

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF ANDOVER
BOARD OF HEALTH

In the Matter of
William Batson, d/b/a
The Vapors Steam Bath.

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck, serving as Hearing Examiner for the Andover Board of Health, on March 22, 1989 at 9:00 a.m. at Andover City Hall, 1685 Crosstown Boulevard N.W., in the City of Andover, Minnesota. The record in this matter closed on June 19, 1989, upon receipt of the final written memorandum by the parties.

John M. Burke, Esq., of the firm of Burke and Hawkins, 299 Coon Rapids Boulevard, Suite 101, Coon Rapids, Minnesota 55433, appeared on behalf of the Health Officer for the City of Andover. Gabriel D. Giancola, Esq., of the firm of Barna, Guzy, Merrill, Hynes and Giancola, Ltd., 3989 Central Avenue N.E. - Suite 600, Minneapolis, Minnesota 55421, appeared on behalf of William Batson, d/b/a The Vapors Steam Bath ("the Respondent").

This Report is a recommendation, not a final decision. Under Ordinance No. 89 of the City of Andover, the Board of Health of the City of Andover will make the final decision in this matter based upon all of the evidence presented.

STATEMENT OF ISSUE

The issue in this case is whether the premises of The Vapors Steam Bath constitutes a hazardous site within the meaning of Ordinance No. 89 of the City of Andover.

Based upon all of the proceedings herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Vapors Steam Bath is a commercial enterprise located in a two-story commercial building at 1860 Bunker Lake Boulevard in the City of Andover. (Ex. 2; Ex. 9). The Vapors is owned by William Batson. (Tr. 142).

2. The physical premises on the first floor consists of a lobby at the entrance where an attendant is present at a window, a locker room, a shower, two steam rooms which are approximately 8 feet by 15 feet in size and a number of small rooms approximately 5 feet by 7 feet in size which contain a mattress on a raised platform, a light and a hook on the wall. (Tr. 18, 115, 74; Ex. 1; Ex. 7; Ex. 8; Ex. 11; Ex. 12). Each first floor room is lettered and has a lock on the door. (Tr. 65).

3. On the second floor of The Vapors, there are more small rooms also approximately 5 feet by 7 feet in size with the same equipment as those on the first floor. (Tr. 74). These rooms are numbered. (Ex. 4; Ex. 6; Ex. 10; Ex. 13). The second floor also contained a sundeck and a large room, approximately 20 feet by 40 feet in size, which contains approximately eight mattresses at different levels. There is no door on the large room. (Tr. 18; Tr. 74).

4. Police officer Mike Sommer and Anoka County Sheriff's Office investigator Leonard Christ visited The Vapors in an undercover capacity on August 23, 1988 shortly after noon. (Tr. 75). While they were in a steam room, a patron began stroking his penis while touching Investigator Christ's thigh with his foot. (Tr. 79; Tr. 97). The patron (A.) was arrested. He admitted to having engaged in oral sex at The Vapors. He is a bisexual who is married and has sexual relations with his wife. (Tr. 99). Another patron present at The Vapors when A. was arrested, told Officer Sommer that he came to The Vapors to engage in sex and that he and A. were engaging in oral sex that day. (Tr. 84). He also stated that he's never known the names of anyone he's had sex with at The Vapors. (Tr. 85).

5. On August 25, 1988, Police Officer Jeffrey Janacek and Police Officer Larry Klink made an undercover visit to The Vapors. (Tr. 114). They rented rooms and changed into towels. (Tr. 125). They observed a male in an adjacent room with the door open whose towel was above his waist and who was stroking his penis. (Tr. 115; Tr. 126). Officer Klink arrested the man for indecent exposure. (Tr. 129).

6. On August 31, 1988, Police Officer Jeffrey Janacek and Investigator Jeff Parks of the Anoka County Sheriff's Department visited The Vapors in an undercover capacity. (Tr. 118). While Officer Janacek was sitting in the steam room, one patron offered to give him a back rub, which Officer Janacek declined. (Tr. 119). The man then sat down next to Officer Janacek and touched his back and ran his hand down to Officer Janacek's buttocks. (Tr.

