

No. A08-681

State of Minnesota
In Court of Appeals

IN THE MATTER OF THE ON-SALE LIQUOR LICENSE, CLASS B,
HELD BY T.J. MANAGEMENT OF MINNEAPOLIS
D/B/A GABBY'S SALOON AND EATERY

**REPLY BRIEF OF APPELLANT T.J. MANAGEMENT OF
MINNEAPOLIS, INC., D/B/A GABBY'S SALOON AND EATERY**

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INTRODUCTION

In its brief, the City seeks to justify its actions by overlooking the fundamental distinction between (1) its power to consider neighborhood livability issues *before* granting a new liquor license to an establishment and (2) its obligation to treat all *existing* licensed liquor establishments in the same, reasonable and even-handed manner, without regard to the respective neighborhoods in which they are located. Notably, while the City heavily relies on the *Anton's* case in its brief, it does not discuss the impact of the *Wajda* case on the issues at hand.

These two Minnesota decisions, which happen to address two separate liquor licensing actions relating to Gabby's very location, 1900 Marshall Street in Minneapolis, reflect the distinction that must rationally guide a city when it considers whether it may take adverse license action respecting premises long occupied by a particular class of liquor licensee, as opposed to determining whether it will grant a particular class of liquor license at a given locale in the first instance. *Anton's* stands for the proposition that city representatives can and should carefully consider neighborhood concerns *before* first granting a license applicant the right to conduct a particular classification liquor business within a particular neighborhood.

Once the City has balanced the various interests and has chosen to grant the license, however, the licensee, like all other licensees in the City of Minneapolis, is held to *one* standard to maintain its license and continue to conduct business. That licensee, like all others, is obliged to operate within the laws relating to its sale of alcoholic

beverages and take adequate steps to preclude violations of the laws by those within its control and on its premises. That licensee, like all licensees, however, is *not* responsible for conduct outside of its control, occurring many blocks away, and its license may not be revoked or otherwise adversely “conditioned” by reason of alleged illegal conduct happening far from its premises and control. Were the law otherwise, a license to operate any business would be rendered meaningless, as a license would be vulnerable to the whim of disgruntled and distant neighbors, to after-the-fact changes in the makeup of the surrounding neighborhood, or to the views of city fathers claiming to know what might be “best for the neighborhood” – even if the licensee had operated its business impeccably and was guilty of no license violation or violation of any laws.

Yet, these are precisely the circumstances this Court confronts today. The City’s brief makes sweeping statements respecting the City Council’s purported authority to legally condition Gabby’s existing license for alleged causes completely outside of Gabby’s control, yet the City can point to no statutes, ordinances, or cases that support its position. If the alleged patrons of neighborhood businesses are truly breaking laws in the area, then the City of Minneapolis should and must properly address the illegal conduct of the perpetrators through its police powers, but it cannot seek to close or adversely condition law-abiding businesses that allegedly attract the troublemakers to those neighborhoods. This division of responsibility is simply part of the fundamental equation upon which our urban society operates. Businesses, nightclubs, theatres, ballparks and shopping centers attract people to the city neighborhoods in which those establishments are located. Police, fire, public works, and other city services are

required to address interests, needs and concerns respecting those neighborhoods and the people attracted to them. And cities impose taxes and fees on citizens, such as Gabby's, to pay for and maintain those necessary services. Indeed, the City of Minneapolis would not need a large and sophisticated police force if it were not a hotbed of commerce and entertainment, but were instead a sleepy hamlet with few attractions.

In this instance, however, the City, rather than meet its obligations to the neighborhood, has instead singled out one of its "attractions" and sought to revoke or condition its license to do business because it draws a particular racial group. Quite simply, the licensing laws and the Constitution preclude this effort by the City to improperly delegate its police responsibilities to a liquor licensee, to target Gabby's African-American clientele based on some perception that this group includes an undue number of "trouble makers," and to impose adverse conditions on Gabby's liquor license in an effort to dissuade Gabby's clientele from showing up in the neighborhood.

ANALYSIS

- I. **THE CITY DOES NOT HAVE AUTHORITY UNDER THE APPLICABLE STATUTE, ORDINANCE, AND CHARTER TO CONDITION A LIQUOR LICENSE AFTER ISSUANCE, PARTICULARLY WHEN THE LICENSEE HAS NOT VIOLATED ANY LAWS RELATING TO THE LICENSE.**
 - A. **The Applicable Caselaw Establishes That, While the City May Be Able to Impose Conditions on a Liquor License Before Its Issuance, the City Does Not Have Authority to Impose Conditions on the Existing License of an Innocent Licensee.**

The City repeatedly emphasizes the breadth of its discretion in licensing matters, but fails to acknowledge the legal restraints on its authority. To support its assertion

that it has authority to impose conditions on existing liquor licenses, the City relies on *Bergmann v. City of Melrose*, 420 N.W.2d 663, 665-66 (Minn. App. 1988), and *Anton's, Inc. v. City of Minneapolis*, 375 N.W.2d 504, 508 (Minn. App. 1985). These cases, however, relate to the City's discretion in initially *issuing* a liquor license, but do not extend the scope of Minn. Stat. § 340A.415 to afford the City the authority to impose adverse conditions on an innocent licensee.

