**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A11-1124**

Grand American Restaurant Company d/b/a The Wild Onion,
Relator,

vs.

City of Saint Paul,
Respondent.

**Filed June 11, 2012**
**Affirmed**
**Peterson, Judge**

City of St. Paul Office of Safety & Inspections
Resolution No. 11-752

Patrick H. O'Neill, Jr., Stephen M. Warner, O'Neill & Murphy LLP, St. Paul, Minnesota (for relator)

Sara Grewing, St. Paul City Attorney, Virginia D. Palmer, Judith A. Hanson, Rachel Gunderson Tierney, Kyle A. Lundgren, Assistant City Attorneys, St. Paul, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Chutich, Judge; and Huspeni, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## U N P U B L I S H E D  O P I N I O N

**PETERSON**, Judge

Relator challenges the denial of its application for a patio liquor license, arguing that (1) respondent's determination that there was not a generally favorable disposition from the surrounding community toward the proposed licensed activity was contrary to the substantial evidence, (2) respondent's licensing ordinance is unconstitutionally vague as applied to relator, and (3) respondent's decision to deny the license was arbitrary and capricious because it was influenced by the political concerns of a city-council member who was biased and actively supported opposition to the license. We affirm.

## FACTS

Relator Grand American Restaurant Company d/b/a The Wild Onion applied to the St. Paul Department of Safety and Inspections (DSI) for a license to serve liquor on an existing outdoor seasonal patio area (patio license). Respondent City of St. Paul's licensing ordinance requires that an applicant seeking a patio license

> shall present with his or her application a statement in writing with the signatures of as many of the owners of private residences, dwellings and apartment houses located within three hundred (300) feet of such premises as he or she can obtain to the effect that they have no objection to the granting of the license sought at the location proposed.

St. Paul, Minn., Legislative Code § 409.06(g)(2)(a) (2011).

The ordinance provides further:

> If the applicant obtains the signatures of ninety (90) percent or more of such persons, the council may grant the license. If the applicant obtains the signatures of sixty (60) percent to eighty-nine (89) percent of such persons, the

> council may grant the license if the licensee demonstrates to the council in writing with respect to specific properties that a good faith effort was made to fulfill all petition requirements, and upon finding that issuance of the license would not interfere with the reasonable use and enjoyment of neighboring property and residences and would not bear adversely on the health, safety, morals and general welfare of the community.

St. Paul, Minn., Legislative Code § 409.06(g)(2)(b) (2011).

> If the applicant fails to obtain the signatures of sixty (60) percent of such persons, the license shall not in any case be granted, unless the license applicant can illustrate to the city council, in writing with respect to specific properties, that a good faith effort was made to fulfill all petition requirements, and that the results of such attempts *showed a generally favorable disposition from the surrounding community toward the proposed licensed activity*, and that the district council representing the area supports the request for the license by the applicant. The council may grant the license upon finding that issuance of the license would not interfere with the reasonable use and enjoyment of neighboring property and residences and would not bear adversely on the health, safety, morals and general welfare of the community.

St. Paul, Minn., Legislative Code § 409.06(g)(2)(c) (2011) (emphasis added).

DSI provided relator with a list of owners of property within 300 feet of the patio, and relator presented with its application a written statement with the signatures of less than 60% of the property owners. DSI mailed notice of the license application to all owners and occupants of property within 350 feet of relator's premises and received objections to the license, which triggered a public hearing on the license application before a legislative hearing officer (LHO). Prior to the hearing, relator obtained the support of the Summit Hill Association, which is the district council that represents the

area. The association's support was subject to seven conditions. DSI also supported the patio license with additional conditions. At the hearing, a property owner presented a petition opposing the license application that was signed by representatives of 41 properties, 22 of whom owned property within 300 feet of relator's premises. Also, two property owners testified against the license application, and eight individuals representing six residential properties within 300 feet submitted letters opposing the application.[1] Following the hearing, the LHO recommended that the city council approve the patio license subject to the Summit Hill Association's and DSI's conditions.

When the LHO's recommendation was presented to the city council, councilmember David Thune, who represented the ward where relator's premises are located, stated that relator had obtained signatures from only 33% of the neighbors and there had been objections to the patio license. Thune moved to refer the matter to the city attorney's office for denial based on the fact that there was no generally favorable disposition and to have an amended resolution before the council in one week. One week later, the council adopted an amended resolution to refer the license application to the city attorney for denial.

