweet, Planner Carole Connell and Attorney Peter Watts.

Brown read the disclosure statement into the record noting the hearing is On The Record and testimony is limited to those having standing, testimony is limited to restating their original testimony and may introduce new oral or written evidence specifically limited to the issue of state law preemption of local government regulations as related to Oregon Lottery and video poker machines. Brown asked for any *ex parte* contact, conflict of interest or bias. Commissioners Lorain, Jesse, Cockrum and Mayor Brown stated they have eaten at the restaurant. Brown asked for any audience challenges to the council being able to impartially hear the reconsideration. None was voiced.

Connell summarized the staff report of July 5, 2017 concluding the request to install video lottery machines in the separate area is not in compliance with some of the relevant comprehensive plan policies, the C-1 zone regulations or the definition of neighborhood café. The created separate area will create a space that will not be used for any of the outright permitted or conditional uses authorized in the C-1 zone. And, based on the findings it is recommended the council affirm the commission's denial of the applicant's request to install four video poker machines in a separate area.

Watts gave an overview to state and local law governing video lottery machines. First question would be to ask if either *video arcade* or *video poker* machines would be allowed under the definition of Neighborhood Café. Next would be to look at if video poker machines have separate rules that apply, Watts reviewed state preemption of local laws under ORS 461.030 explaining state law takes authority away from local governments and requires all cities in Oregon play by the same rules. Watts stressed this preempting language was very strong. ORS 431.217 regulates placement and number of video poker machines only by the director of the Oregon Liquor Control Commission. The question becomes how much of the city zoning code is preempted by state law, does this render city regulations inapplicable. Watts does not feel OLCC regulations render the city code inapplicable. The job of the council is to interpret city code as well as state statutes and how far state preemption goes.

Greg Hathaway of Hathaway Larson, 1131 NW Lovejoy Street #950 Portland, OR 97209, attorney for the applicant – said this is a tough case in addition to applying city code to the application the council must consider the very strong state preemption statute. If the decision is to not allow the applicant to place lottery machines in his premises the preemption effect would be taking out all of the city land use regulation. Hathaway pointed out in land use cases at state level a Land Use Compatibility statement (LUC) must be obtained from the local government to be assured any proposal is first allowed by the local governing body before an application is processed. There is no LUC requirement for state lottery process. If the state lottery commission wanted to know what the City of Gearhart thought about the lottery machines there would be a LUC process. The state takes on a very complex application process to allow a retail contract for the machines and to assure the right thing is being done for the community. Hathaway said ‘the 8-foot wall’ is not disallowed by the definition of *neighborhood café* what is required by the definition is tables and chairs and the service of food. The area behind the wall is going to have tables and chairs and food service meeting the definition, honoring the city code and rendering the state preemption rules moot, discussion of lottery machines triggers the preemption regulations.

Smith asked if the statement on page 3 of his memo are direct quote, ‘the pre-emptions statute is unambiguous and strong’?

Hathaway – said the statement is almost identical wording of the state statute.

Cockrum asked if the applicant already has the lottery permit.

Lowenberg said he has talked to the lottery they are approved for the machines but has not ordered machines until the matter is settled.

Cockrum asked if the LUC comes up in other situations besides mitigation of wetlands.

Hathaway said the best examples are Department of State Lands and wetland fill and removal permits and DEQ for water certifications, there are others but his familiarity are with the two.

Smith asked if his liquor license is not a brewery license but on premise sale license.

Lowenberg said he has a package license on and off premise license.

Lorain noted a café permit limits the amount of tables; with tables behind the wall will the number of tables in the front seating area need to be reduced to meet the total space requirement?

Lowenberg said per the building inspector it is not the number of tables but the number of chairs that will need to be adjusted, if there are 5 lottery machines there will need to be 5 chairs adjusted.

Smith asked if the chairs that are used for the lottery machines will be the chairs used for eating at the tables.

Lowenberg said each lottery machine has a table beside it, allowing each gambler to eat at the table beside his machine and the number is deducted from the number in the restaurant.

Cockrum asked how many seats he has including the bar and the tables.