Specifically, in *Bergmann*, the Court held only that a city may condition the initial *issuance* of a liquor license, and the Court noted that the city may require license applicants "to make certain concessions in exchange for their licenses." 420 N.W.2d at 665-66. Similarly, in *Anton's*, the Minnesota Court of Appeals affirmed the City's authority to deny an initial liquor license application, based on neighborhood livability concerns, when the applicant sought a *new* class of license under which the applicant would have made new uses of the premises. *Anton's*, 375 N.W.2d at 506. Neither case supports the contention that the City may impose adverse conditions, based on neighborhood livability issues, on an existing license under which the licensee has lawfully operated its business for more than twenty years.

On the contrary, our Supreme Court has previously determined that the City's authority in a licensing action is constrained when seeking to apply neighborhood livability factors to premises long used as a similarly licensed bar. Thus, in *Wajda v. City of Minneapolis*, the Minnesota Supreme Court reversed the City's denial of an on-sale beer license, which denial was based on the City's determination that the tavern was unsuitable for the neighborhood. 310 Minn. 339, 345-46, 246 N.W.2d 455, 459

(1976). In determining that the City's denial of the license application was "clearly arbitrary, capricious, and unreasonable," the Court relied on the fact that:

Prior to the 1963 rezoning, the existing zoning specifically permitted the very use [as an on-sale beer establishment] being made of the premises. Such nonconforming use was allowed to continue under the grandfather provisions of the new zoning law, and the city attorney conceded on oral argument that Mrs. Wajda had not abandoned the property's nonconforming use nor done anything else to bring about the termination of that use.

...

No substantial evidence indicated that the premises themselves were inherently unsuitable as the location of a tavern *if the tavern were lawfully and properly managed and operated.*

Id. (emphasis added).

In the instant case, the City has stipulated, and the ALJ has found, that Gabby's *is* properly managed and operated, and the premises have been used for some twenty-two years as a Class B Liquor establishment without any conditions applicable to Gabby's license and without any license violations. *Wajda* stands for the proposition that the City has limited discretion, may not consider neighborhood livability issues in reviewing the license, and may not deny, revoke, suspend, or fail to renew¹ – let alone

¹ Although the renewal of Gabby's license is not at issue in this case, Gabby's notes that the City does not have authority to refuse to renew Gabby's license, in light of the instant record. The Minnesota Supreme Court has stated that "[a]dministrative agencies and other licensing bodies have generally established a renewal process which results in license renewal as a matter of course." *Tamarac Inn, Inc. v. City of Long Lake*, 310 N.W.2d 474, 478 (Minn. 1981). The court noted that this process "is a recognition by the reviewing body that parties who invest substantial amount of resources in preparing facilities for operation are entitled to a reasonable expectation of the continuing receipt of the benefit conferred by the license." *Id.* The Court went on to state that a city only has discretion to revoke or fail to renew a liquor license "provided serious violations of the law occur." *Id.*

condition – that license so long as the premises are lawfully and properly operated and managed. *See id.*

The remaining cases on which the City relies all involve a city's authority to *revoke* a liquor license when the licensee has engaged in illegal conduct. For example, in *Bourbon Bar & Café Corp. v. City of St. Paul*, the Court of Appeals considered whether the City of St. Paul exceeded its statutory authority to revoke a liquor license based on a liquor licensee's plea of guilty to a drug-related offense; in fact, the Court reversed the City's decision to revoke. 466 N.W.2d 438, 440-41 (Minn. App. 1991). Likewise, in *Sabes v. City of Minneapolis*, the Minnesota Supreme Court upheld the City's authority to revoke a liquor license based on the licensee's violation of a licensing statute and illegal conduct on the licensee's premises. 265 Minn. 166, 171, 120 N.W.2d 871, 875 (1963).

These cases establish the parameters of a city's licensing authority. Before a city issues a new license, it may consider a broad range of factors, including those factors beyond the licensee's premises and control, and may exercise its discretion to deny the license application or impose conditions on its issuance. After a city evaluates these factors and issues a license, its authority is limited, as set forth in Minn. Stat. § 340A.415 and those portions of the city's ordinances consistent with that statute. A city may only revoke or suspend an existing license based on the factors listed in Minn. Stat. § 340A.415 and may only condition a license if grounds exist for its suspension or revocation. Quite simply, no law supports the City's assertion in this case that it may also impose adverse license conditions upon Gabby's existing license, when Gabby's

has complied with all applicable laws and has not engaged, encouraged, or tolerated illegal conduct on its premises.

