

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY COUNCIL OF THE CITY OF ST. PAUL

In the Matter of the Licenses held by
Reese-Brooks Hospitality Industries, LLC,
d/b/a Minnehaha Lanes at 955 Seminary
Avenue in Saint Paul

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge M. Kevin Snell on February 28, 2007, in Room 220 of the Saint Paul City Hall/Courthouse. The record closed on February 28, 2007, at the conclusion of the hearing.

Rachel Gunderson, Assistant City Attorney, Office of the City Attorney, 400 City Hall, 15 West Kellogg Blvd., Saint Paul, Minnesota 55102, represented the City of Saint Paul's Office of License, Inspections and Environmental Protection (LIEP). The Licensee appeared on its own behalf in the person of Mr. Harry Erkenbrack, co-owner of Licensee, without legal counsel.

NOTICE

This Report contains a recommendation and not a final decision. The Saint Paul City Council will make the final decision after reviewing the record and may adopt, reject or modify the Findings of Fact, Conclusions and Recommendation contained herein. Under Section 310.05 of the Saint Paul Legislative Code, the City Council's final decision shall not be made until this Report has been made available to the parties to the proceeding and the Licensee has been provided an opportunity to present oral or written arguments alleging error on the part of the Administrative Law Judge in the application of the law or the interpretation of the facts and an opportunity to present argument relating to any recommended adverse action. The Licensee and any interested parties should contact Shari Moore, City Clerk, Saint Paul City Council, 310 City Hall, Saint Paul, Minnesota 55102, to ascertain the procedure for presenting argument to the Council.

STATEMENT OF ISSUES

Should the Saint Paul City Council take adverse action against the Bowling Center, Entertainment, Food Vending, Gambling, Liquor, and Restaurant licenses held by the Licensee on the grounds that the Licensee failed to ensure that ashtrays not be provided in any area where smoking is prohibited?

Based upon all of the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Licensee, Reese-Brooks Hospitality Industries, LLC, d/b/a Minnehaha Lanes, holds Bowling Center, Entertainment, Food Vending, Gambling, Liquor, and Restaurant licenses from the City of Saint Paul, and has been the owner of the business since December 22, 2000.^[1]

2. Minnehaha Lanes is a 92,000 square foot facility containing 40 bowling lanes (24 in one area and 16 in another area), together with a bar, restaurant, banquet hall, main and satellite kitchens, and a basement storage area for food service equipment.^[2]

3. Chapter 238 of the St. Paul Legislative Code ("Code") regarding Public Smoking in Licensed Liquor Establishments and Restaurants (herein the "Smoking Ordinance") was passed by the St. Paul City Council on January 11, 2006, and became effective March 31, 2006.^[3]

4. A Memorandum dated February 15, 2006, was mailed to all City of St. Paul bowling center, liquor and restaurant licensees, noting that smoking is prohibited in all indoor areas, including basements and storage rooms.^[4] This memorandum was also distributed to all participants, including Mr. Erkenbrack, at a February 15, 2006, meeting with licensees at Mancinis, in St. Paul.^[5]

5. Also at the February 15, 2006, meeting at Mancini's, a draft LIEP memorandum titled Enforcement scheme for the St. Paul smoking Ordinance was distributed, containing the Smoking Ban Penalty Matrix,^[6] and stating in part:

"1. Initial enforcement will essentially be complaint based although a routine check for violations of the Smoking Ordinance will be done during the regular food inspection at an establishment. . . ."

6. During routine inspections, inspectors will look [sic] violations of the St. Paul Smoking Ordinance. As defined by the Ordinance, violations are:

- a. Ashtrays, matches and lighters in any area where smoking is prohibited including the dining area, break areas, bathrooms, or offices.
- b. No or inappropriate signage.
- c. A customer or employee smoking in the establishment."^[7]

Paragraphs 2, 3, 4, and 5 of the memorandum specify how complaints will be handled and that after three complaints, an on-site inspection will be conducted, and, if there is an apparent violation witnessed by the inspector, an inspection

report and any evidence will be sent to the Citizens Service Office for possible adverse action.^[8] There have been no complaints about smoking on the Licensed premises.^[9]