Lowenberg said he is allowed 40 seats and there are 40 set up right now. The number will be reduced from the main dining room by the number of lottery machines the lottery gives them; 4, 5 or 6. He clarified the lottery gives a minimum of 4 machines to a maximum of 6 depending on income and other criteria which is determined by state lottery commission.

Lorain asked if he is required to have a sign advertising video lottery and would it be on the outside of Gearhart Crossing.

Lowenberg said he would not put up a lottery sign if he is granted permission by the city council.

Lorain asked if there was a cash machine.

Lowenberg said there has been a cash machine by the door ever since he bought the business.

Brown read the list of those having standing. Brown opened testimony to proponents of the appeal application. There were no proponents.

Brown opened testimony to opponents of the appeal application.

Susan Edy, 707 F Street, Gearhart – Edy read portions of her prepared statement into the record. Stating financial need is driving the request for a revised conditional use, if the conditional use is appealed it would be in violation of Section 7.040 of the City code in determining a demand for the use, accessibility would be affected requiring additional parking. Edy asks if this would make the conditional use no longer true. In accordance with the 1994 Supreme Court decision Gearhart Crossing should be required to show evidence that at least 50 percent of its revenue will be from sales of food, drink or other non-lottery items before the appeal is granted.

Jeanne Mark, P O Box 2627, Gearhart – the process started on March 10, 2016 with a presentation by his representative Mark Mead and the original schematic from that presentation does not show any video poker which the planning commission based its decision for a conditional use for a neighborhood café. This was followed by a second conditional use application with no transparency to the public about his intention for video poker.

Rick Sabol, P O Box 2528, Gearhart – he believed the commission made a bad error granting a conditional use for a bar, the city does not need another bar we need a general store a bar is not in keeping within what Gearhart is all about. Gambling does nothing but serve the greed of the owner and nothing for the City of Gearhart. The city should vigorously defend any appeal.

Wilson Mark, P O Box 2627, Gearhart – asked if the planning commission would have known there was going to be a video poker machine would they have voted as they did.

Brown opened testimony to neutral comments. There were no neutral comments.

Applicant Rebuttal - Hathaway noted this land use process was not business as usual because of the state preemption. He went on to addressing public comments; demonstrating need is not relevant as to how the state looks at this. It is the state's decision determined by the citizens of Oregon and the State legislature adopting the lottery statute, rendering the city ordinance in conflict triggering state preemption; parking increase is not an issue limited by the number of chairs; the accounting of the 50% issue is up to the State and they require that a contract retailer is compliant; with regards to knowing of the intention to install lottery machines at the original conditional use hearing the ordinance allows for modification of an approved conditional use and the applicant is going through the modification process. Questions of safety are researched by the state; the state determines if a permit issued to a site is in the right place and operated by the right people in compliance with what the voters voted for and a jurisdiction is not hurt by placement he went on to note the police chief had no problem with the proposal. There is opportunity for council to interpret the definition that would allow for the applicant to do what he wants moving away from state preemption issue by conditioning the addition of tables and chairs behind the wall in reconsideration.

Councilors granted Shannon Smith permission to testify. Shannon Smith, P O Box 2173, Gearhart – said it would be nice to have more support for local shopping regardless of the business. Per her research contractors earn about \$150,000 income per store. She encouraged the citizens and council make up

the \$150,000 and shop locally, be supportive and maybe this would be an alternative to lottery. She feels Lowenberg has done a great job making a hybrid grocery store.

Jesse asked if in the process of changing from a grocery store when lottery came into the plan.

Lowenberg said when the original plans came back from the building department he was told no brewery, without the brewery they need something else to make it happen. The business is not supported on 60 days a year; they could seclude the lottery in a smaller space. The wall was built to satisfy the state requirements. They have tried hard to make it family oriented keeping the semi grocery store and family friendly restaurant.

Jesse said at the time you had customers in the restaurant the space was built for the lottery, part of the plan when you built for the restaurant?

Lowenberg said yes but not part of the original plan.

Lorain asked why he would not give the community a chance to enjoy the restaurant as it is now, try it for a year then revisit the machines make it a reciprocal process. It is clear most popular opinion is not in favor of the lottery machines for Gearhart residents.

Lowenberg said for 8 years no one stepped up to help financially, should he be forced to endure another 1 year of loss.

