

2016

Mike's Smoke, Cigar & Gifts, Petitioner/ Appellant v. City of St. George, Respondent/ Appellee.

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MIKE'S SMOKE, CIGAR & GIFTS,

Petitioner/Appellant

Case No. 20151030-CA

v.

CITY OF ST. GEORGE,

Respondent/Appellee.

On appeal from the order of the Fifth District Court for Washington County, the
Honorable Jeffrey C. Wilcox presiding.

**ADDENDUM TO
APPELLANT'S OPENING BRIEF**

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UTAH APPELLATE COURTS

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Tab 1

Utah Code § 58-37-2(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;

(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 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

(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 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.

(ii) “Controlled substance analog” does not include:

(A) a controlled substance currently scheduled in Schedules I through V of Section 58-37-4;

(B) a substance for which there is an approved new drug application;

(C) a substance with respect to which an exemption is in effect for investigational use by a particular person under Section 505 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 355, to the extent the conduct with respect to the substance is permitted by the exemption;

(D) any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance;

(E) any drug intended for lawful use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, which contains ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine if

the drug is lawfully purchased, sold, transferred, or furnished as an over-the-counter medication without prescription; or

(F) dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which are not otherwise regulated by law, which may contain naturally occurring amounts of chemical or substances listed in this chapter, or in rules adopted pursuant to Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

Tab 2

21 U.S.C. § 802(32)

(A) Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance--

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

(B) The designation of gamma butyrolactone or any other chemical as a listed chemical pursuant to paragraph (34) or (35) does not preclude a finding pursuant to subparagraph (A) of this paragraph that the chemical is a controlled substance analogue.

(C) Such term does not include--

(i) a controlled substance;

(ii) any substance for which there is an approved new drug application;

(iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) to the extent conduct with respect to such substance is pursuant to such exemption; or

(iv) any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance.

Tab 3

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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.

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.

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 vitae. 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

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,

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:

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

79 (A) a substance the chemical structure of which is substantially similar to the chemical
80 structure of a controlled substance listed in Schedules I and II of Section 58-37-4, a
substance

81 listed in Section 58-37-4.2, or in Schedules I and II of the federal Controlled Substances
Act,

82 Title II, P.L. 91-513[?];

83 ~~[(A)]~~ (B) a substance which has a stimulant, depressant, or hallucinogenic effect on the
84 central nervous system substantially similar to the stimulant, depressant, or hallucinogenic
85 effect on the central nervous system of controlled substances ~~[in the schedules set forth in~~

86

~~Subsection (1)(f), or a substance listed in Section 58-37-4.2; or] listed in Schedules I and II of~~

87 Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I
and

88 II of the federal Controlled Substances Act, Title II, P.L. 91-513; or

89 ~~[(B)]~~ (C) A substance which, with respect to a particular individual, is represented or
90 intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous
system

91 substantially similar to the stimulant, depressant, or hallucinogenic effect on the central
92 nervous system of controlled substances ~~[in the schedules or list set forth in this Subsection~~

93 ~~(+)] listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2,~~

or

94 substances listed in Schedules I and II of the federal Controlled Substances Act, Title II,

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.

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

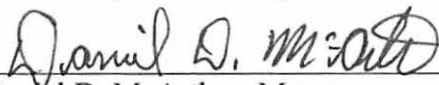
conviction or charge is required. The City is simply required to show by substantial evidence that there was a violation. Substantial evidence is "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *14th St. Gym, Inc. v. Salt Lake City 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.

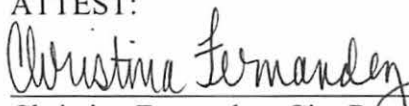
DATED this 18th day of July, 2013.

CITY: City of St. George


Daniel D. McArthur, Mayor



ATTEST:


Christina Fernandez, City Recorder

Tab 4

[Handwritten signature]

FILED

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5TH DISTRICT COURT
ST. GEORGE

03/27/16

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

MIKE'S SMOKE, CIGAR & GIFTS,

Petitioner,

vs.

CITY OF ST. GEORGE,

Respondent.

