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January 17, 2008

VIA E-MAIL AND MESSENGER

The Public Safety & Regulatory Services
Committee of the Minneapolis City Council
c/o Jackie Hanson
City Clerk's Office
Room 304, 350 Fifth Street South
Minneapolis, MN 55415

**Re: In the Matter of the On-Sale Liquor License, Class B, Held by T.J. Management, Inc. of Minneapolis d/b/a Gabby's Saloon and Eatery
OAH Docket No. 2-6010-19003-6**

Dear Ms. Hanson:

Enclosed for filing in the above-captioned matter, please find an original and two copies of Respondent's Exceptions to Administrative Law Judge's Findings of Fact, Conclusions of Law and Recommendation.

By copy of this letter I am serving same upon Lee C. Wolf, Assistant Minneapolis City Attorney.

Very truly yours,

LEONARD, STREET AND DEINARD
Professional Association


Scott G. Harris

cc: Lee C. Wolf, Assistant City Attorney

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

In the Matter of the On-Sale Liquor
License, Class B, Held by T.J.
Management of Minneapolis d/b/a
Gabby's Saloon and Eatery,
OAH Docket No. 2-6010-19003-6.

**RESPONDENT'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND RECOMMENDATION**

INTRODUCTION

This case presents an extraordinarily important question before the Minneapolis City Council: May the City of Minneapolis (the "City") unilaterally impose conditions and restrictions on a liquor license, not for any improper conduct by the licensee, but because of the alleged *off-premises* conduct of the license holder's alleged *customers*? City Attorney Lee Wolf, in his Opening Statement at the hearing on this matter, candidly admitted that the City is "stretching the law."

Let there be no confusion – this case is not about the license holder's acts or omissions or its culpability. The City has stipulated that T.J. Management of Minneapolis d/b/a Gabby's Saloon and Eatery ("Gabby's") has complied with all applicable statutes, rules, and ordinances relating to alcoholic beverages. Moreover, the Administrative Law Judge (the "ALJ") unequivocally found that Gabby's has taken appropriate actions and implemented appropriate security to prevent any violation of the law on its premises. As such, the ALJ correctly held that the City may not revoke Gabby's liquor license.

Rather, this case is about whether Gabby's – which has done nothing wrong, employs over 80 people, pays significant property and sales taxes to the City, and has operated as a legal, conforming use for more than 20 years – nevertheless must be forced to submit to conditions and restrictions imposed on its liquor license that will, as the ALJ specifically found, force Gabby's to shut its doors.

The only reason Gabby's has been subjected to this proceeding is that a small group of neighbors objects to the alleged conduct of Gabby's customers as they travel to and from the bar. These complaints have arisen in the last three years, since Gabby's became popular with a young, African-American clientele. As is reflected in the candid testimony of the City's Inspector Skomra, the City's efforts to condition Gabby's license are motivated by one goal: "to change the crowd that [Gabby's] attract[s] to a different crowd" Testimony of R. Skomra, p. 460. The conditions contemplated by the City would force Gabby's to close earlier at night, when its young, African-American crowd generally frequents the bar at late hours; the proposed conditions call for Gabby's to play a different form of music than hip-hop or rap, when that is generally the favored music of its current crowd; the proposed conditions include a higher coverage charge to enter Gabby's, based on the presumption that many of its young, African-American patrons will be put off by such a higher coverage charge and will no longer frequent Gabby's.

Quite simply, the City has no legal power to interfere with Gabby's long-standing, thoroughly legal operations in a misguided effort to single out and influence the alleged conduct of Gabby's current patrons, not when they are on Gabby's business premises, but when they are on their way to and from those premises.

Moreover, if it is now the City's view that a bar the size of Gabby's is no longer appropriate for its surrounding neighborhood – which includes pockets of residential properties – the City cannot simply “condition” Gabby's out of business. For 22 years, Gabby's has been a conforming legal use within its Bottineau neighborhood, and even if it were not conforming, the City would be obliged to respect Gabby's property rights so long as it continues to operate legally. The City cannot seek to modify legal uses within neighborhoods under the guise of licensure proceedings, as such attempted conduct by the City would render meaningless both property and license rights. The State of Minnesota and City of Minneapolis have in place established legal requirements for potential and existing licensees in all sorts of businesses, and the predictability and uniform application of those requirements are essential both to the functioning of businesses and to the livelihood of citizens throughout our City and State. The instant, blatant “end-run” around the property and license rights of Gabby's is an affront to all legitimate, law-abiding business owners, and the City Council should carefully consider its consequences and reject the notion that it can condition Gabby's liquor license under the circumstances presented in this dispute.

EXCEPTIONS
TO ALJ'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
RECOMMENDATION

The ALJ made several egregious factual and legal errors in reaching his unsupported conclusion that the City may unilaterally impose conditions and restrictions on Gabby's liquor license and also completely overlooked numerous pertinent admissions by the City's witnesses. Gabby's addresses each error in turn.

I. **Factual Exceptions**

Pertinent, Undisputed Facts Which the ALJ Omitted From His Decision

The following undisputed Facts – all of which are established by the sworn testimony of the City’s witnesses – have a direct bearing on the issue before the City, but were omitted from the ALJ’s Findings.

Omitted Finding of Fact 1. In 1986, when Gabby’s was originally issued its liquor license, there was a public hearing conducted and it was determined that the Bottineau neighborhood was an appropriate place for a Class B liquor establishment that could accommodate nearly 700 people. Testimony of R. Cervantes, p. 361.

Omitted Finding of Fact 2. Lieutenant Glampe knows of no legal basis for the City to direct a bar to change the music that it plays and play a different music instead. Testimony of T. Glampe, p. 122. Nor is Lieutenant Glampe aware of the City having any legal right to discourage a bar from encouraging people who like hip-hop and rap music from coming to that bar. *Id.*, p. 122.

Omitted Finding of Fact 3. Similarly, Lieutenant Glampe knows of no legal basis for saying that a group of people who like hip-hop music and rap music should be denied access to entertainment that they enjoy based on any presumption of the number of “troublemakers” among that group of people. *Id.*, p. 123.

