



## MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

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August 31, 2011

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Shari Moore  
City Clerk  
310 City Hall  
15 West Kellogg Blvd.  
St. Paul, MN 55102

Re: *In the Matter of Licenses Held by V & HM Plus, LLC,  
d/b/a El Pantano Plus for Premises Located at  
586 Rice Street in St. Paul  
OAH Docket No. 3-6020-22020-3*

Dear Ms. Moore:

Enclosed herewith and served upon you by mail or by courier service is the Administrative Law Judge's Findings of Fact, Conclusions and Recommendation in the above-entitled matter. Also enclosed is the official record, (one package), to be included in your file. Our file in this matter is now being closed.

Sincerely,

A handwritten signature in cursive script that reads "Kathleen D. Sheehy".

KATHLEEN D. SHEEHY  
Administrative Law Judge

Telephone: (651) 361-7848

KDS:nh

Enclosure

cc: Kyle Lundgren  
Boris Parker

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

In the Matter of Licenses Held by V & HM  
Plus, LLC, d/b/a El Pantano Plus for  
Premises Located at 586 Rice Street in St.  
Paul

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

This matter came on for hearing June 8, 2011, before Administrative Law Judge Kathleen D. Sheehy at the County Commissioner's Office, Room 220 City Hall/Courthouse, 15 West Kellogg Boulevard, St. Paul, Minnesota. The OAH record closed on July 12, 2011, upon receipt of the City's written closing argument.<sup>1</sup>

Kyle Lundgren, Assistant St. Paul City Attorney, appeared on behalf of the St. Paul Department of Safety and Inspections (City or DSI). Boris Parker, Parker & Wenner, appeared on behalf of V & HM Plus, LLC (Licensee or El Pantano).

**STATEMENT OF ISSUE**

1. Did the Licensee allow a person under the age of 21 to enter its establishment on May 9, 2010, in violation of license condition #11?<sup>2</sup>
2. Did the Licensee fail to wand or check identification of patrons entering the establishment on November 20, 2010, in violation of license condition #6, and did the Licensee fail to provide complete video recordings for this date to the City as requested, in violation of license condition #2?<sup>3</sup>
3. If yes to any of the above, is revocation of the licenses warranted under the St. Paul Legislative Code?

Based on the hearing record, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. El Pantano Plus is a nightclub located at 586 Rice Street in St. Paul. It functions as an event center and is typically open only on Fridays through Sundays.

<sup>1</sup> The OAH was closed from July 1, 2011, through July 21, 2011.

<sup>2</sup> The City has referred to past and currently alleged violations as Violations A through E. The exhibits pertaining to the violation alleged in Issue No. 1 were marked as Exs. D1 through D10.

<sup>3</sup> The exhibits pertaining to the violations alleged in Issue No. 2 were marked as Exs. E1 through E10.

The Licensee brings music groups and other entertainment from Mexico to perform at the establishment, and its customers pay a cover charge to obtain entry.<sup>4</sup> The Licensee, V & HM Plus, LLC, holds on-sale liquor, restaurant, and entertainment licenses.<sup>5</sup> Maria Leon and Vu Long are the partners who own V & HM Plus, LLC.<sup>6</sup>

2. El Pantano's licenses were issued August 19, 2009. The Licensee originally sought a 2:00 a.m. closing license, but the City did not approve this license based on objections expressed by neighbors.<sup>7</sup>

3. El Pantano passed a liquor compliance check performed by the St. Paul Police Department on August 21, 2009.<sup>8</sup>

4. One of the license conditions requires El Pantano to obtain a special permit for events open to persons under the age of 21.<sup>9</sup> On February 25, 2010, the City issued a Notice of Violation to El Pantano alleging that the Licensee had failed to have worker's compensation insurance in place and had allowed a 19-year-old to be present without a special permit on February 5, 2010. On March 8, 2010, El Pantano paid the \$1,000 fine required under the City's penalty matrix for a first appearance involving multiple violations. In April 2010 the Licensee complied with the requirement to have worker's compensation insurance in place.<sup>10</sup>