120; Tr. 136). The patron was then arrested.

7. On September 1, 1988 the Anoka County Sheriff's Department searched the premises of The Vapors pursuant to a duly executed Search Warrant. (Ex. 24). The following items were seized, among others:

Paper bag containing condoms and dildo
"Sheik" condoms and wrapper
containing liquid substance
Condom containing liquid substance
Condom containing liquid substance
Empty small brown bottle and condom wrapper
Condom wrapper
Two wrapped condoms
Condom wrapper
Two wrapped condoms.

(Ex. 24; Ex. 26; Tr. 106; Tr. 1 46) .

8. A.H. is a 50-year-old Twin Cities resident who is married and has two children.1 (Tr. 13). Mr. H. had heard about The Vapors from a friend and had seen it advertised as a gay bath house in a gay publication. (Tr. 14). A.H. first visited The Vapors in mid-August of 1988. He visited The Vapors alone on an early Saturday afternoon. When he entered he paid \$5 for a locker. He then changed his clothes and wore a towel around his waist which was how the other approximately 8 to 10 males present were dressed. Mr. H. proceeded to walk around the facility. When he looked into the large room with mattresses on the second floor, he observed four people. Two of them were engaged in oral sex (penis to mouth). (Tr. 49). He remained at The Vapors for approximately two hours. (Tr. 20).

9. A.H. visited The Vapors again for a second time on a Thursday afternoon in mid-October of 1988. (Tr. 21). On this occasion, he rented a room for approximately \$6.50. There were approximately 6 to 8 males present in The Vapors when he arrived. He proceeded to one of the steam rooms where there were four males present. Two of the males were engaged in oral sex. (Tr. 23). Mr. H. walked around the facility and observed males attempting to meet each other. Most of the men were approximately 35 to 40 years old. (Tr. 25). Mr. H. did not meet anyone he was interested in.

10. A.H. visited The Vapors a third time on December 22, 1988. This visit was on a Thursday afternoon and Mr. H. visited with the purpose of meeting somebody interesting, possibly for sexual contact. (Tr. 26). He again purchased a room, removed his clothes, and put a towel around his waist. (Tr. 29). When Mr. H. had entered The Vapors on that date there was only one other person present. Two other people came in shortly thereafter, however. Mr. H. spent some time laying down in his room with the door left open. The doors can be closed and locked. (Tr. 31). Mr. H. then proceeded to the steam room and initiated a conversation with a male who was sitting in the steam room. Mr. H. was interested in the male in a sexual way. (Tr. 33). The male was undercover Police Officer Larry Johnson. (Tr. 57). Mr. H. caressed Officer Johnson's hand and chest and touched the inside of his thigh. (Tr. 58). He also lifted up Officer Johnson's towel to view his

genitals. (Tr. 58). Mr. H. then invited Officer Johnson to his room and Officer Johnson agreed to do so but stated he had to visit his locker first. Mr. H. then proceeded to his room and laid down at which point he was arrested by an officer with the Anoka County Sheriff's office. (Tr. 34). Before leaving The Vapors Mr. H. had a telephone conversation with the owner who told him that he should be careful and that he shouldn't "do things like that in there because you're going to get me in trouble." (Tr. 36).

11. HIV is the virus which causes the series of diseases known as AIDS. (Tr. 155). Seventy percent of persons diagnosed with AIDS are dead within two to three years. (Tr. 158). There is no cure for AIDS. (Ex. 30, p. 5). The virus is transmitted by anal intercourse, among other ways. (Tr. 158). Anal intercourse, with or without a condom, is risky. (Ex. 30, p. 2). There is some evidence to indicate that the virus is also transmitted by oral sex.

lthis witness' full name is contained in a sealed Exhibit in this record.

