

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE CITY OF MINNEAPOLIS

In the Matter of the Lakes Restaurant,  
Inc. d/b/a Tonic of Uptown

ORDER ON  
MOTIONS

This proceeding commenced on November 9, 2004, with the issuance of a Notice and Order for Prehearing Conference signed by Steven E. Heng, Assistant Minneapolis City Attorney.

On November 12, 2004, Respondent filed a Rule 12 Motion to Dismiss, along with a Memorandum and various supporting documents.

On December 8, 2004, the City filed a response to the Motion. On December 13, Respondent filed a reply memorandum in support of its motion.

On December 14, 2004, a prehearing conference was held. As part of the prehearing conference, oral argument was heard on the motion. On December 21, 2004, Respondent filed a memorandum in support of its position, first announced at the prehearing conference, that the motion should be converted to a summary judgment motion. Due to a clerical error, this memorandum may not have been served upon the City.

On January 7, 2005, the City filed a Motion for a Protective Order after having been served with Respondent's second set of requests for admission, interrogatories and requests for production of documents. On January 19, Respondent filed a memorandum in opposition to the City's motion for a protective order, along with a letter brief in support of its motion for summary judgment.

On January 24, 2005, the City filed a letter brief in opposition to the motion for summary judgment, and on January 25, 2005, the City filed a reply memorandum in support of its motion for a protective order.

On January 27, 2005, Respondent filed a response to the City's letter brief.

The City of Minneapolis through its Department of Licenses and Consumer Services, is represented by Steven Heng, Assistant Minneapolis City Attorney, 333 South 7<sup>th</sup> Street, Suite 300, Minneapolis, MN 55402-2453.

Respondent, The Lakes Restaurant, Inc. d/b/a Tonic of Uptown, is represented by Jack Y. Perry, Briggs and Morgan, 2200 IDS Center, 80 S. 8<sup>th</sup> St., Minneapolis, MN 55402.

Having considered all of the materials filed, and the arguments of the parties submitted both orally and in writing, the Administrative Law Judge makes the following:

### ORDERS

1. Respondent's Motion for Summary Judgment is DENIED.
2. The City's Motion for a Protective Order is DENIED.
3. Respondent's request for costs and fees is DENIED.
4. Respondent's objection to the City's use of all eleven inspections is OVERRULED.

These Orders are made for the reasons set forth in the attached Memorandum, which is incorporated herein.

Dated this 4<sup>th</sup> day of February 2005.

s/Allan W. Klein

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ALLAN W. KLEIN

Administrative Law Judge

### MEMORANDUM

Tonic of Uptown is a large (three-story, 21,000 sq. ft.) restaurant located at 1402 West Lake Street in Minneapolis. This is near the intersection of Lake Street and Hennepin Avenue. On December 8, 2003, Tonic applied for a Class B liquor license. As part of that application, Tonic submitted a two-page form which has been referred to as the Business Plan. The instructions for the preparation of this document provide as follows:

As part of the license approval process, all applicants must provide a business plan which sets forth, in detail, the manner in which the license business will be operated. No license application will be forwarded to the Public Safety and Regulatory Services Committee until a satisfactory and acceptable business plan has been provided. Furthermore, no licensee shall be permitted to materially deviate from a business plan without first submitted an amendment and gaining approval from the Department of Licenses and Consumer Services. A business plan must, at a minimum, address the following aspects of the operation of the licensed business...

The form then lists a series of topics which must be addressed, including experience, background or training in the business, the experience of the manager, whether a professional consultant was retained, whether approved server training has been

offered, the food menu, and other matters. Among the other matters is the following item:

A detailed statement of the nature of entertainment to be presented in the establishment, the days and hours of entertainment, and the age group at which the entertainment is directed.

In response to that item, the applicant inserted the following language:

None. Music-background.

The form requires the applicant to acknowledge the following:

That, as part of the license application process, an applicant is required to file a business plan with the Department of Licenses and Consumer Services and that the business plan accompanying this acknowledgement and agreement is a true and correct reflection of the undersigned's intentions should the applied for license be granted by the City Council of the City of Minneapolis; and furthermore, the undersigned agrees to the following:

That any material change in the business plan must be submitted to and approved by the City of Minneapolis prior to being put into effect; and that violation of this acknowledgement and agreement may result in the suspension, revocation, or refusal to renew the license concerned, or in a civil fine as determined by the City Council of the City of Minneapolis.

At sometime prior to February 11, 2004, Kenneth Ziegler, an Inspector with the License and Consumer Services Division, prepared a license inspector's report on the application. (Tonic App. 135). The report deals with a number of issues describing the proposed operation, and it also includes the following statement:

The applicant has applied for a Class B license, however, Class B entertainment is intended to be presented in the banquet areas only. .

Earlier in the report, Ziegler indicated that there was a banquet area for 50 persons on the second floor of the premises, and a banquet area for 36 persons on the third floor. Attached to the report were drawings of the proposed facility, indicating an area at the rear of the second floor labeled "banquet room."