**DECISION AND ORDER AFFIRMING
BUSINESS LICENSE REVOCATION**

Case No. 130500429

Judge Jeffrey C. Wilcox

Petitioner Mike's Smoke, Cigar & Gifts has filed a Petition for Judicial Review, challenging the City of St. George's ("City") decision upholding the revocation of its business license. Following remand from the Court of Appeals, the court once again heard oral argument on October 21, 2015, at the conclusion of which it took the matter under advisement. As explained below, the City Council's decision is affirmed.

Standard of Review

The parties previously disputed the standard of review, but the Court of Appeals clearly resolved that question:

"Judicial review of license revocations by municipalities is limited to a determination whether the municipality acted within its lawful authority and in a manner that is not arbitrary or capricious." Dairy Prod. Servs., Inc. v. City of Wellsville, 2000 UT 81, ¶ 42, 13 P.3d 581 (citation and internal quotation marks omitted). This court has indicated that a "municipality's license revocation decision is deemed arbitrary or capricious if it is not supported by substantial

evidence in the record.” 14th St. Gym, Inc. v. Salt Lake City Corp., 2008 UT App 127, ¶ 10, 183 P.3d 262 (citation and internal quotation marks omitted). This standard does not allow the reviewing court to reweigh the evidence, Dairy Prod. Servs., 2000 UT 81, ¶ 42, 13 P.3d 581, but requires the court to “consider all the evidence in the record, both favorable and contrary, and determine whether a reasonable mind could reach the same conclusion as the [c]ity,” 14th St. Gym, 2008 UT App 127, ¶ 10, 183 P.3d 262.

Mike's Smoke, Cigar & Gifts v. St. George City, 2015 UT App 158, ¶ 14, 353 P.3d 626.

2012 Amendment to Utah’s Definition of “Controlled Substance Analog”

The parties agree on the changes made in 2012 to the statutory provisions defining a “controlled substance analog” in Utah. The following table demonstrates the changes between the 2011 and 2012 versions of the statute (which, as far as this case is concerned, involve only the structural changes to the statute (i.e., the movement of the initial provision into subdivision (A), and the movement of former subdivisions (A) and (B) to (B) and (C), respectively)):

<p>Utah Code Ann. § 58-37-2(g)(i) (2011).</p> <p>(g)(i) “Controlled substance analog” means 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:</p> <p>(A) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the</p>	<p>Utah Code Ann. § 58-37-2(g)(i) (as amended in 2012).</p> <p>(g)(i) “Controlled substance analog” means:</p> <p>(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;</p> <p>(B) a substance which has a stimulant, depressant, or hallucinogenic effect on the</p>
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<p>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</p> <p>(B) 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).</p>	<p>central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances 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</p> <p>(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 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.</p>
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Utah and Federal Controlled Substances Analog Statutes

The relevant provisions of the 2012 version of the Utah statute overlap significantly with the corresponding federal provisions, as indicated in the following table:

<p>Utah Code Ann. § 58-37-2(g)(i) (as amended in 2012) (emphasis added).</p> <p>(g)(i) "Controlled substance analog" means:</p> <p>(A) a substance <u>the chemical structure of which is substantially similar to the chemical</u></p>	<p>21 U.S.C.A. § 802(32)(A) (emphasis added).</p> <p>(32)(A) Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance--</p> <p>(i) <u>the chemical structure of which is</u></p>
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<p><u>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;</u></p> <p>(B) a substance <u>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</u> controlled substances 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</p> <p>(C) A substance which, <u>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</u> controlled substances 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.</p>	<p><u>substantially similar to the chemical structure of a controlled substance in schedule I or II;</u></p> <p>(ii) <u>which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or</u></p> <p>(iii) <u>with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.</u></p>
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Competing Interpretations

Stressing the similarities between the Utah and federal statutes, Petitioner argues that the two statutes should be interpreted similarly. Petitioner correctly points out that the cases

interpreting the federal statute are virtually, if not entirely, unanimous in reading the statute conjunctively, as summarized in an ALR annotation discussing the subject:

The construction of the definition of controlled substance analogue in 21 U.S.C.A. § 802(32) has been a subject of controversy. The government has argued that it should be construed in the disjunctive, so that a substance is a controlled substance analogue if it satisfies either clause (i), (ii), or (iii). The only case so far to adopt this disjunctive interpretation, however, has been reversed, and all cases at this time have construed the definition in the conjunctive as requiring a substantially similar chemical structure to a controlled substance (i), and then either an effect similar to a controlled substance (ii) or the intent to have such an effect (iii)

