

March 22, 2017

VIA E-FILING ONLY

Shari Moore, City Clerk
City of St. Paul
310 City Hall
15 W Kellogg Blvd
Saint Paul, MN 55102
cityclerk@ci.stpaul.mn.us

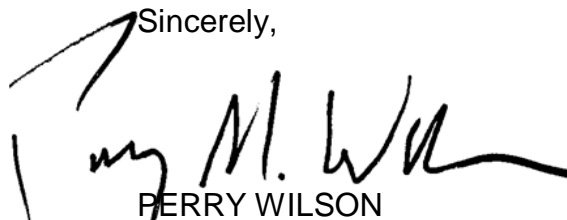
Re: *In the Matter of Midway Enterprises, LTD d/b/a Hot Rods Bar and Grill*
OAH 10-6020-34183

Dear City Clerk Moore:

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 Sheena.Denny@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 Sheena Denny at (651) 361-7881 or Sheena.Denny@state.mn.us, or facsimile at (651) 539-0310.

Sincerely,



PERRY WILSON
Administrative Law Judge

PMW:sd

Enclosure

cc: Therese Skarda
Jeffrey C O'Brien

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 Midway Enterprises, LTD d/b/a Hot Rods Bar and Grill	OAH Docket No.: 10-6020-34183
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Sheena Denny, certifies that on March 22, 2017, she served the true and correct **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** by courier service, by placing it in the United States mail with postage prepaid, or by electronic mail, as indicated below, addressed to the following individuals:

VIA E-FILING ONLY

Shari Moore, City Clerk
City of St. Paul
310 City Hall
15 W Kellogg Blvd
Saint Paul, MN 55102
cityclerk@ci.stpaul.mn.us

Jeffrey C O'Brien
Lommen Abdo, P.A.
1000 International Cte
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VIA E-MAIL ONLY

Therese Skarda
St. Paul City Attorney's Office
Assistant City Attorney
15 W Kellogg Blvd
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Therese.Skarda@ci.stpaul.mn.us

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF SAINT PAUL

In the Matter of All Licenses Held by
Midway Enterprises, LTD d/b/a Hot Rods
Bar and Grill, License No. 0016294

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

This matter came on for hearing on February 22, 2017, before Administrative Law Judge Perry Wilson at the Office of Administrative Hearings (OAH) in St. Paul, Minnesota. The OAH record closed at the conclusion of the hearing.

Therese Skarda, Assistant City Attorney, appeared on behalf of the City of St. Paul (City). Jeffery O'Brien, Lommen Abdo, appeared on behalf of Midway Enterprises, LTD, d/b/a Hot Rods Bar and Grill (Respondent).

STATEMENT OF THE ISSUES

1. Did the Respondent violate St. Paul Legislative Code § 409.08(15) on October 20, 2016, by failing to take reasonable and adequate steps to prevent a person from leaving its premises with a plastic cup containing an alcoholic beverage?

2. Did Respondent violate St. Paul Legislative Code § 409.08(9) on October 20, 2016, by failing to prevent a person from loitering on its premises after the lawful closing hour?

3. Is the proposed \$1,500 penalty an appropriate licensing sanction under St. Paul Legislative Code §§ 310.05 and 310.06?

4. Should the costs of this proceeding be assessed against the Respondent or City under St. Paul Legislative Code § 310.05(k)?

SUMMARY OF RECOMMENDATIONS

The Administrative Law Judge concludes that the Respondent violated St. Paul Legislative Code § 409.08(15) and § 409.08(9), as alleged by the City. The Respondent did not show that there are substantial or compelling reasons to deviate from the presumptive penalty that is set forth in the Legislative Code for these violations. Neither the City nor the Respondent showed that costs should be assessed against the opposing party under St. Paul Legislative Code § 310.05(k). Accordingly, the Administrative Law Judge recommends that the City take appropriate adverse action against the licenses held by the Respondent.

