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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-2157**

In the Matter of the Tobacco Dealer's License held by MADI, Inc.  
and Mesud Didovic d/b/a Venus Grocery,  
Relator,

vs.

City of Minneapolis,  
Respondent.

**Filed November 10, 2008  
Affirmed  
Larkin, Judge**

Minneapolis City Council

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Considered and decided by Connolly, Presiding Judge; Shumaker, Judge; and  
Larkin, Judge.

**UNPUBLISHED OPINION**

**LARKIN**, Judge

Relator licenseholder appeals the Minneapolis City Council's decision to revoke  
his tobacco-dealer's license following three illegal tobacco sales to minors. Because the

council (1) did not exceed its authority or jurisdiction, (2) had substantial evidence to support a departure from the presumptive penalty prescribed by ordinance, and (3) did not act arbitrarily and capriciously, the council did not err in revoking relator's tobacco-dealer's license. We affirm.

## **FACTS**

Relator Mesud Didovic operates a grocery store for which he had a tobacco-dealer's license. Over a 14-month period, relator illegally sold cigarettes to minors during three compliance checks. After the third illegal sale, relator received a "Notice of Hearing." The notice stated that there would be a hearing regarding relator's tobacco-dealer's license and that the hearing could result in the revocation of relator's license based upon relator's violations of city ordinances and based upon the city's charter authority, which allows for revocation of licenses for "good cause." The hearing was held before the public safety and regulatory services committee (PSRS) of the Minneapolis City Council. During the hearing relator admitted to the illegal sales described above. Relator testified that he had difficulty seeing and interpreting age information on identification cards and that some customers became upset when he asked for proper age identification.

The PSRS issued findings of fact, conclusions of law, and a recommendation for adverse license action in which it concluded that the relator "personally and repeatedly" violated city ordinance by selling tobacco to minors and that aggravating factors justified revocation of relator's tobacco-dealer's license. PSRS noted the following aggravating factors: (1) the licenseholder himself, and not an employee, was the offender in each

violation; (2) the violations occurred over a 14-month period; and (3) the relator's explanation of the illegal sales "blamed the conduct on inability and unwillingness to comply with proper and simple age identification procedures." PSRS recommended revocation of relator's tobacco-dealer's license for one year, and the council voted to adopt the recommendation.

Relator brought this certiorari appeal, asking this court to reverse the council's revocation of his tobacco-dealer's license. Relator argues that the council: (1) exceeded its authority or jurisdiction, (2) lacked substantial evidence to warrant a departure from the presumptive penalties prescribed by ordinance, and (3) acted arbitrarily and capriciously in revoking his tobacco-dealer's license.

### **DECISION**

This case is properly before this court on a writ of certiorari. *See City of Minneapolis v. Meldahl*, 607 N.W.2d 168, 171 (Minn. App. 2000) (stating that this court has exclusive jurisdiction over certiorari appeals from quasi-judicial decisions by executive bodies lacking statewide jurisdiction). Both parties cite the Minnesota Administrative Procedure Act (APA) for the standard of review. *See* Minn. Stat. §§ 14.001-.69 (2006). But Minn. Stat. § 14.02, subd. 2, limits the APA's scope to "agencies" with "statewide jurisdiction." The council does not have statewide jurisdiction. *See City of Mankato v. Mahoney*, 542 N.W.2d 689, 693 (Minn. App. 2006) (holding a city council lacks statewide jurisdiction and does not fall within APA). This court, however, has concluded that "the APA's scope of review is similar to the common law scope of review on certiorari. Thus, the same standard applies regardless of the

applicability of APA.” *Stahli v. City of St. Paul*, 732 N.W.2d 298, 304 n.1 (Minn. App. 2007).

A city council’s decision may be modified or reversed if the city violated constitutional provisions, exceeded its statutory authority, made its decision based on unlawful procedure, acted arbitrarily or capriciously, made an error of law, or lacked substantial evidence in view of the entire record submitted. Our review is confined to the record before the city council at the time it made its decision.

*Montella v. City of Ottertail*, 633 N.W.2d 86, 88 (Minn. App. 2001). Generally, decisions of municipalities “enjoy a presumption of correctness,” and as long as the municipality “engaged in reasoned decision-making, a reviewing court will affirm its decision even though the court may have reached another conclusion.” *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 562 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001). “The reviewing court is not to retry facts or make credibility determinations, [and will uphold the decision] if the lower tribunal furnished any legal and substantial basis for the action taken.” *Senior v. City of Edina*, 547 N.W.2d 411, 416 (Minn. App. 1996) (quotation and citation omitted).

## I.

Relator argues that revocation of his tobacco-dealer’s license was in excess of the council’s authority or jurisdiction because the revocation exceeded the presumptive penalty prescribed by Minneapolis, Minn., Code of Ordinances §§ 281.60 and 281.65 (2007). “The interpretation and application of a city ordinance is a question of law, which we review de novo.” *Staheli*, 732 N.W.2d at 307.

