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SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

HISTORICAL MILITARY SALES INC)	Case No.:
(UBI: 602078140) and David Robinson,)	
Plaintiff,)	PETITION FOR JUDICIAL REVIEW OF
)	ADMINISTRATIVE DECISION
)	(AMENDED).
vs.)	
CITY OF LAKEWOOD,)	
Defendant)	

COMES NOW HISTORICAL MILITARY SALES INC and David Robinson by and through its attorneys Jonathan Baner (WSBA: 43612) and Harry Steinmetz (WSBA: 24863) and makes this respectfully submits this petition for judicial review of administrative decision.

I. Parties

a. Plaintiff Historical Military Sales Inc. (herein "HMS") is a duly incorporated Washington State Corporation with its principal place of business in Pierce County Washington. HMS is engaged, at all relevant times, the business of displaying, buying, and selling new and used products typically utilized by the armed forces to consumers. HMS had been issued a Lakewood General Business License BL02-01024 ("Lakewood Business License").

- 1 b. Plaintiff David Robinson (herein “Robinson”) is a single man residing in King
2 County, Washington. Robinson is the president, chairman, director, and founder
3 of HMS.
- 4 c. Collectively David Robinson and Historical Military Sales Inc are referred to as
5 “Plaintiff.” Collectively the mailing address for both of the Plaintiffs is: 32329
6 44th Pl SW Federal Way, WA 98023.
- 7 d. Defendant City of Lakewood is a political subdivision of the State of Washington
8 county of Pierce. The mailing address for the City of Lakewood is: Lakewood
9 City Hall 6000 Main Street SW Lakewood, WA 98499-5027.

10 II. Facts and procedural history

- 11 a. HMS is engaged in the business of purchasing new and used products that are
12 typically associated with the armed forces. HMS’s principal place of business is
13 located in Lakewood, Washington, and is located in close proximity to a joint
14 Army and Air Force base, Lewis-McChord.
- 15 b. On March 21, 2013 United States military investigators arrested a former service
16 member who claimed to have sold certain items to a store owner of a military
17 surplus store named simply “Dave,” and the investigators believed these items
18 were stolen. The service member did not provide the name of the military surplus
19 store.
- 20 c. The officers allegedly conducted a controlled buy and sell of military gear that is
21 not intended for civilian use, but is not illegal to own, buy, or sell under Federal
22 or State Laws.
- 23 d. Upon this information and additional information officers obtained a search
24 warrant in Lakewood Municipal Court to search Historical Military Sales. This
25 search warrant permitted officers to locate “Motorola handheld radios,” a specific
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1 night vision scope, Tasers model X26 (never recovered), and “any other items
2 identified as being government property.” No limitation or instruction was
3 provided regarding how an item could be identified as being “government
4 property.”

- 5 e. Officers then seized a large “trove” of items wholly unrelated to the above
6 limitations of the search warrant.
- 7 f. On or about April 15, 2013 the City of Lakewood issued a Notice of Violation
8 and Order of Revocation of Business License which, in effect, revoked the
9 Plaintiff’s Lakewood Business License without any opportunity for a pre-
10 deprivation or post-deprivation hearing. Specifically it provided that the “City of
11 Lakewood hereby revokes the above-referenced business license. The business
12 must be closed immediately and you must surrender your license to the City
13 within ten (10) days of your receipt of this notice and order.”
- 14 g. An “appeal” process is provided for in the Lakewood Municipal Code and is
15 conducted by a city “hearing examiner.”
- 16 h. The City of Lakewood maintains a “Community Development Department”
17 which “administers business licenses.” It is this department which issued the
18 above described “Notice of Violation and Order of Revocation of Business
19 License.”
- 20 i. The Lakewood hearing examiner system contains no code, rules, procedural
21 guidelines, or any guidelines of any kind whatsoever. No witness list was
22 provided in advance, nor was any exhibit list provided.
- 23 j. The Lakewood City Hearing Examiner specifically indicated that the burden is on
24 the “appallants” to rebut the city’s prima facie case, but later indicated that the
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1 burden of proof was changed to a “preponderance” standard due to the Plaintiff’s
2 Due Process rights.