Omitted Finding of Fact 4. There is nothing illegal about Gabby’s catering to a young, Afro-American crowd which generally wishes to arrive at Gabby’s near 11:00 p.m. and stay until 2:00 a.m. Testimony of R. Cervantes, p. 317.

Omitted Finding of Fact 5. Inspector Skomra is of the view that Gabby's contributes to the City's crime problem by "drawing a criminal element into the neighborhood to prey on the vehicles that are parked there" and by drawing a large crowd which "provides victims who, a lot of them, are at a less than sober state walking the street, which makes them more susceptible to street robberies or thefts from persons than would normally occur on any other city street." Testimony of R. Skomra, pp. 453-54.

Omitted Finding of Fact 6. Inspector Skomra proposed to Gabby's management that Gabby's "change their venue"—to "country music as a venue"—"so as to attract a different crowd than that which they were then currently attracting," as he thought that might partly "solve the crime problems." *Id.*, pp. 455-460.

Omitted Finding of Fact 7. Inspector Skomra also proposed that Gabby's charge a higher cover charge: "Five dollars cover charge, I thought, was drawing all types of people; that if it was higher, he [owner Jeffrey Ormond] would get a better grade of clientele. Everybody can afford \$5.00, even a problem person. If you raised your cover charge to a higher amount, you would discourage the element who is looking for a bargain and maybe just coming there to create trouble. You would eliminate them from the mix, I believe . . ." *Id.* p. 455.

Omitted Finding of Fact 8. Inspector Skomra acknowledged that "if Gabby's isn't attracting customers that . . . includes an element of . . . troublemakers," though those troublemakers might not "disappear and not be a police problem," they "would say

it would be less of a problem for the neighborhood.” Specifically, he stated: “I know that if they didn’t go to Gabby’s, they would be dispersed other places.” *Id.*, p. 456.

Omitted Finding of Fact 9. Inspector Skomra had the following exchange under oath:

- Q. You have no basis for assuming that, if Gabby’s changed its venue and didn’t attract a young Black crowd on Thursday and Saturday nights, that that crowd that no longer came to Gabby’s would somehow disappear from Minneapolis radar screens; that is, would not be going out to bars and entertainment spots?
- A. I have no guarantee that it would disappear from Minneapolis. I know that the people I am responsible for on the east side of Minneapolis near Gabby’s would have a peaceful neighborhood. *Id.*, p. 458.

Omitted Finding of Fact 10. Inspector Skomra’s position toward Gabby’s in May of 2007 was that “Gabby’s either had to agree to the condition of reducing occupancy [*i.e.*, agree to admit a fewer number of its current, young African-American clientele each night] or it had to change venue, meaning it had to change the crowd it attracted to a different crowd” Inspector Skomra “had suggested country music as a venue” *Id.*, p. 460.

Omitted Finding of Fact 11. At that time in May of 2007, Inspector Skomra considered removing his on-duty officers from service in the neighborhood surrounding Gabby’s for awhile, so as to “knowingly provide less security in the neighborhood surrounding Gabby’s, placing greater stress on the neighborhood, greater risk of crime, and greater stress on Gabby’s off-duty officers in order to try to coerce Gabby’s into agreeing to conditions” He refrained from doing so only because “I couldn’t expose

both the neighborhood and the off-duty officers working there to the risk that would come by pulling the on-duty officers out of there.” *Id.*, p. 461.

Omitted Finding of Fact 12. The Second Precinct where Gabby’s is located is many times staffed at minimum levels, at night with as few as 7 or 8 officers on duty. That is “barely adequate to meet the needs of the precinct just for 911 response . . .” *Id.*, p. 417.

Omitted Finding of Fact 13. Gabby’s is not responsible for the shortage of staffing in the Second Precinct. “It’s just a coincidence that Gabby’s happens to be located legally in the precinct that has the fewest resources . . .” *Id.*, pp. 437-38.

Omitted Finding of Fact 14. It does not cost the City of Minneapolis any more money to have a police officer on duty near Gabby’s than it does to have a police officer near a club such as Karma downtown. Accordingly, it does not cost the City more money to have an adequate number of police officers in the neighborhood around Gabby’s than it does to have an adequate number of officers in the neighborhood around the Warehouse District. Testimony of D. Niziolek, p. 240.

Omitted Finding of Fact 15. “[T]he Second Precinct has crime issues that are unrelated to activities at Gabby’s . . .” Testimony of R. Cervantes, p. 283.

Omitted Finding of Fact 16. There are criminal issues in Gabby’s neighborhood that have nothing whatsoever to do with Gabby’s. Testimony of R. Skomra, p. 437.

Omitted Finding of Fact 17. Inspector Skomra knows of no “authorities relating to liquor licenses that stand for the proposition that the licensee is responsible for

providing all security services in the neighborhood surrounding its premises in order to maintain its license . . .” Testimony of R. Skomra, pp. 430-31.

Omitted Finding of Fact 18. According to Inspector Skomra, a police precinct should be able to handle its problems with on-duty resources, rather than tell a business in the precinct that it should have to privately hire off-duty officers. *Id.*, p. 440.

Omitted Finding of Fact 19. Gabby’s privately provides more security resources – including off-duty officers – “per thousand people than any other bar in the city” of Minneapolis. *Id.*, p. 457.

Omitted Finding of Fact 20. “Gabby’s has up to ten off-duty officers stationed in its parking lot until such time as they are dispersed to do patrols of the neighborhood, and to move traffic . . .” Testimony of D. Niziolek, p. 208. *See also* Testimony of T. Glampe, p. 88 (Gabby’s has “upwards of ten officers on those two [Thursday and Saturday] evenings”).

Omitted Finding of Fact 21. With ten off-duty officers serving Gabby’s, it regularly has more off-duty officers serving it than [the Second] precinct has on-duty officers “serving the whole precinct . . .” Testimony of R. Skomra, pp. 417 and 435; Testimony of T. Glampe, p. 70.

Omitted Finding of Fact 22. When an off-duty officer provides services to Gabby’s, Gabby’s directs the officer’s activities. The citizens of Minneapolis do not pay a penny for the security personnel, including off-duty officers, who provide services on behalf of Gabby’s. Testimony of R. Skomra, p. 413; Testimony of T. Glampe, pp. 77, 79.