The city attorney sent a letter to relator stating that the city attorney would be recommending denial of the patio license because (1) relator presented signatures of 33% of property owners within 300 feet of the licensed premises; (2) neighbors testified,

[1] There are minor discrepancies in the record with respect to the numbers of property owners who signed petitions or submitted letters. The numbers presented here are taken from stipulated facts that relator submitted to the city council. The discrepancies do not affect our analysis or decision.

submitted letters, and signed a petition in opposition to the license application; and (3) the city council found that relator "failed to show that the results of the attempts to satisfy the signature requirements showed a generally favorable disposition toward the licensed activity." The letter also informed relator that, if it wanted to admit these facts, but contest the denial, it could have a public hearing before the city council, or, if it disputed these facts, it could request a hearing before an administrative law judge (ALJ).

Relator did not request a hearing before an ALJ, and several letters regarding a stipulation of facts were exchanged between the city attorney and relator. Relator ultimately agreed that it was choosing to proceed with an admission to the facts and a public hearing before the city council. Prior to the hearing, relator submitted a letter with a "proposed stipulated facts and stipulated record" attached.[2]

At the public hearing, the city attorney asserted that 20 or 22 out of 60 property owners within 300 feet of the relator's establishment indicated approval of the patio license and that the percentage in favor of the patio license was 33 percent. Relator asserted it was "in general agreement" but that "actually there were only 58 [property owners] and that 20 or 22 indicated approval of the patio license." The city council's resolution denying the patio license states that relator's application "in support of the proposed license activity . . . was signed by 33% of the owners of private residences, dwellings or apartment houses within three-hundred (300) feet of the licensed premises."

[2] The letter sent by relator is not in the file constituting the record on appeal. But relator stated at the council hearing that "I did send an e-mail to the councilmembers, a letter yesterday," and the city concedes the point, incorporating statements made in the stipulated facts attached to the letter into its arguments on appeal and providing the letter and stipulated-facts document in its appendix.

The city attorney asserted that the property owners' petition in opposition to the license application was signed by 41 people, 22 of whom were "within that 300 feet." The city council found that, "at the Legislative Hearing, a petition in opposition to the proposed license was submitted that was signed by forty-one (41) nearby residents, of those twenty-two (22) were owners of private residences within three-hundred (300) feet of the licensed premises." The city council determined that relator "failed to demonstrate a generally favorable disposition toward the licensed activity" and unanimously voted to deny the license application. This certiorari appeal followed.

**D E C I S I O N**

A city council has broad discretion when determining whether to issue a liquor license. *Wajda v. City of Minneapolis*, 310 Minn. 339, 343, 246 N.W.2d 455, 457 (1976). Our review of a municipality's decision to grant or deny a liquor-license application is narrow and "should be exercised most cautiously," granting relief only from "unreasonable, arbitrary, capricious, or fraudulent action." *Id.* "A city council's decision may be modified or reversed if the city violated constitutional provisions, exceeded its statutory authority, made its decision based on unlawful procedure, acted arbitrarily or capriciously, made an error of law, or lacked substantial evidence in view of the entire record submitted." *Montella v. City of Ottertail*, 633 N.W.2d 86, 88 (Minn. App. 2001) (quotation omitted). Our review is confined "to the record before the city council at the time it made its decision." *Hard Times Cafe, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 173 (Minn. App. 2001) (quotation omitted).

**I.**

In its resolution denying relator's application, the city council found that the "application included a petition in support of the proposed licensed activity that was signed by 33% of the owners of private residences, dwellings or apartment houses within three-hundred (300) feet of the licensed premises" and that "the petition was signed by representatives of at least twenty (20) but not more than twenty-two (22) properties." The resolution also states "that the Council denies [relator's] application for a liquor outdoor service area because [relator] has failed to demonstrate a generally favorable disposition toward the licensed activity."

Relator argues that the city council erred in determining that relator failed to demonstrate a generally favorable disposition toward the licensed activity because, under any reasonable interpretation of the licensing ordinance, a generally favorable disposition toward a patio license would be demonstrated by showing that, among those people who actually stated an opinion about the license application, more people supported the application than opposed it. Therefore, relator contends, because the record shows that more people consented to its application than opposed it, the city council's finding that relator failed to demonstrate a generally favorable disposition toward the licensed activity was contrary to the evidence. We disagree.

Words and phrases of an ordinance are to be construed according to their common and approved usage, unless the resulting construction "is inconsistent with a manifest legislative intent or repugnant to the context of the [ordinance]." *Standafer v. First Nat'l Bank of Minneapolis*, 236 Minn. 123, 127, 52 N.W.2d 718, 721 (1952). A particular

provision must be read "in context with other provisions of the same [ordinance] in order to determine the meaning of the particular provision. *ILHC of Eagan, LLC v. Cnty. of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005) (statutory construction); *see also Eagan Econ. Dev. Auth. v. U-Haul Co. of Minn.*, 787 N.W.2d 523, 535 (Minn. 2010) (stating that statutory construction rules apply to construction of municipal ordinances).