- 3 k. The Plaintiff made an application as provided for in the Lakewood Municipal
4 Code for this “appeal” process to go to the City Hearing Examiner.
- 5 l. On August 5, 2013 the Lakewood Hearing Examiner issued the decision on the
6 Plaintiffs’ “appeal” (hereinafter “Administrative Order”). That decision is
7 attached as Exhibit A.
- 8 m. The Lakewood Hearing Examiner refused, despite a written motion provided by
9 the Plaintiff, to determine the validity of the search warrant or search of the
10 HMS’s business, and therefore concluded that the motion to suppress “cannot be
11 granted” and admitted all exhibits and testimony that was “not otherwise excluded
12 on non-constitutional grounds.” In other words: evidence that could be excluded
13 on constitutional grounds was permitted to be admitted to the record.
- 14 n. Specifically, the hearing examiner claimed to lack the jurisdictional authority to
15 consider the Plaintiff’s motion to suppress illegally seized evidence under
16 *Exendine v. City of Sammamish*, 127 Wn. App. 574 (2005).
- 17 o. In summary the Hearing Examiner ruled that the City met its burden that the
18 Plaintiff violated the municipal code under LMC 5.2.080D and F, but not
19 subsection H. and that the revocation of its business license is a “legally
20 warranted *regulatory* response.” See Exhibit A at 8 (emphasis added).

21 III. Petition for Judicial Review of Agency Action

- 22 a. Pursuant to RCW 34.05 the Plaintiff/Petitioner is entitled to a judicial review of
23 the agency action of the Lakewood Hearing Examiner August 5th, 2013 decision.
- 24 b. The agency action at issue is the August 5th, 2013 decision that is attached as
25 Exhibit A, which upholds a revocation of the Plaintiff’s Lakewood business
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1 license relying upon illegally obtained evidence, and without sufficient legal
2 justification for said revocation.

- 3 c. This action is, in part, a judicial review of agency action by the Lakewood
4 Hearing Examiner system. The court has jurisdiction over this matter pursuant to
5 the Washington State Administrative Procedure Act.
- 6 d. Jurisdiction is proper in Pierce County Superior Court for this judicial review
7 because the city of Lakewood is in Pierce County, the business license at issue
8 was located in Pierce County, Pierce County Sheriffs assisted in the illegal search,
9 a search warrant was issued – and unreviewable – by a Lakewood, and WA
10 municipal court judge.
- 11 e. The Plaintiff has standing to request judicial review of the above referenced
12 decision as the Plaintiff was directly affected by it, and was a party in the
13 administrative decision.
- 14 f. The Plaintiff should be granted relief by the court because the administrative
15 decision was arbitrary and capricious, and the facts produced were insufficient to
16 justify the revocation of the Plaintiff’s business license.
- 17 g. The Plaintiff should be granted relief by the court because the Lakewood Hearing
18 Examiner system is an unlawful procedure.
- 19 h. Under the Administrative Procedures Act, the presiding officer in an
20 administrative hearing must exclude evidence “excludable on constitutional or
21 statutory grounds.” RCW 34.05.452(1), and the Lakewood City Hearing
22 Examiner refused to do so here.
- 23 i. The Plaintiff has exhausted all administrative remedies.

24 IV. Relief requested

- 1 a. For an order determining that the factual determinations made by the Hearing
2 Examiner were unsupported by substantial evidence.
- 3 b. For an order determining that there was not competent proof of all of the facts
4 necessary to be proved in order to revoke the Plaintiff's business license.
- 5 c. For an order determining that the hearing examiner had jurisdiction of the subject
6 matters complained of herein.
- 7 d. For an order setting aside the agency action, reissuing the Plaintiff's Lakewood
8 Business License, and enjoining the City of Lakewood from suspending the
9 Plaintiff's Lakewood Business License based upon the allegations previously
10 made by the City of Lakewood.
- 11 e. For an order remanding this matter to the Lakewood Hearing Examiner with
12 instructions to suppress the illegally seized evidence, and enter findings reissuing
13 the Plaintiff's Lakewood Business License.
- 14 f. For an award of costs necessary for maintaining this action.
- 15 g. For an award of loss of business income in an amount to be proven.
- 16 h. For an award of attorney fees.
- 17 i. For such other relief as the court deems just.
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19 Exhibits:

20 A. August 5, 2013 Decision by Lakewood Hearing Examiner

21 Respectfully submitted this September 4, 2013

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25 _____
26 Jonathan Baner, WSBA: 43612

Attorney for Historical Military Sales and
David Robinson

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August 5, 2013

**CITY OF LAKEWOOD, WASHINGTON
HEARING EXAMINER**

DECISION ON BUSINESS LICENSE REVOCATION APPEAL

Appellant: Historical Military Sales, Inc.
8105 Maple Avenue SW
Lakewood, WA 98498

FINDINGS OF FACT

A. Procedural background

1. On April 15, 2013 the city of Lakewood issued a Notice of Violation and Order of Revocation of Business License to Historical Military Sales, Inc. (HMS) at 8105 Maple Avenue SW regarding general business license #BL02-01024. The notice and order states that HMS violated subsections D, F and H of LMC 5.2.080 based on police reports filed for incident number 130791069 alleging the illegal purchase, receipt and sales of stolen and restricted military equipment from Joint Base Lewis-McChord (JBLM). Attorneys for HMS and its owner David Robinson filed a timely appeal of the notice and order.
2. On the afternoon prior to an already once re-scheduled appeal hearing, June 24, 2013, HMS's attorneys filed a motion to suppress evidence obtained by the City under a search warrant issued by a Municipal Court judge and executed by Lakewood Police on March 22, 2013. The warrant targeted the HMS retail premises on Maple Avenue as part of a criminal investigation emanating from information that a former soldier, Colton Sanders, over a period of time had stolen military equipment from JBLM and sold it to HMS. The HMS attorneys contend that the search warrant was issued without probable cause and thus violated both the Fourth Amendment to the US Constitution and Article 1, Section 7, of the Washington Constitution. As the fruit of an unconstitutional search and seizure, HMS argues that the evidence obtained under the warrant is inadmissible in this civil appeal proceeding.
3. At the opening of the June 25, 2013, appeal hearing the Examiner ruled that the hearing would go forward as scheduled and testimony and evidence would be received, subject to a standing objection from HMS as to the admissibility of any evidence derived from the March 22, 2013, search. This

approach was designed to keep the proceeding moving forward expeditiously while availing the City an opportunity to brief the legal questions raised by the HMS motion to suppress and the Hearing Examiner a full exposition of the issues prior to making an ultimate ruling on the admissibility challenge. The City submitted its brief on July 1, 2013; hearings were held on June 25 and July 12, 2013; HMS submitted a post-hearing brief on July 13, 2013; and the City declined an opportunity to provide responsive briefing on July 16, 2013.

4. The City argues that HMS's objection to the admission of evidence obtained pursuant to the March 22, 2013, search warrant is effectively precluded by the appellate court ruling in *Exendine v. City of Sammamish*, 113 P.3d 494, 127 Wn.App. 574 (Wash.App. Div. 1 2005), which held that a city hearing examiner lacked jurisdictional authority to decide a challenge to the constitutionality of a search warrant issued within a code enforcement proceeding. A key portion of the *Exendine* opinion reads as follows:

“[T]he Exendines contend the Hearing Examiner had the authority to decide the constitutional validity of the search warrants. The Sammamish Municipal Code establishes the office of a hearing examiner. SMC 20.10.020 provides: "The examiner shall act on behalf of the City Council in considering and applying adopted City policies and regulations as provided herein." The city council is a legislative body, and it does not have the power to enforce, interpret, or rule on constitutional challenges. The City Council cannot delegate power it does not have [citation omitted]. The Hearing Examiner correctly decided he did not have the authority to determine the constitutional validity of the search warrants in this code enforcement proceeding.” (127 Wn.App. at 586, 587.)

5. As the City's brief observes, LMC 1.36.020, which defines the authority of the Lakewood Hearing Examiner, is similar to the Sammamish provision quoted above in that it creates jurisdiction “to act on behalf of the City Council”. But this similarity is ultimately non-essential. The critical point is that the City Council's jurisdiction is intrinsically legislative in nature; there is no valid way to express it in a purely judicial context. The Council's delegation of authority thus cannot supply the Hearing Examiner with the capacity to determine a constitutional challenge. Any evidential objection dependent on such capacity inevitably must fail because its merits can never be reached. Any item of evidence obtained by the City as a product of the March 22, 2013, search is not subject to exclusion in this proceeding on constitutional grounds if it is otherwise admissible.

