

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF SAINT PAUL

In the Matter of All Licenses Held by Billy Neng Yang, d/b/a Asian Cuisine, for the Premises Located at 945 Rice Street, Suite A, Saint Paul.

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

This matter came on for hearing on February 6, 2008, before Administrative Law Judge Kathleen D. Sheehy, in Conference Room 42 of the City Hall/Courthouse Building, 15 West Kellogg Boulevard, St. Paul, MN 55102.

Rachel Tierney, Assistant City Attorney, 400 City Hall, 15 West Kellogg Boulevard, St. Paul, MN 55102, appeared for the City of St. Paul's Department of Safety and Inspections (DSI).

Jeffrey J. Fenske, Esq., Ritter & Fenske, Ltd., 461 University Avenue, St. Paul, MN 55103, appeared for Billy Neng Yang, d/b/a Asian Cuisine (Licensee).

**STATEMENT OF THE ISSUES**

1. On August 24, 2007, did the Licensee violate a condition placed upon his license and various provisions of the St. Paul Legislative Code by selling alcoholic beverages without requiring the purchase of food and by selling beer by the case to group celebrating an anniversary party on the premises?
2. On October 21, 2007, did the Licensee violate the St. Paul Legislative Code by allowing a minor to consume alcohol on the premises?
3. If so, is revocation the appropriate licensing sanction based on the Licensee's history of violations?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. Billy Neng Yang is the owner and license holder of a business called Asian Cuisine, located at 945 Rice Street in St. Paul. Since August 2003

he has held the following licenses: restaurant (B), wine and beer on sale, entertainment (B), catering, alarm permit, and food vehicle.<sup>1</sup>

2. For the past two years, the Licensee's sister, Kia Vang, has managed the business, while the Licensee has spent most of his time in Thailand with relatives.<sup>2</sup> For about the last year and one-half, the restaurant has been open only on Friday, Saturday, and Sunday evenings, when entertainment is offered.<sup>3</sup> It has a stage and dance floor, which are surrounded by tables. There is a bar and cashier stand in the southwest corner.<sup>4</sup> Vang is the only person who serves as the bartender and cashier.<sup>5</sup>

3. The liquor licenses are subject, in relevant part, to the following condition:

Condition 1: The sale of wine and beer will take place only in conjunction with the sale and service of food. Alcoholic beverages can not be sold, provided, or poured when the kitchen is closed. Patrons must purchase food with a drink purchase.

This condition restates the express terms and conditions of on-sale wine and beer licenses in St. Paul, which authorize holders to sell wine and beer only in conjunction with the sale of food.<sup>6</sup>

4. On December 14, 2006, the City's Office of License Inspections and Environmental Protection (now known as DSI) issued a Notice of Violation to the Licensee. The Notice of Violation alleged that during a liquor compliance check conducted on November 22, 2006, three plain clothes police officers entered the premises and were allowed to purchase an alcoholic beverage without ordering food. The police officers observed that numerous people were buying beer without ordering food. In addition, they observed that some people bought cases of beer and were passing them to others at their tables.<sup>7</sup> The Notice alleged that this conduct violated license condition #1 and the ordinances limiting the scope of on-sale wine and beer licenses to the sale of those beverages only in conjunction with the sale of food. The Licensee did not dispute the alleged violations and paid the \$500 fine on December 27, 2006.<sup>8</sup>

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<sup>1</sup> Ex. 1-3.

<sup>2</sup> Testimony of Kia Vang.

<sup>3</sup> *Id.* It is unclear whether a restaurant that is open only on Friday, Saturday, and Sunday nights would meet the definition of "restaurant" contained in the St. Paul ordinance, which defines a restaurant in part as an establishment that has "a full service kitchen and a menu, offering meals and full menu service on a daily basis." St. Paul Legislative Code § 409.02.

<sup>4</sup> Ex. 28.

<sup>5</sup> Test. of K. Vang.

<sup>6</sup> St. Paul Legislative code § 409.15(a)(2); § 409.15(e).

<sup>7</sup> Ex. 3.

<sup>8</sup> Ex. 4.

