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CIRCUIT COURT OF  
JEFFERSON COUNTY, ALABAMA  
ANNE-MARIE ADAMS, CLERK

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA  
BIRMINGHAM DIVISION**

JORDAN INDUSTRIAL SERVICES,  
INC.,  
JORDAN STEPHEN L.,  
Plaintiffs,

V. Case No.: CV-2018-901350.00

CITY OF BIRMINGHAM,  
VALERIE A. ABBOTT, PRESIDENT  
OF CITY COUNCIL,  
LASHUNDA SCALES,  
COUNCILLOR,  
HUNTER WILLIAMS,  
COUNCILLOR ET AL,  
Defendants.

**FINAL ORDER AND JUDGMENT ON VERIFIED EMERGENCY  
PETITION FOR WRIT OF MANDAMUS**

Jordan Industrial Services, Inc. and Stephen L. Jordan (collectively, “Jordan”) commenced this action by filing a Verified Emergency Petition for a Writ of Mandamus naming the City of Birmingham and the members of its City Council as Respondents. In the Petition, Jordan requested that the Court compel the City to issue it a scrap metal processor’s license pursuant to Section 12-11-67 of the Birmingham City Code.

Jordan alleged that it had applied for a scrap metal processor’s license and

that the City denied its application on March 20, 2018. Jordan asserted four separate and independent grounds for mandamus relief: (1) that Jordan has a clear legal right to issuance of a license because Jordan's application met all applicable licensing requirements, and issuance of a license is not discretionary under the City Code in that circumstance; (2) that in the absence of a finding that Jordan's application did not meet the requirements for a license, or a finding that Jordan would not conduct its scrap metal recycling business in compliance with all applicable laws and regulations pertaining to health and safety, the City's refusal to approve Jordan's license application was arbitrary, capricious, and/or unlawful; (3) that under the facts and circumstances of this case, the City Council's refusal to approve Jordan's license application is confiscatory and amounts to a taking of Jordan's property without compensation; and (4) in the alternative, that Section 12-11-67 of the Birmingham City Code, as the City Council applied it to Jordan's application for a scrap metal processor's license, is unconstitutionally vague.

This Court held an evidentiary hearing on Jordan's petition on August 6, 2018, at which time the Court heard testimony from various witnesses and received various exhibits into evidence. This Court has likewise considered the applicable law. Based on the foregoing, the Court is of the opinion that Jordan is entitled to the issuance of a writ of mandamus for the reasons set forth below.

### **FACTS AND BACKGROUND**

Many key facts are not in dispute. There is no dispute that:

- Jordan has owned and operated a scrap metal recycling business in the Avondale area of Birmingham for more than fifty years.
- Jordan's Avondale business has never received any health or environmental citation or fine from any government authority.
- Jordan purchased the property at issue in the Petition, which property is located at 125 Finley Boulevard ("the Finley Boulevard Property"), for the purpose of expanding its current operations beyond its Avondale facility.
- If granted a license to operate a scrap metal recycling business at the Finley Boulevard Property, Jordan will recycle only industrial scrap. It will not purchase residential scrap, and will not shred automobiles or grind metal.
- The Finley Boulevard Property is zoned for the use that Jordan proposes to make of it.
- The previous owner of the Finley Boulevard Property (it was previously Kimerling Truck Parts) made the same use of the property, with a license, that Jordan proposes to make of it now.
- There are other heavy industrial operations on Finley Boulevard already, including a junkyard a few hundred yards away from Jordan's Finley Boulevard Property.
- Jordan has made a massive cleanup of the Finley Boulevard Property already, including removing 35,000 tires and 12,000 tons of non-recyclable trash left there by the previous owner, improving the fencing, and graveling much of the property.
- Jordan currently conducts other business on the property (such as cleaning up the property, and a trucking business and truck and machine repairs).
- The City identified no defect in Jordan's application in connection with its denial.

In addition to these facts, the evidence shows that upon receiving Jordan's license application, the City Clerk sent a copy of the license application to the "chief of police, the chief of inspection services, the health office, and the fire and rescue chief for their recommendations," as required by Section 12-11-67(a) of the

Birmingham City Code.

Section 12-11-67(b) of the City Code provides that the “chief of police shall recommend the approval of the application only if he finds the applicant’s business responsibility and moral character are satisfactory and that all agents or officers of applicant, if any, who will take part in the operation of such business are of good character and reputation.”

Section 12-11-67(c) of the City Code provides that the “chief of inspection services shall recommend the approval of the application only if he finds that any proposed or existing buildings or equipment with which the scrap yard is being or is to be operated conform to the requirements of the building code, the requirements of this chapter and other applicable codes and ordinances of the city and laws of the state and also that such business is or will be situated in an area or district of the city which is zoned so as to permit the operation of a scrap yard therein.”

Section 12-11-67(d) of the City Code provides that the “health officer shall recommend approval of the application only if he finds that the proposed or existing premises and equipment conform to the requirements of this chapter and all applicable health laws, ordinances, and regulations.”