Omitted Finding of Fact 23. The officers providing off-duty services to Gabby's are "very good officers" and do "a great job at Gabby's" Testimony of T. Glampe, pp. 68 and 106.

Omitted Finding of Fact 24. In the summer of 2006, Inspector Skomra specifically "brought up to the owners of Gabby's that I would like to see additional officers hired [off-duty, by Gabby's] that would be on a foot patrol going throughout the neighborhood to move people along if they were disturbing people and handling illegal parking issues and trespassing issues, in addition to littering." Testimony of R. Skomra, p. 415.

Omitted Finding of Fact 25. Nonetheless, it is Inspector Skomra's view that the legal responsibilities of a license holder are for the license holder's premises. Testimony of R. Cervantes, pp. 331, 339.

Omitted Finding of Fact 26. Gabby's management has been "careful to make sure that they operate their establishment in a way that fully complies with the law" Testimony of R. Skomra, p. 424.

Omitted Finding of Fact 27. There is nothing illegal about Gabby's operating at its location, nothing illegal about it operating under its liquor license with its current number of parking spaces, nothing illegal about the volume of the music played at Gabby's. Testimony of R. Cervantes, p. 296.

Omitted Finding of Fact 28. Gabby's has never encouraged or tolerated illegal conduct. Testimony of T. Glampe, p. 115.

Omitted Finding of Fact 29. Lieutenant Glampe is unaware of any prior instances “in which a liquor licensee was subject to discipline or revocation proceedings where that licensee neither engaged in illegal conduct, encouraged illegal conduct or tolerated any illegal conduct . . .” *Id.*

Omitted Finding of Fact 30. In his role on behalf of the License Investigation Division, Lieutenant Glampe never made a recommendation for discipline “when the license holder and its employees had not done anything improper or illegal . . .” *Id.*, p. 51.

Omitted Finding of Fact 31. Lieutenant Glampe is unaware of any legal bases “that would impose a different standard of operations on Gabby’s or any other bar because of its proximity to residential neighborhoods . . .” *Id.*, pp. 44, 131-32.

Omitted Finding of Fact 32. Further, Lieutenant Glampe knows of no statute, rule or ordinance that imposes obligations on a liquor licensee off of its premises. *Id.*, p. 46.

Omitted Finding of Fact 33. Lieutenant Glampe knows of no basis for requiring a bar about which there have been more complaints to live up to a different standard of operations than bars that have received less complaints. *Id.*, p. 132.

Omitted Finding of Fact 34. Mr. Niziolek is unaware of any instance where the City has taken action against a licensed establishment based on the City’s determination that the City disapproves of the establishment’s impact on its neighborhood. Testimony of D. Niziolek, p. 212.

Omitted Finding of Fact 35. Mr. Cervantes knows of no “law, statute, ordinance [or] rule . . . that provides that there is some obligation on the part of an establishment with a Class B license to somehow regulate the conduct of people who may be inclined to come, but haven’t arrived yet and might be six blocks away or to regulate the conduct of people who have been in the establishment and left and are no longer there in the premises and are six blocks away . . .” Testimony of R. Cervantes, p. 321.

Omitted Finding of Fact 36. Nor does Mr. Cervantes know of any legal basis that would “allow a bar to take any steps to inhibit the conduct of someone who hasn’t come into the bar, who is six blocks away, is thinking about going to the bar, and is committing some behavior six blocks away that might be deemed illegal . . .” *Id.*, p. 322.

Omitted Finding of Fact 37. Unlike other City ordinances – such as MCO § 360.70 dealing with special late hours food licensing – which purportedly afford the City power to revoke a license if the licensee affects “the peace, quiet or repose of surrounding residential or commercial areas or if it did contribute to crime, disorderly behavior, noise, traffic, litter or parking problems in the area near the establishment,” no such language exists in the City liquor ordinances. *Id.*, pp. 325-328.

Omitted Finding of Fact 38. Mr. Cervantes is unable to identify any legal precedents reflecting that a Class B liquor licensee bears legal responsibility when its business “has a negative impact on a neighborhood and jeopardizes public safety, health and welfare . . .” *Id.*, pp. 333 and 335.

Omitted Finding of Fact 39. As of December 19, 2006, Mr. Cervantes understood that City Attorney Joel Fussy could not find any case law supporting adverse action against a licensee for the off-premises conduct of others. Mr. Niziolek also confirmed that the City Attorney could not come up with any legal precedents “that would say that neighborhood livability, per se, are issues that could be cited to invoke a revocation or discipline towards Gabby’s *Id.*, p. 348, Testimony of D. Niziolek, p. 31.

Omitted Finding of Fact 40. In an e-mail to other City personnel, City Attorney Fussy acknowledged that it “is true” that “the scope of 259.250 is limited solely to the licensed premises, including parking areas, and not to off-premises activities” Testimony of D. Niziolek, p. 229; Exhibit H, Bates p. 594.

Omitted Finding of Fact 41. The City renewed Gabby’s license in April of 2007 after investigation and based on the very same record on which the City subsequently sought revocation or conditions against Gabby’s license. Testimony of R. Cervantes, pp. 282-83.

Omitted Finding of Fact 42. The police reports assembled by Lieutenant Glampe in support of these proceedings are reports largely made by the off-duty officers providing services to Gabby’s. Testimony of T. Glampe, p. 69.

Omitted Finding of Fact 43. Lieutenant Glampe is not aware of any license proceedings being commenced against any of the downtown bars at which thousands of people congregate in the streets, making loud noises, some urinating in the streets and the

like, or against any of the bars which generate far more weekly police reports than does Gabby's. Testimony of T. Glampe, pp. 90, 133-35.

Omitted Finding of Fact 44. Mr. Cervantes is of the view that these proceedings were brought against Gabby's "because of 12 people complaining about Gabby's" *i.e.*, "It's fair to say that [those complaints] would prompt us to take a look at Gabby's and then, through the police reports and through our inspections, yes, that's why we're here." Testimony of R. Cervantes, p. 296.

FACTUAL EXCEPTIONS TO THE ALJ'S STATED FINDINGS

Further, Gabby's takes exception, in whole or in part, to the following Findings of Fact by the ALJ.

