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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1392**

Norshor Experience, Inc., d/b/a Norshor Experience,
Relator,

vs.

City of Duluth,
Respondent.

**Filed June 29, 2010
Affirmed in part and reversed in part
Stauber, Judge**

City of Duluth
Resolution 09-0426

Randall D.B. Tigue, Randall Tigue Law Office, P.A., Golden Valley, Minnesota (for relator)

Gunnar B. Johnson, Duluth City Attorney, M. Alison Lutterman, Deputy City Attorney, Duluth, Minnesota (for respondent)

- Considered and decided by Lansing, Presiding Judge; Peterson, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

Relator Norshor Experience, Inc. (Norshor) challenges the Duluth city council's July 27, 2009 resolution citing relator for its second and third offenses and imposing a six-day license suspension and \$1,000 civil penalty. Relator argues that (1) the city

council erred in concluding that the August 7, 2008 incident involving a patron consuming alcohol in public was a violation of the Duluth Legislative Code and (2) the Alcohol, Gambling, and Tobacco Commission (the AGT) failed to make adequate findings to permit review. Because we conclude that there was not sufficient evidence that relator violated the Code on August 7, 2008, we reverse the decision of the city council regarding that offense.

FACTS

The facts of this case are largely undisputed. Relator Norshor is licensed by the City of Duluth to sell intoxicating liquor “on-sale,” on its premises. In July 2008, relator committed its first liquor license offense, which is not at issue in this appeal. The city council did not consider this offense until its January 29, 2009 meeting.¹ In the meantime, on August 7, 2008, relator sold a patron an alcoholic beverage; the patron took the beverage outside, consumed it in public, and was arrested for and later convicted of drinking in public. As a result of this incident, by a notice citation dated March 26, 2009, the city charged relator with its second offense, alleging that relator was operating as a public nuisance in violation of Duluth, Minn., Legislative Code (DLC) § 8–9(b)(2)

¹ The AGT conducts code-violation hearings on alleged violations, makes findings, and if necessary, recommends a penalty for the city council to consider. The city council conducts its own hearing, at which it accepts, rejects, or modifies the AGT’s findings, and considers the penalty for a violation. At oral argument, the city attorney attributed the significant delays between AGT hearings and city council review on budget cuts causing staffing deficiencies.

(2008), and failing “to maintain order in and around the licensed premises” in violation of DLC § 8–34 (2008).²

At the January 2009 meeting, the city council ordered relator to serve a one-day liquor-license suspension on February 6, 2009, for the July 2008 liquor-license offense. The one-day liquor-license suspension was an enhancement from the presumptive first-offense penalty. It is unclear, but appears that the city council considered the August 7, 2008 alleged offense (which had not yet been charged or proven) when it ordered relator to serve the one-day liquor-license suspension. Relator subsequently sold alcohol on February 6, 2009, in violation of DLC § 8–21 (2008), which prohibits the sale of alcohol without a license. The city considered this violation to be relator’s third offense.

The AGT finally held an evidentiary hearing on May 6, 2009, to consider the August 7, 2008 alleged offense.³ At the close of the hearing, the AGT found that the violations had occurred and voted to recommend that the city council impose a \$1,000 fine and a six-day suspension of relator’s liquor license. On June 4, 2009, the AGT submitted its report and recommendation to the city council. On July 27, 2009, the city council adopted the AGT’s findings of facts and recommendation and imposed the presumptive third-offense five-day license suspension, plus an extra day for failure to serve the February 6, 2009 license suspension, and a \$1,000 fine. Relator now seeks certiorari review.

² The notice citation also charged relator with selling “intoxicating liquor on February 6, 2009, at a time when his license was suspended” This charge was unrelated to the August 7, 2008 incident.

³ We also note the significant delay in prosecuting the August 7, 2008 alleged violation.

DECISION

A municipal agency's action is quasi-judicial and subject to certiorari review; this court will not retry facts or make credibility determinations, and will uphold the decision if the agency furnished any legal and substantial basis for its decision. *Staehele v. City of Saint Paul*, 732 N.W.2d 298, 303 (Minn. App. 2007). Municipal authorities have broad discretion in determining the manner in which liquor licenses are issued, regulated, and revoked. *Bourbon Bar & Cafe Corp. v. City of St. Paul*, 466 N.W.2d 438, 440 (Minn. App. 1991). An appellate court's review of a city council's decision regarding a liquor license is limited to whether the city council exercised reasonable discretion, or whether it acted capriciously, arbitrarily, or oppressively. *See id.* (standard of review applicable to revocation); *see also* Minn. Stat. § 14.69 (2008) (standard of review applicable to agency decisions). A reviewing court must uphold a city council's decision if the record, considered in its entirety, contains substantial evidence supporting the decision. *BAL, Inc. v. City of St. Paul*, 469 N.W.2d 341, 343 (Minn. App. 1991).

I.

Relator contends that the city council erred as a matter of law in determining that it violated the DLC by committing a second offense on August 7, 2008. Because the record does not support a determination that relator operated as a public nuisance or failed to maintain order in violation of DLC §§ 8–9(b)(2) and 8–34, we agree and reverse that portion of the decision.

