

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF SAINT PAUL

In Matter of All Licenses Held
by B H & M, Inc., d/b/a
Born's Dutch Bar, for the
Premises Located at 899 Rice
Street, St. Paul, Minnesota.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Bruce D. Campbell, acting as a hearing officer for the City of St. Paul on April 12 and 13, 1994, in the City Hall, St. Paul, Minnesota.

Appearances: Philip B. Byrne, Assistant City Attorney, Office of the City Attorney, Civil Division, 400 City Hall, 15 West Kellogg Boulevard, St. Paul, Minnesota 55102, appeared on behalf of the City of St. Paul; and David K. Nightingale, Burnick & Lisson, Suite 1200 The Colonnade, 5500 Wayzata Boulevard, Minneapolis, Minnesota 55416, appeared on behalf of B H & M, Inc. (B H M) and its president, Jerome G. Born (Mr. Born).

The record of the proceeding closed on April 13, 1994, at the conclusion of the hearing.

This report is a recommendation, not a final decision. The St. Paul City Council will make the final decision after a review of the record, which may accept, reject or modify the Findings, Conclusions and Recommendations contained herein. Pursuant to § 310.05 (c-1) of the St. Paul Legislative Code, after receipt of this report, the City Council must provide an opportunity to present oral or written arguments alleging error in this report and present an argument related to any recommended adverse action.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are whether the corporation B H & M, Inc., and its president Jerome G. Born, violated the St. Paul Legislative Code, §§ 310 (b) (7), 409.06 (c), 409.085, 310.17, and 409.14 as well as Minn. Stat. § 340A.402 (1992), and the general power of a municipality to limit license holders to persons of the requisite moral character and

fitness, and if so, the appropriate sanction to be imposed for the violation
violations established.

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

FINDINGS OF FACT

1. B H & M, Inc. (B H M, Licensee, or Respondent) is a Minnesota
corporation holding an on-sale liquor license from the City of St. Paul for
premises at 899 Rice Street, St. Paul, Minnesota. The corporation is

owned by the Born family, principally, Jerome G. Born who serves as the president of the corporation. Born's Dutch Bar is a blue-collar, working man bar located on Rice Street in St. Paul, Minnesota. It is located in an area with a number of retail drinking establishments. Born's Dutch Bar is patronized by enough organized motorcycle riders that Mr. Born has established a rule in the bar that no "club colors" can be worn on the premises.

2. Mr. Born was an accomplished amateur boxer in his younger days and become an expert martial arts practitioner and instructor. Mr. Born prides himself on his physical capabilities and on his ability to handle himself against any person causing problems in his bar. The operative rule of the bar in the past had been that if Mr. Born was not present when a patron became unruly, Born was to be called. He would come to the bar from his home located several blocks away and take care of the problem. Mr. Born has a deserved reputation in his bar and in the Rice Street area for being able to handle, physically, any problem that is likely to arise or that presents itself.

3. Mr. Born trains amateur boxers and martial arts students. He maintains, in the basement of his establishment, a weight room and minimally equipped gym for training purposes.

4. At some time in the past, Michael Gorman had frequented the bar. Michael Gorman was a young man who had been a member of the Hell's Angels motorcycle gang. He patronized bars where bikers congregated in the Twin Cities area. Mr. Gorman had a reputation as being an "outlaw biker" in the Rice Street area. He had caused problems in Born's Dutch Bar only once four or five years ago. Mr. Born, on that occasion, asked him to leave.

5. Mr. Gorman had spent time in Stillwater Prison for a serious crime. When Mr. Gorman was released, his parole officer asked Mr. Born to allow the parolee to use the weight training facilities in the basement of the bar. Mr. Gorman had stopped drinking when he left prison. Mr. Gorman eventually began drinking again and formed his own gang or club, called the East Side Cops or Gangsters. The East Side Gangsters were known in the Rice Street community and on the east side of St. Paul. When Mr. Gorman began associating with the East Side Gangsters and started drinking again, Mr. Born stopped allowing him to use the physical training facilities in the basement of the bar. That, apparently, was Mr. Born's practice. He would cease training individuals who drank and were likely to use their skills to injure other people. Mr. Born did not bar Mr. Gorman from drinking in the bar. He was treated, apparently, like any other customer who was not, at that point, causing problems. Mr. Gorman's violent reputation was known, however, to patrons of the bar, regulars and substitute bartenders, and Mr. Born.