6. A LIEP memorandum dated March 8, 2006, was mailed to all licensees subject to the Smoking Ordinance reminding them of the upcoming smoking ban, its requirements, and noted that “no smoking” signs would be provided free of charge.^[10]

7. Licensee received the “no smoking” signs from the City of St. Paul that state “**THIS ENTIRE ESTABLISHMENT IS SMOKE FREE**” and posted them at both of Minnehaha Lanes’ outside entrances to public spaces, on or before March 31, 2006.^[11]

8. Licensee removed all ashtrays from the public areas of Minnehaha Lanes and stored them in the basement on or before March 31, 2006.^[12]

9. Licensee’s additional efforts regarding compliance with the Smoking Ordinance include:

- a. Minnehaha Lanes internet web home page, since the summer of 2006, opens with the banner:

“Now Smoke Free!”^[13]

- b. Sending out flyers to day care centers with “Smoke Free!” at the top.^[14]

- c. Revision of the General Rules for employee of Minnehaha Lanes to include:

“14. No smoking in building.

No smoking during a league shift.

You can take a smoke break with the MOD's [Manager on Duty] permission.”^[15]

- d. Distribution of flyers regarding the Smoking Ordinance to all bowling league participants by the league secretaries.^[16]

- e. Various employees telling bowling patrons who have been caught smoking in entryways between the two sets of doors that they cannot smoke there and that they must go outside.^[17]

- f. Posting additional no-smoking signs between the two sets of doors at the two entrances to public areas.^[18]

- f. Mr. Erkenbrack, owner of Licensee, telling an office employee caught smoking in an office area that she cannot smoke inside and must go outside to smoke.^[19]
- g. Mr. Mike Fletcher, food and restaurant manager, telling the cook who smoked in a basement hallway that he cannot do that any more.^[20]

10. Abdinasir Museid, an inspector with LIEP, visited Minnehaha Lanes on January 9, 2007, for a routine, unannounced health inspection of the licensed establishment. He, along with Mike Fletcher, the restaurant manager, toured the main and satellite kitchens, the bar and restaurant, and the basement food equipment storage area.^[21]

11. During the inspection, Mr. Museid came across cigarette butts on the floor near a 1 1/2 foot, floor standing, ashtray full of cigarette butts in a basement hallway. When asked, Mr. Fletcher said it was a cook who was doing that.^[22] No other ashtrays were found or seen by Mr. Museid.^[23]

12. As a result of the inspection, Mr. Museid issued an Inspection Report citing 8 non-critical deficiencies (including a deficiency for violations of the Minnesota Clean Indoor Air Act),^[24] and one critical deficiency for lack of a Minnesota Certified Food Manager.^[25]

13. The Inspection Report and the Smoking Ordinance were reviewed by the LEIP Deputy Director, who forwarded the Report and licensing file on to the City Attorney for adverse action.^[26] In addition, the Licensee's licensing history entry for January 9, 2007, included the entry that the inspector "observed an ashtray in the basement of the bowling alley that is either used by employees or patrons. This is a violation of the St. Paul prohibition of smoking in liquor and food establishments (LCC 238). Matrix penalty (LCC310.05(m)(2) is \$500 for a first violation. CAR."^[27]

14. There is no evidence, other than the existence of cigarette butts and an ashtray, that any patrons or any employees other than one cook smoked in the basement storage area.

15. By letter dated January 26, 2007, the City's LIEP Office informed the Licensee that Licensee had violated the Smoking Ordinance by: not ensuring that ashtrays are not provided in an area where smoking is prohibited; and failure to post the required signs stating that "This Establishment Is A Smoke-Free Area In It's Entirety." The letter further informed the Licensee that LEIP was recommending a \$500.00 fine. Licensee has received no other Notices of Violations.^[28]

16. Licensee removed the ashtray found in the basement.^[29] The inspector did not check the basement during a January 31, 2007, inspection at

Minnehaha Lanes, even though compliance was required by January 24, 2007.^[30]

16. By letter, Licensee requested a hearing before an Administrative Law Judge.^[31]

17. The City thereafter issued the Notice of Hearing setting this matter on for hearing before the Administrative Law Judge. The Notice was served on the Licensee by mail, and filed with the Office of Administrative Hearings.^[32]

18. The hearing was held in accordance with the Notice.

19. At the conclusion of the presentation of all evidence at the hearing, the City Attorney withdrew the allegation of the violation of Section 238.04(1) of the Smoking Ordinance provision regarding the posting of no smoking signs.