ALJ Finding of Fact No. 6. The ALJ erred in finding that the community impact statements included any complaint of "drunken patrons [of Gabby's] knocking on doors of houses in the neighborhood and demanding to be let in" In fact, as is reflected in the subject Community Impact Statement and was acknowledged by City witness Ricardo Cervantes, "[t]here is nothing in their narrative, in the narrative . . . that says this patron came from Gabby's." "It's possible" that "the man who knocked on their door and tried to get in had nothing whatsoever to do with Gabby's" There is no reliable information "that Gabby's had anything to do with [these neighbors] having a very, very uncomfortable experience." Testimony of R. Cervantes, pp. 310-12; Ex. 5, Bates No. 535.

ALJ Finding of Fact No. 9. This Finding erroneously asserts that 62 police reports, generated between November 1, 2005 and November 5, 2006, "were directly

connected to Gabby's." In fact, City witness Glampe, who compiled and analyzed the police reports, admitted the following: He included a police report of someone being shot on the sidewalk across the street of Gabby's, since the report showed that the victim had previously been in Gabby's. Testimony of T. Glampe, p. 25. Glampe acknowledged that there was no "suggestion that the perpetrators of this shooting had anything to do with Gabby's" Testimony of T. Glampe, p. 60. Lieutenant Glampe admitted that if the victim had been shot after leaving a church, "[t]heir presence at the church would have contributed to the crime" at the "same level of contribution as Gabby's contribution to this shooting" *Id.*, p. 62. Similarly, Glampe "attributed to Gabby's directly" a police report by a person who left Gabby's and alleged that her cell phone was subsequently stolen one block away. Testimony of T. Glampe, pp. 92-93. Again, Glampe admitted that this report is "as attributable to Gabby's as [it would be to a church] if she had been praying in a church in the area before she was victimized" *Id.*, p. 93. Further Lieutenant Glampe "directly" attributed to Gabby's an incident involving one car driving down Marshall at 3:00 a.m. and striking another car pulling out of a parking space on Marshall, though he acknowledged that "[t]here is no suggestion here that either of these drivers had anything to do with Gabby's" Testimony of T. Glampe, pp. 100-102. *See also* Testimony of T. Glampe, pp. 112-14 (husband and wife began verbal argument in Gabby's parking lot and husband was later arrested for domestic assault one block away; Glampe acknowledged that incident was "directly attributable to Gabby's in the same way it would be [attributable to a church] if they had begun having an argument in the church parking lot . . . and they were then

stopped by officers a block away . . .). Thus, there is no reasonable basis to find that these police reports have a “direct”¹ connection to Gabby’s.

ALJ Finding of Fact No. 10. The ALJ erred in finding that the referenced 27 police reports between November 1, 2005 and November 5, 2006 were “indirectly connected” to Gabby’s. In fact, Lieutenant Glampe admitted that the only connection to Gabby’s respecting these police reports were that they arose in the general, 12 block geographic area of Gabby’s during bar hours. Testimony of T. Glampe, pp. 27, 66-67. Indeed, Glampe admitted that as to all of these police reports in Exhibit E, “I have no knowledge of anybody having a direct connection to Gabby’s in the reports, including this one” and it “absolutely” could “only be a presumption on [Glampe’s] part that would connect this in any way, directly or indirectly to Gabby’s . . .” Testimony of T. Glampe, pp. 117-18 (emphasis added). Thus, Lieutenant Glampe included police reports in his compilation “in support of proceedings . . . on Gabby’s liquor license” merely so long as the incident happened “somewhere near Gabby’s and . . . somewhere near closing time.” *Id.*, p. 120. For example, he included a police report on a traffic accident at 18th Avenue and Marshall Street at 2:40 a.m. on a Sunday morning involving a 52 year old man who lives in the general area of Gabby’s. *Id.*, at p. 119. Lieutenant Glampe acknowledged that the man easily could have been heading home and that by reason of his age, he did not fit the profile of a Gabby’s customer. For purposes of this set of reports that he submitted in support of these proceedings,

¹ “Characterized by close logical, causal, or consequential relationship.” *Merriam-Webster’s Collegiate Dictionary, 10th Ed.*

Lieutenant Glampe “thought it appropriate to attribute to Gabby’s . . . anything that happened somewhere near it, somewhere near its late night hours . . .” *Id.*, at p. 120. Lieutenant Glampe also included a report respecting a woman who was driving near Gabby’s at 11:15 p.m. and who was cited for failure to have proof of insurance, though he acknowledged that he was “absolutely” being “presumptive by connecting this report to Gabby’s . . .” *Id.*, pp. 124-26. He similarly included a report on a black male driver who was pulled over on Marshall at 1:00 a.m. and cited for driving with a revoked license, though Lieutenant Glampe had “no “evidence that he was going in or coming out or having anything to do with [Gabby’s]” and had “no reason to think that Mr. Holoman spent his time on a bad license driving up and back in front of Gabby’s for his life activities . . .” *Id.*, pp. 127-28. *See also* testimony of T. Glampe, pp. 129-30 (I’m making educated guesses, presumptive educated guesses”) (emphasis added). Absent anything more than Lieutenant Glampe’s “presumptions,” there is no factual basis for concluding that any of these police reports were “indirectly connected” to Gabby’s.

ALJ Finding of Fact No. 11. The ALJ erred in finding that between November 1, 2005 and November 5, 2006, “152 calls for Minneapolis Police service were attributed to Gabby’s address,” as asserted by Lieutenant Glampe. In fact, Lieutenant Glampe acknowledged that he could not even recall how he “attributed [to Gabby’s] these 152 calls for service:

If I remember correctly, those would have been simply running – it would either have been the 1900 Marshall Street Northeast [Gabby’ address] or it would have been that geographic area, and I cannot tell you what criteria we used. I did that so long ago that I am not

certain, but it was one of the two criterion, either that direct address or that geographic area.