Tracy Bateman Farrell, Annotation, Validity, Construction, and Operation of Controlled Substance Analogue Enforcement Act of 1986, 188 A.L.R. Fed. 325 §2[a] (Originally published in 2003; WestlawNext database updated weekly) (footnote omitted); id. §16 (collecting cases); accord United States v. Ketchen, No. 1:13-CR-00133-JAW, 2015 WL 3649486, at *8 (D. Me. June 11, 2015) (unpublished) (“Although the First Circuit has not addressed the issue, nearly all (or perhaps all) circuit courts that have considered the question have concluded that § 802(32)(A) should be read in the conjunctive.”) (citations omitted). As explained below, the court cannot properly follow this federal case law.

“Above all, this court’s primary objective in construing enactments is to give effect to the legislature’s intent.” LPI Servs. v. McGee, 2009 UT 41, ¶ 11, 215 P.3d 135 (emphasis added and citation and internal quotation marks omitted). In doing so, the court should “look first to the statute’s plain language.” Id. (citation and internal quotation marks omitted). “When the plain

meaning of the statute can be discerned from its language, no other interpretive tools are needed.” Id. (emphasis added and citation omitted). Further, in conducting a plain language analysis, the court may consider the effect of statutory amendments. See T-Mobile USA, Inc. v. Utah State Tax Comm'n, 2011 UT 28, ¶ 27, 254 P.3d 752.

In its “Findings of Fact, Conclusions and Order” (“Council Decision”), the City Council compared the statute as it stood before and after the 2012 amendment, and concluded that “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.” AR-00005 (Council Decision at 5). Without questioning this interpretation of the 2012 amendment,¹ and without undertaking an analysis of the statutory language to show that it can even bear a conjunctive construction, Petitioner simply urges the court to follow the federal decisions holding that the federal statute should be read conjunctively. The court declines this invitation.

As previously quoted, the language of the two statutes overlaps substantially, but there are also critical differences requiring a departure from the federal lead. See Jensen v.

¹ Petitioner actually goes as far as to affirmatively endorse this interpretation, saying, after reciting the above excerpt from the Council Decision, that “[t]here is no question the legislature intended for the amended UCA § 58-37-2(g) to be read in the disjunctive.” Petitioner’s Opening Brief at 11.

Intermountain Health Care, Inc., 679 P.2d 903, 904 (Utah 1984) (recognizing “that when the Legislature adopts a statute from another state, the presumption is that the Legislature is familiar with that state’s judicial interpretations of that statute and intends to adopt them also,” but stating that the presumption “is not applicable where there have been material changes made in the second statute”) (emphasis added and citations omitted).

As relevant to the conjunctive/disjunctive question, the two statutes’ chief similarity is the connection of the three definitional subdivisions by the term “or” between the second and third. The general rule is that when words are “used in series, the only connective being the disjunctive ‘or,’ it applies to the whole series.” Ringwood v. State, 8 Utah 2d 287, 289, 333 P.2d 943, 944 (1959). Of course, as Petitioner emphasized at oral argument, this rule is not absolute. In a case exemplifying the federal cases treating the language of the federal analog statute, the Third Circuit reiterated that “canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meaning unless the context dictates otherwise,” and that “[w]hether requirements in a statute are to be treated as disjunctive or conjunctive does not always turn on whether the word ‘or’ is used; rather it turns on context.” United States v. Hodge, 321 F.3d 429, 436 (3d Cir. 2003) (emphasis added and citations and internal quotation marks omitted).

In deciding how “or” should be understood in Hodge (i.e., as applying to each of the three subdivisions it connects or only to the final two), the court first noted that “even within § 802, Congress did not always consider a single ‘or’ between the final terms of a series sufficient

evidence of disjunctive intent”; the court referenced the fact that “the definition of ‘depressant or stimulant substance’ in § 802(9) contains an ‘or’ after each clause,”² and concluded that, as to subdivision (32)(A), “where ‘or’ is absent between clauses (i) and (ii) but present between (ii) and (iii), we do not find conclusive evidence for a disjunctive reading.” 321 F.3d at 436 (citations omitted). The basis for this initial conclusion is conspicuously absent in the Utah statute, which defines “depressant or stimulant substance” by tracking the language of the federal definition virtually verbatim, but omitting the “or” after the provisions corresponding with subdivisions (A)

² Section 802(9) provides:

The term “depressant or stimulant substance” means--

(A) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid; or

(B) a drug which contains any quantity of (i) amphetamine or any of its optical isomers; (ii) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (iii) any substance which the Attorney General, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; or

(C) lysergic acid diethylamide; or

(D) any drug which contains any quantity of a substance which the Attorney General, after investigation, has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

21 U.S.C.A. § 802 (emphasis added).

and (B) of section 802(9). See Utah Code Ann. § 58-37-2(1).