In the absence of any express authority within statutes or caselaw to impose adverse license conditions on an innocent licensee, the City claims to have implicit authority to impose such conditions. No such implicit authority exists, however, and no Minnesota law supports its existence. Indeed, the only case the City cites in support of its claim is *Bohn d/b/a Old Mill Pawn v. City of Hastings*, C5-01-834, 2002 WL 173148 (Minn. App. Feb. 5, 2002). This unpublished case, however, is very narrow in its reach and has no application here. In *Bohn*, the Court of Appeals determined that the City of Hastings had authority to impose conditions short of revocation, only because the licensee had violated the law and the city therefore had authority to “order an *outright revocation* for ordinance violations.” *Bohn*, 2002 WL 173148, at *5 (emphasis added).

In this case, however, Gabby’s has engaged in no improper conduct and, thus, no grounds exist for revocation of its license. Therefore, the City lacks any legal authority, whether express or implied, to impose conditions as a less harsh alternative to revocation. Specifically, the ALJ determined that the City lacked authority to revoke Gabby’s license due to the absence of any of the statutory grounds for revocation under Minn. Stat. § 340A.415. (A20-A21.) Moreover, when the City claimed authority to revoke Gabby’s license under its own Charter and ordinance, the ALJ determined that

the ordinance and Charter were unenforceable to the extent they exceeded the City's authority under that state statute.² (A19-A20.)

Notably, the City has not filed a notice of review of the ALJ's determination that the City lacks authority to revoke Gabby's license. Therefore, the City may not now assert, in whatever form, that the requisite grounds for revocation exist. See Minn. R. Civ. App. P. 106 ("[R]espondent may obtain review of a judgment or order entered in the same action which may adversely affect respondent by filing a notice of review."); *Arndt v. Am. Family Ins. Co.*, 394 N.W.2d 791, 793 (Minn. 1986) (affirming this Court's refusal to address issue raised by respondent when respondent failed to file a notice of review). Consequently, the unchallenged findings of the ALJ on this issue establish that the statutory grounds for revocation do not exist, and the City therefore cannot rely on any such alleged grounds to support its implied authority to condition Gabby's license.

² Minnesota law fully supports the ALJ's determination. When a state law exists on the same subject as that covered by a municipal ordinance, the ordinance is valid only if "the municipality has authority to legislate in that field and the ordinance is not in conflict with the state enactment." *Mangold Midwest Co. v. Village of Richfield*, 274 Minn. 347, 350, 143 N.W.2d 813, 815 (1966); *A/AL, Inc. v. City of Faribault*, 569 N.W.2d 546, 547-48 (Minn. App. 1997). Because the City has stipulated that no grounds exist for revoking Gabby's license under Minn. Stat. § 340A.415, the City may not assert that it has authority to revoke and, thus, authority to condition Gabby's license.

B. The Legislative History of Section 340A.415 and Policy Considerations Further Confirm that the City May Only Impose Adverse License Conditions on a License Before Issuance.

In the absence of any law to support its position, the City resorts to a claimed “common sense” argument by suggesting that there is no logic for the notion that the City’s authority should be more limited after issuance of a license than before. However, such a limitation on the City’s authority to condition a license after its issuance is fully supported by the legislative history and comports with both logic and necessity.

The statutory language in this case is unambiguous, thereby obviating any need to resort to the legislative history of Minn. Stat. §340A.415. Nonetheless, that history fully supports Gabby’s interpretation of the law. In fact, the Minnesota legislature amended Minn. Stat. § 340A.415 in 1985 to enable municipalities to impose adverse license actions beyond suspension or revocation, thereby allowing cities to impose civil fines for licensees’ violations of laws or ordinances relating to intoxicating liquor. 1985 Minn. Laws, § 11. Nonetheless, in explicitly considering and expanding the choices of available adverse license actions, the legislature did *not* afford cities the power to impose *conditions* on licenses, as the City now argues should be inferred. *Id.*

Additionally, Gabby’s interpretation is supported by policy considerations. When a business applies for a liquor license, the City has the opportunity to evaluate, weigh, and balance an array of factors, including the qualifications of the license applicant, the zoning of the locale, the peace, safety and security of neighbors, the potential benefits to the business district, and the entertainment interests of patrons.