(Tr. 160; Ex. 30, p. 2; Ex. 29, p. 1360). Approximately 86% of persons diagnosed with AIDS received the virus through a bisexual or homosexual transmission. (Tr. 159). The more sexual partners a person has the higher will be the risk of transmitting a sexually transmitted disease. (Tr. 161).

12. Susan Strand is a public health nurse employed by Anoka County. (Tr. 152). She is responsible for the investigation of communicable disease outbreaks and is the designated HIV resource person in Anoka County. (Tr. 152). It is her opinion that high risk sex with a partner that a person knows nothing about puts a person at risk for the transmission of sexually transmitted diseases. (Tr. 167). She believes the anonymous contacts at The Vapors constitutes high risk sexual activity. (Tr. 170-72).

13. By a letter dated February 1, 1989 and personally served upon William Batson on February 2, 1989, the Health Officer of the City of Andover advised Mr. Batson that The Vapors was a hazardous site within the meaning of Andover Ordinance No. 89. The letter alleged that The Vapors maintained individual rooms offered to persons for a fee which were used for the purpose of engaging in the high-risk sexual activities of fellatio and anal intercourse. The letter advised Mr. Batson that he had 10 days to request a hearing before the Andover Board of Health to challenge the findings of the Health Officer. (Ex. 16).

14. By a letter dated February 7, 1989 and received by the City of Andover on February 9, 1989, Mr. Batson requested a hearing on or after March 7, 1989. (Ex. 16).

15. The administrative hearing in this matter was held on March 22, 1989. Subsequently the Respondent, Mr. Batson, challenged the constitutionality of the Ordinance authorizing this hearing in Anoka County District Court. By an Order dated May 3, 1989, the Court found the Ordinance to be constitutional.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS

1. The Andover Board of Health and the Hearing Examiner have jurisdiction in this matter pursuant to Article 4. of Ordinance No. 89 of the City of Andover and Minn. Stat. sec. 14.55.

2. That the City of Andover has given proper notice of the hearing in this matter.

3. That the Respondent, Mr. Batson, made a timely request for a hearing.

4. That the City of Andover has the burden of proof in this matter and must prove the facts at issue by a preponderance of the evidence.

5. That Ordinance No. 89 provides that any premises found to be a hazardous site within the meaning of the Ordinance shall be declared a public health nuisance and shall be subject to corrective measures as ordered by the Health Officer to prevent high-risk sexual conduct from taking place within the premises.

6. That Ordinance No. 89, Article 2(2) defines "hazardous site" as:
any commercial premises, building or structure, or any part thereof, which is a site of high-risk sexual conduct.

7. That Article 2(1) of the Ordinance defines "high risk sexual conduct" as:

- (a) Fellatio;
- (b) Anal intercourse;
- (c) Vaginal intercourse with persons who engage in sexual acts in exchange for money.

8. That high risk sexual conduct, specifically fellatio and anal intercourse, has taken place at the commercial premises known as The Vapors and that The Vapors is therefore a hazardous site within the meaning of the Ordinance.

9. That The Vapors has been operated for the purpose of permitting persons to engage in high-risk sexual conduct contrary to Article 3(1) of the Ordinance.

10. That the above Conclusions are arrived at for the reasons set out in the Memorandum which follows.

Based upon the foregoing Conclusions, the Hearing Examiner makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Andover Board of Health find that The Vapors is a hazardous site within the meaning of Ordinance No. 89 and (1) issue an Order and cause The Vapors to be posted with a warning advising the public that the premises have been declared a hazardous site; and (2) direct the Health Officer to issue an Order to William Batson, d/b/a The Vapors Steam Bath setting out appropriate corrective measures to prevent high-risk sexual conduct from taking place within the premises.

Dated: June 1989.

GEORGE A. BECK
Hearing Examiner

NOTICE

It is requested that the City of Andover Board of Health serve a copy of

its final decision upon the Hearing Examiner, as well as the parties.

Reported: Angela M. Foss, Southwest Court Reporters.
1-800-873-3376. Transcript Prepared.