The court next said “that the definition of a controlled substance analogue reads more naturally in the conjunctive. First, clause (i) seems to state an independent requirement; even the dictionary defines chemical analogues in terms of their similar chemical structures.” 321 F.3d at 436 (citing American Heritage Dictionary 65-66 (3d ed. 1992) (defining “analogue” in chemistry as “[a] structural derivative of a parent compound that often differs from it by a single element”)). The court immediately highlighted the limited value of this point, however, in a footnote acknowledging “that arguments from dictionary definitions can only take us so far when construing a provision that is itself definitional. Absent an absurd departure from conventional English, Congress of course is free to define terms in statutes differently than any particular dictionary does.” Id. at 436 n.5 (emphasis added). Accord Hercules Inc. v. Utah State Tax Comm’n, 2000 UT App 372, ¶ 9, 21 P.3d 231 (“When a statute fails to define a word, we rely on the dictionary to divine the ‘usual meaning.’”) (emphasis added and citations omitted).

Next, the court observed that

clauses (ii) and (iii) read in parallel and appear subordinate to clause (i) because the functional language in each begins with the relative pronoun “which.” The doctrine of the last antecedent teaches that “qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding” and not to “others more remote.” That suggests that clauses (ii) and (iii) more likely modify clause (i)’s phrase “controlled substance in schedule I or II” than the word “substance” in the main clause.

321 F.3d at 436 (citations omitted).

Again, comparison with the corresponding provisions of the Utah statute shows that applying the same analysis to the Utah statute yields a different conclusion. “[T]he functional language in” subdivisions (B) and (C) of section 58-37-2(g)(i) begins, not with the word “which,” but with the phrase “a substance which” (emphasis added), reinforcing the conclusion that each of these subdivisions is intended to stand on its own rather than modifying subdivision (A).

After conducting its plain-language analysis, the Hodge court “readily concede[d] that the disjunctive reading is plausible” based on “[t]he word ‘or’ between clauses (ii) and (iii),” but concluded that the other features noted above made section 802(32)(A) “ambiguous as to whether it should be read conjunctively or disjunctively.” 321 F.3d at 436-37.

Because section 58-37-2(g)(i) includes the same “or” between subdivisions (B) and (C), but not the features that the Hodge court said made it possible to read § 802(32)(A) conjunctively (except for the dictionary definition of “analogue,” the significance of which the Hodge court itself properly minimized), the court concludes that section 58-37-2(g)(i) is not ambiguous, and that the plain meaning of the language in this subdivision requires it to be read disjunctively.

This interpretation of section 58-37-2(g)(i) is further supported by contrasting the 2011 and 2012 versions of the statute, as Petitioner freely admits. See footnote 1, supra, and accompanying text. This is also consistent with legislative history; the State has presented the enrolled copy of the bill amending the statute in 2012, which expressly states that the bill

“amends the definition of a controlled substance analog to allow proof that the substance is chemically substantially similar to a controlled substance, without requiring proof of the effect of the substance by the expert testimony of a pharmacologist” AR-00129 (H.B. 254 (enrolled copy), lines 11-15), available at <http://le.utah.gov/~2012/bills/static/HB0254.html> (emphasis added).

Despite acknowledging the Legislature’s manifest intent that the statute be read disjunctively, Petitioner nevertheless argues that it should be read conjunctively because to read it disjunctively “renders it unconstitutionally vague.” Petitioner’s Opening Brief at 12.³ Importantly, however, Petitioner is not challenging the constitutionality of the statute.⁴ As

³ Petitioner has cited Papachristou v. City of Jacksonville, 405 U.S. 156, 163, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972), for the proposition that a law is unconstitutionally vague if it “makes criminal activities which by modern standards are normally innocent,” and Lanzetta v. State of N.J., 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939), for the proposition that “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.” Petitioner argues that if the statute is interpreted disjunctively, it fails on both of these counts because people who sell “aromatherapy products, caffeine, tobacco, or sugar” “are now left guessing and hoping their conduct is lawful.” Petitioner’s Opening Brief at 15-16.

