

1 **OFFICE OF THE HEARING EXAMINER**

2 **CITY OF TACOMA**

3 **DRAKE W. CHISHOLM,**

HEX2024-005

(CA #500205184)

4 **Appellant,**

5 **v.**

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
DECISION AND ORDER**

6 **CITY OF TACOMA**, a Washington
7 Municipal corporation, through its
8 Finance Department, Tax & License
9 Division,

Respondent.

10
11 **THIS MATTER** came on for hearing before JEFF H. CAPELL, the Hearing
12 Examiner for the City of Tacoma, Washington, (the “City”), on April 18, 2024.¹ Appellant
13 Drake Chisholm (“Appellant” or “Chisholm”) appeared at the hearing *pro se*. The City’s
14 Finance Department, Tax & License Division (“T&L”) was represented by Deputy City
15 Attorney Debra E. Casparian.

16 Witnesses were sworn and testified. The following witnesses testified at the hearing
17 (in order of appearance):

- 18
- Tacoma Police Detective Christopher Shipp;²
 - Danielle Larson, Division Manager, Financial Services; and
 - Appellant Drake Chisholm, on his own behalf.
- 19

20

21 ¹ On April 16, 2024, Appellant Chisholm contacted the Hearing Examiner’s office by email asking either to withdraw his appeal, or in the alternative that the hearing be conducted remotely because he had a conflict with work that prevented his in-person attendance as originally requested. The Hearing Examiner’s Office notified the City of Appellant Chisholm’s emailed request. The City had no objection to a remote hearing. The hearing was then conducted solely through Zoom at no cost to any participant with video, internet, and telephonic access.

² Individuals who participated in the hearing may be referred to by first or last name only hereafter. No disrespect is intended.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
DECISION AND ORDER**

1 Exhibits were admitted and reviewed. Based upon the evidence presented, the Hearing
2 Examiner makes the following:

3 **FINDINGS OF FACT**³

4 1. This appeal concerns the City’s denial of a door-to-door soliciting license (or
5 “DDSL” for short herein). DDSL’s are governed by Tacoma Municipal Code (“TMC”)
6 Chapter 6B.170. Appellant Chisholm applied for a DDSL from the City and his application
7 was assigned City Account#: 500205184.⁴ The application was denied by letter dated March
8 13, 2024 (the “Denial”). *Larson Testimony; Ex. R-7.*

9 2. Applicants for a DDSL in the City “[m]ust consent to be fingerprinted for a
10 state and federal criminal background check and shall submit, with the application, one
11 current full[-]face photograph of the applicant or consent to a full[-]face photograph taken by
12 the director.” *TMC 6B.170.060.* Chisholm complied with this requirement. *Chisholm*
13 *Testimony; Ex. R-1, Ex. R-7.*

14 3. Detective Christopher Shipp of the Tacoma Police Department conducts
15 required background checks on DDSL applicants for T&L. Shipp conducted a background
16 check on Chisholm for his DDSL application. The results of that background check became
17 the basis for the City’s denial of Chisholm’s DDSL. *Shipp Testimony, Larson Testimony; Ex.*
18 *R-1, Ex. R-7.*

19 4. The background check disclosed that on May 16, 2017, Chisholm entered a
20 guilty plea to the charge of Conspiracy to Commit Robbery in the First Degree (the

21 //

³ The Examiner notes here that the facts established at the hearing that are relevant to the issue on appeal were generally not contested by either side.

⁴ The date this application was made is not clear from the record, but it does not need to be necessarily. Timing is not in issue in this appeal.