Testimony of T. Glampe, pp. 36-37 (emphasis added). For example, if there was a call for service about illegal parking at 10:00 a.m. in the vicinity, Glampe “just included it” and attributed it to Gabby’s. *Id.*, p. 38. In fact, Glampe did “no analysis” whatsoever, he just “did put it [the report] down and say, That’s attributable to Gabby’s” *Id.*, p. 67. Indeed, if “there was a call for some kind of medical problem somewhere within 12 blocks of Gabby’s within a year’s time, [Glampe was] going to attribute that to Gabby’s” for purposes of conditioning Gabby’s liquor license. *Id.*, p. 67. Obviously, this testimony by Lieutenant Glampe, the sponsor of these police reports, thoroughly undermines the ALJ’s reference to these reports as any form of factual support for his Recommendations.

ALJ Finding of Fact No. 12. The ALJ purports to make a Finding of Fact that “Lieutenant Glampe . . . believes that based on the number of reported incidents and the effect on the livability of the nearby residential neighborhood, adverse action should be taken against Gabby’s” and “Glampe believes some of the problems could be alleviated or reduced” by imposing certain requirements on Gabby’s. There is not the slightest “Finding of Fact” in the ALJ’s recitation of one witness’s opinions, and “ALJ Finding of Fact 12” should be stricken.

ALJ Finding of Fact No. 13. While the ALJ makes a finding that Dan Niziolek, the Manager of the City’s Problem Property Unit, recorded activity surrounding Gabby’s between 11:45 p.m. and 2:45 a.m., including the alleged facts that “a woman

leaving Gabby's urinated in the street" and "four Gabby's patrons were yelling on the sidewalk as they left the bar," Mr. Niziolek admitted under oath that these statements were not accurate. Specifically, Mr. Niziolek acknowledged that he was at 22nd and Grand when he allegedly made these observations, that "at one point in time, a female was urinating in the street" but there was "[n]o direct connection to Gabby's in terms of watching her leave Gabby's and arrive there." Testimony of D. Niziolek, pp. 163-64. Mr. Niziolek similarly acknowledged that since he was around a corner and four blocks from Gabby's when he observed four people yelling on the sidewalk, he could not say that those people were Gabby's patrons. *Id.*, pp. 162-64 and 184. Thus, the ALJ has based his Recommendations on purported "facts" which the testifying witness has acknowledged are not accurate and lack foundation, and these falsehoods may not properly form the basis for the ALJ's decision.

ALJ Finding of Fact No. 14. Again, the ALJ merely recites that it is "Inspector Niziolek's opinion . . . that the activities at Gabby's and the patron behavior that he observed pose a problem for the neighboring residential community . . ." (emphasis added). Again, this is not a "Finding of Fact" but a recitation of one witness's opinion, and it should properly be stricken and cannot form any basis for the ALJ's Recommendations. Further, as noted above, Mr. Niziolek wrongly attributed behavior he observed to Gabby's patrons, when he had no foundation for doing so, and this, too, discredits even the "opinion."

ALJ Finding of Fact No. 15. While the ALJ's Finding is true that "[s]ome restaurants and bars located in downtown Minneapolis, *e.g.*, the 'Block E' area, generate

more calls for service and police reports than does Gabby's," the ALJ considerably understates the point. In fact, at the very page to which the ALJ cites, Lieutenant Glampe testified that "I would guess Block E, if you pulled up the number of complaints in Block E, it would be extraordinarily higher than what we see at Gabby's." Testimony of T. Glampe, p. 33 (emphasis added). Indeed, auto-generated weekly reports from the City of Minneapolis Police Department regarding bar-related crime events reflect that during the summer weeks of 2007, the number of reports from a variety of bars throughout Minneapolis dwarf the number attributed to Gabby's. See Exhibit G. Specifically, in the subject weeks there were 51 reports for the Block E bars, 18 reports on the Gay 90's, 13 reports on the 200 Club, 13 reports on Stand Up Frank's, 10 reports on the Lone Tree/Annex, 9 reports on Pizza Luce, 7 reports on Bellanotte, 7 reports on Champion's on Lake Street, and 7 reports on Gabby's. Testimony of T. Glampe, pp. 133-35; Exhibit G. Lieutenant Glampe also acknowledged that on Friday nights through Monday mornings in the warehouse district of Minneapolis, in the Block E area, at Hennepin and 5th Street in Minneapolis, "there are thousands of people congregating in the streets, making loud noises, some of them urinating in the streets and the like" Testimony of T. Glampe, p. 90. Inspector Robert Skomra agreed that such public displays in downtown Minneapolis on weekend nights, Block E, Warehouse District, Fifth and Hennepin area, are substantially worse than the scene in the neighborhood around Gabby's. Testimony of R. Skomra, p. 432.

ALJ Finding of Fact No. 16. With regard to the Bottineau Neighborhood Association meeting in September 2006, the ALJ relies upon testimony of Ricardo

Cervantes which was in fact contradicted by the Coordinator for the Bottineau Neighborhood Association, who testified from records of that meeting that four neighbors articulated complaints about Gabby's, rather than the 12 neighbors to which Cervantes testified. Testimony of C. Gams, p. 595.

ALJ Finding of Fact No. 17. The ALJ erroneously asserts that the inspectors observed "Gabby's patrons urinating in public," when the video exhibit on which Inspector Roberts relied for this assertion does not show any such individuals to be Gabby patrons. See, Exhibits 7 and 8 and Testimony of L. Roberts, pp. 474-77. This factual allegation lacks foundation and properly should be stricken.

ALJ Finding of Fact No. 20. In support of his Recommendations, the ALJ cites to Inspector Roberts' report that she witnessed a parked vehicle at 22nd Avenue and Second Street, N.E.—some one-half mile from Gabby's—wherein a man and a woman were having sex in the back seat. Inspector Roberts reported the incident to off-duty officers working at Gabby's and the officers responded to the scene. The ALJ failed to note that Inspector Roberts acknowledged that she had no sound basis for connecting this incident to Gabby's, saying only that "it could be" connected. Testimony of L. Roberts, p. 512. She further acknowledged that she did not see these two people either come from Gabby's or go to Gabby's. *Id.*, p. 513. Finally, Officer David Garman, who is in charge of those off-duty police officers who service Gabby's, testified that one of the off-duty officers investigated this incident, reported that it was not related to Gabby's, and further reported that the man and woman who had allegedly engaged in sex in the car left the vehicle and entered a residence near where the vehicle was

parked—further confirming that the incident had absolutely nothing to do with Gabby’s. Testimony of D. Garman, pp. 575-76. Thus, this “Finding of Fact” has absolutely no connection to Gabby’s and provides no support for the ALJ’s recommendations.