⁴ No doubt this is because, in order to challenge the statute’s facial vagueness, as the City correctly points out, “Defendant must show that the statute is totally invalid and ‘incapable of any valid application.’” Salt Lake City v. Lopez, 935 P.2d 1259, 1265 (Utah Ct. App. 1997) (citations and some internal quotation marks omitted), superseded by statute on other grounds as stated in Baird v. Baird, 2014 UT 08, ¶ 39, 322 P.3d 728. “[A] person ‘who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant’s conduct before analyzing other hypothetical applications of the law.’” Id. (citations and some internal quotation marks omitted). Petitioner makes no attempt to show that the statute is incapable of any valid

Petitioner puts it, “the question is not whether the application of the statute in the present case is unconstitutionally vague but rather whether the interpretation used by the City can withstand vagueness challenges under the federal constitution and in light of federal law.” Id. at 16. At oral argument, Petitioner cited Utah Department of Transportation v. Carlson, 2014 UT 24, ¶ 23, 332 P.3d 900, and clarified that it is invoking the canon of constitutional avoidance, the premise of which

is a presumption that the legislature “either prefers not to press the limits of the Constitution in its statutes, or it prefers a narrowed (and constitutional) version of its statutes to a statute completely stricken” by the courts. Thus, when a court rejects one of two plausible constructions of a statute on the ground that it would raise grave doubts as to its constitutionality, it shows proper respect for the legislature, which is assumed to “legislate[] in the light of constitutional limitations.”

2014 UT 24, ¶ 23 (citations omitted).

Petitioner’s argument is unpersuasive. First, as Carlson itself clearly explains, “[t]he canon of constitutional avoidance is an important tool for identifying and implementing legislative intent.” Id. (emphasis added). Here, as already stated, there is no dispute as to the Legislature’s intent, so there is no need to apply this canon to “identify[] and implement[]” it,

application, and the evidence in the record (summarized by the City at pages 28-29 of its brief filed November 20, 2013) clearly shows that Petitioner’s owners and manager “had knowledge of the illegality of [their] activities, and thus this is not a situation where [they] ‘could not reasonably understand that [their] contemplated conduct is proscribed.’” United States v. Saffo, 227 F.3d 1260, 1270 (10th Cir. 2000) (citations omitted).

much less to openly circumvent it. Accord McFadden v. United States, 135 S. Ct. 2298, 2306-07, 192 L. Ed. 2d 260 (2015) (canon of constitutional avoidance “‘has no application’ in the interpretation of an unambiguous statute”) (citation omitted).

Second, Petitioner also incorrectly states that there is “a wealth of federal case law directly on point which states unequivocally that a disjunctive reading of the language such as that contained in UCA § 58-37-2(g) renders it unconstitutionally vague.” Petitioner’s Opening Brief at 11-12. The cases cited by Petitioner, however, reach no such conclusion. Rather, they merely identify some “absurdities” that could result from a disjunctive reading, such as (regarding § 802(32)(A)(ii)) caffeine or alcohol qualifying as controlled substance analogs (because, in concentrated form, their effects are similar to those of controlled substances), or (regarding § 802(32)(A)(iii)), flour or sugar or any number of other harmless substances likewise so qualifying (because represented by someone to have effects similar to those of a controlled substance). See United States v. Turcotte, 405 F.3d 515 (7th Cir. 2005); United States v. Vickery, 199 F. Supp. 2d 1363, 1369 (N.D. Ga. 2002), United States v. Forbes, 806 F. Supp. 232, 235 (D. Colo. 1992). Such situations are not entirely hypothetical. See Hodge, 321 F.3d at 439 (overturning controlled substance analog convictions for sale of candle wax and flour mixture misrepresented to be crack cocaine).⁵

⁵ Petitioner also cites United States v. Washam, 312 F.3d 926 (8th Cir. 2002), in which a defendant asserted – as part of a constitutional vagueness challenge to the federal analog law –