1 “Conviction”).⁵ As is often the case, Chisholm was initially charged differently than how he
2 ultimately pleaded. Testimony from the City witnesses made it apparent that denying
3 Chisholm’s DDSL was initially based only on the Conviction, but later *all* the information
4 the City received in performing his background check was considered rather than just the
5 offense for which he acknowledged responsibility through his guilty plea. In both testimony
6 and argument, it was apparent that the City placed a fair amount of weight in its denial on
7 Chisholm’s initial charge from 2016 having included a count of “Conspiracy to Commit
8 Murder in the First Degree.” Chisholm was not convicted for this offense. Chisholm did not
9 contest or try to minimize anything regarding the Conviction at the hearing, but rather
10 acknowledged it and testified regarding his efforts to change and leave the Conviction
11 behind. *Shipp Testimony, Larson Testimony, Chisholm Testimony; Exs. R-2 ~R-6.*

12 5. City witnesses explained that the denial was based on the seriousness of
13 Chisholm’s offense.⁶ Shipp characterized robbery as a crime of moral turpitude.⁷ Both City
14 witnesses testified that they did not think the citizens of Tacoma would want someone with a
15 robbery conviction showing up on their doorstep as a door-to-door-solicitor. Both City

16 //

17 //

18 ⁵ For purposes of this decision, the guilty plea entered on the Conspiracy to Commit Robbery in the First-Degree
19 charge is considered a conviction. In most legal proceedings, a plea of guilty is treated the same as a jury verdict
of guilty. *In re Disciplinary Proceeding Against Smith*, 170 Wn.2d 721, 732, 246 P.3d 1224, 1229-30).

20 ⁶ Again, it was clear that the City was taking into account more than just the conspiracy to commit robbery
conviction. This is contrary to TMC 6B.10.140.A.10 which allows the consideration of *convictions*, but not
acquittals. The City argued otherwise and that its consideration of the original charge was valid under the TMC.
21 There is no language in TMC 6B.10.140.A.10 that supports this approach nor is it supported by our legal system’s
well-established principle of innocent until/unless proven guilty. Just as Chisholm’s guilty plea is the same as a
conviction at trial, not being convicted of other charged offenses is in effect an acquittal for double jeopardy
purposes.

⁷ Black’s Law Dictionary defines a crime of moral turpitude as “[a]n offense or a crime that is illegal but also
shows a person’s baseness and depravity.” <https://thelawdictionary.org/moral-turpitude/> Robbery is typically
included in any list of crimes of moral turpitude. The City never drew any distinction between an actual robbery
conviction as opposed to Chisholm’s actual conviction, Conspiracy to Commit Robbery in the First Degree.

1 witnesses expressed concerns about creating liability for the City if Chisholm were granted a
2 DDSL. *Shipp Testimony, Larson Testimony.*

3 6. Both City witnesses acknowledged that the TMC has no period of repose⁸ for
4 the consideration of conviction history in the case of a DDSL application. In other words,
5 there is no period of time after which a DDSL applicant’s criminal history cannot be
6 considered as the basis for a denial. Both City witnesses acknowledged that for other types of
7 City licenses that require a background check, such as For-hire drivers (e.g., taxi drivers)
8 under TMC 6B.220, and Security personnel⁹ under TMC 6B.70, there is a dichotomous
9 paradigm setting forth two periods-of-repose, one of seven years during which “The Director
10 may deny...” an application for certain disqualifying convictions, and another period of three
11 years during which “The Director shall deny...an application for certain types of
12 convictions.” *TMC 6B.70.050.A, TMC 6B.220.210.A~B.* Under the TMC, the City does not
13 look back past seven years. Shipp testified that no amount of time passage would ever be
14 sufficient for him to recommend approval of a DDSL for Chisholm. Larson echoed this
15 position. *Id.*

16 7. Both City witnesses testified that they considered door-to-door sales to be a
17 more volatile situation than what presents with a taxi driver or security personnel. Larson
18 testified that she thought this greater volatility was why the DDSL provisions of the TMC

19 //

20 //

21 ⁸ A repose period, or statute of repose, imposes a time period after which an injuring party can no longer be held liable for the injurious conduct or behavior. Shipp referred to the seven-year period for other licenses as a “look back period” which makes sense in that if the conviction is over seven years old, the City cannot look back that far and consider it in deciding whether to issue a permit. The codified “look back period” for taxi drivers notwithstanding, Shipp testified that he recommended denying a for-hire license for an individual with a homicide conviction that was 20 years in the rearview mirror.