Smith asked for clarification of the drawing dated January 22, 2016 with no lottery machine included.

Lowenberg said the drawing was not allowed because the original drawing did not have lottery on it; the change was made after they got the permit back they decided to add lottery machines.

Cockrum questioned the statement in the staff report that Lowenberg had not applied to have food served in the 5 lottery stations.

Connell said it was never stated there would be food served until now.

Jesse said it is implied you can have food served in the lottery space.

Brown commented it is not about the video poker, the definition of neighborhood café is very narrow; there is not a definition for extra room, the use is not defined in the C1 zone and Section 3.435 deems it prohibited.

Hathaway said first look at the definition, it is narrow but clear the requirements are tables, chairs and food service, wall or no wall the language of the code is honored, there is nothing in the ordinance preventing any other use. When focusing on the machines behind the wall is when preemption kicks in. Other uses could be controlled by the city if not governed by state preemption.

Connell said in standard zoning practice with 3 commercial zones the levels above the limited uses in the C1 allow for other uses beyond the limitations. Use limitations are intentional in C1 zone; broader uses are allowed in C2 and C3 zone.

Hathaway said zoning districts define what are allowed in zones when not governed by state preemption.

Brown questioned if the city has no jurisdiction why not withdraw the application and just do it.

Hathaway said Lowenberg has been a member of the community for a long time, a recommendation for a win win situation would be to approve the conditional use permit with the condition the applicant provide the chairs, tables and food service consistent with the ordinance and in the best interest of the community.

Lorain said she does not feel the proposal complies with the definition requiring *customers be seated at tables*; you can't be seated at a table and at a video poker machine.

Hathaway said the council could approve the conditional use permit and condition the approval exactly as the definition requires.

Lowenberg said he is willing to put in required tables and chairs, when working in the dining room they were not regulated as to the size of chairs and tables.

Cockrum asked if it would be true that the 'tables and chairs' in the lottery area be similar to sitting at the bar.

Lowenberg asked if a person would want to sit at a comfy chair to play lottery, the table is a convenience for the person playing the lottery machine to eat.

Smith clarified Hathaway's statement about the local jurisdiction not being able to enact anything because of preemptive language, the council is not enacting laws but using laws on the city books prior to preemption language of the state lottery, a grandfathered right of preexisting law.

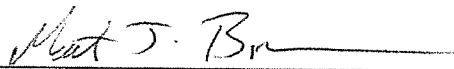
Hathaway said the intent of the 1984 regulations was that local jurisdictions could not have regulations on its books that could be used to deny the placement of lottery machines in conflict with the state law, he is not aware of any grandfather limitation in applying the preempting clause and he said the cities land use regulations fall into the preemption statute.

Watts said the preemption is strong language that has not been tested; he said all local taxes were no longer valid. The conservative approach would be any laws that were in effect beforehand would be preemptive vs. laws that occur after the fact. With regards to the word 'fixtures' he reads that to be video arcade machines and video poker machines rather than the wall. Watts did not read any of this to say the city is prohibiting video poker machines. The discussion was whether the city was preempted from denying a conditional use permit for a separate room.

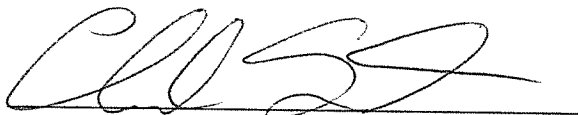
The public testimony was closed at 8:50pm.

Discussion followed on allowable uses in the zone, state preemption, definition of neighborhood café, regular monitoring by OLCC. On **MOTION** by Jesse, 2nd by Lorain, based on findings provided by the applicant the council allow the amendment of the conditional use permit for the placement of lottery machines at Gearhart Crossing Pub and Deli with the following conditions 1) no signage will be visible from the exterior of the building related to the lottery machine, 2) food and beverage service shall be available to patrons at the lottery bar, and 3) tables will be available for patrons at the lottery machines. Motion passes 4-0, 1 abstention, Lorain – aye, Jesse – aye, Smith – aye, Cockrum – aye, Brown – abstain. The applicant will submit tentative findings one week before the August 2nd council meeting.

The public hearing was closed at 9:15 pm.



Matt Brown, Mayor



Chad Sweet, City Administrator