



## MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

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July 27, 2015

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Geoffrey S. Karls  
St. Paul City Attorney's Office  
Assistant City Attorney  
400 City Hall & Courthouse  
15 W Kellogg Blvd  
Saint Paul, MN 55102

**Re: *In the Matter of Jefferson Avenue Investments, Inc d/b/a/ Tavern on the Avenue***  
**OAH 5-6020-32561**

Dear Mr. Karls:

Enclosed and served upon you is the Administrative Law Judge's **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** in the above-entitled matter. The official record, with the exception of the recording of the hearing, is also enclosed. If you would like a copy of the recording, please contact the Office of Administrative Hearings in writing, by telephone at (651) 361-7881, or by e-mail at [rachel.youness@state.mn.us](mailto:rachel.youness@state.mn.us). The Office of Administrative Hearings' file in this matter is now closed.

If you have any questions, please contact my legal assistant Rachel Youness at (651) 361-7881 or [rachel.youness@state.mn.us](mailto:rachel.youness@state.mn.us).

Sincerely,

A handwritten signature in blue ink, appearing to read "JM", followed by a long, wavy horizontal line.

JIM MORTENSON  
Administrative Law Judge

JRM:ry  
Enclosure  
cc: Thomas Williams

RECEIVED  
JUL 29 2015  
CITY ATTORNEY

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE CITY OF ST. PAUL

In the Matter of All Licenses held by  
Jefferson Avenue Investments, Inc. d/b/a  
Tavern on the Avenue for the premises  
located at 825 Jefferson Avenue in Saint  
Paul

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

License ID #20060003441

This matter came on for hearing before Administrative Law Judge Jim Mortenson on July 21, 2015, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota. The record closed the same day.

Geoffrey Karls, Assistant Saint Paul City Attorney, appeared for the city of St. Paul (City). Thomas Williams, Owner, appeared on behalf of Jefferson Avenue Investments, Inc. (Licensee).

Prior to the start of the hearing the parties stipulated to the facts of this case, including the admission of the City's six exhibits. All six exhibits were admitted into the record and no testimony was taken. The parties made arguments based on the stipulated record.

**STATEMENT OF ISSUES**

1. Whether Licensee violated the terms of its license when a neighbor could hear noise from the Licensee's establishment?
2. Whether Licensee violated Saint Paul Legislative Code § 293.02(a) when a neighbor could hear noise from the Licensee's establishment?
3. If Licensee has violated the terms of its license or the Saint Paul Legislative Code, whether it should be assessed a \$500 matrix penalty?

**SUMMARY OF RECOMMENDATION**

Licensee did not violate the terms of its license. Licensee did violate the noise ordinance of the Saint Paul Legislative Code. Five hundred dollars is the presumptive matrix penalty and there are no substantial or compelling reasons to deviate from that penalty.

## FINDINGS OF FACT

1. On November 26, 2014, the Licensee agreed to the following license condition for License No. 20060003441, among others:

7. There will be no amplification of music or broadcasted events outside the building. Speakers on the patio will be removed.<sup>1</sup>

2. On April 25, 2015, at approximately 10:54 p.m., Leslie Darling of 380 Fulton Street, Saint Paul (Darling), filed a noise disturbance complaint with the Saint Paul Police Department. Darling complained of constant loud noise coming from Licensee's establishment, Tavern on the Avenue, at 825 Jefferson Avenue, Saint Paul (establishment).<sup>2</sup>

3. Officer Anthony Yarusso (Yarusso) investigated the complaint and could hear music coming from the inside of the establishment as he drove through the establishment's parking lot. The music did not seem unreasonably loud.<sup>3</sup>

4. Yarusso went to Darling's residence, which is approximately one half block south of the establishment. As Yarusso walked to the door of the residence, he could hear the constant rumbling of low bass noise coming from the establishment, which he determined was unreasonably loud and causing a nuisance to neighbors trying to sleep during the night hours. Darling advised Yarusso that the noise made her windows shake and kept her awake.<sup>4</sup>

5. The music was coming from inside the establishment and could be heard outside because the doors to the establishment had been propped open to cool the interior. There was no music being amplified or broadcast on the establishment's patio.<sup>5</sup>

6. Yarusso returned to and entered the establishment, and spoke with management and the disc-jockey (DJ) about the loud music. Management and the DJ were cooperative and turned down the music and advised they would work to ensure music was not disturbing the neighbors in the future.<sup>6</sup>

7. On May 14, 2015, the City issued a Notice of Violation to Thomas Williams, owner of the establishment (Williams), stating that based on Darling's noise disturbance complaint, amplified music was heard playing outside of the building in violation of license

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<sup>1</sup> Exhibit (Ex.) 3.