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

CONCLUSIONS

1. The Saint Paul City Council and the Administrative Law Judge have jurisdiction in this matter pursuant to the St. Paul Legislative Code § 310.05 and Minn. Stat. § 14.55 (2004).

2. The hearing was conducted in accordance with the requirements of Minnesota Statutes sections 14.57 to 14.62 and applicable portions of the procedures set forth in section 310.05 of the Saint Paul Legislative Code.

3. The City has given proper notice of the hearing in this matter and has fulfilled all relevant procedural requirements of law and rule.

4. The City bears the burden in this matter of proving by a preponderance of the evidence that adverse action is warranted with respect to the Licensee's licenses.

5. Chapter 310 of the Saint Paul Legislative Code contains general provisions relating to licenses issued by the City. Section 310.06(b)(5) and (6) of the Saint Paul Legislative Code specifies that adverse action may be taken when "[t]he licensee . . . has violated . . . any of the provisions of . . . any . . . ordinance . . . reasonably related to the licensed activity"

6. Adverse action is defined in Saint Paul Legislative Code § 310.01 to include the revocation or suspension of licenses and the imposition of fines. Section 310.05(l) provides, in applicable part:

"(l) *Imposition of Fines.* The council may impose a fine upon any licensee or license applicant as an adverse license action. A fine may be in such amount as the council deems reasonable and appropriate, having in mind the regulatory and enforcement purposes embodied in the particular licensing ordinance. A fine may be in addition to or in lieu of other adverse action in the sole discretion of the council."

7. The St. Paul Legislative Code provides that, for a first violation, the presumptive sanction for violation of a provision of the legislative code relating to the licensed activity is a fine in the amount of \$500.^[33] The City Council may deviate from this penalty in an individual case where the Council finds that substantial and compelling reasons exist making it more appropriate to do so.^[34]

8. There are substantial or compelling reasons in the record to justify a downward deviation from the presumptive penalty in this case.

9. Section 238.04 of the Smoking Ban Ordinance, titled **Responsibilities of Proprietors**, provides as follows:

“The proprietor or other person in charge of a bar or restaurant shall:

(1) Post "no smoking" signs that comply with the Minnesota Clean Indoor Air Act Rules, Minnesota Rules, part 4620.0500, as amended from time to time;

(2) Ensure that ashtrays, lighters, and matchbooks are not provided in any area where smoking is prohibited; and

(3) Ask any person who smokes in an area where smoking is prohibited to refrain from smoking and, if the person does not refrain from smoking after being asked to do so, ask the person to leave. If the person refuses to leave, the proprietor or person in charge of the bar or restaurant shall contact the police department and ask that the person be trespassed from the establishment.”

10. Minnesota Rules section 4620.0500 provides in applicable part:

“Subpart 1. Posting. . . . the statement "Smoking is prohibited except in designated areas" or a similar statement must be conspicuously posted on or immediately inside of all outside entrances to a public place.

Subp. 2. Statement on sign. All signs used to identify a location where the responsible person prohibits smoking in an entire public place or public meeting must use the statement, "No smoking is permitted in this entire establishment" or a similar statement. The sign must be conspicuously posted either on or immediately inside of all outside entrances to the public place. . . .”

11. The City failed to demonstrate by a preponderance of the evidence that the Licensee failed to comply with Section 238.04(1) of the Saint Paul Legislative Code regarding the posting of no smoking signs.

12. Section 2.02 of the Saint Paul Legislative Code specifies that “[w]ords and phrases shall be construed so far as possible in their plain, ordinary and usual sense except that technical words and phrases having a peculiar and recognized meaning in law shall be understood according to their technical import.”

13. It is reasonable and consistent with the plain, ordinary, and usual sense of the term “provide”^[35] for the City to view the presence of an ashtray filled with cigarette butts in a basement hallway as a failure to “Ensure that ashtrays, lighters, and matchbooks are not provided in any area where smoking is prohibited.”

14. The City demonstrated by a preponderance of the evidence that the Licensee failed to comply with Section 238.04(1) of the Saint Paul Legislative Code regarding Licensees' obligations to ensure that ashtrays not be provided in areas where smoking is prohibited.