Based upon the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Respondent operates a bar at 1553 University Avenue West in the City of St. Paul. Dean Bigaouette owns the Respondent,¹ and he also owns the real estate on which Respondent operates its bar.²

2. The Respondent currently holds the following licenses issued by the City: Liquor On Sale; Liquor On Sale – Sunday; Alarm Permit; and Entertainment.³

3. On September 15, 2016, during a compliance check at Respondent, an undercover police officer was allowed to leave the bar with an open alcoholic beverage.⁴

4. On December 7, 2016, the City Council fined Respondent \$500 and imposed three conditions on Respondent's licenses, based on the September 15, 2016 incident.⁵ Respondent agreed that three conditions would be placed on its licenses and paid the fine.⁶

5. In 2016, the City police department established the Snelling Corridor Midway Area (SCMA) program in response to an increase in drug crime and crime by youth in the Snelling/University area.⁷ Police in the SCMA area increased surveillance and worked with business owners to lower crime.⁸ Respondent's bar is located in the SCMA.⁹

6. City police met with Respondent's owner and employees to discuss criminal activity occurring in and around its bar.¹⁰

7. On October 20, 2016, the sergeant in charge of the St. Paul Police's Western District assigned officers on the midnight shift to locate and arrest Michael Jones, who had an outstanding arrest warrant for a gross misdemeanor offense.¹¹ Jones was known to police to frequent Respondent's bar.¹²

8. Respondent did not have security personnel working on the premises on October 19 or 20, 2016.¹³

¹ Exhibit (Ex.) 1-3; Testimony (Test.) of Dean Bigaouette.

² Test. of D. Bigaouette.

³ Test. of Eric Hudak.

⁴ Ex. 4-1.

⁵ *Id.*

⁶ Test. of D. Bigaouette.

⁷ Test. of Sergeant Michael Dunaski.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Test. of M. Dunaski.

¹² *Id.*

¹³ Test. of D. Bigaouette.

9. In order to locate Jones, one officer was assigned to surveillance behind Respondent's bar.¹⁴ That officer stationed himself about 50 yards from the rear door of Respondent's bar.¹⁵ Using binoculars, the officer observed Jones moving in and out of the rear door.¹⁶ Jones's car was parked about five yards from the rear of the bar.¹⁷

10. Other officers were stationed in squad cars at locations in the blocks surrounding Respondent's bar, waiting for the officer performing surveillance of Jones to tell them that he was leaving Respondent's bar in his car.¹⁸

11. At approximately 2:00 a.m. the surveillance officer observed Jones and a female leave Respondent's bar. Jones, who was carrying a white cup from Respondent's bar, entered his car, and drove away.¹⁹ Jones did not have time to put alcohol in the cup between the time he entered his car and the time he drove away.²⁰

12. The surveillance officer reported Jones's departure to the officers waiting to arrest him.²¹

13. The female who left with Jones is Respondent's night manager.²² On October 20, 2016, she and Jones were dating.²³ Jones was in the bar to make sure that the manager was safe as she closed the bar.²⁴ Jones brought a bag from a liquor store into the bar when he arrived earlier in the evening.²⁵ The manager placed the bag behind the bar until closing time.²⁶

14. Within a few minutes after Jones left Respondent's parking lot, the police officers waiting close by stopped Jones and arrested him.²⁷ The officers were able to observe Jones from the time he left Respondent's bar until the time of his arrest.²⁸ Jones did not stop his vehicle until ordered to do so by the police.²⁹

15. When officers searched Jones's vehicle they found a white cup with liquid and ice in it spilled on the floor of the car.³⁰ The liquid from the cup smelled like an alcoholic beverage.³¹

¹⁴ Test. of M. Dunaski.

¹⁵ Test. of Vincent Adams.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Test. of M. Dunaski.

¹⁹ Test. of V. Adams.

²⁰ *Id.*

²¹ *Id.*

²² Test. of Maura Eledridge.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Test. of Joshua Nyhus.

²⁸ Test. of M. Dunaski.

²⁹ *Id.*

³⁰ Test. of David Ratley.