⁹ As defined at TMC 6B.70.020.F.

1 had no repose period and that the omission of such may have been intentional.¹⁰ Both City
2 witnesses acknowledged that there are no criteria for evaluating the appropriateness of
3 granting or denying a DDSL beyond the language of TMC 6B.10.140 which was used as the
4 basis for the Denial. *Shipp Testimony, Larson Testimony.*

5 8. The Denial specifically cites to “TMC 6B.70.049 (A)(1)” as providing the
6 authority for requiring a background check, and to “TMC 6B.10.140 (A)(3), 6B.10.140
7 (A)(3)” as the basis for the Denial. *Ex. R-7.*

8 9. Chisholm spent time in custody serving out the court’s sentence (of 36 months,
9 with 2 years actually served) after his guilty plea. While in custody, he made efforts to turn
10 his life around and enable himself to make better decisions on his return to society. Among
11 these efforts, he obtained his GED,¹¹ and he graduated from the “Redemption and Re-entry”
12 program while in custody. *Chisholm Testimony; Ex. R-5, Ex. R-6, Ex. A-1.*

13 10. The hearing record shows no further criminal convictions or other violations in
14 Chisholm’s past. It has now been nearly seven years since the Conviction was entered. The
15 date of the conduct giving rise to the Conviction is now over seven years in the past. *Id.*

16 11. Chisholm is currently employed in a position that does not require a DDSL, but
17 he testified that the DDSL would open better paying opportunities for him that would help
18 him support his family. He testified that Renewal by Anderson had offered him a position
19 contingent on obtaining a DDSL in Tacoma. *Chisholm Testimony.*

20 //

21 //

¹⁰ Larson admitted that she had no hand in writing the relevant provisions of the TMC, however, and did not know with any certainty what the driver was for not including a period of repose for DDSLs.

¹¹ Chisholm submitted his GED documentation after the hearing during a period in which the Examiner left the record open for such submittal. He was unable to find his certificate from the Redemption and Re-entry program.

1 wheel.¹⁴ The City did not explain why the DDSL context was potentially more dangerous in
2 any particulars. To the Examiner, they seem to have equal potential for problems, and therefore
3 the City’s justification for a lack of repose with DDSLs is not well-founded. Nonetheless, the
4 Hearing Examiner cannot rewrite or otherwise alter the City’s code in applying it here unless
5 the code is ambiguous.¹⁵ In other words, the Examiner cannot *de facto* impose a repose period
6 into the TMC for DDSLs. The problem here is not necessarily ambiguity in any event, but
7 rather a lack of clarity due to imprecise wording that results in a failure of clear guidance to
8 DDSL applicants with criminal history, and a failure of guidance for a decision maker such as
9 the Director or the Examiner when there is an appeal.

10 4. TMC 6B.170 is problematic in its significant lack of guidance/notice to applicants
11 and the level of discretion it confers on the Director (and City staff). As the City witnesses
12 noted, there are essentially no applicable criteria for obtaining—or being denied—a DDSL,
13 other than the generally applicable factors set forth at TMC 6B.10.140 under the heading
14 “Denial or revocation.”

15 5. The City’s Denial starts by referencing the wrong chapter of title 6B for the
16 background check requirement as “6B.70.049 (A)(1),” a subsection that does not exist within
17 TMC Chapter 6B.70. TMC Chapter 6B.70 actually deals with “Entertainment/Dancing-Liquor
18 Served” as opposed to Chapter TMC 6B.170, which deals specifically with “Sales-Door-To-
19 Door Soliciting.” The Denial then lists “TMC 6B.10.140 (A)(3), 6B.10.140 (A)(10)” as the
20 basis for the denial. TMC 6B.10.140.A.3 states that the Director may deny an application or

21 //

¹⁴ Setting aside the question of security personnel having criminal history.