ALJ Finding of Fact No. 25. The ALJ recites that “[i]n Commander Skomra’s opinion, Gabby’s requires the deployment of excessive city resources and police officers.” Again, this is not a “Finding of Fact,” but rather simply a recitation of a witness’s opinion. As such, it should be stricken, as it properly forms no basis for the ALJ’s Recommendations.

ALJ Finding of Fact No. 34. The ALJ recounts that “Cervantes is concerned, however, that although Gabby’s security reacts quickly to remove troublesome patrons from the premises, the patrons are then exited into the neighborhood where problems can ensue.” This recitation of a witness’s position similarly is not a “Finding of Fact.” As such, it does not properly support the ALJ’s Recommendations and should be stricken.

ALJ Finding of Fact No. 37. The ALJ understates the facts when he declares: “most likely, the imposition of the suggested conditions [sought by the City] would reduce Gabby’s revenues so severely it would be forced to close.” In fact, the uncontroverted testimony of Jeffrey Ormond, who has been one of the owners/operators of Gabby’s since its inception in 1986, was: If Gabby’s were compelled to discontinue the sale of alcohol at 11:00 p.m., “I may as well not be in business.” . . . “My competition would eat me alive. Nobody would come to Gabby’s other than my lunch customers that don’t drink to begin with.” Testimony of J. Ormond, p. 678. If Gabby’s

is compelled to close entirely at 12 midnight every night of the week, “[i]t would kill our business.” *Id.*, p. 679. If Gabby’s were compelled to increase its entertainment cover charge to a minimum of \$15.00 every night, “it would hurt me dramatically.” *Id.*, pp. 679-80. If Gabby’s were compelled to eliminate any free drink specials such as Ladies Night, “I wouldn’t be competitive because about every bar in the city is doing some type of promotional activity and drink specials, and a lot of them do Ladies Night” *Id.*, p. 680. Finally, Mr. Ormond testified that if any of the above-referenced conditions was imposed upon his business, there would not be “a glimmer, not even a chance” that Gabby’s business would be able to survive. “Anyone of them would close me.” *Id.*, p. 681. The City’s Ricardo Cervantes acknowledged that he “did not look into” whether the conditions proposed by the City would so adversely affect Gabby’s that it would put it out of business. Testimony of R. Cervantes, p. 300. He acknowledged that compelling Gabby’s to stop serving liquor at 11:00 p.m. and to close its doors at 12:00 a.m. “would effectively kill the entire business of the current patrons who attend Gabby’s” *Id.*, pp. 315-16. Thus, it is undisputed that any of the proposed conditions would force Gabby’s to close.

II. Legal Exceptions

With scant analysis and no legal support, the ALJ inexplicably found that the City may unilaterally impose conditions or restrictions on Gabby’s liquor license – conditions that the ALJ found would force Gabby’s to close its doors – solely pursuant to the “good cause” provision of MCO § 259.250(9). The ALJ’s holding is insupportable and contrary

to law and, accordingly, the City must *reject* the ALJ's recommendation that it may take any action against Gabby's license under § 259.250(9).

I. The City Cannot Impose Conditions on Gabby's Existing License in an Effort to De Facto Revoke its License.

Gabby's liquor license was most recently renewed in April 2007. (*See* ALJ Findings of Fact ¶ 2.) Before renewing Gabby's license, the City conducted investigations in September 2006, January 2007, and March 2007. At the conclusion of these investigations and based on the findings therein, the City renewed Gabby's license *without* condition. (*Id.*) Nevertheless, the City now attempts to, and the ALJ has concluded it can, impose conditions on Gabby's existing license not because of *Gabby's* conduct *on its business premises*, but because of the alleged, even presumed, off-premises conduct of Gabby's alleged *customers*—conduct of which the City was fully apprised before renewing Gabby's license in April 2007 without condition. (*See* ALJ Findings of Fact ¶¶ 9-11, 13 and 17) (referring to police reports generated between November 1, 2005 and November 5, 2006 and inspections occurring on September 30, 2006, October 1, 2006 and March 31, 2007).² Clearly, any attempt by the City to single out and condition an *existing* licensee, which it has no authority to do, for conduct the City was apprised of and considered when renewing the license without condition, would be the City seeking to enforce its *will* and not the liquor statute and ordinance. Such a decision be would the epitome of an arbitrary and capricious decision. *See Trout Unlimited v. Minn. Dept. of Ag.*, 528 N.W.2d 903, 907 (Minn. Ct. App. 1995) (“An

² The only inspections reports occurring *after* Gabby's 2007 license renewal were entirely favorable (*See* ALJ Findings of Fact ¶¶ 18 and 19) or entirely without basis in fact (*See id.* at ¶ 20 and Exception # __, above).

agency's decision is arbitrary or capricious if it represents the agency's will, rather than its judgment.).

In reality, the City's attempt to impose conditions on Gabby's existing license—conditions that the ALJ found would force Gabby's to close—is nothing more than the City's effort to circumvent the limitations on revocation set forth in Minn. Stat. § 340A.415 and revoke Gabby's liquor license under the guise of imposing fatal conditions. Such an attempt is improper because any conditions may only be imposed where no state law governs the sale and possession of alcoholic beverages. *See A/Al, Inc. v. City of Faribault*, 569 N.W.2d 546, 548 (Minn. App. 1997). Minn. Stat. § 340A.415 governs the revocation of liquor licenses and, as the ALJ rightly recognized, it preempts the City from revoking a liquor license on grounds other than those specified therein. (See ALJ Mem. at 11-13.) Thus, the City has no legal authority to impose conditions on Gabby's in an effort to de facto revoke its license. *See A/Al, Inc.*, 569 N.W.2d at 547-48.