<sup>2</sup> Ex. 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Ex. 5.

<sup>6</sup> Ex. 1.

condition #7. The notice also advised Williams that as a result of the violation, a \$500 matrix penalty would be recommended.<sup>7</sup>

8. By letter dated May 20, 2015, Williams requested a hearing because he disputed the facts outlined in the Notice of Violation. Specifically, Williams asserted that the source of the noise complained of was amplified music within the interior of the establishment, that the noise was heard outside because management had opened doors to cool the building despite the Licensee's policy of keeping all doors and windows closed after amplified music starts at 10:00 p.m., that the doors were closed when police came, and that there was no external source of amplified music. Thus, the alleged violation and fine were contested.<sup>8</sup>

9. A Notice of Administrative Hearing was sent to Licensee on June 22, 2015. In addition to the alleged violation of license condition #7, the Notice provided that the noise problem violated Saint Paul Legislative Code § 293.02(a), which provides:

- (1) It shall be unlawful for any person to make, continue, permit or cause to be made, continued or permitted within the city, any loud, disturbing or excessive noise which would be likely to cause significant discomfort or annoyance to a reasonable person of ordinary sensitivities in the area.<sup>9</sup>

From the foregoing findings of fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS OF LAW**

1. The city of St. Paul and the Office of Administrative Hearings have jurisdiction to consider this matter pursuant to St. Paul Legislative Code §§ 310.05 and 310.06.

2. The City has complied with all relevant procedural requirements of ordinance and rule.

3. Saint Paul Legislative Code § 310.06 permits the City Council to take adverse action against a licensee based on, in relevant part:

(5) The licensee. . . has failed to comply with any condition set forth in the license, or set forth in the resolution granting or renewing the license.

(6) a. The licensee or applicant (or any person whose conduct may by law be imputed to the licensee or applicant) has

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<sup>7</sup> Ex. 4.

<sup>8</sup> Ex. 5.

<sup>9</sup> Ex. 6.

violated, or performed any act which is a violation of, any of the provisions of these chapters or of any statute, ordinance or regulation reasonably related to the licensed activity, regardless of whether criminal charges have or have not been brought in connection therewith[.]

4. Code section 310.05 sets forth hearing procedures and, in section (m), provides a matrix of penalties for first, second, third, and fourth license violations. The matrix penalties are presumed to be appropriate for every case. However, the City may impose penalties different than those described in the matrix when substantial and compelling reasons make it more appropriate to do so. If the council deviates, it must provide written reasons why the penalty selected was more appropriate. The presumptive penalty for a first-time violation of the legislative code is \$500.<sup>10</sup>

5. Code section 293.02(a) provides, in relevant part:

- (1) It shall be unlawful for any person to make, continue, permit or cause to be made, continued or permitted within the city, any loud, disturbing or excessive noise which would be likely to cause significant discomfort or annoyance to a reasonable person of ordinary sensitivities in the area.
- (2) The characteristics and conditions which shall be considered in determining whether a noise is loud, disturbing or excessive for the purposes of paragraph (a) of this section, shall include, without limitation, the following:
  - a. The time of day or night when the noise occurs.
  - b. The duration of the noise.
  - c. The proximity of the noise to a sleeping facility and/or a residential area.
  - d. The land use, nature and zoning of the area from which the noise emanates and the area where it is perceived.
  - e. The number of people and their activities that are affected or are likely to be affected by the noise.
  - f. The sound peak pressure level of the noise, in comparison to the level of ambient noise.

6. Code section 293.02(d) provides:

*Amplified sound.* It shall be a violation of this section to play, operate or permit the playing, use or operation of any radio, tape player, disc player, loud speaker or other electronic

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<sup>10</sup> St. Paul Legislative Code § 310.05(m).



device used for the amplification of sound, unless otherwise permitted by law, located inside or outside, the sound of which carries to points of habitation or adjacent properties, and is audible above the level of conversational speech at a distance of fifty (50) feet or more from the point of origin of the amplified sound.