To obtain a patio license under the ordinance, relator needed to demonstrate to the city council that the owners of residential property located within 300 feet of the proposed licensed premises did not object to the license being granted. To do so, relator needed to present with its license application a written statement that the residential-property owners did not object, and the statement needed to include as many of the owners' signatures as relator could obtain. If the written statement had included the signatures of 90 percent of the owners, which would have demonstrated that there was little, if any, opposition to the license, the city council could have granted the license without any additional showing by relator. St. Paul, Minn., Legislative Code § 409.06(g)(2)(b). If relator had presented the signatures of 60 to 89 percent of the owners, which would have left open a possibility that there was significant opposition to the license, the council could have granted the license only if it found that doing so "would not interfere with the reasonable use and enjoyment of neighboring property and residences and would not bear adversely on the health, safety, morals and general welfare of the community." *Id.* But because relator failed to obtain the signatures of at least 60 percent of the owners, which left open a possibility of even greater opposition to the license, the council could not grant the license "unless [relator could] illustrate to the city

council . . . that a good faith effort was made to fulfill all petition requirements, and that the results of such attempts showed a *generally favorable disposition from the surrounding community* toward the proposed licensed activity." St. Paul, Minn. Legislative Code § 409.06(g)(2)(c) (emphasis added).

Relator's argument that a generally favorable disposition toward a patio license would be demonstrated by showing that, among those people who actually stated an opinion about the license application, more people supported the application than opposed it, changes the requirement for showing a generally favorable disposition of the surrounding community to a requirement for showing a generally favorable disposition of only those people who stated an opinion. This change is significant because, under the plain language of the ordinance, the general rule is that a license shall not be granted if less than 60 percent of all residential-property owners demonstrate with their signatures that they have no objection to granting the license. And the overall structure of the ordinance, which places on the applicant the burden of demonstrating to the city council that there is broad community support for the proposed licensed activity, indicates that the intent of the ordinance is to require an applicant to show support from more than a simple majority of all property owners to obtain a license. Allowing a license applicant to show a generally favorable disposition by establishing the support of only a bare majority of those property owners who state an opinion is contrary to this intent. We, therefore, conclude that, to demonstrate a generally favorable disposition toward the licensed activity, it is not sufficient for a license applicant to show only that, among those

people who actually stated an opinion about the license application, more people supported the application than opposed it.

As we have already discussed, there are some minor disputes between the parties about how many residential property owners signed written statements indicating that they either did or did not object to granting relator a license. But even if we assume that relator's count of the signatures is correct, only a slight majority of those owners who stated an opinion did not object to granting the license, and approximately one third of the owners did not state any opinion. In addition, relator obtained signatures from 27 tenants who lived within 300 feet from relator's premises and six businesses within 300 feet that indicated they did not object to the license, and ten property owners either testified against the license application or submitted letters opposing the application. Thus, the evidence showed that, among those who stated their opinions, the community was divided between two substantial factions that either supported or opposed the license, and the opinions of a substantial part of the community were not known. Therefore, we conclude that, although there were some residents who were favorably disposed to the license, the city council's finding that relator "failed to demonstrate a generally favorable disposition toward the licensed activity" is supported by substantial evidence.

**II.**

Relator argues that, to the extent that the phrase "generally favorable disposition from the surrounding community" is applied to mean anything other than majority support from responding property owners within 300 feet of the relator's premises, the ordinance is unconstitutionally vague as applied to relator. The constitutionality of an

ordinance is a question of law that this court reviews de novo. *State v. Botsford*, 630 N.W.2d 11, 15 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001). When no fundamental right or suspect class is involved, a municipal ordinance is presumed to be constitutional, and a challenger has the burden to prove a constitutional violation beyond a reasonable doubt. *Thul v. State*, 657 N.W.2d 611, 618 (Minn. App. 2003), *review denied* (Minn. May 28, 2003).