II. The City Has No Authority to Condition or Restrict Gabby's Liquor License.

A. The City Has No Authority to Condition a License for Failure to Comply with MCO § 259.250.

MCO § 259.250 does not provide the City with any authority to impose conditions on Gabby's liquor license. On the contrary, the scope of authority granted under MCO § 259.250 is unambiguously set forth in the introductory text to that provision, which provides:

The following minimum standards and conditions shall be met in order to hold a license, provisional license or permit under Titles 10, 13 and 14 of this Code. Failure to comply with any of these standards and conditions

shall be adequate grounds for the denial, refusal to renew, revocation or suspension of said license or permit.

(emphasis added). Thus, the City’s only “adverse license actions” purportedly authorized under MCO § 259.250 for failure to comply with its provisions are: *denial, refusal to renew, revocation or suspension.*³ MCO § 259.250 does not provide the City with the authority to impose *conditions* on a license as a penalty for failure to comply with its provision. Any attempt by the City to do so would be an action outside the authority it purportedly derives under § 259.250. *See Breza v. City of Minnetrista*, 725 N.W.2d 106, 110 (Minn. 2006).

B. The City Has no Authority to Condition Gabby’s License Under Section 259.250(9).

In his Memorandum, the ALJ finds that the City has the authority to *condition* Gabby’s license *solely* pursuant to MCO § 259.250(9). (*See* ALJ Mem. at 14-18.) Perhaps recognizing that § 259.250 does not explicitly grant the City the authority to condition, the ALJ claims to find that authority in the language of § 259.250(9) which purports to grant the City the authority to take an “adverse license action” upon a showing of “*good cause as authorized by Chapter 4, Section 16 of the Charter.*” (emphasis added). The ALJ’s reading of § 259.250(9), however, is contrary to the plain language of that provision and contradicts his own findings.

MCO § 259.250(9) grants the City the authority to take an adverse action only “*as authorized by Chapter 4, Section 16 of the Charter.*” (Emphasis added). Meanwhile,

³ As reflected in the ALJ’s Recommendations, however, § 259.250 is unenforceable and the City cannot revoke or suspend a license on the grounds set forth therein, to the extent that those enumerated grounds conflict with the limited bases for revocation or suspension set forth in Minn. Stat. § 340A.415.

Chapter 4, Section 16 of the Minneapolis City Charter, entitled “Licenses May Be *Revoked*,” provides that:

[A]ny license issued by authority of the City Council may be *revoked* by the City Council at any time upon proper notice and hearing for good cause; and upon conviction before any court of any person holding such a license for a violation of the provisions of any law, ordinance or regulation relating to the exercise of any right granted by such license, the city council may revoke such license in addition to the penalties provided by law or by ordinance for any such violation.

The Charter does not provide, as the ALJ would have it, that conditions may be imposed for good cause, but only that a license may be *revoked*. As such, MCO § 259.250(9) only purports to grant the City the authority to *revoke* a license for “good cause”—which it cannot do. (See ALJ at p. 12.) Any attempt by the City to *condition* would be an action outside of the authority even purportedly granted to it in its ordinances.

Moreover, in finding that the City did not have the authority to revoke Gabby’s license, the ALJ found that Chapter 4, Section 16 of the Charter is invalid to the extent it contravenes Minn. Stat. § 340A.415, which specifically sets forth the only five circumstances under which revocation could occur. (See ALJ Mem. at 12.) Despite finding Section 16 of the Charter invalid, and without any explanation, the ALJ somehow attempts to bootstrap from this discredited section regarding “revocation,” in an effort to find some authority for the City to condition Gabby’s license for “good cause.” The ALJ simply cannot find Section 16 of the Charter unenforceable respecting revocation—its only subject matter—then resurrect that provision to support imposition of conditions under § 259.250, when that ordinance does not speak to imposing conditions at all.

C. Even If The City Had The Authority Under MCO § 259.250(9) To Condition Gabby’s License, “Good Cause” To Do So Does not Exist.

The City has admitted that Gabby’s has complied with all applicable statutes, rules, and ordinances relating to alcoholic beverages. (*See* ALJ Mem. at 10-11.) Moreover, the ALJ unequivocally found that Gabby’s took “appropriate action” and “implemented appropriate security” to prevent any violation of law on its premises.” (*Id.* at 14.) (emphasis added). Nevertheless, the ALJ found that “good cause” exists to condition or restrict Gabby’s liquor license not because of *Gabby’s* conduct *on its business premises*, but because of the alleged, even presumed, off-premises conduct of Gabby’s alleged *customers*. (*See generally id.* at 14-18.) The ALJ’s finding that “good cause” exists is neither supported by MCO § 259.250 nor the case law cited by the ALJ.

Basic rules of statutory construction demonstrate that “good cause” must arise out of some conduct by Gabby’s on its business premises. These rules instruct that words and phrases are to be construed according to their plain and ordinary meaning. An ordinance should be interpreted, whenever possible, to give effect to all of its provisions, and no word, phrase, or sentence should be deemed superfluous, void, or insignificant. Not only must various provisions of the same ordinance be interpreted in light of each other, but an ordinance should be construed to avoid absurd and unjust consequences. *See Baker v. Ploetz*, 616 N.W.2d 263, 268-69 (Minn. 2000).

It is self evident that MCO § 259.250 focuses only on the *on-premises conduct of the license holder*, and not the off-premises conduct of its customers, over which the licensee could not possibly exercise any control or influence. That ordinance imposes

standards and conditions that “shall be *met*” in order to hold a license and for which failure to “*comply*” will be grounds for an adverse license action. (Emphasis added). Common sense dictates that it is the *license holder* – not the holder’s customers – who must “meet” and “comply” with these specified standards and conditions in order for the *license holder* to receive or maintain its license. Indeed, the specific provisions of the ordinance itself confirm that all the enumerated “good causes” refer to conduct of the licensee, or those under the licensee’s control, on the premises. Specifically, MCO § 259.250 provides that:

(1) It shall be the responsibility *of the licensee to take appropriate action* to prevent further violations following conduct by any persons *on the business premises*, including parking areas, in violation of any of the following statutes or ordinances;

(2) It shall be the *responsibility of the licensee to maintain* and operate the business in compliance with all applicable laws and ordinances, including the zoning, fire, environmental health, environmental management, license, food, liquor, housing and building codes.