MEMORANDUM

This case arises under Ordinance No. 89 of the City of Andover. Article 4 of that Ordinance grants a hearing to the Respondent to contest the Health Officer's determination that a hazardous site exists at the premises of The Vapors, a steam bath. The Respondent, William Batson, properly filed a request for a hearing on that issue. The intent of Ordinance No. 89 is contained in its first Article and is stated as to protect the public from sexually transmittable diseases, including AIDS, by regulating commercial premises where persons are placed at risk in that regard. The Ordinance clearly defines 'high risk sexual conduct' as, among other things, fellatio or oral sex and anal intercourse. The preceding Findings quite clearly indicate that oral sex is taking place on the premises of The Vapors among its patrons. The record supports the conclusion that The Vapors is operated as a business which permits homosexuals or bisexuals interested in sexual activity with other men to meet and engage in high risk sexual conduct. According to testimony in the record, that was the intent of the patrons of the establishment in visiting The Vapors.

Although the police officers who engaged in the undercover investigation of The Vapors did not observe anal intercourse, there is a strong inference in the record that this activity also occurred at The Vapors. The articles found during the search of The Vapors on September 1, 1988 included a large number of both used condoms containing liquid and unused condoms. Both testimony and written exhibits in the record indicate that anal intercourse with a condom, although safer than without a condom, is still a high risk sexual activity insofar as the AIDS virus is concerned. The Respondent offered no testimony or evidence to rebut the allegations that fellatio and anal intercourse were being engaged in at The Vapors. The conclusion is inescapable that these types of high risk sexual conduct were taking place at The Vapors and that The Vapors is therefore a "hazardous site" within the meaning of the statute. It must also be concluded that The Vapors violates Article 3(1) of the Ordinance in that it is a commercial building used and operated for the purpose of

permitting persons to engage in high risk sexual conduct.

The testimony from the public health nurse, as well as written exhibits offered into the record make it clear that anal intercourse and oral sex are means of transmitting HIV or AIDS virus. The risk is greatly increased when a person has a large number of sexual partners. The situation is made even riskier where a person has an essentially anonymous sexual contact and therefore knows nothing about his sexual partner. The evidence in the record indicates that this is the situation which is occurring at The Vapors. It is exactly that type of conduct at which the Ordinance is aimed. In its post-hearing submission, the Respondent argued that there was no proof in the record that AIDS was a threat in Andover or Anoka County or that the activity occurring at The Vapors was contributing to the spread of AIDS. The Ordinance does not, however, require the Health Officer to carry such a burden of proof in this proceeding. The Ordinance itself is based upon a determination that HIV virus or AIDS is a threat to the public health.

Both parties devoted a portion of their post-hearing briefs to the subject of the constitutionality of the Ordinance. The issue of constitutionality is

outside the jurisdiction of the Hearing Examiner or the Andover Board of Health. Starkweather v. Blair, 71 N.W.2d 869, 884 (Minn. 1955); Neeland v. Clear-water Memorial Hospital, 257 N.W.2d 366, 368 (Minn. 1977); Holt v. State of Minnesota Board of Medical Examiners, 431 N.W.2d 905, 906 (Minn.App. 1988). In fact, the question of the constitutionality of Ordinance No. 89 was decided by the Anoka County District Court in an Order dated May 3, 1989. The Honorable Kenneth J. Maas determined the Ordinance to be constitutional.

The Ordinance provides that if the Board of Health makes a determination that the premises constitute a hazardous site, it shall then issue an Order and cause the premises to be posted with a warning advising the public that the premises have been declared a hazardous site. Based upon this declaration the Ordinance then directs the Health Officer to cause orders to be issued to the owner of the premises to take corrective measures to prevent high risk sexual conduct from taking place within the premises. Appropriate recommendations to the Health Officer are contained in the brief submitted by the City Attorney. The Ordinance then charges the Health Officer with determining whether such corrective measures have been undertaken with thirty (30) days.

G.A.B.