STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1599

DRJ, Inc.,
d/b/a Diva's Overtime Lounge,
Relator,

vs.

City of St. Paul,
Respondent.

Filed August 26, 2008
Affirmed
Harten, Judge[*]

City of St. Paul
Council File No. 07-737

Marshall H. Tanick, Teresa J. Ayling, Mansfield, Tanick & Cohen, P.A., 1700 U.S. Bank Plaza South, 220 South Sixth Street, Minneapolis, MN 55402; and

Andrew J. Dawkins, Law Office of Andrew J. Dawkins, 1700 U.S. Bank Plaza South, 220 South Sixth Street, Minneapolis, MN 55402 (for relator)

John Jung-Hoon Choi, St. Paul City Attorney, Rachel Gunderson Tierney, Assistant City Attorney, 400 City Hall, 15 West Kellogg Boulevard, St. Paul, MN 55102 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Connolly, Judge; and Harten, Judge.

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HARTEN, Judge

Relator DRJ Inc., d/b/a Diva's Overtime Lounge (Diva's), challenges the revocation of its licenses by respondent City of St. Paul (the city). Because evidence supports the city's findings of fact and conclusions of law and because the revocation was not arbitrary or capricious, we affirm.

FACTS

In June 2005, the bar at 1141 Rice Street in St. Paul began operating as Diva's. Maintaining video surveillance cameras that operated during business hours was among the conditions imposed when Diva's obtained necessary operational licenses from the city.

In May 2006, the city filed a notice of violation, alleging that Diva's had permitted after-hours consumption of alcohol and display of alcoholic beverages. Diva's appeared before the St. Paul City Council (the city council), which imposed a $500 fine and $2,800 in costs and required Diva's to close at 1:00 a.m. instead of 2:00 a.m.

Two other events, not related to these violations, happened at Diva's later in 2006: a murder was committed inside the building in July, and the attempted murder of a patron leaving the building occurred in November.

In December 2006, the city served on Diva's a notice of intent to revoke its licenses (the December notice). A hearing on the allegations in the notice was held in March and April 2007 before an administrative law judge (ALJ). During the hearing, the ALJ ruled that: (1) the city could not rely on the incidents in July and November 2006

because they were still under criminal investigation; (2) the city could "submit and adduce testimony [about these incidents], in the same manner as . . . other historical events in the hearing record—such as meetings, inspections or police calls—are referenced"; but (3) [the incidents may] not form the basis of an adverse licensing action."

In April 2007, while the ALJ's decision on the December notice was pending, Diva's received another notice of violation (the April notice). A hearing on the April notice before a second ALJ resulted in that ALJ concluding that Diva's had violated Minn. Stat. § 340A.502 (2006) by serving alcohol to an intoxicated person and had violated St. Paul, Minn., Legislative Code § 310.06(b) (2006) by failing to comply with its obligation to provide the city's police with surveillance videotapes. The second ALJ's order recommended that the city "take appropriate action against [Diva's] licenses."

The first ALJ released his order pertaining to the December notice in June 2007. He concluded that Diva's committed six violations of code or license requirements, to-wit: (1) and (2) Diva's twice failed to comply with the video surveillance requirement; (3) Diva's did not obtain the required building permit before building a smoking patio; (4) Diva's did not apply for a building permit before renovating a kitchen exhaust system; (5) Diva's did not apply for a permit to display signs and violated limitations on the size of signs; and (6) Diva's did not timely pay a fine imposed at Diva's initial appearance before the city council. The ALJ also concluded that the city did not establish by a preponderance of evidence that Diva's conduct endangered the community and

recommended that the city impose "a weighty administrative sanction" but not revoke Diva's licenses.

In August 2007, the city council held a public hearing on the recommendations of both ALJs. Following the hearing, the city adopted both ALJs' findings of violations and found in addition that Diva's had unreasonably annoyed or endangered a number of members of the public. The city council revoked Diva's licenses. Diva's challenges the revocation.[1]

D E C I S I O N

"[W]hen examining quasi-judicial municipal proceedings, we review the evidence only to determine whether it supports the findings of fact or the conclusions of law, and whether the municipality's decision was arbitrary or capricious." *In re Dakota Telecomm. Group*, 590 N.W.2d 644, 646 (Minn. App. 1999).