The interpretation and application of a city ordinance is a question of law, which we review de novo. *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604,

608 (Minn. 1980). DLC § 8-34, entitled “Licensee to maintain order on premises” provides, in pertinent part: “Every licensee shall be responsible for the conduct of his place of business and the conditions of sobriety and order therein.” The AGT found that relator failed to maintain order and sobriety in violation of this section when a patron consumed alcohol outside relator’s premises on August 7, 2008; the city council agreed. But neither the AGT nor the city council made a showing as to how a single incident of a patron drinking alcohol in relator’s back alley shortly after midnight resulted in a public nuisance and a failure of order and sobriety. The patron was in an alley; there is no evidence that he was loud, drunken, or disruptive. Moreover, a police person on a bicycle happened upon the incident, and the police presence was not loud or disruptive to the public.

The AGT also found that relator violated section 8–9(b)(2) by operating its establishment in such a way as to constitute a public nuisance. This is also unsupported by the record. Neither the AGT nor the city council described how the August 7, 2008 incident caused a public nuisance. The DLC does not specifically define “public nuisance,” but Minn. Stat. § 609.74(1) (2008) defines misdemeanor public nuisance, in pertinent part, as “maintain[ing] or permit[ting] a condition which unreasonably annoys, injures, or endangers the safety, health, morals, comfort or repose of any considerable number of members of the public[.]” Neither the AGT nor the council determined whether a patron drinking an alcoholic beverage late at night, in a back alley behind a bar, would unreasonably annoy, injure, or endanger the safety, health, morals, comfort, or

repose of a considerable number of members of the public. Thus, we conclude that there is not substantial evidence in the record supporting the city council's decision.

Furthermore, relator contends that it did not violate section 8-22, which is likely the proper basis under which it should have been cited for claims of patrons' consumption of alcoholic beverages in public. Section 8-22 provides that "No owner, manager or person having control of any public place shall serve, permit to be served or permit any person to drink alcoholic beverages in such place unless such place has been duly issued an on sale or temporary on sale license." Although that was not the legal basis under which the AGT or the city council cited relator for a violation, it appears that this is the proper code provision under which the AGT could have cited relator. But as relator points out, the AGT likely did not have evidence that relator "permitted" alcohol to be consumed in public. As the police officer agrees, there is no evidence that relator or its employees permitted the patron to take a drink outside, or even knew he did so. And the record shows that there was a sign by relator's back door stating that alcohol was not permitted outside. Moreover, there is a general rule of construction that the more specific clauses in a document govern over the general. *Burgi v. Eckes*, 354 N.W.2d 514, 519 (Minn. App. 1984); *see also Reserve Min. Co. v. Minn. Pollution Control Agency*, 294 Minn. 300, 307, 200 N.W.2d 142, 146 (1972) ("the specific provisions of § 115.05, subd. 7, take precedence over the general provisions of § 15.0416"). Thus, even if relator had been cited under section 8-22, the record evidence would not support a finding of a violation.

II.

We affirm the city council's determination that relator violated the Code by selling alcohol when its license was suspended on February 6, 2009, because this suspension was based on earlier incidents not at issue on appeal and because the city-council resolution imposing that suspension is also not at issue on appeal. But the record indicates that the city council improperly considered the August 7, 2008 incident, which was not yet cited, litigated or proven before the AGT prior to the January 26, 2009 city council meeting when it imposed the February 6, 2009 license suspension.

At the May 6, 2009 hearing before the AGT, city attorney Alison Lutterman acknowledged that city councilmember Fedora amended the proposed January city-council resolution relating to incident one, and

that his intent offering that amendment was because of this event of August 7th that occurred after this Board had heard the earlier matter in July of 2008. So we could concede that fact that the licensee received an enhanced punishment above the recommendation of this Commission because of that incident.

Further, in her brief, city attorney Lutterman states that

[b]y the time the [July 2008 violation] matter came before the council in January of 2009, the August 7, 2008 violation had occurred. The council was aware of the August 7th violation and as a result, the council imposed the entire \$750 fine and one day suspension[.]

Moreover, at oral argument, the city attorney acknowledged that the city council had meted out the penalty for the August 7th incident at its January council meeting, but stated that the AGT considered the alleged violation at its May 6, 2009 hearing to simply

make a “violation . . . record” because “without such a finding the violation could not be relied upon for purposes of applying the penalty schedule.” Despite the city attorney’s statements, we cannot conclude that the February 6, 2009 license suspension was improper because according to its January 2009 resolution, the city council did not formally consider the August 7, 2008 incident. But we discourage the action it appears the city council engaged in: considering an as-yet uncharged and unproven allegation to enhance a penalty.

Furthermore, the AGT and the city council waited an unreasonably long time before conducting hearings on these incidents. The city council did not consider relator’s first offense, which the AGT heard in July 2008, until its January 2009 meeting. And the city council did not “officially” hear the August 7, 2008 incident or the February 6, 2009 incident until July 2009. The delay caused unnecessary complication and confusion not only for the city council but also for this reviewing court. And the delay likely resulted in the enhanced penalty of the February 6, 2009 one-day license suspension, which would likely not have been imposed given our decision here.

III.

We conclude that relator’s contention that the AGT did not make adequate findings to permit review is without merit. In making liquor license determinations, the city council may accept, reject, or modify a hearing examiner’s findings, conclusions, and recommendations. *BAL*, 469 N.W.2d at 343. Relator claims that a review of the AGT’s deliberations reveals that the AGT “never voted upon or adopted any findings of fact.” But the AGT conducted a hearing and the city council adopted the findings set forth by

the AGT. Although the AGT apparently did not vote on the final written recommendation, it acted on the underlying issues and voted on its recommendation to the city council. And the AGT chair signed the findings. Thus, we conclude that the findings are sufficient to permit review.

Reversed.