6. Ronald Galvin is a bartender at Born's Dutch Bar. He normally works six hours on Friday and six hours on Saturday. Mr. Galvin has worked for Mr. Born as a bartender about one year, on a part-time basis. Mr. Galvin started working for the bar in the summer of 1993. On October 15, 1993, Mr. Galvin was tending bar along with Mr. Born.

7. Because Mr. Born lives only about two-and-one-half blocks from the bar, he leaves the bar frequently and goes to his home when business is slow. He usually calls the bar every hour or so to check on activities in the bar. Mr. Born comes back to assist the bartender on duty to close the bar.

8. At approximately 10:00 p.m. on October 15, 1993, there were eight to ten people in the bar. Mr. Born told Mr. Galvin that he was leaving the bar to go home, would call back every hour, and would return to help Mr. Galvin close the bar. When Mr. Born left, everything was normal. Mr. Gorman was not in the bar.

9. Mr. Born called the bar at 11:00 p.m. and was informed that everything was quiet with only a few people in the bar. Mr. Born stayed at home watching television the rest of that evening.

10. Phyllis Thomas is a part-time bartender at Born's Dutch Bar. Ms. Thomas, at the time, was working at the Volunteers of America women's correctional facility. She had been a part-time bartender for Mr. Born for approximately eight years. She normally worked in the bar from 10:00 a.m. to 6:00 p.m. on Sundays. Ms. Thomas goes to the bar one to three times a week as a patron after work and on her days off.

11. On the evening of October 15, 1993, Ms. Thomas had purchased a used Corvette automobile. She drove past her house and noticed that her adult son was not home. She proceeded to Born's Dutch Bar. She arrived at the bar sometime between 11:40 p.m. and 11:45 p.m. She came into the bar and saw her son talking to some of the members of the East Side Gs with Michael Gorman. She went up to her son and told him about the car she had purchased. He said he needed to try it out. Ms. Thomas and her son left the bar and went for a ride in the Corvette. They drove up Rice Street to Como Avenue, drove through a housing project area, and were coming back to the bar on Jackson Street when they were stopped by a police officer at Sycamore. The police officer gave a ticket to Ms. Thomas's son and a driving lecture. Ms. Thomas and her son then returned to Born's Dutch Bar. They arrived back at the bar sometime between 12:15 a.m. and 12:30 a.m.

12. In the early evening of October 15, 1993, Mr. William Thomas, who is not related to Phyllis Thomas, left work to engage in social activities. He worked for a recycling business owned by Patrick Parrott, a recycler from Farmington, Minnesota. Mr. Parrott dropped William Thomas off across the street from Born's Dutch Bar that evening so that Mr. Thomas could visit a woman friend. Mr. Parrott was to return to pick up Mr. Thomas at midnight on October 16, 1993. Mr. Parrott was delayed in Farmington and did not return to St. Paul until approximately 12:10 or 12:15 on the morning of October 16, 1993.

13. When Ms. Thomas returned to the bar, she sat down at a table. Mr. Gorman was upset. He was pacing the bar and speaking in a loud voice to everyone in general. Shortly before Ms. Thomas returned to the bar, Mr. Gorman

came out of a bathroom and claimed to be missing a wallet with several thousand dollars in it. He had stated that no one was going to leave the bar until he got his money back. A friend of Mr. Gorman went to the front door of the bar. He said that he was going to prevent people from leaving until the wallet was found. Mr. Galvin, the bartender, told the friend of Mr. Gorman to move away from the door.

14. When Ms. Thomas returned to the bar, she went up to the bar and ordered a drink. It was at this time that she saw Mr. Gorman pacing and making statements about not letting people leave until the wallet was found. She told the bartender that he should stop this "bullshit" right now because Gorman was "kind of a nut". She warned the bartender because he was new and

she had seen Mr. Gorman get out of control in other bars. She does not know whether the bartender directly observed Mr. Gorman's conduct. The bartender did respond, however, that there was little that he could do because Mr. Bor allowed Mr. Gorman to drink in the bar.