1. Does Substantial Evidence Support the City's Findings?

Code § 310.06(b) provides that a license may be revoked because "(5) [t]he licensee or applicant has failed to comply with any condition set forth in the license, or set forth in the resolution granting or renewing the license," or "(8) [t]he licensed business, or the way in which such business is operated, maintains or permits conditions that unreasonably annoy, injure or endanger the safety, health, morals, comfort or repose

[1] Both the city and this court denied Diva's motions to stay the revocation pending appeal. *See DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 143, 45-46 (Minn. App. 2007) (holding that the city's denial of Diva's motion for a stay pending appeal was not an abuse of discretion).

of any considerable number of members of the public." St. Paul, Minn., Legislative Code § 310.06(b)(5), (8) (2006).

a. Code § 310.06(b)(5)

The city based its revocation in part on the conclusion that "[eight] violations [of laws, codes, or license conditions,] with one prior sustained adverse action, form a sufficient basis for license revocation." Diva's does not challenge three violations: failure to comply with signage requirements, failure to timely pay the fine imposed at Diva's first appearance, and serving alcohol to an intoxicated patron.

Three of the remaining five violations involved failures to provide surveillance videotapes. One ALJ found that, when police requested tapes for the night of 2-3 March 2007 to see if Diva's had served an obviously intoxicated individual, the tapes Diva's provided were "useless for determining whether [Diva's] had served [the individual] when he was intoxicated" because: (1) they "did not show camera angles from outside" and "revealed only about one-fourth of the service area inside"; (2) they "switched between one date and another and switched from black and white to color"; (3) "[i]n some shots, patrons wore shorts and short sleeves, although the tape was to have [been] recorded March 2nd"; (4) "[i]n other shots, patrons were smoking, indicating that the video could not have been [recorded on 2 March 2007], by which date smoking had been banned entirely from bars"; and (5) at some points, "[t]he portion of the tape . . . was recorded at 16 times normal speed." The other ALJ found that, when police sought tapes for the night of 12-13 September 2006 to investigate a fight, a videocassette Diva's provided on 20 September was blank; a viewable tape was provided on 4 October but the

date-line on it was not the tape for the date requested; and, about a month later, police ultimately obtained tapes and recording equipment with a warrant. Diva's does not dispute any of the ALJs' videotape findings.

A fourth violation was the constructing, without the required permit, of a smoking patio that did not comply with legal requirements. Diva's challenges this procedurally, arguing that the city is estopped from considering the patio violation because the city allegedly told Diva's to remove the patio by 2 August 2006 and Diva's removed it on 1 August. But the city found that the office of License, Inspection, and Environmental Protection (LIEP) had informed Diva's, as it had informed all other licensees, of the requirements for a smoking patio at the time the smoking ban came into effect. Diva's then built a non-complying patio, without a permit, in April 2006. On 26 June 2006, the city directed Diva's to either furnish a site plan or remove the patio by 3 July 2006, or face legal action. Diva's did not remove the patio. After the murder at the premises on 13-14 July 2006, Diva's was again told to remove the patio or bring it into compliance, this time by 2 August 2006. Thus, Diva's ignored both the city's directives on how to build a patio and its first order to remove the patio and complied only with a second order, by which time the patio had existed for four months.

A fifth violation involved an exhaust hood in the kitchen. Diva's again argues that the city is estopped from raising this issue because, in a letter dated 26 July 2006, the city told Diva's that it "shall not use the kitchen exhaust hood until the building inspector has given written approval" and the exhaust hood was never used. But Diva's estoppel argument ignores two other letters Diva's received from the city, one on 28 July 2006 and

the other on 4 October 2006. Both letters said that the exhaust hood had to be removed or brought up to compliance. The first letter provided 31 August 2006 as the last day to comply without penalty; the second letter referenced the first and set 18 October 2006 as a "final opportunity" to correct the problem. Thus, failing either to remove the hood or to bring it into compliance was a violation.

Substantial evidence supports the findings that Diva's in eight instances failed to comply with the conditions set forth in its licenses, thereby violating Code § 310.06(b)(5) and providing a basis for revocation.

b. Code § 310.06(b)(8)[2]

The city based its conclusion that Diva's had violated Code § 310.06(b)(8) on eight factors: (1) an increase in police calls to the area; (2) large street fights involving Diva's patrons; (3) modification of police patrol patterns to accommodate Diva's; (4) neighborhood noise; (5) the concern of police officers for their own safety in dealing with situations at Diva's because of large crowds; (6) proximity of Diva's to a residential neighborhood, school, and church; (7) citizen complaints; and (8) failure of community efforts to resolve issues with Diva's.[3] Substantial evidence supports these factors.