5. On February 12, 2007, the City issued a Notice of Violation alleging that on December 27, 2006, the Licensee failed to maintain its video surveillance camera to record activity in the parking lot, as required by license condition #3; and that on January 20, 2007, the Licensee had operated after hours in violation of St. Paul ordinances and failed to provide security, as required by license condition #4.<sup>9</sup> The Licensee requested a hearing, which was held on April 3, 2007.<sup>10</sup> On July 5, 2007, the City Council found all three violations had occurred and imposed a fine of \$1,500 against all licenses for the establishment.<sup>11</sup> The Licensee paid the \$1,500 fine on August 9, 2007.<sup>12</sup>

6. On August 2, 2007, the City issued a Notice of Violation alleging that on June 17, 2007, a police officer observed customers standing outside and re-entering the premises at will until 2:03 a.m. In addition, an officer in plain clothes observed that many customers were still drinking beer at 1:40 a.m., the band was playing, and people were dancing. This conduct allegedly violated §§ 409.07(c) and 409.07(a) of the St. Paul Legislative Code.<sup>13</sup> The Licensee did not dispute the Notice of Violation, and the City Council imposed a fine in the amount of \$2,000 and required the establishment to close for ten days.<sup>14</sup> The Licensee paid the fine on October 3, 2007, and complied with the order to close between October 3 and October 12, 2007.<sup>15</sup>

7. On August 24, 2007, Community Liaison Officer (CLO) Tong Yang was assigned to work with police in a plain clothes investigation of gambling at Asian Cuisine, as well as complaints that the establishment operates more like a night club than a restaurant.<sup>16</sup> CLO Yang entered the premises at about 9:00 p.m. and stayed there until about 11:00 p.m. He did not observe any gambling activity. He purchased a beer, but was not offered a menu, and he was not asked whether he wanted to order any food. After about 30 minutes, CLO Yang requested a menu from a server and ordered some food.<sup>17</sup>

8. That night, there was a well-attended anniversary party going on in the southwest corner of the restaurant. At around 10:00 p.m., CLO Yang observed that the bartender had rolled four cases of beer on a cart to the table where the party was taking place. As new people joined the party, customers would open bottles of beer and hand the bottles to newcomers.<sup>18</sup>

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<sup>9</sup> Ex. 5-2.

<sup>10</sup> Exs. 6, 7.

<sup>11</sup> Exs. 8-12.

<sup>12</sup> Ex. 13.

<sup>13</sup> Ex. 14.

<sup>14</sup> Exs. 15 & 16.

<sup>15</sup> Ex. 17.

<sup>16</sup> Ex. 19.

<sup>17</sup> Ex. 20-2; Testimony of Officer Tong Yang.

<sup>18</sup> Ex. 20-2; Test. of T. Yang. At the hearing, Officer Yang testified that he did not recall if the crowd attending the party was eating or not. The report he filed a few days after the incident

9. Although CLO Yang did not observe it, the people attending the anniversary party were served food in the course of the evening. Some ordered appetizers and ate while waiting for other guests to arrive. In addition, there was a special menu prepared for the event, consisting of chicken with vegetables, pad Thai, soup, and chicken wings. According to the cook who prepared the meal, he cooked enough food for 50 to 60 people. The guests did not order individually but served themselves from a buffet.<sup>19</sup>

10. On October 21, 2007, St. Paul Police Officer Jeff Gilsrud was working off-duty for Asian Cuisine during the evening hours. While in the parking lot, he observed a group of young men walking toward the door, one of whom appeared to be under 21 years of age. The person working security at the door initially turned the group away, but the manager allowed the group to enter because they were there to join a larger group having a birthday party. A few minutes later Officer Gilsrud inquired of the security person as to where the group had gone, and during this conversation Officer Gilsrud observed that the person who appeared to be under 21 years of age was inside the premises consuming a bottle of beer. Officer Gilsrud subsequently determined the person was 19 years of age, and he issued a citation to the man for underage drinking.<sup>20</sup>

11. On November 8, 2007, the City issued to the Licensee a Notice of Intent to Revoke Licenses. With regard to the incident on August 24, 2007, the City alleged the Licensee had sold alcohol to Officer Yang and the people attending the party without requiring a purchase of food, in violation of license condition #1 and §§ 409.15(a)(2) and 409(a)(3)(e)<sup>21</sup> of the St. Paul Legislative Code; and had served beer by the case, in violation of § 409.02 of the St. Paul Legislative Code. With regard to the October 21, 2007, incident, the City alleged the licensee had permitted a minor to consume alcohol on the premises, in violation of § 409.08(2) of the St. Paul Legislative Code. The City informed the Licensee that because this would be the Licensee's fourth appearance before the City Council within 24 months, it would recommend revocation of all licenses pursuant to § 310.05(m) of the St. Paul Legislative Code.<sup>22</sup>

12. The Licensee requested a hearing on November 15, 2007.<sup>23</sup> On December 26, 2007, the City issued a Notice of Administrative Hearing, scheduling the hearing to take place on February 6, 2008. The hearing took place as scheduled.