6. HMS has attempted to circumvent the consequences of the *Exendine* opinion. It first suggests that the City's complete reliance on *Exendine* in its brief is a tacit admission that the search was in fact illegal. But this was not the City's actual position. It rather opted to “defer briefing on the validity of the warrant itself” in the belief that *Exendine* is conclusive within this proceeding and in the expectation that the constitutional issue may later arise in a criminal prosecution. The City may well have put all its eggs into the *Exendine* basket but it did not concede the illegality of the search. Finally, reliance by HMS on the appellate opinion in *State v. Lampman*, 724 P.2d 1092, 45 Wn.App. 228 (Wash.App. Div. 2 1986), for the proposition that the state's privacy policy underlying Article 1, Section 7, supports a broader exclusionary rule than the Fourth Amendment misses the essential point. The question in this proceeding is not whether HMS or its officers have succeeded in asserting a colorable constitutional challenge to the search warrant. The issue here is limited to a fundamental threshold jurisdictional question: who gets to make this ruling?

B. Substantive issues

7. The most clear and persuasive component of the City's case for upholding the business license revocation was the testimony of undercover officer Shaun Darby of the Pierce County Sheriff's Department. Officer Darby made a controlled sale of classified military equipment to David Robinson at HMS on the afternoon of March 22, 2013, just before the disputed search of the premises. He then filed a written investigative report describing the sale on March 25, 2013 (exhibit 4). Officer Darby obtained two restricted items of military equipment from the JBLM Criminal Investigation Command (CID) team for use in the undercover sale. One was a recently issued GPS system unavailable for civilian use and the second a portable night vision scope clearly marked as US government property. He testified that at HMS he sought out Mr. Robinson and identified himself as a friend of Colton Sanders, told Mr. Robinson that the items for sale were restricted and highly valuable, offered them both for \$500 and ultimately negotiated a sale of the two items for \$100 plus a pair of boots. Since he had no driver's license on him, Officer Darby provided his vehicle license number as personal identification.

8. Although his emphasis and explanations differ, Mr. Robinson's version of the transaction does not depart in any essential way from the foregoing description by Officer Darby. Mr. Robinson recited that the store was busy and he had other customers to attend to. He stated that he experiences difficulty hearing and did not recall any conversation about the restricted nature of the military equipment. He claimed ignorance about the technical sophistication of the equipment and its value. He dismissed the US government markings as meaningless in the context of a thriving internet market for authentic military equipment. Mr. Robinson suggested that he was mostly just trying to accommodate Darby by offering him a low price in order to get him out of his busy store.

9. The potential importance of Mr. Robinson's version relates mainly to the question of his knowledge and intent. Our finding is that his testimony concerning key events was self-serving and lacked credibility in the context of his nearly 50 years of experience buying and selling military surplus equipment. He surely understood that he was buying from Officer Darby restricted state-of-the-art equipment at a bargain-basement price.

10. In terms of length and detail of testimony, the City's primary witness was Army Special Agent Nathan Echols of the JBLM CID, who was (and remains) part of the military team investigating Colton Sanders and HMS. SA Echols participated in the March 22, 2013, search of the HMS retail premises and composed the CID property custody document that appears in the record as exhibit 5D. Of the three purported inventory records submitted as exhibits, only 5D has primary evidential value. It is highly detailed and its author, SA Echols, testified at length as to its contents. Exhibit 5A, labeled "property report," contains an incident number relating it to the Lakewood Police Department HMS investigation plus an entry note identifying Officer Russell Martin as its author. Officer Martin testified at the hearing but not about the property report specifically, which on its face is rather generic. Exhibit 5C is an undated "pawn shop seizure" list containing no identifying reference linking it to this proceeding.

11. Special Agent Echols identified numerous items on his CID property custody document as controlled items unavailable to non-military personnel which cannot be legally sold on the civilian market. Major pieces of controlled military equipment seized at HMS according to his testimony included an XTS2500 Motorola radio coded for military frequencies and with the serial number

defaced; 18 infrared strobes with serial numbers; a MILES system chest and shoulder harness; a recently issued and as yet commercially unavailable Combat Casualty Response Kit; an M57 firing device for an M18 Claymore mine; and an aiming post requiring specialized training and clearly marked for military use.