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[2] Code § 310.06(b)(8) is almost identical to Minnesota's public nuisance statute, which provides that it is a misdemeanor to "maintain[] or permit[] a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort or repose of any considerable number of members of the public." Minn. Stat. § 609.74(1) (2006).

[3] The city also gave "violations of the license conditions" as a factor supporting revoking Diva's licenses under Code § 310.06(b)(8). While these violations furnish an independent basis for revocation under Code § 310.06(b)(5), they do not meet the "unreasonably annoy, injure or endanger the safety, health, morals, comfort or repose of any considerable number of members of the public" criterion of Code § 310.06(b)(8).

The first factor, an increase in police calls, is supported by exhibits showing that there were 117 police calls to Diva's area between its June 2005 opening and March 2007 (22 months), as opposed to 43 police calls in the 22 months preceding June 2005, and that many of the 117 calls were for fights and/or led to arrests.

The second, third, fourth, and fifth factors—street fights, changes in police patrol patterns, neighborhood noise, and officers' concern for their own safety—are supported by testimony from six police officers.

One officer testified that, at about 2:00 a.m. on 20 November 2005, she was driving past Diva's and observed about 30 people fighting in the street, that the people did not respond to requests to clear the area, and that about ten squad cars were summoned to assist. When asked, "Could you tell where the people were coming from?" she answered, "They were coming out of Diva's bar." When asked, "Did you see them coming out of Diva's bar?" she answered, "We did." The officer testified that she would have been concerned for the safety of someone who happened to walk by and that the situation was disruptive to the neighborhood.

A second officer testified that he was sent to Diva's on 17 June 2006 at about 2:00 a.m.; that he found one man unconscious in the street after apparently having been hit with a brick; that the crowd numbered at least 30 people; that the officer assumed they came from Diva's and knew of nowhere else they could have come from; that he did not remember seeing Diva's security guards present; that at least 14 officers were needed to control the situation; and that he was concerned for the officers' safety.

A third officer testified that he was driving by Diva's at the time of the 17 June 2006 incident, saw a crowd of between 50 and 60 people, got out of his squad car to try to control the crowd, had to radio for assistance, and saw people coming out of Diva's and fighting.

A fourth officer, testifying about yet another incident, answered the question, "Was the crowd [outside Diva's] loud?" with "They were fighting, obnoxious, yelling."

A fifth officer testified that "It was known [to officers] that when it got close to bar clos[ing time], that we had to go up around that [Diva's] area because of the continued problems that we had up there as far as fights."

The sixth officer testified that, "The midnight sergeant said there was a lot of problems at the Diva's Bar . . . and he asked the officers if anybody had any downtime, when they were not taking calls, to please drive up there and just make sure that there's no problems going on up there." This officer also testified that she had used her loudspeaker to tell two groups of fighting patrons "to break it up, go home, keep walking," but that they "weren't listening to our orders to go home."

The testimony of these six officers provides substantial evidence to support the findings that large fights involving Diva's patrons occurred in the street outside Diva's, that police officers changed their patrol patterns because of the situation at Diva's, that Diva's was a source of noise in the neighborhood,[4] and that officers feared for their own safety because of occurrences at Diva's.

[4] Diva's claims that "noise" was not an appropriate basis for the revocation because noise was not mentioned in the notice of intent to revoke. But the notice of intent to revoke

The sixth, seventh, and eighth factors—Diva's proximity to church, school, and residence, citizens' complaints, and the failure of community efforts to resolve issues with Diva's—were supported by testimony from the city's director of LIEP. When asked how he became aware of Diva's, he testified that, soon after becoming LIEP director, he "began to meet with neighborhood groups and organizations talking about the position, and [Diva's] frequently came up." He recounted complaints made through a computerized complaint system about loud music at all hours, about Diva's dumping dirty water under a nearby store, about an obscene sign, about a sign saying "Smoking permitted" because Diva's was a "private club," and about patrons so loud between 1:00 and 2:30 a.m. that a neighbor two blocks away had to close her windows. The LIEP director reported that one complainant had said, "Diva's had brought a trashy element to the neighborhood . . . patrons wander the streets and yell at each other." The record also includes a number of email complaints from neighborhood residents.