15. Ms. Thomas was sitting at a table with Roger Craighead. They were seated at the table marked in red on Ex. 8. Mr. Nysted, a friend of Mr. Gorman, came over and patted down Mr. Craighead to see if he had the wallet on his person. Mr. Craighead put his hands back, away from Mr. Nysted. Mr. Nysted then approached Ms. Thomas, as if to search her. Ms. Thomas made the following statement to Mr. Nysted: "If you put your fucking hands on me, one of us won't walk out of here." Mr. Nysted then said something about her being the mother of one of his friends, so that it was not necessary to search her. Ms. Thomas does not know where the bartender was when she had her confrontation with Mr. Nysted.

16. Mr. Gorman and his female friend and another male friend and a second female were playing pool in the back room of the bar. The main bar room and the back game room are separated from each other by the doorway shown in Ex. 8. At the time of the incident, there was a pool table in the main area of the bar and two pool tables in the back game room. Also, a large fan, shown in Ex. 9a and 9b, was in the doorway of the back game room. There was no electronic monitoring of the game room from the bar room.

17. The bar itself also curves into the wall as shown in Ex. 8. From the layout of the bar and actual visual inspection by the Administrative Law Judge, it would not be possible for a bartender standing behind the bar to see directly into the game room, even if his view were not substantially obstructed by the fan and the fixture over the pool table.

18. William Thomas had allowed himself to be searched by Mr. Nysted or one of Mr. Gorman's other friends. Mr. Thomas was playing pool at the pool table in the main area of the bar. At some point, he walked back into the game room and encountered Mr. Gorman. Mr. Gorman "sucker" punched him. Mr. Thomas fell from a standing position onto a hard terrazzo floor, presumably hitting the back of his head against the floor. At that point, Eric Seltz, who had also been playing pool in the main area of the bar went to see what had happened to Mr. Thomas. Mr. Seltz was himself knocked unconscious by someone in the game room, either Mr. Gorman or his male friend.

19. Ms. Thomas, still seated at the table in the main bar area, heard a "scuffling" sound and went to the back game room. She saw Eric Seltz, the friend of her son Dennis, on the floor. Ms. Thomas knelt beside him. Mr. Seltz was dazed and trying to get up. She told Mr. Seltz to lay still. Mr.

Seltz got up and staggered to the pool table in the main bar area. Ms. Thomas looked back into the game room area and saw William Thomas on the floor by the side of the furthest pool table, being held up into an almost sitting position by Mr. Gorman, who was pulling on his shirt. Ms. Thomas said "Don't hit him any more, Mike, he's out." Gorman dropped Mr. Thomas. Ms. Thomas believes that William Thomas was kicked at least once while he was on the floor.

20. Ms. Thomas left the back game room and went to the phone booth in the main area of the bar. Mr. Gorman and his friends were following behind her. It was her intention to call the police. When she could not find a quarter to make the public call, she left the phone booth and went behind the bar. She

did not call 911, the paramedics or the police. She contacted Mr. Born at his home several blocks away. She told Mr. Born that someone had been hit at the bar and that he should come to the bar right away. Ms. Thomas called Mr. Born rather than the police because there was an understanding that Mr. Born would "handle" all problems. Ms. Thomas told the bartender that somebody had been hit in the back room and that she had called Jerry Born to come down. Mr. Galvin did not go to the back room to make any investigation. He waited for Mr. Born to arrive.