³¹ *Id.*

16. The arresting officers photographed all items they found during the search of Jones's car.³² Except for the plastic cup, no other alcoholic beverages were found.³³

Procedural Findings

17. By letter dated December 22, 2016, Therese Skarda, Assistant City Attorney, notified Respondent that the City Department of Safety and Inspections (DSI) had recommended adverse action against all licenses held by the Respondent based on alleged violations of St. Paul Legislative Code § 409.08(9) and (15). The letter advised the Respondent that the DSI intended to recommend that a \$1,000 penalty be imposed against the Respondent under St. Paul Legislative Code § 310.05(m) based on multiple violations of the Legislative Code.³⁴

18. By letter dated January 4, 2017, the Respondent contested the violations alleged by the City and requested a hearing.³⁵

19. On January 9, 2017, the City issued a Notice of Administrative Hearing, scheduling the hearing to take place on February 22, 2017.³⁶

20. The hearing took place as scheduled on February 22, 2017.

Based upon the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the St. Paul City Council have authority to hear this matter pursuant to St. Paul Legislative Code § 310.05(c).

2. The hearing in this matter was conducted in accordance with the applicable portions of the procedures set forth in St. Paul Legislative Code § 310.05.

3. The City gave proper notice of the hearing in this matter and has fulfilled all procedural requirements of rule and law.

4. As the party proposing that certain action be taken, the City has the burden of proving by a preponderance of the evidence that adverse action is warranted against the licenses held by the Respondent.³⁷

5. Under the St. Paul Legislative Code, the St. Paul City Council has grounds to take adverse action against any or all licenses held by a licensee if the licensee has failed to comply with any condition set forth in the license or if the licensee has violated

³² Exs. 9-1 to 9-4.

³³ Test. of M. Dunaski.

³⁴ Ex. 10.

³⁵ Ex. 11.

³⁶ Ex. 12.

³⁷ Minn. R. 1400.7300, subp. 5 (2015).

the provisions of any statute, ordinance or regulation reasonably related to the licensed activity.³⁸

6. St. Paul Legislative Code § 409.08(9) provides: “No person shall remain in or loiter in the parking lot of an on-sale licensee after the lawful closing hour.”

7. On October 20, 2016, the lawful closing hour of Respondent’s bar was 1:00 a.m.³⁹

8. The City proved by a preponderance of the evidence that Respondent violated Legislative Code § 409.08(9) on October 20, 2016, when a person not an employee, remained in the bar after the lawful closing hour.

9. St. Paul Legislative Code § 408.09(15) provides:

Each on-sale licensee shall have the responsibility of taking reasonable and adequate steps to prevent persons from leaving the licensed premises with a bottle, can or glass containing any alcoholic beverage, and the failure to do so may subject such licensee to adverse action against his or her license.

10. The City demonstrated by a preponderance of the evidence that the Respondent violated the requirements set forth in St. Paul Legislative Code § 408.09(15) on October 20, 2016, by allowing a person to leave its premises with an alcoholic beverage.

11. The penalty matrix contained in the St. Paul Legislative Code sets forth presumptive penalties for certain violations. The Code states that the City Council may deviate from the presumptive penalty where the Council determines that there are “substantial and compelling reasons making it more appropriate to do so.”⁴⁰

12. The Respondent committed a prior violation of Legislative Code § 408.09(15) on September 15, 2016. As a result, the violation that occurred on October 20, 2016, was the Respondent’s second violation within one year. The penalty matrix suggests a presumptive penalty of \$1,000 for a second violation.

13. The City has shown a sufficient basis to impose a presumptive penalty of \$1,000 against the Respondent.

14. There are no substantial or compelling reasons in the record to justify a deviation from the presumptive penalty in this case.

15. St. Paul Legislative Code § 310.05(k) provides that the City may impose costs of this hearing on Respondent, if it has engaged in any of the following specified acts:

³⁸ St. Paul Legislative Code § 310.06(a), (b)(6)(a).

³⁹ Test. of E. Hudak.

⁴⁰ St. Paul Legislative Code § 310.05(m).

(i) the position, claim or defense of the licensee or applicant was frivolous, arbitrary or capricious, made in bad faith, or made for the purpose of delay or harassment; (ii) the nature of the violation was serious, or involved violence or the threat of violence by the licensee or employees thereof, or involved the sale of drugs by the licensee or employees thereof, and/or the circumstances under which the violation occurred were aggravated and serious; (iii) the violation created a serious danger to the public health, safety or welfare; (iv) the violation involved unreasonable risk of harm to vulnerable persons, or to persons for whose safety the licensee or applicant is or was responsible; (v) the applicant or licensee was sufficiently in control of the situation and therefore could have reasonably avoided the violation, such as but not limited to, the nonpayment of a required fee or the failure to renew required insurance policies; (vi) the violation is covered by the matrix in section 409.26 of the Legislative Code; or (vii) the violation involved the sale of cigarettes to a minor.