¹⁵ A hearing examiner or even a judge cannot rewrite a statute or ordinance when it is unambiguous. Judges/courts are not legislatures. Courts must assume that legislative bodies intended their enactments to be exactly as they are. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792, 795 (2003), citing *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999).

1 revoke an issued license if “The licensee has failed to comply with any provisions of the TMC
2 related to the operation of the business.” Chisholm is not currently operating a business. By its
3 wording, this provision appears to apply to a revocation not a denial. In any event, the City
4 presented no evidence on this criteria as the basis for denying Chisholm a DDSL.

5 6. The City’s focus, as recounted in Findings of Fact 4, 5, 7 and 8 above, was clearly
6 more centered on the language of TMC 6B.10.140.A.10 and the Conviction as the basis for the
7 Denial. TMC 6B.10.140.A.10, states the following:

8 The Director may deny an application for, or revoke any license issued under, the
9 provisions of Title 6 based on one or more of the following grounds:

10 10. The licensee, or the licensee’s agents or employees, has committed a
11 crime or other violation of law which bears a relationship to the conduct of the
12 business under the license issued pursuant to this subtitle. The Director may
13 consider any relevant violation of law regardless of whether the same act was
14 charged as a civil infraction or crime or resulted in a finding of committed or
15 conviction or if it is deferred or subject to pretrial diversion. If a licensee
appeals such a suspension, revocation, or denial of a license under this
subsection, the violation must be proved by a preponderance of the evidence;
provided, however, that a finding of not committed on a civil infraction or a
verdict of not guilty on a criminal charge precludes use of that act as a basis
for a violation under this chapter.

16 Here again, the actual language of the section seems to apply more to a revocation than a
17 denial. Chisholm is not yet a “licensee”; he is an applicant. He has no agents or employees
18 because he has no licensed business that he is conducting as yet. He *has* committed a
19 crime—the Conviction. But how the Conviction “[b]ears a relationship to the conduct of the
20 business under the license *issued pursuant to this subtitle*” is anyone’s guess because, again,
21 Chisholm is not conducting a door-to-door business operation yet because he has no license.

1 In other words, there is no “[l]icense issued pursuant to this subtitle” or “[c]onduct of []
2 business” to which the Conviction can bear a relationship. This is revocation language in its
3 wording and tense. There is no existing license to revoke here, but the City shoehorns this
4 revocation language into a denial decision anyway. As referenced above, the Examiner
5 cannot rewrite a legislatively enacted ordinance, but City staff does just that by implication
6 essentially to read TMC 6B.10.140.A.10 as including something like “If a permit applicant
7 has committed a crime or other violation of law which bears a relationship to the conduct of
8 the business under the license for which the applicant has applied, the Director may deny
9 issuance of the permit.” The City certainly implies, by the Denial, that this kind of language
10 is present in TMC 6B.10.140.A.10 when it is not. It has to be implied.

11 7. The City no doubt considers subsequent language in TMC 6B.10.140.A.10 as
12 evidence of the intent that the whole section applies to denials as well when it says, “If a
13 licensee appeals such a suspension, revocation, *or denial* of a license under this subsection...”
14 (Emphasis added). Whether this reference to “denial” really clarifies anything is debatable,
15 especially given that suspensions have now apparently entered the denial/revocation
16 conversation as well. Typically, in a decision such as this, the Examiner will cite the specific
17 language of the applicable TMC provision that is the basis for the decision rendered. If the
18 Examiner were to uphold the Denial, the closest language available for citation here is the first
19 sentence of TMC 6B.10.140.A.10, but as already pointed out, that language is written from a
20 revocation perspective.