5. On May 20, 2010, the City issued a Notice of Violation to El Pantano alleging that the Licensee had allowed patrons to remain in the bar after 1:30 a.m. on May 16, 2010. On June 3, 2010, El Pantano paid the \$1,000 fine required under the City's penalty matrix for a second appearance.<sup>11</sup>

6. On October 8, 2010, the City issued a Notice and Order for Administrative Hearing to El Pantano, based on allegations that the Licensee had served a patron who had not provided identification on August 14, 2010, in violation of a license condition that requires El Pantano to verify the age of patrons by checking state or federally issued identification cards. This matter went to hearing in November 2010. On February 16, 2011, the City Council concluded the violation had occurred and imposed the matrix penalty for a third appearance—a \$2,000 fine and a ten-day suspension of the licenses. The Licensee's appeal of the City's disciplinary action for this violation is presently pending in the Minnesota Court of Appeals. The issue to be determined on appeal is whether a Mexican Consular identification card is adequate photo identification for purposes of satisfying the license condition. The City has stayed the fine and ten-day suspension pending the conclusion of the appeal process.<sup>12</sup>

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<sup>4</sup> Testimony of Maria Leon.

<sup>5</sup> Ex. D5-2.

<sup>6</sup> Ex. D5-4.

<sup>7</sup> Ex. D5-4; Testimony of Christine Rozek.

<sup>8</sup> Ex. D5-1.

<sup>9</sup> Ex. D5-1.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Ex. D5-1, D5-3.

## Incident of May 9, 2010

7. El Pantano's license is subject, in relevant part, to the following license condition:

No. 11. The license holder will not allow anyone under the age of twenty-one (21) to enter the establishment except in accordance with Minnesota State Statute 340A.503(4), and Section 409.08 of the City of Saint Paul Legislative Code. Events held for individuals under the age of twenty-one (21) require a special permit from DSI, and require that such events are held in a portion of the establishment where liquor is not permitted, consumed, sold, or served. The licensee shall be responsible for ensuring that individuals under the age of twenty-one (21) who attend such events can not gain access to an area where liquor is sold, served, permitted, or consumed.<sup>13</sup>

8. At about 1 a.m. on May 9, 2010, St. Paul Police Officer Charles Redmond was on patrol in the area of 586 Rice Street. A private security officer (not associated with El Pantano) flagged down Officer Redmond. The security officer had taken a man into custody, after being told by someone else that the man was attempting to break vehicle windows in the parking lot at 586 Rice Street. Officer Redmond put the man in his squad car and looked at vehicles in the parking lot, but he found no broken windows. The man had a state-issued identification card identifying him as Jesus Jacobo, and he was 20 years and seven months of age at the time. He appeared to be intoxicated. The officer administered a preliminary breath test, the results of which reflected a blood alcohol level of 0.217 percent.<sup>14</sup>

9. Officer Redmond asked Jacobo where he had been drinking, and Jacobo pointed toward El Pantano. He said he had consumed two shots and a couple of drinks before being escorted out by security. Officer Redmond issued Jacobo a citation for underage drinking and brought him home. Jacobo had a mark on his wrist that appeared to be an "X" made with permanent marker ink.<sup>15</sup>

10. At the time of this incident, Jacobo was on probation for a felony conviction in Dakota County for aiding an offender—accomplice after the fact, to which he had pleaded guilty on January 13, 2009. His 44-month sentence had been stayed on the condition that he comply with the terms of probation, one of which was that he was required to refrain from using alcohol. He had recently been released from the Dakota County Jail for a probation violation.<sup>16</sup>

11. DSI received Officer Redmond's report regarding this incident on May 10, 2010.<sup>17</sup> Seven months later, on December 28, 2010, DSI requested more information

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<sup>13</sup> Ex. D6.

<sup>14</sup> Testimony of Officer Charles Redmond.

<sup>15</sup> Test. of Officer Redmond.

<sup>16</sup> Ex. D4.