Section 12-11-67(e) of the City Code provides that the “fire and rescue chief shall recommend approval of the application only if he finds that the proposed or

existing premises and equipment conform to the requirements of this chapter and all applicable fire prevention laws, ordinances, codes, and regulations.”

Each of these four officials recommended approval of Jordan’s license application. The Police Department report states that Jordan has “met the requirements for” the license and that Jordan is “in compliance with all state and local laws.” The Police Department report also states that Jordan’s facility is “clean and organized” with a “new privacy fence” and that Jordan will “not be buying scrap metal from the public” and “will not be buying vehicles.”

The Fire Marshal’s report states that “the site had undergone a major clean-up operation from the previous owner” and that “Jordan has agreed to correct any items the Fire Inspector has noted as items of concern.”

The Health Department’s report states that Jordan will process scrap “on a schedule that should not present a public health nuisance” and that the department “found no evidence of Public Health Violations” when it conducted its site visit. The Health Department acknowledged that all scrap metal processors are potential mosquito and rodent breeding sites, and recommended that appropriate pest control measures be used should the need arise.

The Department of Planning, Engineering, and Permits stated that the scrap to be recycled at the Finley Boulevard Property would be “clean” scrap, that no burning or melting would occur, “only the cutting up of scrap by utilization of

welding type torches.”

On March 20, 2018, the City Council held a public hearing on Jordan’s license application. The application was denied. At the public hearing, residents of nearby neighborhoods raised health-related concerns common to many heavy industrial operations, among other concerns. Various members of the City Council acknowledged that the Finley Boulevard Property is zoned for the use that Jordan proposes to make of it and that the Health Department recommended approval of Jordan’s application. No member of the City Council identified any defect in Jordan’s application. No member of the City Council made any finding that Jordan lacks good character or is incapable of operating the business at 125 Finley Boulevard in a manner consistent with public health, safety, good morals, and all applicable laws, ordinances, codes, and regulations. Although the residents expressed concerns about the alleged health effects of Jordan’s operations, they did not present any evidence that Jordan has ever had a health or environmental citation or violation in connection with its Avondale business or its current operations at the Finley Boulevard Property.

At the evidentiary hearing before this Court, Jordan presented evidence of its compliance with all requirements for a license. Mr. Stephen Jordan testified that if Jordan is granted a license, he intends to operate his scrap metal recycling business at the Finley Boulevard Property in full compliance with all applicable laws,

regulations, and ordinances. He also testified that if there are conditions precedent to the issuance of a license (such as the maintenance of a pest control plan, or additional landscaping), that he will fully comply with those requirements. He testified that his operations, which include recycling steel from dismantled interstates and train cars, provide an important service to customers such as ACIPCO, U.S. Steel, and Nucor Steel.

Also at the evidentiary hearing before this Court, the City presented testimony from residents of nearby neighborhoods. Multiple residents of neighborhoods adjacent to the Finley Boulevard Property testified that they are concerned for the health of the surrounding neighbors if Jordan is issued a license. The neighbors expressed concern about smoke emissions associated with Jordan's use of a cutting torch (a device used to cut metal that is too thick to be cut with shears). The residents offered pictures of Jordan's current operations at the Finley Boulevard Property into evidence that demonstrated the use of a torch at the Finley Boulevard Property (which the City Code recognizes may occur in connection with scrap metal recycling operations, *see* City Code § 12-11-2(12)(c)).

The testimony presented by the neighbors at the evidentiary hearing was generally consistent with the statements made by those residents during the City Council meeting. Additionally, the video of the City Council meeting was played during the Court's evidentiary hearing. To the extent that any of the evidence

presented at the Court's evidentiary hearing was inconsistent with the evidence the City Council considered in making its decision on Jordan's license application, the Court has not considered such evidence in determining whether the City Council's decision was unlawful in any manner.

### **APPLICABLE LAW**

Mandamus is the appropriate remedy to compel official action such as the issuance of a license or permit where the petitioner establishes a clear legal right to have the act performed. *Dixieland Waste Systems v. Jones*, 486 So. 2d 421, 421-24 (Ala. 1986); *Guar. Funding Corp. v. Bolling*, 260 So. 2d 589, 592 (Ala. 1972).

Section 12-11-67(i) of the City Code provides that after the City Council hears a license application at a public hearing, the council may "consider such application, the recommendations required to be submitted to [the Council], relevant evidence offered by any party at the public hearing, including the applicant and such other information and knowledge it may have bearing upon such application and if it determines that the applicant's business responsibility and moral character are satisfactory and that all agents or officers of applicant, if any, who will take part in the operation of such business are of good character and reputation, and capable of operation the business in a manner consistent with public health, safety and good morals and the operation of such business will be in accordance with an in compliance with the requirements of this chapter and all



other applicable laws, ordinances, codes and regulations of the city, county board of health, and the state, then in such event it shall grant such application; otherwise, the application shall be denied. In the granting or refusal of such application, the council shall be deemed to act in a judicial capacity.”