16. The City has not shown that Respondent has engaged in conduct that would allow it to impose on Respondent any of the costs of this proceeding pursuant to City Legislative Code § 310.05 (k).

17. Section 310.05(k) of the City Legislative Code does not permit an award of the costs of this proceeding against the City.


18. The attached Memorandum is incorporated in these Conclusions of Law.

Based upon the Conclusions of Law, and for the reasons explained in the attached Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the St. Paul City Council take appropriate action against the licenses held by Midway Enterprises, LTD d/b/a Hot Rods Bar & Grill, located at 1553 University Avenue West in St. Paul, Minnesota.

Dated: March 22, 2017


PERRY M. WILSON
Administrative Law Judge

Reported: Digitally recorded; no transcript prepared.

NOTICE

This report is a recommendation, not a final decision. The St. Paul City Council will make the final decision after reviewing the record and may adopt, reject or modify the Findings of Fact, Conclusions of Law, and Recommendation issued by the Administrative Law Judge. Pursuant to Section 310.05 of the St. Paul Legislative Code, 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. The parties should contact Shari Moore, City Clerk, City of St. Paul, 290 City Hall, 15 West Kellogg Boulevard, St. Paul, MN 55102, to find out the process for presenting argument.

MEMORANDUM

The City's Legislative Code provides, in general, that the City may take adverse action against any or all licenses or permits on the basis that the licensee has failed to comply with any condition set forth in the license or has violated any of the provisions of any statute, ordinance or regulation reasonably related to the licensed activity.⁴¹ The Code also sets forth presumptive penalties that should be applied for various violations, and allows the City to deviate from the presumptive penalty where there are substantial and compelling reasons for doing so.⁴²

As detailed in the Findings of Fact, the City provided ample evidence that Respondent violated the City Legislative Code on October 20, 2016 and that \$1000 is the appropriate amount of the fine that should be imposed.

During the hearing, the Respondent argued that the conditions and \$ 500 fine imposed on its license on December 7, 2016, and the \$1000 fine imposed against it in this proceeding are part of an attempt by the City to take Respondent's bar away from it. The motive for this attempted deprivation of property was alleged to be the City's desire to redevelop the area in light of the opening of a new soccer stadium. No admissible evidence was presented to support this claim. Respondent's owner did testify that he was told by a person that an unidentified sheriff's deputy had warned of the city's attempt to take Respondent's property. This testimony does not meet the requirements of Minn. R. 1400.7300, subp. 1 (2015), for admissible hearsay evidence, because it is unreliable.

The testimony offered by Respondent in an attempt to show that Jones was on the premises until 2:00 a.m. to provide security for the night manager is unpersuasive. If security was needed, Respondent should have provided it as a part of responsibly operating its business.

The Administrative Law Judge finds the night manager's testimony that she did not provide alcohol found in the plastic cup to Jones is incredible when compared with the testimony of the police officers. The night manager said that Jones left the bar at 2:00 a.m. with a bag containing alcohol and that he went to his car, where she collected

⁴¹ St. Paul Legislative Code § 310.06(b)(6)(a).

⁴² *Id.*, § 310.05(m).

the bag and put it in her trunk. Why Jones would have possession of the bag for no more than a minute or two is not explained. The surveillance officer testified that he saw only a white cup in Jones's hand when he left the bar at 2:00 a.m. The other officers testified that there was not time for Jones to put alcohol in the cup from the time he left the bar parking lot until his arrest. No motive was suggested for the police officers to make up these facts. The Administrative Law Judge finds the officers' testimony more credible on this point than the testimony of the night manager, who would admit violating Respondent's rules and the law by providing alcohol to Jones after 1:00 a.m. and by allowing him to leave Respondent's premises with a cup containing alcohol.

P. M. W.