15. The Licensee's violation of Section 238.04(1) of the Saint Paul Legislative Code, is reasonably related to Licensee's Restaurant license.^[36]

16. The Licensee's violation of Section 238.04(1) of the Saint Paul Legislative Code, in this instance, is not reasonably related to Licensee's Bowling Center, Entertainment, Food Vending, Gambling, or Liquor licenses.

17. The Council may impose some or all of the costs of a contested case hearing if any one of several conditions is met, including if "the applicant or licensee was sufficiently in control of the situation and therefore could have reasonably avoided the violation."^[37]

18. The Licensee was sufficiently in control, as shown by the facts of this case as applied to the responsibilities of the Smoking Ordinance, to prevent the use of the ashtray in the storage area by the cook. However, the alleged sign violation was unsupported by the facts or the law and was not withdrawn until then end of the hearing and after the presentation of all evidence. A fair, prorated portion of the costs, if any, of the hearing could be imposed on the Licensee pursuant to Section 310.05(k) of the St. Paul Legislative Code.

19. A fine of \$150.00 or less would be a reasonable and appropriate adverse action, having in mind the regulatory and enforcement purposes embodied in the Smoking Ordinance.

20. These Conclusions are reached for the reasons set forth in the accompanying Memorandum, which is hereby incorporated by reference in these Conclusions.

21. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions, and as Findings any Conclusions that are more appropriately described as Findings.

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

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED:

That the Saint Paul City Council take adverse action against the restaurant license held by Reese-Brooks Hospitality Industries, LLC, d/b/a Minnehaha Lanes.

Dated: March 20, 2007

s/M. Kevin Snell
M. KEVIN SNELL
Administrative Law Judge

Reported: Tape recorded (two (2) tapes); no transcript prepared.

MEMORANDUM

The City argues in this proceeding that the presumptive penalty of a \$500.00 fine for a first violation is appropriate because the health inspector was “under the impression” that the manager was aware that smoking was going on, and the many cigarette butts found in and around the ashtray. The evidence is contradictory about the restaurant/food manager’s knowledge of the cook smoking in the basement. The inspector, Mr. Museid, testified that the manager told him that he (the manager) knew a cook was the one smoking in the basement. After receiving the Notice of Violation, Mr. Erkenbrack was told by the manager that yes, he did discover that the cook smoked in the basement, and that he told the cook that he couldn’t do that anymore. There is no evidence in the record as to when the manager knew of the smoking cook, or how long, if at all, the cook continued to smoke after being told he couldn’t do that, except for the large amount of cigarette butts found by the health inspector. The Administrative Law Judge cannot reach a decision on this issue by speculating whether the cook continued to smoke with or without management’s knowledge or whether or not some of the cigarette butts were still sitting in the ashtray from before the smoking ban and whoever put the ashtray in the basement simply failed to dump them out.

The Licensee asserts that the ashtray wasn’t “provided” for anyone to smoke because it was in a basement storage area. He argued that there would have been other employees smoking down there if his managers were allowing smoking in the basement. However, the determining facts are that the ashtray was in a hallway (not behind closed doors of a locked storage area) in the basement and cigarette butts were on the floor around the ashtray. The evidence is clear that no other ashtrays were observed in the hallway.^[38] The ashtrays put into storage must be in another storage location or room in the basement, away from access by employees. The Smoking Ordinance’s requirements on the proprietor’s and any other persons in charge are rigid, along the lines of strict liability: Proprietors must “ensure” that ashtrays are not “provided” in a non-smoking area. Allowing an ashtray in a hallway of a non-smoking area is “providing.” Finally, although Licensee argued in closing that the Xcel Energy Center has received warnings for Smoking Ordinance violations, he offered no basis for such a statement and the Administrative Law Judge did not consider the statement as evidence in making this decision.

A downward deviation from the presumptive \$500.00 penalty in this case would be appropriate because the Administrative Law Judge believes that there are substantial and compelling reasons in the record to justify such a determination. First, the alleged violation of the sign posting requirement was unsupported by the evidence. There was testimony that the inspector told the manager that there must be a non-smoking sign posted in the basement. Such a posting may be desirable, but it is not a basis for a violation. The law requires posting of no smoking signs at outside entrances to public spaces. The basement, or its entrance is an inside entrance to a private, non-public space.