21. Some time shortly after Mr. Thomas was punched, Mr. Parrott returned from Farmington. He went across the street from the bar to the apartment of Mr. Thomas' female acquaintance. He was told by Mr. Thomas's friend that Mr. Thomas had seen someone out the window going into the bar and had gone to Born's Dutch Bar to wait for him. Mr. Parrott then left the apartment of the female acquaintance of Mr. Thomas and entered Born's Dutch Bar. He did not see Mr. Thomas in the front of the bar and went back toward the game room. When he got back toward the game room door, he saw Mr. Thomas lying on the floor with Mr. Gorman standing over him patting him down. Mr. Parrott asked "what the hell was going on" and Mr. Gorman left. Mr. Thomas was breathing, but did not move. There was no blood on the floor. There was no obvious sign of injury. Mr. Thomas' eyes were open and blank. Mr. Parrott assumed that Mr. Thomas had been knocked unconscious. Mr. Parrott tried to find out what had happened and eventually went over to the bar for a towel and some water. Mr. Thomas started labored breathing with a "gurgling sound". Mr. Parrott told the bartender what had happened and was told by Mr. Galvin that the owner had been called. Some people came around Mr. Thomas and tried to assist him. Mr. Parrott tried to put him in a chair. All this time, Mr. Thomas was unconscious and making a "gurgling sound". Some people stated that Mr. Thomas was "faking it for the insurance money".

22. There is no evidence in the record that Mr. Galvin came over to Mr. Thomas and tried to assist him in any way. Mr. Thomas was lying on the game room floor about 5 - 10 minutes before Mr. Born arrived at the bar.

23. Mr. Born arrived at the bar several minutes after being called by Mr. Thomas. He looked at Mr. Thomas and immediately told the bartender to call paramedics. The police and the paramedic unit arrived on the scene at approximately 12:47 a.m. on October 16, 1993. The paramedics were at the location for approximately 16 minutes.

24. Mr. Born went out front of the bar to speak to the police, and then closed the bar. Mr. Born described to the police what had occurred. Bar patrons did not want to become involved with the police. At Mr. Born's urging, the police received the cooperation of most or all of the witnesses. Mr. Born

assisted the police throughout their investigation by cooperating himself and by encouraging patrons to discuss the matter with the police.

25. Mr. Galvin, the bartender, was afraid of Mr. Gorman, who threatened him, after the incident. Mr. Galvin's state of mind on the night of the incident was to become as little involved as possible and to allow Mr. Born handle any physical problems.

26. Within a few days of the incident, William Thomas died of a brain injury received when his head struck the hard terrazzo floor after being punched by Mr. Gorman.

27. Mr. Gorman was tried and convicted for the murder of Mr. Thomas.

28. After the occurrence, Mr. Born hired a security firm, A.S.I.A., Inc. to make recommendations regarding security at the bar. Their recommendations are contained in Born Ex. 12. Among other things, "panic buttons" have been installed at the bar that automatically call 911, bartenders are instructed to call the police and paramedics, if necessary, when trouble arises, and the billiard game room now has video surveillance equipment installed. Mr. Born will continue to cooperate with the police fully to protect his patrons.

29. A timely Notice of Hearing was properly served on the Licensee.

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

CONCLUSIONS

1. The Administrative Law Judge and the St. Paul City Council have jurisdiction in this matter pursuant to Minn. Stat. § 14.55 (1992) and § 310.01 (c-1) of the St. Paul Legislative Code.

2. The Notice of Hearing was proper in form and was validly served.

3. Mr. Galvin, the bartender, did not act appropriately with due concern for the physical safety of bar patrons on the night of October 15-16, 1993, when he failed to investigate the back room of the bar after being told that a patron had been punched. Moreover, Mr. Galvin failed to exercise due care for the safety of bar patrons when he did not call the police or paramedics but instead, allowed an off-duty employee to call Mr. Born.

4. The failure of Mr. Galvin to act with due regard for the safety of bar patrons, as noted in the previous conclusion, was not a causative factor in the death of William Thomas.

5. Mr. Born has taken appropriate remedial measures to improve the security at Born's Dutch Bar. See Ex. 12.

6. As a consequence of Conclusions 3 - 6, supra, it is appropriate to impose a license suspension of a moderate duration on the Corporation.

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

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the City Council suspend all of the Paul city licenses applicable to Born's Dutch Bar held by the Corporation for a period of seven days.

Dated this 18th day of May, 1994.

s/ Bruce D. Campbell
BRUCE D. CAMPBELL
Administrative Law Judge

NOTICE

The City Council is respectfully requested to provide a copy of its final decision to the Administrative Law Judge by first class mail.

Reported: Tape recorded; no transcript prepared.