Again, however, the federal cases cited were dealing with an ambiguous statute. Under such circumstances, application of the absurd consequences canon makes sense. See Utley v. Mill Man Steel, Inc., 2015 UT 75, ¶ 46, --- P.3d --- (opinion concurring in part Durrant, C.J., for majority of court) (“If statutory language lends itself to two alternative readings, we choose the reading that avoids absurd consequences.”) (emphasis added and footnote omitted); State v. Redd, 1999 UT 108, ¶ 12, 992 P.2d 986 (“Where we are faced with two alternative readings, and we have no reliable sources that clearly fix the legislative purpose, . . . we interpret [the] statute to avoid absurd consequences.”) (quoted in Utley, 2015 UT 75, ¶ 46 n.15) (emphasis added). Because section 58-37-2(g)(i) unambiguously requires a disjunctive reading, however, there is no basis for applying the absurd consequences canon here. See Visitor Info. Ctr. Auth. of Grand Cnty. v. Customer Serv. Div., Utah State Tax Comm'n, 930 P.2d 1196, 1198 (Utah 1997) (“When language is clear and unambiguous, it must be held to mean what it expresses, and no

that the law was subject to arbitrary enforcement because the food additive MSG (like the analog substance the defendant was convicted of distributing) “also becomes GHB in the human body,” thereby qualifying as a substance with a substantially similar chemical structure to a listed controlled substance. In rejecting this argument, the court pointed out that the federal law requires more than just a substantially similar chemical structure. Id. at 932. Petitioner’s reliance on Washam is misplaced. As stated, the court there was addressing a direct vagueness challenge, not deciding whether the statute should be read conjunctively or disjunctively (which issue had been decided in a footnote earlier in the decision, see id. at 930 n.2). Here, as previously indicated, see footnote 6 and accompanying text, supra, Petitioner makes no vagueness challenge, so the arbitrary enforcement supposedly allowed by the statute is not an issue. See State v. Anderson, 701 P.2d 1099, 1103 (Utah 1985) (“It is a fundamental rule that this Court should avoid addressing constitutional issues unless required to do so.”) (footnote omitted).

room is left for construction.”) (citation and internal quotation marks omitted).⁶ Moreover, contrary to Petitioner’s argument that the statute will be unconstitutionally vague unless it is read

⁶ In addition to the “absurd consequences” canon, the court in Utley also discusses the “absurdity doctrine,” which “has nothing to do with resolving ambiguities,” but which is applied “to reform unambiguous statutory language where applying the plain language leads to results so overwhelmingly absurd no rational legislator could have intended them.” 2015 UT 75, ¶ 46 (footnote omitted). To the extent this very limited canon has been invoked, the court declines to apply it here. While at least one court addressing a vagueness challenge to an unambiguously disjunctive analog statute has indicated that absurd consequences would prevent it from being applied to someone possessing alcohol, see People v. Silver, 230 Cal. App. 3d 389, 395, 281 Cal. Rptr. 354, 357 (Ct. App. 1991) (where statute defined, with some exceptions, “controlled substance analog” to “mean[] either of the following: (1) A substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance . . . (2) A substance which has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to, or greater than, the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance,” the court tersely rejected the argument that the statute “could be used to convict a person of possession of alcohol,” saying, “[t]he answer is that the statute will be construed to avoid absurd consequences”) (emphasis added and citations omitted), such statement was dicta, and at any rate the court did not say that the statute would therefore be read conjunctively, so the statement did not help the defendant there, who was prosecuted under the substantially similar chemical structure alternative, and it does not help Petitioner here. In another case involving an unambiguously disjunctive analog statute, the court took a more circumspect approach that the court adopts as its own. See Robinson v. State, 783 S.W.2d 648, 650 n.4 (Tex. App. 1989) (declining to “address the constitutionality or alleged definitional deficiencies of [a statutory provision] concerning the effects of substances because the stipulated evidence and record only present[ed] evidence as to the structural similarity,” and because the court could not “pass on the validity of any part of the Controlled Substance Act which [was] not shown to have been violated, nor [could it] decide constitutional issues on a broader basis than the record require[d]”) (emphasis in original; citation omitted), aff’d, 841 S.W.2d 392 (Tex. Crim. App. 1992) (en banc). Accord State v. Roberts, 2015 UT 24, ¶ 47, 345 P.3d 1226, 1240 (“[A] party may only challenge a statute ‘to the extent the alleged basis of its infirmity is, or will be, applied to his detriment.’”) (citation omitted); Anderson, 701 P.2d at 1103 (court will not reach constitutional issues unnecessarily).

conjunctively, courts in other states have rejected vagueness challenges to analog statutes that, like Utah's, are unambiguously disjunctive. See Silver, 230 Cal. App. 3d 389; Robinson, 783 S.W.2d 648. In sum, Petitioner's argument that the language of Utah Code section 58-37-2(g)(i) should be read conjunctively is without merit.