7. Licensee did not violate the terms of his license because there was no amplification of music or broadcasted events outside the building.

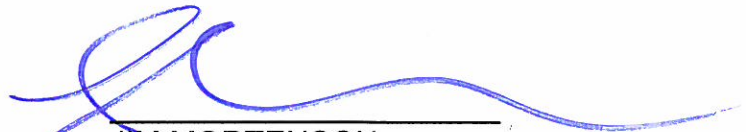
8. Licensee did violate Saint Paul Legislative Code § 293.02 when amplified sound was permitted to leave the establishment and disturb the residential neighborhood in which the establishment is located.

Based upon the Findings of Fact, Conclusions of Law, and the Memorandum below, the Administrative Law Judge makes the following:

### RECOMMENDATION

IT IS HEREBY RECOMMENDED that the City of St. Paul **ASSESS** Licensee a \$500.00 matrix penalty.

Dated: July 27, 2015

  
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JIM MORTENSON  
Administrative Law Judge

Digitally recorded; no transcript prepared

### NOTICE

This Report is a recommendation, not a final decision. The Saint Paul City Council will make a final decision after a review of the record and may adopt, reject, or modify these Findings of Fact, Conclusions, and Recommendation. Pursuant to Saint Paul Legislative Code § 310.05 (c-1), the City Council shall not make a final decision until the parties have had the opportunity to present oral or written arguments to the City Council. Parties should contact Shari Moore, City Clerk, City of Saint Paul, 170 City Hall, 15 W. Kellogg Blvd., Saint Paul, Minnesota 55102, to ascertain the procedure for filing exceptions or presenting arguments.

## MEMORANDUM

### Issue 1 – License Terms

Licensee is a bar on Jefferson Avenue in a residential neighborhood in St. Paul. The establishment includes an outdoor service area (patio).<sup>11</sup> The license for the establishment includes the following condition:

There will be no amplification of music or broadcasted events outside the building. Speakers on the patio will be removed.

Given the establishment includes a patio, this condition is straightforward – that the City does not want loud music or other broadcasted events on the patio.

The City may take adverse action against a license when there has been a violation of a license condition.<sup>12</sup>

In this case, Licensee had loud music playing inside the building, which escaped into the neighborhood because doors to the building were propped open. Licensee was not playing music outside on the patio or elsewhere on the premises. Thus, despite noise emanating from the inside of the building, Condition 7 of the license was not violated.

The City argues that such an interpretation of the license condition is too narrow because the point of the license condition is to keep loud music inside the building. The City can articulate the standards it wishes for licensees. Once articulated, those standards must be read within the plain meaning of the language used. In this case, the plain meaning is to prohibit loud music and other broadcast events outside of the building. If the City wanted to be more explicit, it could do so. This is not necessary because the City already has an ordinance prohibiting loud music from inside a building escaping into the neighborhood.

### Issue 2 – Noise as Public Nuisance

There are two provisions within the City's noise ordinance which need to be examined in this case. The first concerns noise generally.

- (1) It shall be unlawful for any person to make, continue, permit or cause to be made, continued or permitted within the city, any loud, disturbing or excessive noise which would be likely to cause significant discomfort or annoyance to a reasonable person of ordinary sensitivities in the area.<sup>13</sup>

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<sup>11</sup> Ex. 3.

<sup>12</sup> Saint Paul Legislative Code § 310.06(b)(5).

<sup>13</sup> Saint Paul Legislative Code § 293.02(a)(1).

To determine whether noise is loud, disturbing, or excessive, the ordinance provides the following factors to consider:

- a. The time of day or night when the noise occurs.
- b. The duration of the noise.
- c. The proximity of the noise to a sleeping facility and/or a residential area.
- d. The land use, nature and zoning of the area from which the noise emanates and the area where it is perceived.
- e. The number of people and their activities that are affected or are likely to be affected by the noise.
- f. The sound peak pressure level of the noise, in comparison to the level of ambient noise.<sup>14</sup>