12. Items recovered and identified as sold to HMS by Colton Sanders included an unopened box of 15 cots and fuel and water cans, all prominently marked as US government property. Items recovered at HMS identified specifically as stolen from JBLM included a complete explosive ordnance disposal (EOD) suit with serial number on the helmet -- and a ladder. No model X26 tasers of the type mentioned prominently in the search warrant affidavit were recovered.

13. The item seized at HMS that generated the most excitement at the hearing was a Claymore anti-personnel mine taken from the front area of the shop. While labeled as training equipment, SA Echols testified that it was capable of being exploded with the addition of a firing device of the type found in the HMS storage room. The attorneys for HMS challenged him as to whether the training mine recovered was in fact capable of being detonated, and an item within HMS's internet sales printout package (exhibit D-10) advertises a Claymore Mine Trainer Set on eBay that is "completely inert" and "cannot nor was it ever able to fire." A determination of whether the mine seized at HMS was a bomb or a toy (assuming there is a difference) lies beyond the scope of this proceeding. But it is hard to explain the presence on the premises of a Claymore firing device if the mine was just a harmless souvenir. It also appears undisputed that live mortar charges were recovered from the HMS site as well as 32 Beretta M9 magazine clips in original packaging with a serial number.

14. Further controversy was generated over the significance to be attributed to the armored vests seized at HMS. As shown by the exhibit D-10 printouts, various types of armored vests and inserts are readily available on the internet, many of them appearing to have been originally issued as US military equipment. Nonetheless, SA Echols was adamant that the ballistic plates identified as item 38 within exhibit 5A were of a military grade rigorously restricted to official use, clearly marked as such and never released to the civilian market. His testimony on this point was not contradicted.

15. Unless one concludes definitively that the Claymore mine recovered from the HMS store was in fact a weapon capable of being detonated, the March 22, 2013, search produced no "smoking gun" -- that is, a single item so egregiously illegal and dangerous for civilian possession that no legitimate business could reasonably undertake to stock and sell it. The evidential value of the seizure lies mainly in its breadth. A large quantity of restricted military equipment was recovered, either clearly marked as US government property or carrying government serial numbers, or both. Many items were technically sophisticated with no obvious every-day civilian use. Some items were new products in original unopened packages, undercutting the argument that they might have been mistaken for second-hand goods. As SA Echols suggested, the principal effect of the search was to establish that HMS routinely engages in the business of purchasing and reselling restricted military equipment.

16. A few peripheral matters additionally need to be addressed. First, while other ongoing CID investigations apparently also involve HMS, no prior final determinations of illegal activities exist with respect to this business. Second, both the search warrant affidavit and the City's notice and order contained rather breathless recitations of stolen military equipment monetary values reaching into the hundreds of thousands of dollars; neither these values nor their accuracy have any bearing on the issues governing this appeal. In like manner, appellant witnesses spent considerable time describing how

active duty soldiers who lose equipment issued to them may be forced to pay full replacement value to rectify the loss, and how HMS alleviates their pain by selling them used equipment at about half the replacement cost. What HMS did not explain is why this matters. If the goods being resold by HMS are themselves stolen or restricted, what difference does it make who buys them?

17. Then there is the problem of the “everybody does it” defense – the murky question of what effect the thriving internet market in military equipment should have on this appeal. The appellant's theory is that a large uncontrolled internet market in US military equipment renders the existence of names, serial numbers and US government property recitations on individual items meaningless. If so, the conclusion must necessarily follow that one cannot impute to a buyer of goods stolen from a US military base any specific knowledge of their unlawful origin based on limiting identification marks appearing on individual items.

18. The problem with this contention is that it paints with too broad a brush. One can perhaps argue that purchase of a single used gasoline can or sleeping cot with a “US government property” inscription is so commonplace an occurrence involving an ordinary fungible domestic item that the realistic effect of the warning label is probably negligible. But purchase of 15 brand new cots in an unopened shipping package supplies a higher level of warning. And the more sophisticated the item or the more militarily focused its use, the more seriously the labeling must be taken. A person who buys a complete bagged military-issue colored EOD suit marked with a serial number must be deemed aware that he is likely receiving stolen goods.