On February 11, 2004, as part of the licensing process, the City held a public hearing in an elementary school in the Uptown neighborhood. The avowed purpose of the meeting was "to present information and solicit comments on the following on-sale liquor license application. The Notice of the Public Hearing (Tonic App. 141) stated, in part:

\* \* \*

The requested license: On Sale Liquor, Class B with Sunday sales

Nature of entertainment: Class B permits amplified musical performances by an unlimited number of musicians and dancing by patrons.

\* \* \*

According to later statements from Ken Ziegler, Inspector from the Licenses and Consumer Services Division, during the public hearing Bob Carlson, one of the principals of Tonic, was asked why a Class B license was being sought. Ziegler reports that Carlson responded that the Class B license was needed to fully serve patrons who might reserve the banquet areas. (Tonic App. 307). There are substantial disputes, however, about this statement – disputes about what was said and what was not said. There is also some question as to whether similar statements were made by Carlson to Ziegler at meetings other than the public hearing.

On February 13, 2004, the City Council granted Tonic an On-sale liquor Class B with Sunday sales license, but with a number of conditions. One of them was that “the applicant shall not utilize second and third floor banquet facilities during the 11:00 a.m. to 2:00 a.m. time period until such time as a permanent resolution to the lack of off-street parking accommodations during this time period is arrived at.” (Tonic App. 144).

Tonic opened for business on March 3, and appears to have been an instant success. A police officer, in an email dated March 23, refers to a “line out of the bar of people waiting to get in [that] goes half way around the corner at times.” (Tonic App. 262). Early in the morning of Sunday, March 14, two neighborhood residents were assaulted by three men who had been (at least as the victims understand it) at Tonic. At least two of the men were charged with assault. (Tonic App. 263 and 273). There were other complaints concerning noise, vandalism, and public urination which led to the City’s inspecting and citing the restaurant for various infractions. On March 30, 2004, Ziegler wrote to the restaurant, pointing out that the business plan indicated that there was going to be no entertainment other than background music, while experience had demonstrated that on Friday and Saturday evenings, there was music and patron dancing going on. (Tonic App. 146). A series of meetings were held but no resolution was reached, and on May 5, 2004 the City issued the first of a number of citations to the facility. There were a total of six administrative citations issued in early May. Tonic requested a contested case hearing on the citations, and a hearing was held on June 17, 2004 before a private attorney serving as an administrative hearing officer. That hearing resulted in an order affirming the City’s issuance of the six administrative citations as well as ordering Tonic to “immediate take corrective action to cease operating its business...in violation of the...code.” (Tonic App. 192) Tonic appealed that decision to the Minnesota Court of Appeals on August 19, 2004, and that matter is still pending before the Court of Appeals.

On May 14, 2004, Tonic submitted a request that its business plan be amended to clarify its operations. (Tonic App. 277). In the application form area where Tonic had previously indicated that there would be no entertainment and only background music, the proposed amendment stated that Tonic would use a disc jockey and sound system to deliver music to all parts of the restaurant but that the volume would vary area by area, and that patrons would be allowed to dance to the music. Attached to the form was a revised site plan, indicating that the center portion of the banquet room would be a "dance area." (Tonic App. 282).

On August 12, 2004, the City issued to Tonic a Notice to Appear at an August 25, 2004 hearing before the City's Public Safety and Regulatory Services (PS&RS) committee.

On August 19, 2004, the same day in which it filed its appeal at the Court of Appeals, Tonic also filed a request for a stay of all further enforcement action by the City. The City denied its request, and the August 25 committee hearing did go forward. The agenda for that meeting indicates that there would be two items considered in connection with Tonic. The first would be Tonic's request to amend its business plan, while the second would be a recommendation by the Licenses and Consumer Services Division that Tonic's license be downgraded from a Class B license to a Class E license (3.2 beer only) and that its operating hours be restricted to no later than 11:00 p.m. each night. (Tonic App. 301). A partial transcript of that August 25 committee hearing indicates that the City believed that the use of the banquet area as a public dance floor had altered the basic nature of the establishment from that of a restaurant to that of a nightclub, and that a nightclub is prohibited by the zoning code from being within 500 feet of a residentially zoned area. The City license inspector, Mr. Ziegler, recommended that the committee deny the amendment to the business plan which Tonic had filed. Mr. Ziegler went on to urge the committee to limit the facility to 11:00 p.m. each night and to downgrade the license to a Class E license. Both of these were urged in order to cut down on the neighborhood problems which had arisen during the spring and summer. Tonic's attorney argued that the proposed downgrade was really a revocation, and he requested a full-blown contested case before an ALJ. The committee ultimately granted that request.

On November 9, 2004, Assistant City Attorney Steven E. Heng issued a Notice and Order for Prehearing Conference, indicating that issues to be determined at the hearing were as follows:

1. Whether the Lakes Restaurant, Inc. d/b/a Tonic of Uptown violated Minneapolis Ordinance § 362.395(a)(2) by maintaining a bar area where prohibited?
2. Whether the Lakes Restaurant, Inc. d/b/a Tonic of Uptown materially deviated from their business plan without seeking prior approval of that change from the Minneapolis City Council.