<sup>17</sup> Test. of C. Rozek.

from Officer Redmond about his discussions with the Licensee's employees. Officer Redmond replied that he had only a vague memory of employees at the door stating that Jacobo was causing problems inside the bar before he was asked to leave.<sup>18</sup>

12. On March 8, 2011, the City issued a Notice of Violation to El Pantano with regard to this incident, alleging that El Pantano had allowed Jacobo, an underage man, on the premises without a special permit.<sup>19</sup>

13. Because of the ten-month delay between the time of this incident and the issuance of the Notice of Violation, the Licensee could not review video from its security cameras to determine whether Jacobo had been inside its premises, or had been denied entry that night due to his state of intoxication (as asserted by a manager). Jacobo was not available to testify at the hearing in this matter, because on March 23, 2011, his felony sentence was executed based on additional probation violations, and he was committed to prison.<sup>20</sup>

14. El Pantano's practice is to have security personnel ask customers for identification; after identification is provided, the customer is allowed to pay the cover charge. After the cover charge is paid, the customer's wrist or top of the hand is marked with a stamp that says "Admit." The Licensee does not mark the wrists of customers with an "X" made by marker pen.<sup>21</sup>

#### **Incident of November 20, 2010**

15. El Pantano's licenses are subject to the following conditions, in relevant part:

No. 2. The licensee will provide and maintain working video surveillance cameras and equipment to record activity on these premises prior to issuance of the license and in accordance with Saint Paul Police Department (SPPD) recommendations. Tapes and recordings must be maintained for a minimum of thirty (30) days, and there shall be an employee on-staff at all times during business hours with the ability to make them immediately available to the SPPD and/or the Department of Safety and Inspections (DSI) upon request.

No. 6. Security personnel shall be assigned to each entrance and remain until all patrons have left the licensed premises, which include the parking lot(s). Security personnel shall "wand" (using a metal detector) each patron and check all handbags and packages carried by patrons. Security personnel shall verify the age of patrons by checking state or federally issued identification cards (no picture I.D., no entrance). Customers re-

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<sup>18</sup> Ex. D2.

<sup>19</sup> Ex. D7-1. There is no allegation that the Licensee served alcohol to an underage person.

<sup>20</sup> Ex. D4.

<sup>21</sup> Testimony of Alejandro Perez.

entering the establishment shall be subject to the same security measures as customers entering the establishment for the first time.<sup>22</sup>

16. In the course of the matter that went to hearing in November 2010, the Licensee submitted a DVD containing video clips taken from its security cameras on November 20, 2010. The DVD was submitted for the purpose of proving that the person in question was a regular customer who used a consular identity card with a photograph, issued under a name different than the one he had provided to the St. Paul police. The DVD was received in evidence in that case.

17. After viewing the DVD, the City mailed a request to the Licensee on November 24, 2010, seeking copies of all video from all cameras on November 20-21, 2010.<sup>23</sup> DSI personnel believed the DVD provided evidence of other potential violations that it sought to investigate further. On December 8, 2010, the Licensee emailed a response indicating that it was attempting to download the requested material.<sup>24</sup> In assembling the DVD, however, the computer file storing the video footage was corrupted. The Licensee has been unable to produce a copy of the requested video footage.<sup>25</sup>

18. The DVD of video clips from November 20, 2010, shows two men entering the premises together. Security personnel require the men to show identification, and the security personnel then perform a physical pat-down search of each man before allowing them to enter. The security personnel do not "wand" the men with metal detectors.<sup>26</sup>

19. The Licensee's practice, until receiving the Notice of Violation in this matter, was to require a physical pat-down search of all male customers entering the premises. Women were "wanded" using a metal detector. The Licensee's manager believed that a physical pat-down search of men was more effective in discovering weapons and drugs than a metal-detecting wand; the Licensee used a metal-detecting wand on women because the Licensee believed a pat-down search by male security personnel was too intrusive for female customers.<sup>27</sup> After receiving the Notice of Violation, the Licensee began wandling both men and women with a metal detector.<sup>28</sup>

20. The City does not require any licensees to conduct pat-down searches of customers. DSI agrees that pat-down searches can be a potential invasion of the privacy of customers.<sup>29</sup>

21. The Licensee has had no reported problems with customers using weapons or drugs inside or outside the establishment in the time that it has been open.

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<sup>22</sup> Ex. E9.

<sup>23</sup> Ex. E2.