Vague laws are a deprivation of due process. When laws, regulations, or ordinances address matters “in terms . . . too vague and general to inform owners about the standards which they must meet,” or the reasons for disapproving a license application are “vague and uncertain in meaning, and provide no information to [an applicant] to enable him to know wherein the plan failed to meet the requirements of the regulations, it has been held that such action operates to deprive [an applicant] of his property without due process of law.” *Smith v. City of Mobile*, 374 So. 2d 305, 308–09 (Ala. 1979) (internal quotation marks and citations omitted); *accord Shoal Creek Land & Cattle, LLC v. City of Arab*, No. 2160040, 2017 WL 2991470, at \*2–3 & \*5 (Ala. Civ. App. July 14, 2017).

“Municipal ordinances, placing restrictions upon lawful conduct, or the lawful use of property, must, in order to be valid, specify the rules and conditions to be observed in such conduct of business, and must admit of the exercise of the privilege by all citizens alike who will comply with such rules and conditions, and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities between citizens who will so

comply.” *Smith*, 374 So. 2d at 308 (quoting *Longshore v. City of Montgomery*, 119 So. 599, 600 (Ala. Ct. App. 1928)).

Further, “[i]f a plan fails in any respect to conform to the regulations it becomes the duty and obligation of the approving authority to so indicate. A city council, vested with authority to approve a plan, may not disregard the regulations and substitute its pure discretion for a discretion controlled by fixed standards applying to all cases of a like nature.” *Smith*, 374 So. 2d at 308-09 (internal quotation marks and citations omitted).

Accordingly, a statute or ordinance will be declared vague “if a person of ordinary intelligence, exercising common sense, can derive no rule or standard at all from the statute's language,” or if the statute or ordinance “authorize[s] or encourage[s] arbitrary” decision-making by the authorities. *Northington v. Alabama Dep't of Conservation & Nat. Res.*, 33 So. 3d 560, 567 (Ala. 2009) (quoting *Friday v. Ethanol Corp.*, 539 So. 2d 208, 213 (Ala. 1988)).

As applied to Jordan, Section 12-11-67 of the City Code is unconstitutionally vague. Jordan has submitted a license application (in which no defect has been identified), and all four departments of the City charged with evaluating its application have recommended approval of the application. The use Jordan proposes to make of the Finley Boulevard Property is a lawful use for which the property is zoned. There is no evidence that Jordan is incapable of

operating its business in full compliance with all applicable laws, regulations, and ordinances, and Jordan has a history of such lawful operations in the same business in another location. The City Council denied Jordan's license application, and it did so without any finding that its "business responsibility" or "moral character," terms that are not defined in the City Code are in any way deficient.

Under these circumstances, the City Code did not inform Jordan about the standards it was required to meet to obtain a license, and it did not enable Jordan to know wherein its application failed to meet the applicable requirements. There is no requirement in the City Code that an applicant obtain unanimous approval from all neighboring residents, yet the City Council's refusal to approve Jordan's application effectively imposed such a requirement. When the Health Department finds that a license applicant fully complies with all applicable health laws, regulations, and ordinances, but the City Council denies an application on the basis of neighbors' health-related concerns, an applicant does not have clear knowledge about the health standards it is required to meet and where it failed to meet them.

Moreover, the City Code did not supply a fixed standard that was applied to Jordan's case and all cases like it. Jordan's predecessor at 125 Finley Boulevard, Kimerling Truck Parts, was issued a license for many years to operate a scrap metal processing business at the Finley Boulevard Property. And Jordan's neighbor on Finley Boulevard, Rather Recycling, was recently issued a license to

operate a junk dealer's business at its property. Jordan met the same requirements that Kimerling and Rather met, yet they were granted a license and he was denied one. Indeed, Rather's neighbors expressed concerns similar to the ones that Jordan's neighbors have expressed. To allow Rather to receive a license but prevent Jordan from obtaining one would be plainly arbitrary.

As demonstrated by the facts of this case, Section 12-11-67 both authorizes and encourages arbitrary decision-making with respect to scrap metal processor's licenses. It "vest[s] a discretion in the [City Council] which is unguided by uniform standards, and capable of arbitrary application." *Smith*, 374 So. 2d at 309. The City's consideration of health-related factors relating to license applications (as well as any other factors) "must be guided and limited by clearly drawn standards which can be uniformly applied and which give reasonable notice to applicants of requirements with which they must comply to obtain approval." *Id.*

Accordingly, mandamus is proper to require the approval of Jordan's license application, and it is therefore **ORDERED, ADJUDGED, and DECREED** that within fourteen days of this Order, the City shall take all such actions as are necessary to immediately and forthwith approve and issue to Jordan a scrap metal processor's license pursuant to Section 12-11-67 & 12-11-68 of the Birmingham City Code.

Costs of this action are taxed as paid.

**DONE this 13<sup>th</sup> day of November, 2018.**

**/s/ CAROLE C. SMITHERMAN**  
**CIRCUIT JUDGE**