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indicates only that at about 10:00 p.m. he saw people drinking beer but did not observe any food present on their table.

<sup>19</sup> Testimony of Paul Vang; Testimony of Ger Vue; Testimony of Pao Vue.

<sup>20</sup> Ex. 21; Testimony of Officer Gilsrud; Exs. 25-27.

<sup>21</sup> The reference to § 409.15(a)(3)(e) is incorrect. The section of the Code pertaining to on-sale licenses for beer is § 409.15(e).

<sup>22</sup> Ex. 22.

<sup>23</sup> Ex. 23.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

## CONCLUSIONS

1. The Administrative Law Judge and the St. Paul City Council have authority to hear this matter pursuant to St. Paul Legislative Code § 310.05(c).

2. The hearing in this matter was conducted in accordance with the applicable portions of the procedures set forth in section 310.05 of the St. Paul Legislative Code.

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

4. The City has the burden of proving by a preponderance of the evidence that adverse action is warranted against the licenses held by Billy Neng Yang, d/b/a Asian Cuisine.

5. The St. Paul City Council may take adverse action against any or all licenses or permits, licensee or applicant for a license, on the basis that the licensee or applicant has failed to comply with any condition set forth in the license or has violated any of the provisions of any statute, ordinance or regulation reasonably related to the licensed activity.<sup>24</sup>

6. The St. Paul Legislative Code defines an on-sale wine license as a license authorizing the sale of wine for consumption on the licensed premises only in conjunction with the sale of food.<sup>25</sup> A similar provision authorizes the sale of intoxicating malt liquors only in conjunction with the sale of food.<sup>26</sup>

7. The City demonstrated by a preponderance of the evidence that on August 24, 2007, the Licensee sold beer not in conjunction with the sale of food to Officer Yang, in violation of license condition #1 and the terms and conditions of the license as described in § 409.15(e) of the St. Paul Legislative Code. The City did not demonstrate by a preponderance of the evidence that the Licensee sold alcohol not in conjunction with the sale of food to customers attending the anniversary party.

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<sup>24</sup> St. Paul Legislative Code § 310.06 (b)(5) & (b)(6)(a); see also § 409.12 (any license or permit under this chapter may be suspended for up to 60 days or revoked or a civil fine imposed not to exceed two thousand dollars (\$2,000.00) for each violation on a finding by the council that the license or permit holder has failed to comply with an applicable statute, rule or ordinance relating to alcoholic beverages).

<sup>25</sup> *Id.* § 409.15(a)(2).

<sup>26</sup> *Id.* § 409.15(e).

8. The St. Paul Legislative Code authorizes the holder of an on-sale license to sell liquor by the glass for consumption on the premises only.<sup>27</sup>

9. The City demonstrated by a preponderance of the evidence that on August 24, 2007, the Licensee sold beer by the case to customers attending the anniversary party, in violation of the terms and conditions of the license as described in § 409.02 of the St. Paul Legislative Code.

10. The St. Paul Legislative Code prohibits any licensee, or agent or employee thereof, from serving or dispensing any intoxicating liquor to any minor; “nor shall such licensee, agent or employee permit any minor to be furnished with or to consume any such liquor on the licensed premises; nor shall such licensee, agent or employee permit any minor to be delivered any such liquor.”<sup>28</sup> Licensees are responsible for insuring that any individual under the age of 21, other than an employee, who enters the establishment is present only for the purpose of consuming a meal or attending a social function open to the public held in a portion of the establishment where liquor is not sold, consumed, served or displayed.<sup>29</sup>

11. The City demonstrated by a preponderance of the evidence that on October 21, 2007, the Licensee permitted a minor to consume alcohol on the premises in violation of § 409.08(2)(a) of the St. Paul Legislative Code.