19. Finally, there is the question of how to regard the completed HMS “property purchase disclaimer” forms entered into the record as exhibit 3. These forms were retrieved from the store's counter area during the March 22, 2013, search, and at first the attorneys for HMS objected to the City's offer of this exhibit. Later they withdrew their objection and embraced the forms as proof of HMS's reasonable efforts to weed out purveyors of stolen goods.

20. The general procedure followed by HMS was to have sellers of military equipment fill out the top of the form with the date and their name, address, telephone and some sort of identification number (military ID or Social Security). In the middle of the form five lines are provided for a description of items purchased. Near the bottom are blanks for the total purchase price and employee initials, and below that in boldface the following sentence: “I certify that the property described above IS MY OWN PERSONAL PROPERTY”.

21. The form seems adequately designed for its putative purpose, but the evidence indicates that its actual use was largely symbolic and perfunctory. Officer Darby's testimony was that he was unable to produce a personal ID at the time of his undercover sale and Mr. Robinson accepted a vehicle license plate number as being sufficient. He also stated that Mr. Robinson told him that he would fill in the description of the purchased items later, a representation supported by the form displaying Officer Darby's undercover pseudonym “William West”: on this form the items purchased description is in a clearly different handwriting than the entries at the top of the page. No signature is on the form, but the payout sum of \$185 has been initialed and the initials “DR” appear on the employee line.

22. Seven of the disclaimer forms in exhibit 3 were made out to Colton Sanders, and three falling within a one-week period in January, 2013, were initialed by David Robinson. In all three the purchase items descriptions are in a handwriting distinctly different from the entry data at the top. The payout

sums have all been initialed. In all these forms the potential disclaimer effects of the boldface statements at the bottom are vitiated by the facts that the statements were not signed by the seller and the information specifying “the property described above” appears not to have been entered until after the transactions were completed.

CONCLUSIONS

1. Although an appellant normally must shoulder the burden of proof, Washington case law generally regards a public license to be a valuable property right the revocation of which must meet due process requirements. Accordingly, in this proceeding the City will carry the burden of proof of demonstrating by a preponderance of the evidence that its legal standards for license revocation have been met. See *Hardee v. State, Dept. of Social and Health Services*, 256 P.3d 339, 172 Wn.2d 1 (Wash. 2011).
2. As explained in the findings above, a hearing examiner lacks the jurisdictional authority to determine a claim that constitutional standards were violated by the issuance of a search warrant. And by extension, issues relating to the constitutional sufficiency of Mr. Robinson's after-the-fact consent to the search also cannot be litigated in this forum. As a result, the appellant's motion to suppress evidence obtained pursuant to the March 22, 2013, search warrant cannot be granted in this administrative proceeding. All exhibits and testimony offered at the public hearing on this appeal not otherwise excluded on non-constitutional grounds thus have been admitted to the record.
3. The City offered alternative grounds for admission of evidence obtained under the search warrant based on the inspection provisions stated in LMC 5.2.160, which provide as follows:

The City is authorized to make such inspections of licensed premises and take such action as may be required to enforce the provisions of any business license ordinance. The City may designate any appropriate City employees, designated representatives, and other agencies to undertake such inspections. Inspections should, to the extent possible, be in compliance with the following procedure:

- A. An inspector may enter any licensed business location, at any reasonable time, to inspect the same or perform any duty imposed on the City, by any business license or regulation ordinance.
- B. If the place of business is occupied, the inspector must first present proper credentials prior to entry and inspection.
- C. If the place of business is unoccupied, the inspector shall first make a reasonable effort to locate the licensee or other person having charge or control of the premises and shall then present proper credentials and demand entry and right to inspect.
- D. No licensee, employee or agent, shall fail or neglect, after proper demand, to admit the inspector, acting within the scope of the inspector's employment, to any location licensed for business, or to interfere with the inspector while in the performance of the inspector's duty.
- E. Nothing herein shall prevent or prohibit undercover investigations or inspections.

The City emphasized in its brief the effect of subsection A quoted above and argued that the search warrant should simply regarded as an “additional safeguard.” HMS argued that LMC 5.2.160 only authorizes routine business license inspections, not criminal investigations.