In the body of the notice, there is a section entitled "Allegations" which sets forth a brief history of the facility, indicating that inspections had been conducted on April 30, May 8, May 15, May 17, May 21, June 13, July 2, July 7, July 23, August 8, and August 13, and that based on those inspections, the City had concluded that Tonic had created and maintained a bar area in and around the dance floor as well as on the catwalk accessible from the second floor, that the "primary activity" in this area is the consumption of alcoholic beverages, and thus it is a "bar area." The allegations also note that inspectors have reported that the music was not in the nature of background music, but instead was being played "so loud that the conversation has been difficult," and that Tonic had materially deviated from its business plan without the approval of the City.

### Legal Standards

Summary disposition is the administrative equivalent to summary judgment. Minn. R. 1400.5500(K). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03. The Office of Administrative Hearings generally has followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested cases. See Minn. R. 1400.6600.

It is well established that, in order to successfully resist a motion for summary judgment, the nonmoving party must show that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988). Summary judgment may be entered against the party who has the burden of proof at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery. *Id.* To meet this burden, the party must offer "significant probative evidence" tending to support its claims. A mere showing that there is some "metaphysical doubt" as to material facts does not meet this burden. *Id.*

Questions as to how equivocal evidence is to be considered have been addressed by long-standing rules governing summary judgment motions. As the Minnesota Supreme Court has stated:

1. Under Rule 56.03, Minn.R.Civ.P., a summary judgment may be granted to either party if "there is no genuine issue as to any material fact." In construing this rule, we have held that "the moving party has the burden of proof and \* \* \* the nonmoving party has the benefit of that view of the evidence which is most favorable to him." Sauter v. Sauter, 244

Minn. 482, 484, 70 N.W.2d 351, 353 (1955); see 2 J. Hetland & O. Adamson, *Minnesota Practice* 571 (1970). All doubts and factual inferences must be resolved against the moving party. Anderson v. Twin City Rapid Transit Co., 250 Minn. 167, 186, 84 N.W.2d 593, 605 (1957); 2 J. Hetland & O. Adamson, *supra* at 572. However, as the Anderson court stated, "it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried." 250 Minn. at 186, 84 N.W.2d at 605. The care with which an inquiry required by Rule 56.03 should be conducted was emphasized by this court in Donnay v. Boulware, 275 Minn. 37, 144 N.W.2d 711 (1966). There, we stated that "(s)ummary judgment is a 'blunt instrument' and \* \* \* should be employed only where it is perfectly clear that no issue of fact is involved." *Id.* at 45, 144 N.W.2d at 716.

Nord v. Herreid, 305 N.W.2d 337, 339 (Minn. 1981).

### Analysis

In this case, Respondent has filed the entire record of briefs and appendices from the parties' submissions to the Court of Appeals. Included in this record is the full transcript of the hearing held on June 17, 2004. In addition, both parties have provided argument on both the facts and the law. This volume of material provides a complete view of the parties' positions on the issues. However, there are material facts in dispute which preclude the grant of summary judgment, and require that a hearing be held. For example, before the license was granted, what statements did Carlson make concerning drinking, dancing and the use of the banquet area? Did he state that any dancing would be limited to groups that rented the banquet room? Or, did he imply that? Or, did Ziegler infer that? Or did Ziegler make it up as an *ex post facto* justification? The briefs and memoranda make a wide range of allegations about this topic, but the record before me does not allow me to determine the fact of what actually happened.

As quoted earlier, summary judgment is a "blunt instrument" to be used only when it is "perfectly clear" that no factual disputes exist. That is not the case here, and so the motion must be denied.

### Discovery

The matters covered by the Second Set of Requests for Admission, Interrogatories and Requests for Production of Documents are relevant to the proceeding. The request, when coupled with the First request, is exhaustive and demanding for the City to answer. But it cannot be said to be oppressive or unduly burdensome in light of what is at stake in this proceeding. Respondents are entitled to know, in advance of the hearing, the City's theory of the case and the City's entire factual basis for its proposed action.

The City's Motion for a Protective Order was not inappropriate, and fees to Respondent are not granted.

Counsel should confer concerning the timing of the City's response to the Second Request. If they cannot agree on a schedule, then they should contact the Administrative Law Judge for a telephone conference.

#### Other Matters

The City has indicated its intent to rely on eleven inspections up to and including August 13. Respondent has opposed the City's reliance on any inspections other than the five which occurred prior to May 22 because the six citations were based on inspections prior to that date.

The City is entitled to rely on all of the inspections, so long as the Respondent is informed, in advance, of the City's intentions. Since all eleven inspections are noted in the Notice and Order for Prehearing Conference, all eleven may be used.

**A.W.K.**