The licensing record indicates that the ashtray was used by patrons. Again, there is no evidence for such a conclusion. The LEIP conclusions were a part of the information presented to the City Attorney for issuance of the eventual Notice of Violation. The Licensee made numerous efforts to enforce and promote the non-smoking nature of Minnehaha Lanes, and was at all times in complete compliance with the legal requirements for sign posting. A complete lack of required sign postings would indicate a disregard for the requirements of the law. The Administrative Law Judge did not see such disregard by the Licensee. The City Attorney appropriately dismissed the alleged sign violation at the end of the hearing. Finally, the Administrative Law Judge finds it unusual that adverse action would be taken against a licensee for a “non-critical” deficiency, yet no adverse action was taken against the licensee for a “critical” deficiency.^[39]

Under the circumstances and for the same reasons stated above regarding a downward departure for adverse action, it would be unreasonable to allocate any substantial portion of the costs of this matter to the Licensee.

The Administrative Law Judge determined that the violation was only related to the restaurant license because the offending ashtray was in the basement food storage area and the smoking offender was a cook. There was no evidence that the basement food storage area or the ashtray were in any related to entertainment, gambling, liquor, or the 40 bowling lanes, all of which are upstairs in the building.^[40]

While the City introduced sufficient evidence to support the imposition of disciplinary action against the Licensee, the City may wish to consider action short of the presumptive fine for a first offense, particularly in light of the reasons stated above, the clear record of the Licensee and its consistent efforts to otherwise promote and enforce the requirements of the Smoking Ordinance.

M.K.S.

^[1] Exhibit 1.

^[2] Testimony of Mr. Erkenbrack, Ex. 10., test. of Abdinasir Museid, Environmental Health Specialist II, St. Paul Office of License Inspections, Sanitarian and Environmental Health Specialist registered with the State of Minnesota.

^[3] Ex. 3-7.

^[4] Test. of Christine Rozek, Deputy Director, Office of License Inspections and Environmental Protection (LIEP), Ex. 4.

^[5] *Id.*

^[6] Ex. 5-2, see *also* Sec. 310.05(m) of the Code.

^[7] Test. of Christine Rozek, Ex. 5.

^[8] Ex. 5-1.

^[9] Ex.1-1.

^[10] Test. of Christine Rozek, Ex.6.

- [11] Test. of Josh Goodman, Harry Erkenbrack; Exs. 10, 14-1 and 14-2
- [12] Test. of Harry Erkenbrack, where he noted that the ashtrays were stored “pending any further developments in this never-ending smoking ban battle.”
- [13] Test. of Harry Erkenbrack, Ex. 11.
- [14] *Id.*, Ex. 12.
- [15] Test. of Harry Erkenbrack, Ex. 13.
- [16] Test. of Josh Goodman, Dave Erickson, and Harry Erkenbrack,
- [17] *Id.*
- [18] Test. of Dave Erickson.
- [19] Test. of Harry Erkenbrack.
- [20] *Id.*
- [21] Test. of Abdinasir Museid.
- [22] *Id.*
- [23] *Id.*
- [24] Ex. 2-2, requiring “Remove ashtrays from the nonsmoking areas” and requiring that entrances be posted with signs stating: “THIS ESTABLISHMENT IS A [sic] SMOKING AREA IN ITS ENTIRETY.”
- [25] Ex. 2.
- [26] Testimony of Christine Rozek, LEIP Deputy Director.
- [27] Ex. 1-1.
- [28] Ex. 7-1.
- [29] Test. of Harry Erkenbrack.
- [30] Test. of Abdinasir Museid, Ex. 2-2.
- [31] Ex. 8.
- [32] Ex. 9.
- [33] Sec. 310.05(m)(2) of the Code.
- [34] Sec. 310.05(m) of the Code.
- [35] which means to supply or make something available, Merriam Webster On Line Dictionary, <http://www.merriam-webster.com/dictionary/provide>
- [36] Sec. 310.06(b)(6) a.
- [37] Section 310.05 (k) of the Code.
- [38] Findings of Fact 11.
- [39] See, Ex. 2-2 & 2-3.
- [40] Ex. 10.