

ATKINSON • FARASYN, LLP

ATTORNEYS AT LAW

REPLY TO:
VALERIE J. ARMENTO

660 WEST DANA STREET
P.O. BOX 279
MOUNTAIN VIEW, CALIFORNIA 94042
TELEPHONE (650) 967-6941
FACSIMILE (650) 967-1395

J.M. ATKINSON (1892-1982)
L.M. FARASYN (1915-1979)

September 18, 2015

Kenny Ma, Owner
Run He, Owner
Green Leaf Spa
333 Estudillo Avenue, Suite A
San Leandro, CA 94577

Kris Kokotaylo, Assistant City Attorney
City of San Leandro
835 E. 14th Street
San Leandro, CA 94577

Re: Green Leaf Spa Business License Revocation Appeal

Everyone,

Enclosed is my decision as the hearing officer in this matter.

Yours truly,



Valerie J. Armento

CITY OF SAN LEANDRO
BUSINESS LICENSE REVOCATION APPEAL

GREEN LEAF SPA
Hearing Date: September 14, 2015

Appearing for Appellant

Steve Ward, Representative

Kenny Ma, Co-Owner

Appearing for City

Kris Kokotaylo, Assistant City Attorney

David Baum, Finance Director

This appeal came on for hearing after written notice in accord with San Leandro Municipal Code Section 2-2-450 and City Council Resolution No. 2015-143 before Valerie J. Armento, Esq. Sworn testimony was provided by Kenny Ma, David Baum, the undercover Detective and Lieutenant Robert McManus.

Background

A business license was applied for and granted (#4526) to Kenny Ma and Run He in July 2014 to operate Green Leaf Spa at 333 Estudillo Avenue, Suite A, San Leandro.

Acting upon a third-party nuisance complaint regarding possible prostitution, San Leandro police detective personnel (a Sergeant and a Detective), went to 333 Estudillo Avenue on January 13, 2015. The plainclothes Detective entered the premises and was greeted by Run He. The Detective expressed interest in receiving a deep tissue massage, based upon a posted sign paid \$40.00 for a 30 minute \$35.00 massage and was told change would be available when the massage concluded.

The Detective was lead to a small room, where he undressed and, lying face down on the massage table, covered himself with a towel. Zhenying Liu entered the room and provided massage services. When the Detective pointed to his genital area and asked "How much?" and held up 5 fingers to represent a willingness to pay \$5.00, Liu became sexually aggressive. After several exchanges, Liu left the room; the Detective dressed and left the spa.

Both the Detective and the Sergeant donned police vests and entered the premises. When the Sergeant asked to see a business license, Run He presented an expired license from the counter.

Liu responded to the Detective's questions about her activities that she could not remember how many similar encounters she has had with customers and that she accepted whatever the customer left in terms of cash. (SL Police Report #2015-00002106)

On June 4, 2015, a Notice of Hearing for a business license revocation proceeding was sent to owners Run He and Kenny Ma. A revocation hearing was held before Finance Director David Baum on June 17, 2015 and a Final Notice of Business License Revocation dated June 19, 2015 was sent to the owners. The revocation was based upon two grounds: false statements on the business license application and operating a house of prostitution in violation of state and local law.

Pursuant to San Leandro Municipal Code Section 2-2-440, the business license was revoked and ordered to cease operation within 5 days of the date of mailing the notice. The owners were advised of the right to appeal the decision by filing a written appeal within ten days of the decision, in accord with San Leandro Municipal Code Section 2-2-450.

On June 24, 2015, Kenny Ma met with a Finance Department employee who explained the license revocation requirements to him. On June 25, 2015 an appeal was filed.

On July 20, 2015, Lieutenant Robert McManus noticed the business was open and operating. He entered the business. He found Yan Zhang and a male patron inside the establishment. The Lieutenant requested that Yan Zhang contact the owners. Run He returned to the business location nearby and shortly thereafter Kenny Ma arrived. Mr. Ma told Lieutenant McManus it was his understanding he could continue operating while the appeal was in progress. Lieutenant McManus contacted the Finance Department employee who met with Mr. Ma on June 24, who reiterated over a speakerphone that the business should have ceased operation no later than June 24, 2015. A subsequent warrant check revealed that Yan Zhang is on federal probation from August 4, 2014 through August 3, 2019 for human trafficking/transporting people for prostitution purposes. (SL Police Report #2015-00033624)

Testimony

The undercover Detective and Lieutenant McManus testified to the information set forth in the two police reports.

Kenny Ma testified that he disputed the events and/or the interpretation of events asserted to have occurred on January 13, 2015, but that he terminated Zhenying Liu after the incident and that he was taking steps to further control operations. A copy of Ms. Liu's Certified Massage Therapist certificate is attached to the Independent Contractor Agreement provided. Mr. Ma also testified that Yan Zhang was one of four therapists working at the business and that she had a massage therapist certification, although no copy or certification number was provided. He testified that he relied on the Certified Massage Therapist certifications and did not do any background checks of contractors/employees.