<sup>24</sup> Ex. E4-2.

<sup>25</sup> Test. of A. Perez.

<sup>26</sup> Ex. E1.

<sup>27</sup> Test. of A. Perez; Test. of M. Leon.

<sup>28</sup> Test. of A. Perez.

<sup>29</sup> Test. of C. Rozek.

DSI personnel agree that the Licensee's policy has been successful in preventing the occurrence of violations concerning weapons and drugs.<sup>30</sup> DSI maintains, however, that use of a metal-detecting wand is a condition of the license and that the Licensee must comply with the condition and use the wand on all customers.<sup>31</sup>

22. The DVD also shows an older single man wearing a patterned jacket entering the premises. The man appears to show the top of his hand to a security guard, who then allows him to enter the premises without conducting a pat-down search or using a metal-detecting wand.<sup>32</sup>

23. The man in the patterned jacket is Gregorio Sanchez, known to the Licensee by the nickname Amate. Until three to four months ago, Sanchez worked in El Pantano's parking lot assisting customers and picking up trash. Based on the DVD, it appears that Sanchez was a patron on the night in question, because he showed the top of his hand to security personnel to obtain re-entry into the establishment.<sup>33</sup>

24. On March 18, 2011, the City issued a Notice of Intent to Revoke Licenses based on the failure to wand patrons on November 20, 2010, and the failure to provide all video from that day, as requested by the City.<sup>34</sup>

25. The two Notices alleging violations on May 9, 2010, and November 20, 2010, were combined for hearing in this matter.

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

### CONCLUSIONS

1. The Administrative Law Judge and the St. Paul City Council have authority to hear this matter pursuant to Minn. Stat. § 14.50 and St. Paul Legislative Code § 310.05(c).
2. The Hearing was conducted in accordance with applicable procedures set forth in § 310.05 of the St. Paul Legislative Code.
3. The City gave proper notice of the Hearing and has fulfilled all procedural requirements.
4. The City has the burden of proving by a preponderance of the evidence that adverse action is warranted against the Licenses held by V & HM Plus, LLC, d/b/a El Pantano Plus.

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<sup>30</sup> Test. of C. Rozek.

<sup>31</sup> *Id.*

<sup>32</sup> Ex. E1.

<sup>33</sup> Test. of A. Perez.

<sup>34</sup> Ex. E6-1.

5. The City has not demonstrated by a preponderance of the evidence that on May 9, 2010, the Licensee violated condition #11 by allowing an underage person into the bar without a special permit.

6. The City has demonstrated by a preponderance of the evidence that the Licensee failed to comply with condition #6 on November 20, 2010, because it used a pat-down search of male customers instead of the metal-detecting wand required by the license and it failed to wand a patron who re-entered the premises after being outside.

7. The City has demonstrated by a preponderance of the evidence that the Licensee failed to comply with condition #2, when it failed to make all video taken on November 20, 2010, from its security cameras available to the City in response to the City's request.

8. The St. Paul City Council may take adverse action against any or all licenses or permits, licensee or applicant for a license, on the basis that the licensee or applicant 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.<sup>35</sup>

9. Section 310.05(m) of the St. Paul Legislative Code contains a penalty matrix applicable to all license types, "except that in the case of a violation involving a liquor license § 409.26 shall apply where a specific violation is listed."

10. Pursuant to § 310.05 (m)(v) of the St. Paul Legislative Code, this would be either the Licensee's third and fourth appearance within 18 months or fourth and fifth appearance within 24 months, depending on whether the case that is currently on appeal is counted. The presumptive penalty for a third appearance for violations of license conditions is a \$2,000 fine and ten-day suspension; the presumptive penalty for a fourth appearance is revocation. The City Council may deviate from the presumed penalties in an individual case where the council finds and determines that there exist substantial and compelling reasons making it more appropriate to do so.

11. Assuming this is a fourth appearance, the City's recommendation to revoke all licenses is supported by the penalty matrix contained in § 310.05. There are substantial and compelling reasons, however, to impose sanctions other than revocation in this matter.