4. The City's contentions regarding the effect of LMC 5.2.160 are not persuasive. The only question of practical consequence here is whether this section would provide a separate and independent basis for admitting evidence obtained from the March 22, 2013, search if the warrant were at some point deemed constitutionally defective. Under the facts of record, it would not. At the time of the search the City's focus was entirely on the alleged criminal activity. The police were not acting in any designated capacity as business license inspectors. Finally, in the absence of a warrant, the broad scope and invasive nature of any putative license inspection that occurred on March 22, 2013, cannot be justified by the provisions of LMC 5.2.160.

5. The bases for revocation of a City business license are stated at LMC 5.2.080:

Any of the grounds below provide a basis for license suspension, revocation or denial; provided that no business license issued pursuant to this ordinance shall be suspended, revoked, or denied without cause.

A. Any applicant, licensee or employee of applicant or licensee who has been convicted of a crime relevant to the business within ten years for a felony conviction, five years for a gross misdemeanor conviction and three years a misdemeanor conviction.

B. Within the last five years, any applicant, licensee or employee of applicant or licensee who has suffered any of the following which is relevant to the business: a civil judgment, or any other judgment, cease and desist order, notice and order, consent decree, or administrative action, including prior licensing actions.

C. Any applicant, licensee or employee of applicant, licensee or employee of applicant or licensee who has failed to comply with any of the provisions of this Ordinance.

D. Any applicant, licensee or employee of applicant or licensee, if any reasonable grounds exist to believe that such person is dishonest in a manner that is relevant to the business, or that the license was procured by fraud or misrepresentation of fact, or desires to obtain a business license so as to practice some illegal act or some act injurious to the public health, safety or welfare.

E. Any applicant, licensee or employee of applicant or licensee who has caused, maintained, permitted or allowed a public nuisance to exist. "Public nuisance," in addition to its common meaning, includes but is not limited to a business generating a need for significant police and/or other government services.

F. Any applicant, licensee, or employee of applicant or licensee or their agents have engaged in, maintained, permitted, allowed or failed to prevent unlawful activity on the business premises.

G. The applicant, licensee or employee of applicant or licensee failed to pay a civil penalty or to comply with any notice and order of the City.

H. If reasonable grounds exist to believe that any applicant, licensee or employee of applicant or licensee is likely to present an adverse impact to the public health, safety, or welfare for any other reason, including but not limited to conduct related to past operations of business.

6. The City's notice and order based its revocation of the HMS business license on alleged violations of LMC 5.2.080 subsections D, F and H involving, respectively, dishonesty in the business context, engaging in or tolerating unlawful activity on the business premises, and any other adverse impact to the public health, safety or welfare. Subsection D presupposes a state of mind of either actual knowledge of unlawful activity or reckless disregard of facts that would put a reasonable person on notice that unlawful activity is occurring. Subsection F, on the other hand, contemplates imposing a standard of strict liability for maintaining a business environment hospitable to unlawful activity, while subsection H is more of a catch-all category based on adverse public consequences of a general nature.

7. David Robinson's March 22, 2013, purchase from Officer Shaun Darby of technically sophisticated and clearly restricted modern military equipment satisfies the requirements for revocation or suspension of a business license under LMC 5.2.080D. Mr. Robinson either knew, or based on the circumstances and his experience should have known, that these items were not available to the civilian market and must have been stolen. The standard based on intentional dishonesty does not require a pattern of behavior over an extended period; a single dishonest event suffices.

8. David Robinson's purchase from Officer Darby combined with the large trove of restricted and stolen military equipment seized later the same day pursuant to the search warrant also meets the requirements of LMC 5.2.080F for the revocation or suspension of a business license. The broad pattern of trafficking in restricted and stolen goods demonstrated by the seizure satisfies the subsection F standard for engaging in or failing to prevent unlawful activity. Because this subsection focuses on systemic business behavior, it does not require a finding of specific intent or knowledge on the part of the participants.

9. LMC 5.2.080H comes into play only if there are adverse public impacts caused by "any other reason". The City has neither alleged nor demonstrated any civilly actionable behavior by HMS that is not covered by LMC 5.2.080D and F. Therefore no separate violation of LMC 5.2.080H has been shown.