21 //

1 8. Discretionarily, *permanently* denying an individual from getting a DDSL under
2 language as imprecise in the denial context as that in TMC 6B.10.140.A.10 is also problematic
3 from the standpoint of the City’s intended permanency of the denial. Previously
4 permanent bars to some licenses based on prior convictions have become less permanent in
5 recent years in Washington. For example, in the past, a felony conviction would almost
6 certainly rule out admittance to practice law in Washington. That is not the case anymore.¹⁶

7 9. In licensing attorneys, the State Bar, and ultimately the State Supreme Court, take
8 seriously their role in safeguarding the public.¹⁷ The City also based its denial on public safety
9 and liability concerns.¹⁸ Unlike our State Supreme Court in recent bar admissions decisions,
10 however, the City acknowledged, but refused to take into account Chisholm’s efforts at
11 rehabilitation, and the length of time since he last offended.¹⁹ In *Simmons*, the State Supreme
12 Court looked at the applicant’s

[s]ix-year record of complete sobriety, stable financial position, exemplary
conduct, complete candor, and demonstrated ability to recognize and respond
appropriately to situations that might lead to relapse [] [as being] sufficient to
persuade the court that she is highly likely to remain on her current path when she
becomes a practicing attorney.²⁰

16 10. In spite of all the foregoing, the bottom line here is that TMC 6B.10.140.A.10
17 makes the denial of a license discretionary to the Director in the provision’s lead in language,
18 namely “The Director *may deny* an application...on one or more of the following grounds...”

19 _____
20 ¹⁶ See, *In re Bar in re Simmons*, 190 Wn.2d 374, 414 P.3d 1111 (2018); [People can change, Washington Supreme Court says regarding bar applicant with felony convictions \(abajournal.com\)](#); *In re Bar in re Stevens*, 200 Wn.2d 531, 519 P.3d 208 (2022).

21 ¹⁷ *Simmons*, 190 Wn.2d at 386~387.

¹⁸ The City never really elaborated on its liability concerns. Issuing permits is an archetypal governmental function that should be entitled to the protection of the public duty doctrine. See e.g., *Fabre v. Town of Ruston*, 180 Wn. App. 150, 321 P.3d 1208 (2014).

¹⁹ City representatives even stated at one point in the hearing that Chisholm seemed sincere in his reformation, but still advocated for denying the DDSL.

²⁰ *Id.*, at 387.

1 (Emphasis added). In a *de novo* proceeding, that same discretion falls to the Hearing Examiner
2 to exercise on appeal.

3 11. In the absence of any applicable criteria in TMC 6B.170 for approving a DDSL
4 (*FoF 7*), the evidence in the record clearly shows that the City denied Chisholm’s DDSL
5 application because of the Conviction citing to TMC 6B.10.140. This determination was not
6 without basis in the discretionary context presented by TMC 6B.10.140, even though it
7 requires reading language into subsection .10 that is not there.

8 12. The evidence in the record also shows, as least by a preponderance, that Chisholm
9 has committed no new offenses in just over seven years, that he has made significant efforts
10 both while serving his sentence for the Conviction, and since, to change the direction of his life
11 (*FoF 9-11*). His handling of himself during this appeal, and while testifying under oath has
12 demonstrated the kind of candor and conduct that our State Supreme Court looks to in
13 considering the moral fitness of bar applicants. The Examiner is not reading these into the
14 TMC as certain criteria, nor is he imposing a repose period into the TMC for DDSLs. That is
15 not within his purview, as already mentioned above. Rather, he looks to these factors and how
16 they have been applied in other contexts to assist in exercising his discretion here. Again, this
17 discretion is codified in TMC 6B.10.140, and is part of making this *de novo* decision.

18 13. TMC 6B.10.140.G states that “After the hearing, the Hearing Examiner shall,
19 after appropriate findings of fact and conclusions of law, affirm, modify, or overrule the denial,
20 revocation, or conditional license, or reinstate the license, and may impose any conditions upon
21 the continuance of the license.”