After reviewing all these factors, the City may grant the application, deny it, or inform the license applicant that the license will issue only if the licensee accepts certain conditions or restrictions. *See, e.g., Bergmann*, 420 N.W.2d at 665-66. In the latter instance, the license applicant then has a fair opportunity to evaluate whether it can profitably operate the business subject to the proposed conditions or should instead invest its efforts in another location. If, however, cities could impose adverse license conditions at any time *after* the issuance of a license, a licensee that had invested substantial time, effort, and money in developing a profitable business would find itself at the mercy of changes in the political environment, the views of vocal minorities in its neighborhood, and the unpredictable conduct of third parties away from its premises and outside its control. In short, its “license” (i.e., permission) to operate its defined business for a fixed time would be rendered meaningless, and no one would reasonably rely on a license to pursue a business venture.

Indeed, in the instant case, as a direct result of the City’s imposition of the subject license conditions, Gabby’s will be forced to close its doors after more than twenty years of lawful operation in a location the City determined was appropriate for just such a Class B bar with its occupancy levels. Its business reputation and competitive advantages will be undermined by the requirements that it reduce its occupancy and eliminate its popular free drink special, as its owner testified that each proposed condition would quickly deter its clientele from visiting Gabby’s and would destroy the business. (A197-A198.) In fact, the ALJ found that the City’s proposed conditions “most likely . . . would reduce Gabby’s revenues so severely it would be

forced to close.” (A17.) Yet the City claims just such an unfettered, implied power to destroy a business that has admittedly violated no law or term of its license. Logic and common sense clearly lead to a very different conclusion.

C. The Alleged Conduct of Third-Parties, Off Gabby’s Premises, May Not Constitute “Good Cause” to Impose Adverse License Action.

The City asserts that the “good cause” standard set forth in MCO § 259.250(9) and the City’s Charter allow it to condition Gabby’s license, based on neighborhood livability issues. This is clearly not the case, as good cause is necessarily limited to instances in which the licensee violates an applicable law, regulation, or ordinance relating to the sale of alcoholic beverages on its premises.

Indeed, in the instant case, the ALJ held that the City may not revoke Gabby’s liquor license, in light of his determinations that (1) the City may not revoke a license “on grounds other than those set forth in Minn. Stat. § 340A.415” and (2) “the City may not revoke a license based on *additional grounds set forth in its own ordinance or charter.*” (A22 (emphasis added).) The ALJ also properly determined that, to the extent City ordinances and Charter provisions are irreconcilable with the applicable state law, the City laws are “preempted by Minn. Stat. § 340A.415.” (A20.)

The “good cause” standard on which the City relies is found in its Charter, Chapter 4, Section 16, and is in turn incorporated by reference in MCO § 259.250(9). That Charter Section is entitled “License May Be Revoked” and states:

[A]ny 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; and upon conviction before any court of any person holding such a license for a violation of the provisions of any law, ordinance or

regulation relating to the exercise of any right granted by such license, the city council *may revoke* such license in addition to the penalties provided by law or by ordinance for any such violation.

(Emphasis added.) Meanwhile, MCO § 259.250(9) states that “[a]dverse license action may be based on “*good cause as authorized by Chapter 4, Section 16 of the Charter.*”

By its plain terms, the ALJ’s ruling preempts from the Charter’s “good cause” standard for revocation any causes not among the five criteria for revocation set forth in Minn. Stat. § 340A.415. Accordingly, “good cause” for revocation or other adverse license action, as set forth in Chapter 4, Section 16 of the Charter and MCO § 259.250(9), is necessarily synonymous with “the failure to comply with an applicable statute, rule or ordinance relating to alcoholic beverages” or one of the other four, specific violations *by a licensee* set forth in Minn. Stat. § 340A.415. “Good cause” simply may not be predicated on alleged neighborhood livability issues, alleged undue burdens on police resources, or any other “causes” unrelated to violations *by a licensee* and away from the licensed premises. As the ALJ noted, the “City has stipulated that Gabby’s has not violated any of the provisions of Minn. Stat. § 340A.415.” (A20.) Thus, the “good cause” standard for adverse license action has no possible application in this case.

While the City notes that Minnesota courts have upheld the good cause standard set forth in MCO § 259.250(9) and the City’s Charter, it fails to acknowledge that our Courts have limited its breadth to improper conduct by the licensee and within the licensed premises, in keeping with the dictates of Minn. Stat. § 340A.415. Thus, in the *Hard Times Café* decision, the Minnesota Court of Appeals upheld the good cause

standard against claims that it was unconstitutionally vague only by interpreting the standard as limited to instances involving conduct on the business premises and within the control of the licensee, such as the license holder's violation of laws relating to the exercise of a right granted by the license. See *Hard Times Café v. City of Minneapolis*, 625 N.W.2d 165, 172 (Minn. App. 2001). Under the *Hard Times Café* standard, the City simply may not rely on the off-premises conduct of third parties to institute adverse license action against an innocent licensee.