The LIEP director testified about complaints made to him personally about Diva's "hours of operation, of late at night the loud music, reports of fights and unfortunately of gunshots being fired and people actually being shot, killed and wounded." The LIEP director also testified about an occasion in July 2006 when he

> had an opportunity to meet with over 150 neighbors in a very large meeting, and to a person they expressed to me their concern about public safety as a result of the way that this particular establishment [Diva's] was being operated. . . . [I]t's the nature of the fights, of the large, loud interactions of people outside of the establishment, and again the gunshots,

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listed an incident on 28 April 2006 when an officer near Diva's observed "a large group of people yelling who can be heard from 80 feet away."

> the people being shot, and the fear that people have for that establishment being . . . right across the street from a school.

The LIEP director explained that he was familiar with the neighborhood where Diva's was located and that what had been "a very safe, very sound neighborhood" was now a place "where [people] feel threatened in their own particular neighborhood, where they don't feel safe actually walking out of church at night to their cars." He believed that this was "solely due to the way this particular bar is operating, when it has been a bar for many, many, many years and we had not had complaints like that."

When asked how he responded to all the complaints, the LIEP director said, "[W]e met in a number of meetings . . . to try to fashion conditions that would be placed on the license [issued to Diva's] that would assure that the establishment could operate, continue to operate, and at the same time would be safe to the rest of the neighborhood." He testified that, after the murder at Diva's, meetings were held "to develop conditions to assure the safe operation of that establishment, to protect the neighborhood and to maintain the license holder's right to operate." This testimony supports the findings that Diva's was close to a school, a church, and private residences; that citizens had complained about Diva's; and that efforts to resolve issues with Diva's had failed.

Diva's argues that some evidence indicates that Diva's did not violate Code § 310.06(b)(8), i.e., that it did not "maintain[] or permit[] conditions that unreasonably annoy, injure or endanger the safety, health, morals, comfort or repose of any considerable number of members of the public." But the city's findings must be supported by substantial evidence, which is "such relevant evidence as a reasonable mind

might accept as adequate to support a conclusion." *Nat'l Audubon Soc'y v. Minn. Pollution Control Agency*, 569 N.W.2d 211, 215 (Minn. App. 1997), *review denied* (Minn. 16 Dec. 1997). It is unnecessary that all the evidence favor the finding of a violation.

To summarize, substantial evidence supports the findings that Diva's, in eight instances, "failed to comply with any condition set forth in the license, or set forth in the resolution granting or renewing the license" under Code § 310.06(b)(5); and that Diva's, or the way in which Diva's was operated, in eight further instances, "maintain[ed] or permit[ted] conditions that unreasonably annoy, injure or endanger the safety, health, morals, comfort or repose of any considerable number of members of the public" under Code § 310.06(b)(8).[5]

2. Was the Decision to Revoke Diva's Licenses Arbitrary or Capricious?

Code § 310.05(m) provides a matrix of penalties for violations based on the number of appearances the licensee has had before the city council. St. Paul, Minn., Legislative Code § 310.05(m) (2006). For example, violations of conditions placed on a

[5] Diva's also argues that the city council erred in relying on evidence of the murder and the attempted murder occurring on Diva's premises, but admits that "it may never be known with certainty whether the City Council improperly considered the July and November 2006 incidents[] when it voted to revoke." The ALJ ruled that the city council "may not rely on [these incidents] to establish that [Diva's violated] . . . Code 310.06(b)(8)" but that the city could "submit and adduce testimony [about these incidents] in the same manner as to which other historical events in the hearing record—such as meetings, inspections or police calls—are referenced." The ALJ also noted that "due process requires that [the incidents] not form the basis of an adverse licensing action." The only extensive testimony about the murder was provided by Diva's manager in response to questions from Diva's counsel, over the city's objection. The city produced ample evidence, exclusive of these incidents, to justify the revocation. Thus, those incidents did not form the basis of this adverse licensing action.