12. Section 310.05(m) of the St. Paul Legislative Code contains a penalty matrix applicable to all license types, “except that in the case of a violation involving a liquor license § 409.26 shall apply where a specific violation is listed.” The penalty matrix in § 310.05(m) sets out presumptive penalties for violations of conditions placed on a license and violation of provisions of the legislative code relating to the licensed activity. These penalties are presumed to be appropriate for every case; however, the Council may deviate from the presumptive penalty in an individual case where the Council finds and determines that there exist substantial and compelling reasons making it more appropriate to do so. When deviating from these standards, the Council shall provide written reasons that specify why the penalty selected was more appropriate.<sup>30</sup>

13. Pursuant to § 310.05(m) of the St. Paul Legislative Code, this would be the Licensee’s fourth appearance within 24 months, for which revocation is the presumptive penalty.<sup>31</sup>

14. Section 409.26 of the St. Paul Legislative Code, applicable to liquor licenses, contains a different penalty matrix that sets out presumptive penalties

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<sup>27</sup> St. Paul Legislative Code § 409.02.

<sup>28</sup> *Id.* § 409.08(2)(a).

<sup>29</sup> *Id.* § 409.08(21).

<sup>30</sup> *Id.*, § 310.05(m).

<sup>31</sup> *Id.*

for specific offenses in connection with the sale of intoxicating liquor, including after hours display or consumption of alcohol and sale of alcoholic beverages to underage persons.<sup>32</sup> The purpose of this section is to establish a standard by which the City Council determines the length of license suspensions and the propriety of revocations, and it applies to all on-sale and off-sale licensed premises for intoxicating liquor and nonintoxicating liquor. The penalties in the matrix are presumed to be appropriate for every case; however, the Council may deviate therefrom in an individual case where the Council finds and determines that there exist substantial and compelling reasons making it more appropriate to do so. When deviating from these standards, the Council shall provide written reasons that specify why the penalty selected was more appropriate.<sup>33</sup> The occurrence of multiple violations shall be grounds for departure from such penalties in the council's discretion.<sup>34</sup>

15. Pursuant to § 409.26 of the St. Paul Legislative Code, this would be the Licensee's third appearance within 18 months for the enumerated violations. The presumptive penalty for sale of alcoholic beverages to an underage person on a third appearance before the council is suspension for up to 18 consecutive days.

16. The City's recommendation to revoke all licenses would require a deviation from the penalty matrix contained in § 409.26, but there are substantial and compelling reasons to impose the sanction of revocation in lieu of further suspension. Most of the Licensee's appearances before the Council (including this one) have involved not only the specific offenses enumerated in the matrix, but multiple violations, over a short period of time, of license conditions and ordinances governing the most basic requirements of licensure.

Based upon these Conclusions, and for the reasons explained in the Memorandum attached hereto, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

It is respectfully recommended that the St. Paul City Council take adverse action against the licenses held by Billy Neng Yang, d/b/a Asian Cuisine.

Dated: February 28, 2008

s/Kathleen D. Sheehy

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KATHLEEN D. SHEEHY  
Administrative Law Judge

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<sup>32</sup> St. Paul Legislative Code § 409.26(b).

<sup>33</sup> *Id.* § 409.26(a).

<sup>34</sup> *Id.* § 409.26(c).

Reported: Digitally recorded,  
No transcript prepared

### **NOTICE**

This report is a recommendation, not a final decision. The St. 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. Pursuant to Section 310.05 of the St. 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, Saint Paul City Clerk, 290 City Hall, 15 West Kellogg Boulevard, St. Paul, MN 55102, to ascertain the procedure for presenting argument.

### **MEMORANDUM**

The record establishes that on August 24, 2007, the Licensee sold beer to Officer Yang without inquiring whether he wished to order food, without offering him a menu, and without taking any affirmative action whatsoever to ensure that the sale of beer took place in conjunction with the sale of food. The fact that Officer Yang of his own volition chased down a server, asked for a menu, and succeeded in ordering food at a later time does not mean the violation did not occur. On the other hand, the City did not prove that the same violation took place with regard to those persons attending the anniversary party that evening. Four people, including guests as well as the cook, testified that food was prepared and served to persons attending the party. In light of this testimony, the fact that Officer Yang did not see food on their table at 10:00 p.m. that evening does not establish a violation.

The City did prove a different violation, however, concerning service to the anniversary party group. There was a factual dispute as to whether the manager brought one case of beer to the table, as she testified, or four cases, as observed by Officer Yang. This conflict is not material. The manager admitted bringing one case of beer to the table. This was one of the violations alleged in the Licensee's first appearance before the City Council in December 2006. The Licensee continued to engage in this practice, either because there were insufficient numbers of staff to provide adequate service to the numbers of people present or because it was just easier to let the party-goers serve themselves out of the case. In either event, this practice is not permitted by the license and makes it difficult for the Licensee to keep track of which customers

are drinking, and how much they are drinking, which the Licensee needs to know in order to comply with licensing responsibilities.