This interpretation is also consistent with Minnesota caselaw relating generally to a city's licensing authority. In *Wajda*, discussed above, the Minnesota Supreme Court concluded that the misconduct of a third party may not be attributed to the licensee for purposes of adverse license action. 310 Minn. at 345, 246 N.W.2d at 459. Specifically, the Court stated that imputing a tenant's conduct to the landlord applicant constituted an effort by the City to "shift its obligation to enforce its nonintoxicating liquor ordinances onto the lessor of licensed premises, an impermissible delegation of responsibility." *Id.* Additionally, in noting the City's concern that the establishment would not comply with applicable laws, the Court stated that the City had authority to rescind the license if the licensee violated the law; notably, the Court did *not* indicate that the City would have any authority to condition the license. *Id.*

Like the City's conduct in *Wajda*, the City's conduct in this case is unlawful because it seeks to impute the off-premises conduct of alleged customers to the licensee and effectively requires Gabby's to police its neighborhood to preserve its license. This constitutes an impermissible delegation of the City's police powers. Gabby's has

complied with its license and all applicable laws throughout the term of its liquor license. Therefore, the City does not have a factual basis on which to impose adverse license action.

Again, the available legislative history of Minn. Stat. § 340A.415 only lends support to Gabby's interpretation of the law. In amending section 340A.415 in both 1987 and 1991, the Minnesota legislature broadened the grounds on which a city may suspend or revoke a license. In 1987, the legislature added as a ground *a licensee's sale or purchase of alcoholic beverages to or from another retail licensee for purposes of resale*. 1987 Minn. Laws, § 12. And, in 1991, the legislature added as a ground *a licensee's conduct* in allowing gambling on the premises and *a licensee's failure to dispose of alcoholic beverages when ordered by the commissioner to do so*. 1991 Minn. Laws, § 19. Notably, despite revisiting the statute several times, the Minnesota legislature has never extended its scope to activities of third parties occurring off the premises of the licensee and outside the licensee's control. Indeed, both amendments relate entirely to the conduct of the licensee and/or within its control on its premises. This legislative history fully comports with the Court's determination in *Hard Times Café*. To the extent that the City may take adverse license action, it may only do so based on conduct that occurs on the licensee's premises and within the licensee's control.

II. GABBY'S HAS ESTABLISHED THAT THE CITY VIOLATED ITS SUBSTANTIVE DUE PROCESS RIGHTS.

The City disputes Gabby's due process claim on grounds that Gabby's possesses no protectable property or liberty interest and because the City's adverse license action against Gabby's allegedly is not "truly irrational." However, the "truly irrational" standard does not apply in the face of racial animus, the City's action is truly irrational in any event, and Gabby's certainly has a property and/or liberty interest relating to its existing liquor license.

In *Ventura Village, Inc. v. City of Minneapolis*, the Minnesota Federal District Court noted that the "truly irrational" standard would be inapplicable to a substantive due process claim in the event the plaintiffs had produced evidence of racial animus. 318 F.Supp.2d 822, 829 n.5 (D. Minn. 2004) (citing *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1004 (8th Cir. 1992)). The United States Supreme Court has specifically held that "all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Under strict scrutiny, the government must prove that its actions "are narrowly tailored measures that further compelling governmental interests." *Id.* The Sixth Circuit, too, has noted that, in substantive due process analysis, a "balance of rights is struck by deciding the appropriate standard of review in the first place Implicit in the strict-scrutiny approach is the requirement that the government's interest be sufficiently weighty to override a fundamental right in general, without attention to the specific fundamental right implicated." *United States v.*

Brandon, 158 F.3d 947, 959 (6th Cir. 1998) (citing *Adarand* and applying strict scrutiny to substantive due process claim involving liberty and free speech issues).

In light of the compelling evidence that the City instituted the instant license action against Gabby's only when Gabby's refused to change its musical format and thereby displace its African American patrons, the question before this Court is whether the City has instituted a "narrowly tailored measure" that furthers a "compelling governmental interest" through this adverse license action against a business which has admittedly complied with all laws, including its license requirements. In truth, the City's conduct makes a mockery of the notion of a "narrowly tailored measure." Rather than addressing the conduct of the alleged perpetrators, which conduct is happening many blocks from Gabby's premises, the City has instead fired a salvo at a law-abiding and well managed business, in the hopes that driving its customers away will somehow remove the alleged "troublemakers" from the neighborhood.

Furthermore, the City's approach is "truly irrational" in any event because it seeks to impose responsibility for alleged illegal conduct occurring in the outlying neighborhood on a business that is carefully monitoring and preventing misbehavior within the premises it controls. Of course, the City's approach, if approved, would put every licensed business at risk to be shut down, regardless of how well the business addresses problems and concerns within the premises for which it bears legal responsibility.