In this case, the noise was occurring around 11:00 p.m., a time after many people had retired for the evening. The noise was occurring for up to an hour, since amplified music begins at 10:00 p.m., and the police arrived approximately 11:00 p.m.<sup>15</sup> It is not known how long the doors were open, but they were closed at the request of the police officer.<sup>16</sup> The bar is located in a residential neighborhood. It is unknown how many people were affected or likely to be affected by the noise emanating from the establishment. The sound peak pressure level of the noise, in comparison to the level of ambient noise is also unknown, although the bass was shaking windows in a home a half block from the establishment.<sup>17</sup>

Given the late hour of the noise in the residential neighborhood where the establishment is located, and the fact that a neighbor and police officer heard and felt the bass of the music shaking windows a half block away from the establishment, it is reasonable to conclude the noise was loud, disturbing, and excessive, until the doors of the establishment were closed.

The noise ordinance also prohibits amplified sound from an electronic device inside or outside which carries to homes "or adjacent properties, and is audible above the level of conversational speech at a distance of fifty (50) feet or more from the point of origin of the amplified sound."<sup>18</sup>

This ordinance specifically addresses the City's concern regarding loud music escaping into the neighborhood from the establishment. The police officer could hear the bass, which was shaking the windows of the Complainant, whose home was more than 50 feet from the establishment.

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<sup>14</sup> *Id.* at (a)(2).

<sup>15</sup> Exs. 1 and 5.

<sup>16</sup> *Id.*

<sup>17</sup> Ex. 1.

<sup>18</sup> Saint Paul Legislative Code § 293.02(d).



Based on both of these provisions of the noise ordinance, the noise ordinance was violated by Licensee when, on April 25, 2015, loud music was emanating from the establishment.

Violation of the noise ordinance may result in a misdemeanor, including up to 90 days in jail and a \$1,000.00 fine.<sup>19</sup> No criminal charges were pursued in this case, however.

### **Issue 3 – Penalty**

The City may take adverse action against a licensee when there has been a violation of a city ordinance, regardless of whether criminal charges have been brought.<sup>20</sup> The City also has legislated presumptive penalties for certain violations. For the first violation of the legislative code relating to the licensed activity, other than food code violations, the penalty is a \$500.00 fine.<sup>21</sup> This penalty is “presumed to be appropriate for every case; however the council may deviate therefrom in an individual case where the council finds and determines that there exist substantial and compelling reasons making it more appropriate to do so.”<sup>22</sup>

Licensee argues that the \$500.00 fine is not reasonable because the noise issue was quickly addressed when brought to the attention of the establishment, and that the violation was simply the result of a mistake by management when management had the doors of the building open while loud music was playing.

The question, therefore, is whether there are “substantial and compelling” reasons to deviate from the presumptive \$500.00 penalty. The facts that the loud music was permitted to emanate from the building due to management error and was quickly corrected when the police arrived do not create substantial and compelling reasons to deviate from the presumptive penalty. In considering how the noise ordinance may commonly be violated, it can be presumed that a person may be playing loud music without thought of the neighbors and, when advised of the disturbance, turns it down or closes the windows. This would seem to be a typical case. The ordinance does not require a violator to be deliberate in his or her disturbance of the neighbors where it is addressed by the City administratively. Licensee concedes that there was a noise disturbance. However, there are no substantial and compelling reasons to force a deviation from the presumptive administrative penalty.

**J.R.M.**

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<sup>19</sup> *Id.* at (f).

<sup>20</sup> Saint Paul Legislative Code § 310.06(b)(6)(a).

<sup>21</sup> *Id.* at § 310.05(m).

<sup>22</sup> *Id.*

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
PO BOX 64620  
600 NORTH ROBERT STREET  
ST. PAUL, MN 55164-0620

**CERTIFICATE OF SERVICE**

In the Matter of Jefferson Avenue Investments, Inc d/b/a/ Tavern on the Avenue	OAH Docket No.: 5-6020-32561
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Rachel Youness, certifies that on July 27, 2015, she served the true and correct **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** by courier service or by placing it in the United States mail with postage prepaid, addressed to the following individuals:

Thomas Williams  
1605 Atwater Path  
Inver Grove Heights, MN 55077

Geoffrey S. Karls  
St. Paul City Attorney's Office  
Assistant City Attorney  
400 City Hall & Courthouse  
15 W Kellogg Blvd  
Saint Paul, MN 55102