On October 21, 2007, the security person working at the door initially barred the minor from entering the premises, based on the Licensee's policy not to allow minors inside after a certain point in the evening. The manager overruled this decision and allowed the minor to enter so that he could join another group celebrating a birthday party. Within a short time, Officer Gilsrud observed the minor drinking a bottle of beer inside the restaurant. Although the manager disavowed any knowledge of how the minor obtained the beer and maintained that she did not serve it, her lack of knowledge does not absolve the Licensee of responsibility for the violation. The ordinance makes it the Licensee's responsibility to ensure that minors do not obtain or consume alcohol on licensed premises.

In support of its recommended penalty, the City has cited the penalty matrix contained in § 310.05(m). This section provides in relevant part:

The purpose of this section is to establish a standard by which the city council determines the amount of fines, the length of license suspensions and the propriety of revocations, and shall apply to all license types, *except that in the case of a violation involving a liquor license § 409.26 shall apply where a specific violation is listed.* These penalties are presumed to be appropriate for every case; however the council may deviate therefrom in an individual case where the council finds and determines that there exist substantial and compelling reasons making it more appropriate to do so. When deviating from these standards, the council shall provide written reasons that specify why the penalty selected was more appropriate.<sup>35</sup>

Section 409.26(b) contains a different matrix, specifically applicable to liquor licenses, but it only references certain types of violations. Under this penalty matrix, the Licensee has had two previous violations for after hours display or consumption of alcoholic beverages, and the current violation for sale of alcoholic beverages to an underage person would be considered a third appearance within 18 calendar months of the first appearance for a listed violation. The presumptive penalty would be a suspension of up to 18 consecutive days.

Although neither party raised this issue, it is difficult to conclude that the penalty matrix in § 310.05(m) should govern the disposition of this case. This appearance involves the sale of alcohol to an underage person, which is a violation specifically identified in § 409.26(b). Pursuant to this matrix, this would be considered the Licensee's third appearance for the specified types of

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<sup>35</sup> St. Paul Legislative Code § 310.05(m) (emphasis added).

violations.<sup>36</sup> This does not mean that the multiple, additional violations of license conditions and other ordinance provisions previously addressed pursuant to § 310.05(m) must be disregarded; the Council would be justified in basing a deviation from the presumptive penalty in § 409.26 on those other violations, all of which have involved basic requirements of licensure and all of which occurred over a very short period of time. The Licensee appears to be unable to operate in compliance with these requirements. Furthermore, the manager's decision to terminate the employment of the security person working at the door, in response to the minor consumption incident, does not establish that the Licensee has taken action to follow more responsible business practices in the future. Under all these circumstances, revocation could still be the appropriate penalty.

Finally, pursuant to § 310.06(d), in any case in which the Council is authorized to take adverse action against less than all of the licenses held by a licensee, or applied for by an applicant, the following standards may be used:

- (1) The nature and gravity of the grounds found by the council to exist upon which the adverse action would be based;
- (2) The policy and/or regulatory goals for the particular licenses involved, either as embodied in the Legislative Code or as found and determined by the council;
- (3) The interrelationship of the licenses and their relative importance to the overall business enterprise of the licensee or applicant;
- (4) The management practices of the licensee or applicant with respect to each of such licenses;
- (5) The extent to which adverse action against less than all of the licenses or applications would result in difficulty in enforcing and monitoring the adverse action taken;
- (6) The hardship to the licensee or applicant that would be caused by applying adverse action to all licenses or applications; and
- (7) The hardship and/or danger to the public, or to the public health and welfare, that would result from adverse action against less than all of the licenses or applications.

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<sup>36</sup> The violations are: after hours display or consumption of alcohol on January 20, 2007, for which the Licensee appeared before the Council on July 5, 2007 (Exs. 8-12); after hours display or consumption of alcohol on June 17, 2007, for which the Licensee appeared before the Council on September 12, 2007 (Exs. 14-16); and sale of alcoholic beverages to a minor on October 21, 2007 (the current violation).

Given the manner in which Asian Cuisine is being operated, it does not appear that the Licensee would be able to operate a restaurant without the entertainment and liquor licenses. The Council could take this into consideration in addressing the above factors to determine whether to take adverse action against all or some of the licensees held by the Licensee.

K.D.S.