Conclusion that XLR-11 Is a Controlled Substance Analog

Petitioner also assails the Council Decision rejecting the opinions of Petitioner's experts and adopting the rather conclusory opinion of Terry Lamoreaux that "XLR11 has a chemical structure which is substantially similar to the chemical structure of the controlled substance AM-694 due to a common core structure with a single point of divergence." AR-00119.

It is not altogether surprising that Petitioner objects to the short shrift the City Council apparently gave the reports of Petitioner's experts. Petitioner's experts certainly spent more time explaining their opinions than Mr. Lamoreaux did his, and there is clearly room to quibble over how accurately the Council Decision summarizes the bases for Petitioner's experts' opinions.

Nevertheless, the question before the court is whether the City Council could reasonably have found that XLR-11 is an analog to AM-694, and that question must be answered in the affirmative. As indicated in the preceding section, the Legislature clearly intended to make a substantial similarity in chemical structure (between a listed controlled substance and another substance) a sufficient ground on which to make the analog determination. Because Petitioner does not challenge the statute's constitutionality, the only question is whether there is enough

evidence for a reasonable person to conclude that XLR-11's chemical structure is substantially similar to that of AM-694. There clearly is.

Although, as indicated above, Mr. Lamoreaux's opinion is stated in somewhat conclusory terms, Petitioner's own experts provided two-dimensional drawings for the chemical substances in question (as well as for other substances). See AR-00206 and AR-00212. By reviewing these drawings in connection with Mr. Lamoreaux's opinion, the City Council could reasonably conclude that the chemical structure of the two substances is substantially similar (and that XLR-11 is therefore an analog to AM-694). Cf. United States v. McKinney, 79 F.3d 105, 108 (8th Cir. 1996) ("[A] reasonable layperson could . . . have examined a chemical chart and intelligently decided for himself or herself, by comparing their chemical diagrams, whether the chemical structure of two substances were substantially similar."), *rev'd on other grounds*, 520 U.S. 1226, 117 S. Ct. 1816, 137 L. Ed. 2d 1025 (1997). This same comparison would also enable the City Council to reasonably disagree with the opinions of Petitioner's experts that the chemical structures were not substantially similar. Thus, based on "the evidence in the record, both favorable and contrary," the court determines that "a reasonable mind could reach the same conclusion as the [C]ity [Council]." Mike's Smoke, Cigar & Gifts v. St. George City, 2015 UT App 158, ¶ 14, 353 P.3d 626 (citation and internal quotation marks omitted).

Conclusion

Because Petitioner has not shown either that Utah Code section 58-37-2(g)(i) should be

read conjunctively, or that the City Council was not justified in concluding that XLR-11 is a controlled substance analog, the court declines to disturb the City Council's decision upholding the revocation of Petitioner's business license.

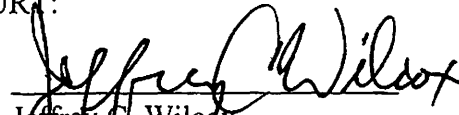
ORDER

For the foregoing reasons, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. the court affirms the City Council's decision upholding the revocation of Petitioner's business license.

Dated this 24th day of November, 2015.

BY THE COURT:



Jeffrey C. Wilcox
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 130500429 by the method and on the date specified.

MAIL: THOMAS J BURNS 111 E BROADWAY STE 900 SALT LAKE CITY, UT 84111

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BY HAND: SHAWN M GUZMAN

BY HAND: PAULA J HOUSTON

BY HAND: BRYAN J PATTISON

11/24/2015

/s/ JUDY BRADER

Date: _____

Deputy Court Clerk

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2016, I served two copies of the Addendum to Appellant's Opening Brief on the following by U.S. Mail, postage prepaid, addressed to the following:

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