Moreover, the very conditions imposed by the City fly in the face of the ALJ's findings and conclusions on which the City purports to rely, thereby further rendering

the City's action "truly irrational." Thus, the City has imposed a "\$10,000.00 sanction" on Gabby's, when the ALJ determined that Gabby's did not violate its license or any laws relating to the provision of liquor on its premises. (A11, A17, A21.) The City has required of Gabby's a "comprehensive management plan" addressing "security, alcohol service, over service," and "strategies to effectively address criminal activity," when the ALJ determined that "Gabby's implemented appropriate security," has taken "appropriate action" to prevent criminal activity, and "has complied with all statutes, rules, and ordinances relating to alcoholic beverages." (A11, A17, A21, A23.) The City has required Gabby's to reduce the occupancy at its premises from 689 to 438 at any given time, "including staff and patio occupants," when the ALJ determined that there is no basis for any adverse license action against Gabby's relating to conduct on its business premises. (A22-A23) Finally, the City banned Gabby's free drink specials, when the ALJ determined that Gabby's has not violated any law relating to alcoholic beverages. (A11, A17, A21.) In short, the City's approach fails not only under the applicable strict scrutiny standard, but also under the truly irrational standard sponsored by the City.

As for the question of Gabby's having a protectable property or liberty interest, the City merely cites a 1907 Minnesota case for the proposition that Minnesota law does not create a property interest in *renewal* of a license. (City's Brief at 18.) While the City blithely asserts that *Country Liquors, Inc. v. City Council*, 264 N.W.2d 821 (Minn. 1978) does not support Gabby's position that it has a property interest in an existing license, the City conveniently overlooks the very statements in *Country Liquors* which

are on point. *Country Liquors* arose after the United States Supreme Court decided *Board of Regents v. Roth*, 408 U.S. 564 (1972), in which the Supreme Court stated that a liberty interest is implicated under the due process analysis when a person's good name, reputation, honor, or integrity is at stake." (quotation omitted). *Roth*, 408 U.S. at 573. Additionally, the *Roth* Court determined that a person has a property interest in a statutory benefit when a person has "a legitimate claim of entitlement to it" because the "purpose of the ancient institution of property is to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Id.* at 577. The *Roth* Court further stated:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id.

Citing *Roth*, the Minnesota Supreme Court, in *Country Liquors*, acknowledged that, while a business does not have a property right in an inactive license it seeks to have transferred, it may have "tacit" property rights and liberty interests associated with an existing liquor license and a bar's "reputation or personal character." *See Country Liquor*, 264 N.W.2d at 826. Later, in *Tamarac Inn*, the Minnesota Supreme Court noted in the context of a liquor license renewal case that "parties who invest substantial amounts of resources in preparing facilities for operation are entitled to a *reasonable expectation of the continuing receipt of the benefit* conferred by a license." 310 N.W.2d at 477 (emphasis added). More recently, in an unpublished opinion by the Minnesota

Court of Appeals respecting city action adverse to the goodwill enjoyed by a liquor licensee, the Court of Appeals presumed that a protectable property or liberty interest existed, for purposes of due process analysis:

[W]e will assume that Upper Deck has articulated some property or liberty interest, based partially on its claim that the city has adversely affected its ability to contract and “has taken away some of the goodwill [it] has enjoyed.” *See Country Liquors*, 264 N.W.2d at 826 (holding that bar has no liberty or property interest in application to transfer dormant or inactive liquor license, but suggesting that “tacit” property right might be identified if existing license were involved and that liberty interest might be implicated if city’s decision adversely affected bar’s “reputation or personal character”).

In re Dead Broke Saddle Club, No. A03-306, 2004 WL 51692 at *3 (Minn. App. Jan. 13, 2004).

As is reflected in these cases and the many cases cited in Gabby’s original brief, Gabby’s has a cognizable interest for purposes of asserting its substantive due process claim. The City’s broad, irrational, arbitrary and capricious infringement of that interest constitutes a violation of Gabby’s protected due process rights.

III. THE RACIAL ANIMUS UNDERLYING GABBY’S EQUAL PROTECTION CLAIM IS DEMONSTRATED BY DIRECT AND CIRCUMSTANTIAL EVIDENCE.

Remarkably, the City describes Inspector Skomra’s undisputed statements directed at Gabby’s African-American clientele as “random statements” not properly attributable to the City, and asserts that Gabby’s has failed to provide the requisite direct evidence of racial animus to establish an equal protection violation. The City is plainly wrong on both the facts and the law. Courts nationwide have uniformly held that evidence of racial animus or discriminatory purpose “may be direct *or* circumstantial.”