Mr. Ma stated the business has been closed since the June decision and, with regard to July 20, "that day it was open it really was not open" and that the business has remained closed since July 20, 2015.

Mr. Ma stated that one of the owners was always present when the establishment was open for business, but the facts noted in the police reports show otherwise.

Lieutenant McManus testified that as a result of a regional law enforcement meeting on human trafficking, he became aware of a website (rubmaps.com) and that on the website he found a November 28, 2014 posting from a Green Leaf Spa customer indicating solicitation/prostitution activities occurring. The Lieutenant also found an add for Green Leaf Spa on Craigslist and the undercover Detective stated that other massage operations, such as Massage Envy, do not typically advertise on Craigslist.

Findings

1. When the business license was applied for in July 2014 the owners stated "massage therapy, foot reflexology, pain relief" as the activities to be engaged in. The business was identified as a partnership, with two owners and no employees. It was noted that both owners were Certified Massage Therapists and their certification numbers were provided, He #52349, Ma #56589. (A check on the Certified Massage Therapy Council's website on September 17, 2015, indicated that both certifications are active.)
2. Both He and Ma signed the Certification and Acknowledgment on the business license application affirming the statements on the application were true and that the business would be conducted in accordance with the San Leandro Municipal Code.
3. Mr. Ma testified that all the therapists were Certified Massage Therapists and operated under independent contractor agreements. A copy of the Independent Contractor Agreement executed by Zhenying Liu and Kenny Ma had attached to it a copy of Ms. Liu's Certified Massage Therapist certificate. (A check on the Certified Massage Therapy Council's website on September 17, 2015, indicated that Ms. Liu's certification was active.)
4. It is doubtful the IRS would recognize the therapists as independent contractors or conclude they are employees, based upon the language of the contract and the manner in which Green Leaf Spa conducted business operations.
5. Mr. Ma terminated Zhenying Liu immediately after the January 13, 2015 incident.
6. Section 1-12-115 of the San Leandro Municipal Code says in relevant part "A violation of this Code, including any continuing violation as set forth in Section 1-12-140, below, is hereby declared to be a public nuisance." The original undercover operation on January 13, 2015 was due to a complaint of a likely public nuisance and the investigation found violations of the San Leandro Municipal Code.
7. Section 1-12-120 of the San Leandro Municipal Code says in relevant part "It shall be a violation of this Code to violate any term or condition of any license, permit, agreement, or approval granted or issued pursuant by the City,... Any person, whether as principal, agent, employee or otherwise, violating or contributing to the violation of any such term or condition shall be subject to the sanctions provided in this Chapter or any other law." Numerous facts were not refuted; provisions of the San Leandro Municipal Code were violated and sanctions may be imposed by the City.
8. Section 2-2-300 and Section 2-2-315 of the San Leandro Municipal Code respectively provide that a business license is required before operating a business in the City of San Leandro and that licenses expire every year on December 31. As noted in Police Report #2015-00002106 and testified to by the Detective, the business license provided by Run He on January 13, 2015 was expired (the 2014 license).
9. Section 647(b) of the California Penal Code defines prostitution as including "any lewd act between persons for money or other consideration." A "lewd" act is defined as any act that involves touching the genitals, buttocks, or female breast of another person with the specific intent to arouse or gratify someone sexually. The actions of Zhenying Liu described by the undercover Detective were lewd acts and were done with the expectation of monetary gain.

10. Section 315 of the California Penal Code provides " Every person who keeps a house of ill-fame in this state, resorted to for the purposes of prostitution or lewdness, or who willfully resides in such house, is guilty of a misdemeanor; and in all prosecutions for keeping or resorting to such a house common repute may be received as competent evidence of the character of the house, the purpose for which it is kept or used, and the character of the women inhabiting or resorting to it." The complaint which resulted in the initiation of the investigation, the review on the rubmaps website, the ad on Craigslist in comparison to the way other massage establishments are advertised and the involvement of Yan Zhang who is on federal probation for human trafficking qualify as "common repute" which "may be received as competent evidence of the character" of Green Leaf Spa.

11. Section 2-2-400 of the San Leandro Municipal Code empowers the Finance Director to revoke a business license when "a licensed business does not comply with any statute of the State of California or any ordinance of the City of San Leandro." Clear violations of both the San Leandro ordinances and California law occurred.

12. Section 2-2-400 of the San Leandro Municipal Code further provides that within five days of the mailing of a business license revocation notice, "the licensee shall cease the operation of the business for which the license was issued." Although the business license for Green Leaf Spa was revoked in late June 2015, the business was found to be operating in late July 2015, even though a Finance Department employee had advised Mr. Ma in person in June that operation must cease. Mr. Ma's statement that the business was not actually open when it was open and operating is not credible.

Conclusion

The licensee has failed to show cause why the action or determination of the Finance Director should not be approved. Based upon the evidence submitted and the findings set forth, the business license revocation is upheld and the appeal is denied.