PSRS found that on three occasions within a 14-month period, relator illegally sold tobacco to persons less than 18 years of age. Relator's sales of tobacco to minors violated Minneapolis, Minn., Code of Ordinances § 281.50 (2007) and subjected relator to a penalty under section 281.60(a). Section 281.60 provides "[e]very license holder under this chapter will either be subject to a monetary penalty or in extenuating circumstances have their license revoked, suspended, or not renewed by the city council according to the penalty schedule as provided in section 281.65." Section 281.65 lists the "presumptive" penalties for violations that are listed in section 281.60 and that occur within a consecutive two-year period.

In this case the presumptive penalty is a "[t]hirty-day suspension of license and six hundred dollar (\$600.00) fine." Minneapolis, Minn., Code of Ordinances § 281.65(c). After a fourth violation, the presumptive penalty is "[l]icense revocation for a minimum of one (1) year and eight hundred dollar (\$800.00) fine." Minneapolis, Minn., Code of Ordinances § 281.65(d). In addition to the presumptive penalties prescribed by section 281.65, the Minneapolis City Charter provides for license revocation as follows: "Any license issued by authority of the City Council may be revoked by the City Council at any time upon proper notice and hearing for good cause . . . ." Minneapolis, Minn., City Charter ch. 4, § 16 (2007).

Relator argues that the council's revocation was in excess of its authority or jurisdiction under section 281.65. Specifically, relator asserts that revocation was not permissible because relator only committed three violations, and under section 281.65, revocation is presumed for four violations, not three.

Although section 281.65 only prescribes license revocation after a fourth violation within a consecutive two-year period, the entire penalty schedule is “presumptive.” We generally strive to construe a term according to its plain and ordinary meaning. *Frank’s Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980). The *American Heritage Dictionary* defines presumptive as “[p]roviding a reasonable basis for belief” and “[f]ounded on probability.” *The American Heritage Dictionary of the English Language* (4th ed. 2000). To presume is “[t]o take for granted as being true in the absence of proof to the contrary.” *Id.* Construing the word “presumptive” in section 281.65 according to its plain and ordinary meaning, alternative penalties are permitted when there is proof to rebut the presumptive penalty. This reading is consistent with chapter 4, section 16 of the Minneapolis City Charter, which allows for revocation after proper notice and a hearing for good cause, without regard to the presumptive penalties contained in section 281.65. Thus, the council had authority to revoke relator’s tobacco-dealer’s license under both the Minneapolis, Minn., Code of Ordinances § 281.65 and the city charter.

## II.

Relator next argues that the council’s decision to revoke his tobacco-dealer’s license was unreasonable because it was unsupported by substantial evidence. Substantial evidence is “(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; and (5) evidence considered in its entirety.” *Staheli*, 732 N.W.2d at 310. Judicial deference is given to “the city’s decision to cancel

relator's license." *Id.* Relator has the burden to prove that a decision is unsupported by substantial evidence. *Id.*

Relator argues that the city's decision was unsupported by substantial evidence because there was no evidence of a fourth violation. This argument is without merit because, as previously explained, a fourth violation was not necessary to trigger revocation.

The record indicates that relator admitted that (1) relator illegally sold tobacco to minors on three occasions within 14 months, (2) relator had difficulty seeing and interpreting age information on identification, and (3) some customers became upset when relator asked for identification. PSRS considered the relator's statements and concluded that they evinced an "inability and unwillingness to comply with proper and simple age identification procedure." The record provided substantial evidentiary support for the council's conclusion that both aggravating factors and good cause warranted revocation of relator's tobacco-dealer's license.

### **III.**

Finally, relator argues that the council's decision was arbitrary and capricious because there was no rational basis to depart from the presumptive penalty schedule. A decision is arbitrary and capricious only if it (1) "relied on factors not intended by the ordinance; (2) entirely failed to consider an important aspect of the issue; (3) offered an explanation that conflicts with the evidence; or (4) is so implausible that it could not be explained as a difference in view or the result of the city's expertise." *Rostamkhani v. City of St. Paul*, 645 N.W.2d 479, 484 (Minn. App. 2002). Where there is room for two

opinions on a matter, the decision to accept one over another is not arbitrary and capricious. *CUP Foods*, 633 N.W.2d at 565. “[T]he burden is on [relator] to demonstrate the arbitrariness of the council’s action.” *Country Liquors, Inc. v. City Council*, 264 N.W.2d 821, 824 (Minn. 1978).

The council concluded that aggravating factors warranted a departure from the presumptive penalties. Three violations occurred during a 14-month period. Relator himself, and not an employee, was the offender on each occasion. Relator appeared unable or unwilling to comply with age identification procedures. Relator counters that PSRS was wrong to characterize his testimony as evincing an inability or unwillingness to comply. But, “[this court] is not to retry facts or make credibility determinations.” *Senior*, 547 N.W.2d at 416. Even without this finding, the fact that relator violated the ordinance himself on three occasions in a 14-month period would provide sufficient grounds for this court to conclude that the council’s explanation for the revocation was consistent with the evidence and was the result of reasoned decision making. Relator’s claims that he has taken subsequent measures to ensure future compliance are assertions outside of the record, and we will not consider such claims. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1998) (stating this court generally will not consider matters not considered and argued below); *see also* Minn. R. Civ. App. P. 110.01 (defining the record on appeal). Relator has not shown that the council’s decision was arbitrary and capricious.

**Affirmed.**

Dated: \_\_\_\_\_

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The Honorable Michelle A. Larkin