Vague ordinances are prohibited by the due-process standards of definiteness in the Minnesota Constitution and the United States Constitution. *City of Edina v. Dreher*, 454 N.W.2d 621, 622 (Minn. App. 1990), *review denied* (Minn. June 15, 1990). An ordinance "is void due to vagueness if it defines an act in a manner that encourages arbitrary and discriminatory enforcement, or the law is so indefinite that people must guess at its meaning." *Hard Times Cafe*, 625 N.W.2d at 171 (quotation omitted). The use of general language, however, does not make an ordinance vague. *Id.* Thus, "[t]o satisfy the Due Process Clause, a city ordinance permitting adverse action against a liquor license must provide sufficient objective standards to control the discretion of the governing authority and must give adequate notice to the licensee of the criteria used to permit adverse action against the license." *In re On-Sale Liquor License, Class B*, 763 N.W.2d 359, 366 (Minn. App. 2009).

Relator asserts that the phrase "generally favorable disposition" "gives an applicant no real guidance regarding what quantum of evidence will satisfy the requirements of the Ordinance for approval of a Patio License Application." Relator

relies on this court's opinion in *Class B*[3], where a city council took adverse action against a liquor licensee based on a determination that off-premises conduct of its patrons and neighborhood "livability issues" constituted "good cause" under the governing ordinance. *Id.* at 364-65. Reversing the city council's decision to take adverse action, this court concluded that the phrase "good cause" did not provide the licensee with "adequate notice that off-premises conduct of its patrons and neighborhood 'livability' issues could be the basis of adverse license actions." *Id.* at 367-68.

But, unlike *Class B*, the ordinance here creates a framework for understanding what "generally favorable" means. As discussed above, the ordinance sets forth a three-tiered approach based on the percentage of favorable responses from property owners within 300 feet of the proposed activity. "Generally" means "popularly; widely." *American Heritage Dictionary* 755 (3rd ed. 1992). "Favorable" means "advantageous; helpful; encouraging; propitious; manifesting approval; commendatory." *Id*. at 666. Applying the ordinary meaning of these words within the framework of the ordinance, ordinary people would not have to guess that "generally favorable" does not mean the approval of 33% of property owners when approximately 33% of property owners have expressed disapproval and the remaining property owners have not expressed an opinion.

[3] Realtor also cites *State v. Newstrom*, 371 N.W.2d 525, 527 (Minn. 1985), in which the supreme court found a statute that required home-school instructors to have qualifications that were "essentially equivalent" to public-school teachers and imposed criminal liability for failure to comply with compulsory school-attendance laws to be unconstitutionally vague. *Newstrom*, however, involved a criminal statute, and "where a statute imposes criminal penalties, a higher standard of certainty of meaning is required." *Newstrom*, 371 N.W.2d at 528.

*See Hard Times Café, Inc.*, 625 N.W.2d at 172 (ordinance not unconstitutionally vague because ordinary people would not have to guess that selling illegal drugs on premises constituted "good cause" for adverse action on a license even though licensee was not found to have violated any laws).

**III.**

Relator argues that councilmember Thune had substantive ex parte communications with one of the owners of The Wild Onion and that those communications constituted an unlawful procedure that requires reversal of the council's denial of the license. Relator asserts that Thune told the owner "that he would not support the Patio License application over concerns that doing so would cost him votes from neighbors in opposition." Relator requested that Thune recuse himself from considering the license application.

In its resolution denying the license, the city council did not make findings regarding Thune's statement or address relator's recusal request. Thune addressed the request at the hearing, stating: "There has been a suggestion by the owners that I should recuse myself because they've actually spoken to me. And I just want to state for the record that I make decisions based on the testimony that's presented."

Thune admitted that he had a discussion with an owner of The Wild Onion. But relator bears the burden of demonstrating that any improper ex parte communication was prejudicial. *Koes v. Advanced Design, Inc.*, 636 N.W.2d 352, 363 (Minn. App. 2001), *review denied* (Minn. Feb. 19, 2002). Relator does not argue that it was prejudiced by the

discussion. Thus, even if we assume that the discussion was an improper ex parte communication, relator has not shown that the communication compels reversal.

**IV.**

Relator argues that e-mails between Thune and his constituents, together with Thune's actions throughout the license-application process, confirm that Thune was biased and had direct contact with neighborhood license opponents and coached them about what to do. The e-mails were between Thune and his constituents and do not demonstrate the type of bias, close-mindedness, or prejudgment on Thune's part that would compel reversal. Several of the e-mails indicate that Thune received a complaint or information from a constituent, and Thune responded that he would forward the complaint or information to the city licensing department. Many of the e-mails contain negative comments about the Wild Onion, but the comments were made by Thune's constituents. As an elected official, it was not improper for Thune to receive opinions and information from his constituents. The e-mails do not demonstrate that the decision of the city council was made pursuant to unlawful procedure or was arbitrary or capricious.

**Affirmed.**