10. The City has met its burden of proof to establish by a preponderance of the evidence that HMS violated LMC 5.2.080 and that revocation or suspension of its business license is a legally warranted regulatory response. Beyond its challenge to the constitutionality of the search warrant, HMS's case at the hearing consisted mostly of trying to create a positive aura around HMS's community presence and establishing doubt about the competence of the City's witnesses and the realistic possibility of identifying restricted military equipment. HMS made little attempt to refute the basic facts of the City's presentation.

11. A further question arises as to whether the "death penalty" of revocation is the appropriate remedy under these facts. A single offense (the undercover buy) combined with a clean prior record would argue in favor of a more lenient treatment. A pattern of unlawful behavior (based on the goods seized under the search warrant) pushes the arrow toward license revocation.

12. If a court of competent jurisdiction had ruled in advance of this license revocation appeal hearing that the March 22, 2013, search warrant was constitutionally defective, the evidence derived from the unlawful search would have been excluded from the record. Since the criminal process involving HMS appears to be still unfolding, one possible scenario is that the March 22, 2013, search warrant could be rejected as constitutionally flawed at some later date after conclusion of this civil administrative appeal. If that happened, the evidential case for revocation of the HMS business license as an appropriate remedy could suddenly become considerably weaker.

13. This Hearing Examiner decision will order revocation of the Historical Military Sales, Inc., business license on the basis of an evidential record containing both Officer Darby's testimony describing the undercover buy and a substantial inventory of restricted and stolen military equipment seized under authority of the search warrant. But jurisdiction over the appeal will be retained for one year. If during that time a court of competent jurisdiction rules that the March 22, 2013, search warrant was not validly issued and the fruits thereof must be suppressed, the appellant may petition for reconsideration of the Examiner's decision to revoke the license in view of the newly determined illegality of the search warrant.

DECISION

The appeal of Historical Military Sales, Inc. and David Robinson challenging the City of Lakewood's April 15, 2013, revocation of Lakewood General Business License #BL02-01024 is DENIED, subject to the following terms and conditions:

ORDER

A. The City of Lakewood Hearing Examiner will retain jurisdiction over this appeal proceeding for one year from the date of this order.

B. The revocation of General Business License #BL02-01024 is hereby affirmed and shall take effect immediately, subject to later reconsideration in the manner provided below.

C. If within one year of the date of this order a court of competent jurisdiction rules that the March 22, 2013, warrant for the search of the HMS premises was improperly issued and the evidence obtained thereunder must be suppressed, the appellant may move for reconsideration of the business license revocation imposed by this order. If deemed appropriate, pursuant to reconsideration the Hearing Examiner may impose a lesser remedy, including license suspension and/or probation.

D. If reconsideration of this order is granted as provided above, either the appellant or the City may further move for a full reopening of the record to introduce new information generated after the date of this order on any matters relevant to the determinations mandated by LMC 5.2.080, and the Examiner may authorize a reopened evidential hearing if it appears that a more complete and thorough review may result.

E. If no timely reconsideration motion meeting the terms of this order is filed by the appellant, Hearing Examiner jurisdiction over this appeal proceeding shall terminate one year after the date of this order without further notice.

ORDERED August 5, 2013.

Stafford L. Smith, Hearing Examiner
City of Lakewood

EXHIBITS

1. Historical Military Sales business license
 2. Notice and order and notice of appeal
 3. HMS property purchase disclaimers
 4. Lakewood Police Department incident report
 5. A. Police Department property report
B. Consent to search
C. Pawn shop seizure list
D. CID property custody document
 6. Search warrant
 7. Photo of older GPS unit
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- D-1. Claymore photos
 - D-2. Mortar photo
 - D-3. Night vision device box photo
 - D-4. Night vision device box photo
 - D-5. Night vision goggle photo
 - D-6. Crest and medal photos
 - D-7. Photos of military equipment models
 - D-8. Craigslist printout – vest
 - D-9. Business card photocopies
 - D-10. Printouts of internet advertisements – eBay and Craigslist
 - D-11. Federal terrorism printout

The Hearing Examiner is authorized to make the City of Lakewood's final decision on a business license revocation appeal. A party with standing may seek judicial review of this decision by filing a timely suit in Pierce County Superior Court.