Based on the Conclusions, the Administrative Law Judge makes the following:

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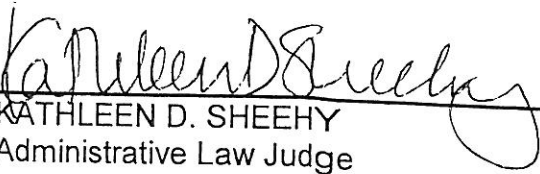
<sup>35</sup> St. Paul Legislative Code § 310.06 (b)(5) & (b)(6)(a).



## RECOMMENDATION

**IT IS RECOMMENDED** that the St. Paul City Council take action consistent with the Conclusions above.

Dated: August 31, 2011

  
KATHLEEN D. SHEEHY  
Administrative Law Judge

Reported: Digitally Recorded

## 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 and Recommendation contained herein. Pursuant to Section 310.05 of the St. Paul Legislative Code, the City Council's final decision shall not be made until this Report has been made available to the parties to the proceeding and either party has been provided an opportunity to present oral or written arguments alleging error on the part of the Administrative Law Judge in the application of the law or the interpretation of the facts and an opportunity to present argument relating to any recommended adverse action. Any interested parties should contact Shari Moore, St. Paul City Clerk, 290 City Hall, 15 West Kellogg Boulevard, St. Paul, MN 55102, to learn the procedure for presenting argument.

## MEMORANDUM

The factual record regarding the Licensee's culpability for the May 9, 2010, incident is cloudy. The City asserts that Jacobo was inside the premises and became angry after he was ejected for causing trouble; the Licensee contends Jacobo attempted to enter and became angry when he was denied entry because he was drunk. The delay by the City in characterizing this as a violation, and the Licensee's resulting inability to use its security system to shed light on the question, have contributed to the difficulty. Although the Notice of Violation alleges that Jacobo told Officer Redmond he had been drinking inside the bar, Officer Redmond testified during the hearing that Jacobo merely pointed toward the bar. Officer Redmond also frankly acknowledged that he was not sure, given the passage of time, whether the Licensee's employees had indicated that Jacobo had been causing trouble inside the bar.

As a consequence, resolution of this issue is basically a credibility contest between the hearsay statements made by a heavily intoxicated felon, on the one hand, and the Licensee's manager. The Administrative Law Judge concludes that the statements made by Jacobo to Officer Redmond about drinking inside the bar are insufficiently reliable to serve as the basis for licensing action. In addition, the manager testified that the Licensee does not mark customers' wrists with an X made in marker pen, but rather uses a stamp to mark "Paid" on their wrists. Based on the record as a

whole, the Administrative Law Judge cannot conclude that the City has proved a violation of license condition #11 on May 9, 2010.

With regard to the incident on November 20, 2010, the Licensee first contends that the DVD showing video clips from that night should not have been received in evidence here because, as evidence received in a previous case, it is subject to an absolute judicial privilege. During the hearing in this case, the ALJ indicated that the DVD (marked as Ex. E1) was conditionally received, subject to the privilege objection, which the parties agreed to brief in post-hearing memoranda. The case law is clear that statements made in the course of a judicial proceeding are absolutely privileged and may not serve as the basis for a defamation action or other tort action; however, there is no case law applying this principle to video evidence submitted in the course of a regulatory proceeding. The Administrative Law Judge concludes that Ex. E1 is not protected by a privilege and that it was properly received in evidence in this case.

The DVD demonstrates that the Licensee's security personnel did not wand the two men who were subjected to a pat-down search, and the security personnel did not wand or pat down the employee who was socializing there that night when he re-entered the premises after going outside. These are violations of license condition #6. But the Licensee complied with the spirit of the condition, no harm to the public has resulted, and DSI witnesses agreed that whatever measures the Licensee was taking have been effective in preventing both drug and weapons offenses inside and outside the premises.

The Licensee's owners are not sophisticated, but it appears to the Administrative Law Judge that they are attempting to run the business responsibly. Considering the nature of the violations established here, the nature of previous violations, and the lack of evidence that the Licensee's operation of the business is having an adverse impact on the public, the ALJ concludes that there are substantial and compelling reasons to deviate from the matrix and that the City Council should impose sanctions other than revocation.

K.D.S.