Ventura Village, 318 F. Supp. at 828 (emphasis added); *O'Neal v. Moore*, No. 06-2336, 2007 WL 541695, at *24 (D. Minn. Feb. 16, 2007) (“[A]n equal protection claimant must also show, by direct *or* circumstantial evidence, that discriminatory intent was the motivating factor for the differentiation in treatment.”) (emphasis added); *see also Williams v. Seniff*, 342 F.3d 774, 777-78 (7th Cir. 2003) (“Mr. Williams can prevail on his equal protection claim by offering direct proof of discriminatory intent or he may prove discriminatory intent by circumstantial evidence.”). In fact, the City acknowledges in its brief that courts may and do infer racial animus from various conduct: “[I]n RK Ventures and Desi’s Pizza, the complaining parties successfully *imposed* a racist taint to the actions and decision making of municipalities.” (City’s Brief at 24 (emphasis added)); *see Desi’s Pizza, Inc. v. City of Wilkes-Barre*, No. Civ. A. 3 Civ. 01-0480, 2006 WL 2460881 at * 25 (M.D. Pa. Aug. 23, 2006). Regardless, in this case Gabby’s has provided considerable evidence, *both* direct and circumstantial, of the City’s racial animus towards Gabby’s and its patrons. (See Brief of Appellant, Statement of Facts.)

The City next raises the case of *Orgain v. City of Salisbury*, 521 F.Supp.2d 465 (D. Md. 2007), a federal district court case in Maryland, to support its position that Gabby’s has not established a claim that its equal protection rights were violated. The facts of *Orgain*, however, are dissimilar to those presented in this case. Significantly, the bar in *Orgain* was guilty of ten violations of Maryland’s liquor laws; Gabby’s has committed no violations of liquor laws. In *Orgain*, the police calls that formed the basis for revoking the liquor license related to shootings and fights that took place inside the

bar or in its parking lot. The alleged police incidents in the present case relate to conduct by third parties outside of Gabby's and off its premises. These factual differences are significant because the licensing authority in *Orgain* had a lawful basis for license revocation, which contradicted the plaintiff's assertions that the revocation was racially motivated. In this case, the record is devoid of any legitimate, legal bases for revocation. Additionally, the plaintiff in *Orgain* was unable to adduce any evidence of a nexus between the revocation and racial motivation. Here, the record is replete with such evidence.

Indeed, the sworn testimony of City witnesses Skomra and Glampe unequivocally demonstrates that the City was intent on eliminating African American patrons at Gabby's, for the avowed purpose of reducing the number of "troublemakers" drawn to the neighborhood, without regard for Gabby's right to play whatever form of music it chose and the rights of its African American customers to enjoy entertainment of their choice at a place of public accommodation. It is indisputable that, had Gabby's voluntarily agreed to change its musical venue so as to cater to a White crowd, Gabby's would have avoided this adverse license action and the onerous conditions imposed by the City.

While the City characterizes as "random statements" Inspector Skomra's damning ultimatums to Gabby's owners – i.e., to change its music venue from a hip-hop/rap format to a country music format or face other adverse conditions, including occupancy reductions – the record flatly belies this contention. The meeting at which Inspector Skomra confronted Gabby's owner about changing its music format was the

product of e-mail correspondence from Councilmember Diane Hofstede to, among others, Skomra and Cervantes. As the record reflects, Councilmember Hofstede spearheaded the efforts leading to the adverse license action against Gabby's.

Indeed, Skomra was involved throughout the adverse license process. He conducted the late night inspections requested by Councilmember Hofstede; presented the proposal that Gabby's change its music venue to avoid adverse action by the City; prepared proposed license conditions presented to Gabby's during the License Settlement Conferences wherein the City sought to negotiate a settlement of the instant dispute (A132); and attended License Settlement Conferences in which the parties engaged. By indicating, on behalf of the City, that Gabby's could avoid adverse license conditions by agreeing to change its music venue and thereby attracting a different clientele, Skomra inextricably tied the discriminatory intent toward Gabby's African-American clientele to the differential, adverse treatment ultimately suffered by Gabby's at the hands of the City.

Beyond this direct evidence of racial animus, the record contains substantial circumstantial evidence, all reflected in sworn testimony of City witnesses, that the City's adverse license action was motivated by animus toward Gabby's clientele.

- Though Gabby's frequently reached its maximum occupancy of almost 700 in the previous twenty years, it never had any problems with the City's liquor licensing authorities until two years ago, when its clientele became predominantly African-American. (A11, A188, A320-A321.)

- In a purported effort to address crime concerns, the City sought Gabby's agreement to various conditions directed at African-American patrons, including a change of music away from hip-hop, implementation of a dress code targeted at clothing popular with young African-American males, and elimination of drink specials on "hip-hop night." (A197, A285.)
- In no other instances has the City subjected a liquor licensee to discipline when neither the licensee nor its employees engaged in illegal conduct, encouraged any illegal conduct or tolerated any illegal conduct. (A56.)
- In no other instances has the City instituted adverse license action based solely on its alleged disapproval of an establishment's purported impact on its neighborhood and alleged drain on police resources. (A60, A135.)
- The City has not instituted adverse license proceedings against those restaurants and bars in downtown Minneapolis which generate more police reports and more calls for police service than does Gabby's. (A61.)