license or of relevant provisions of the code are punishable by a $500 fine after the first appearance; a $1,000 fine after the second appearance; a $2,000 fine and a ten-day suspension after the third appearance; and revocation after the fourth appearance. *Id.* Code § 409.26(b) provides another matrix specifically for those holding licenses to sell alcoholic beverages. St. Paul, Minn., Legislative Code § 409.26(b) (2006). For example, the sale of an alcoholic beverage to an intoxicated person is punishable at the first appearance by an unspecified fine; at the second appearance by an unspecified fine; at the third appearance by a suspension of the license for up to 18 days; and at the fourth appearance by revocation of the license. *Id.*

The penalties stated in the matrices "are presumed to be appropriate for every case; however the council may deviate therefrom in an individual case where [it] finds and determines that there exist substantial and compelling reasons making it more appropriate to do so." St. Paul, Minn., Legislative Code §§ 310.05(m), 409.26(a). When deviating, the city council must "provide written reasons that specify why the penalty selected was more appropriate." *Id.*

Diva's argues that, because this was only its second appearance before the city council, it was subject only to a fine of $1,000 under Code § 310.05(m) or an unspecified fine under Code § 409.26(b), and not to revocation. But the city council "considered all the evidence contained in the record for both hearings" before the ALJs and resolved "that these two separate actions having come before the Council at one time are more efficiently given one sanction." Therefore, the appearance at issue here was in reality a consolidation of what would have been Diva's second and third appearances.

In revoking Diva's license, the city council treated this as a fourth appearance, saying it found "[five] substantial and compelling reasons to deviate from [the] presumptive penalty [for a third appearance under Code § 310.05(m)]." First, "[b]oth Notices alleged more than one license violation . . . and in both cases more than one license violation was proved." Second, "[t]he violation of . . . Code § 310.06(b)(8) [wa]s a serious violation that indicates Diva's poses an immediate threat to public safety." Third, if Diva's had had a separate appearance before the city council for each violation, revocation would have been imposed after the fourth violation. Fourth, Diva's had multiple violations after it agreed to add conditions to its license, demonstrating that adding conditions to its license was ineffective. And fifth, in some instances Diva's had not complied with license conditions until the city took further action.

Diva's claims that one member of the city council "tried to blur the distinction between violations and appearances in determining the penalty." But the code clearly intends to make penalties commensurate with the type of violation and the number of times it was committed, not with the number of times an offender appears before the council. *See* St. Paul, Minn., Legislative Code §§ 310.05(m)(ii)-(iii), 409.26(c) (providing that "[t]he occurrence of multiple violations shall be grounds for departure from such penalties [in the matrix] in the council's discretion"; and that unless the licensee admits the facts of a subsequent violation and stipulates to its addition to the notice, "violations occurring after the date of the formal notice of hearing shall be the subject of a separate proceeding and dealt with as a '2nd [or subsequent] appearance' before the council").

Diva's contrasts its situation to that in *BAL, Inc. v. City of St. Paul*, 469 N.W.2d 341 (Minn. App. 1991) (upholding revocation of a bar's license), to argue that the revocation was not permitted by the code and was arbitrary and capricious because Diva's was given the same penalty as another licensee whose violations were more severe.

As happened here, the city council in *BAL* revoked the license of The Wabasha Bar on its third appearance, even though the ALJ had not recommended revocation. 469 N.W.2d at 342-43. This court affirmed the revocation. *Id*. at 343. Diva's argues that *BAL* is distinguishable on its facts but the distinctions are insignificant. In *BAL*, "[w]itnesses and police officers testified they saw bar patrons leave the premises with drinks, congregate outside, and engage in loud and sometimes unruly behavior," *id.*, whereas here, several police officers, but no other witnesses, testified to similar behavior of Diva's patrons. In *BAL*, the owner of a neighboring apartment building testified that he had lost business because of the bar; here, the LIEP director testified to complaints he had received from neighborhood residents and business owners. Moreover, The Wabasha Bar did not violate its on-sale license conditions or the building code. The situation of The Wabasha Bar in *BAL* is sufficiently similar to that of Diva's to show that imposing the same penalty on Diva's was not arbitrary or capricious. Thus, *BAL* does not indicate that the revocation of Diva's license was arbitrary or capricious.

We conclude that substantial evidence supports the findings that Diva's violated the conditions of its licenses and operated in such a way as to endanger members of the public and that the city's decision to revoke its license was not arbitrary or capricious.

Affirmed.