MEMORANDUM

A variety of sections of the St. Paul Legislative Code, as applicable to on-sale drinking establishments, and the provisions of Minnesota Statutes § 340A.402 (1992), require the owner of a bar to use reasonable measures to protect the safety of bar patrons and maintain sobriety on the licensed premises. The owner of the bar and the holder of the license is not an observer on the sidelines. He or she must be an active participant in protecting the safety of bar patrons when threatening situations occur. The City has broad authority under the Legislative Code, state law and common law to regulate the public safety and well being in liquor establishments. Courts Liquors, Inc. v. Minneapolis, 264 N.W.2d 821, 824 (Minn. 1978) Moskovitz v. Saint Paul, 16 N.W.2d 745 (Minn. 1944). A bar owner has an affirmative duty to use reasonable measures to protect the safety of bar patrons. Dennis v. McLain, 306 N.W.2d 827 (Minn. 1981); Filas v. Daher, 218 N.W.2d 467 (Minn. 1974). The bar owner also has a duty to summon necessary medical help for injured bar patrons.

It appears that everyone knew, on the night of October 15-16, 1993, that Mr. Gorman was enraged. In spite of the initial actions of Mr. Gorman and his friends, as detailed in the Findings, the bartender did not call Mr. Born or the police. Mr. Galvin was afraid of Mr. Gorman and his friends and consciously tried to interact with them as little as possible, hoping that the problem would resolve itself without serious incident. Unfortunately, it did not. Whether or not Mr. Gorman and his friends should have been forcefully ejected from the bar when at least one of Mr. Gorman's friends stated he would not allow anyone to leave until the missing wallet was found and when Mr. Nysted searched Mr. Craighead and threatened to search Ms. Thomas, is open to debate. The Administrative Law Judge accepts the statement of the bartender that things had "quieted down" and there was no reason, at that point, to eject Mr. Gorman.

There certainly was, however, a reason for Mr. Galvin to watch Mr. Gorman. He had been warned by a more experienced bar employee that a volatile situation existed. Despite that warning, Mr. Galvin made no effort to check

the back room of the bar where Mr. Gorman was playing pool. He did not hear "scuffling sounds" when Ms. Thomas did. He did not go to the back room of the bar to investigate once he had been told by Ms. Thomas that someone had been punched and was lying on the floor. He did not call the police when told of the fight. He did not himself attempt to assist Mr. Thomas once Mr. Thomas was down on the floor and his location had been discovered by Mr. Parrott and communicated to Mr. Galvin. Mr. Galvin simply waited for Mr. Born to arrive after someone else had called Mr. Born.

It is also clear to the Administrative Law Judge that Mr. Born and his employees have supreme confidence in Mr. Born's proficiency in boxing and the martial arts. This "vigilante mentality", however, cannot be encouraged or

sanctioned. The police and the paramedics should have been summoned immediately by a bartender who was keeping an eye on a volatile situation and who made the appropriate inspection and inquiries once he knew someone had been struck. Mr. Galvin's only comment was that he had seen men punched unconscious before and thought that Mr. Born could take care of the situation. Granted this is a working man's bar in an area of the city that is, unfortunately, not stranger to violence. Working men, however, are entitled to a safe place to drink within the law. The Administrative Law Judge is not familiar with the ordinary conduct of the bar business on Rice Street. It appears to him, however, that whenever someone is knocked unconscious, common sense would require the summoning of the paramedics, unless the person involved is able to assess his or her situation and voluntarily declines to accept medical attention.

The Administrative Law Judge has found that Mr. Galvin acted inappropriately. Mr. Born also acted inappropriately in not himself immediately summoning the police and the paramedics to the bar when he was called by Ms. Thomas. The Administrative Law Judge, in recommending a sanction to the City Council, has taken into consideration the fact that Mr. Born was not present in the bar at the time of the occurrence, that the delay in summoning the paramedics was not a causative factor in Mr. Thomas' death, and that Mr. Born has taken significant remedial measures. The City, at the hearing, recommended a three-week suspension of the bar's licenses. The Administrative Law Judge believes that the oral recommendation of the License Division was significantly too severe under all attendant circumstances. The Administrative Law Judge believes that a more appropriate license suspension for Mr. Galvin's and Mr. Born's conduct is seven days.

B.D.C.