Thus, the record amply reflects, both directly and circumstantially, that racial animus and discriminatory intent were the motivating factors for the City's differential treatment of Gabby's.

IV. DESPITE GABBY'S ALLEGED PROXIMITY TO RESIDENTIAL NEIGHBORS, IT IS SIMILARLY SITUATED TO OTHER BARS FOR PURPOSES OF EQUAL PROTECTION ANALYSIS.

The City contends that Gabby's bar is not similarly situated to the downtown bars because Gabby's is allegedly located within a far more residential neighborhood

than those bars. However, Gabby's alleged proximity to more residences is simply irrelevant to this Court's determination as to whether it is similarly situated to other licensed liquor establishments. "For purposes of an equal protection analysis, the plaintiff and others "must be similarly situated 'in all *relevant* respects.'" *Carter v. Arkansas*, 392 F.3d 965, 966 (8th Cir. 2004) (emphasis added). Further, "usually one must look to the end or purpose of the legislation in order to determine whether persons are similarly situated *in terms of the government system*." *Hawkeye v. Miller*, 432 F. Supp.2d 822, 860 (N.D. Iowa 2006) (emphasis added). Pursuant to Minnesota liquor laws and the City's own ordinances, *all* bars with an existing, comparable liquor license are similarly situated, and the City cannot now purport to create additional criteria, such as location, to distinguish between license holders.

While proximity to residential areas, schools, and churches may be relevant in determining *whether* to *issue* a liquor license to a business, once a liquor license is issued the City cannot take regulatory action against the license, based merely on the location of the bar. *See, e.g.*, MCO § 360.120 ("[N]o liquor, wine or beer license shall be *issued* for any building, room or place within three hundred feet from any building space that is used primarily and regularly for any public or parochial schools or used primarily and regularly for any church." (Emphasis added.)). Additionally, neither Minnesota statutes nor the City's ordinances and Charter contain any regulatory provisions that distinguish between bars based on their proximity to residences. Rather, an existing licensee is merely responsible for preventing misbehavior on its premises and within its control, regardless of the proximity of those premises to residences. The

City not only fails to point out any contrary government system or scheme, but its own witnesses have acknowledged the absence of any Minnesota or City law “that would impose a different standard on Gabby’s or any other bar because of its proximity to residential neighborhoods” (A38, A60.) The City’s attempt to distinguish between Gabby’s and other existing liquor license holders based on their location is contrary to the plain language and governmental system reflected in the applicable liquor laws. As such, Gabby’s is similarly situated to all other City bars holding valid, existing liquor licenses.

V. GABBY’S CONSTITUTIONAL CLAIMS AND STATE LAW CLAIMS ARISE FROM A COMMON NUCLEUS OF OPERATIVE FACT, SUPPORTING GABBY’S CLAIM FOR ATTORNEYS’ FEES.

While the City argues otherwise, Gabby’s constitutional and state law claims clearly arise from a common nucleus of operative fact and are tightly intertwined. For example, as noted above, Gabby’s asserts that the City’s adverse license action was unsupported by any state law authority and was thus without any rational basis thereunder. These same facts give rise to its substantive due process claims. *See Poor Richard’s Inc. v. Ramsey County*, 922 F. Supp. 1387, 1393 (D. Minn. 1996). Indeed, all of Gabby’s claims rely on the facts that Gabby’s has violated no laws and has been subjected to adverse actions based on the alleged composition/conduct of its clientele.

CONCLUSION

For the foregoing reasons and those set forth in its original brief, Gabby's respectfully requests that this Court reverse the City's imposition of adverse license conditions and award it its reasonable attorneys' fees.

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Respectfully submitted,



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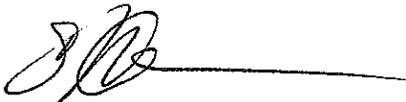
CERTIFICATE OF COMPLIANCE

The undersigned, Scott G. Harris, hereby certifies, pursuant to Minn. R. Civ. App. P. 132.01, subd. 3(a), that the word count of the attached Brief of Plaintiff-Appellant T.J. Management of Minneapolis, Inc. d/b/a Gabby's Saloon and Eatery, exclusive of pages containing the Table of Contents, the Table of Authorities, the Addendum, and the Appendix is 6992 words. The Brief complies with the typeface requirements of the rule and was prepared, and the word count was made, using Microsoft Word 2000.



SCOTT G. HARRIS.

Subscribed and sworn to before me
this 1st day of July, 2008.



Notary Public