(3) The *licensee* is directly and vicariously responsible for any violations *on the premises*, including parking areas, by any employees, independent contractors, other persons hired by the licensee, or otherwise under the supervision or management of the licensee.

(4) It shall be the *responsibility of the licensee to provide* adequate security to prevent criminal activity, loitering, lurking and disorderly conduct *on the business premises*, including parking areas.

(5) A *licensee* shall be required to pay all delinquent court judgments *arising out of their business* and business operations.

(6) Areas *of the premises* that are not regularly monitored by employees or security shall not be accessible to patrons, customers, or the public.

(7) Vending and other unattended coin operated machines shall be in plain view of employees and shall not be operable during hours the *business* is

not open to the public and in operation. Public pay telephones shall be operated in full compliance with Chapter 264 of this Code.

(8) Parking and other outdoor areas *of the premises* accessible to the public shall be illuminated at an intensity of at least two (2) foot-candles per square foot at eighteen (18) inches above ground level.

MCO § 259.250, subd. 1-8 (emphasis added).

All these specific provisions of § 259.250 make it clear that good cause can be based only on the actions or omissions of the license holder or its agents respecting the business premises – of which it presumably has control – not the actions or omissions of other people occurring off its business premises, in surrounding neighborhoods where the licensee has no legal authority to exert control. It is absurd to read § 259.250(9) as allowing the City to impose conditions or restrictions on a license holder because of something that the license holder’s purported *customers* did while *off* the license holder’s business premises. But that is exactly how the ALJ interpreted § 259.250(9). In fact, construing “good cause” in § 259.250(9) to include conduct of *anyone* and circumstances *anywhere*, renders the specific references to the licensee and its premises in § 259.250(1)-(8) superfluous and insignificant. Accordingly, the ALJ’s interpretation violates basic rules of construction, would result in absurd and unjust consequences and, therefore, it must be rejected. *See Baker*, 616 N.W.2d at 268-69 (stating that various provisions of the same ordinance must be interpreted in light of each other and construed to avoid absurd and unjust consequences).

Furthermore, Chapter 4, Section 16 of the Charter makes it clear that good cause can be based only on the actions or omissions of the license holder or its agents

respecting the business premises. That Section purports to allow the City to revoke a license for “good cause; and upon conviction before any court of *any person holding such a license* for a violation of the provisions of any law, ordinance or regulation *relating to the exercise of any right granted by such license.*” Clearly, only the license holder and not its customers is “*holding such a license*” and is the person who might violate the “provisions of any law, ordinance or regulation *relating to the exercise of any right granted by such license.*”

In fact, none of the four cases cited by the ALJ support his interpretation of the “good cause” standard. (See ALJ’s Mem. at 14, n. 54.) Not one of those cases found that “good cause” existed to condition a license based on the off-premises conduct of a license holder’s customers. One of the cases, *Zeman v. City of Minneapolis*, 552 N.W.2d 548 (Minn. 1996), does not even address the “good cause” standard. In each of the other cases, the city took action on a license because of the *conduct of the license holder*, or its employees, *on the business premises*. See *Hard Times Café v. City of Minneapolis*, 625 N.W.2d 165 (Minn. App. 2001) (drug activity by employee on the business premises); *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557 (Minn. App. 2001) (failure by license holder to meaningfully control the sale of drugs on the business premises); *In the Matter of the Application for a Class A On-Sale Liquor License with Sunday Sales Submitted by JenRich, Inc., d/b/a Whispers*, OAH Docket No. 3-6010-18054-6 (licensee allowed prostitution, violations of smoking ban, and other criminal activity on the business premises). Accordingly, based on his own cited case law, the ALJ’s incongruous reading of the ordinance also must be rejected.

III. The City's Imposition Of Conditions Would Violate Gabby's Constitutional Rights.

Before the ALJ, Gabby's strenuously argued that the City's unilateral imposition of conditions on its existing license violated Gabby's constitutional rights, including its equal-protection rights and the right to maintain of its property in the absence of just compensation. The ALJ refused to address Gabby's constitutional claims. (ALJ Mem. at 17.) Those rights remain inviolate, however, and the City may not cavalierly disregard them.

A. Any Effort by the City to Impose Conditions on Gabby's Liquor License Would Deprive Gabby's of its Right to Its Continuing Legal Use of Its Property.

The City has admitted that it is "stretching the law" (Opening Statement of City Attorney, p. 9) in this case, based on a perception (real or imagined) that some neighbors want Gabby's driven from their community because the "residential neighborhood surrounding Gabby's continues to be adversely affected by the operation of Gabby's despite the efforts of the owners to try to control their customers." (City's Mem. in Supp. of a Recommendation for Adverse License Action at 7.) In essence, the City asserts that, in light of its neighborhood surroundings, Gabby's premises are no longer suitable for the precise use to which they are currently put, i.e., as a Class B liquor establishment open until 2 a.m. and serving up to 689 patrons. The City thereby seeks to justify proposed restrictions on Gabby's current use of its property. Any such restrictions, however, would constitute an unlawful attempt to implicitly change the applicable zoning laws to appease certain residential neighbors. *See Olsen v. City of Hopkins*, 276 Minn. 163, 169,

149 N.W.2d 394, 398 (1967) (stating that city may not impose restrictions on property rights based on implied changes in zoning laws). Because the City may not constitutionally restrict Gabby's precise use of its property -- even if there were an express change in zoning laws -- the City is precluded from relying on some implied (or "stretched") zoning justification for imposing such restrictions here.

Minnesota law has repeatedly recognized that, in the face of zoning changes, any existing uses that do not conform to the new zoning law must either be permitted to remain unimpeded or be eliminated through condemnation proceedings. *County of Freeborn v. Claussen*, 203 N.W.2d 323, 325 (Minn. 1972) (holding that "zoning ordinance may constitutionally prohibit the creation of uses which are nonconforming, but existing uses must either be permitted to remain or be eliminated by use of eminent domain"). The City's pertinent ordinance is in accord with this principle. MCO § 531.20(a) ("Legal nonconforming uses and structures shall be allowed to continue so long as they remain otherwise lawful."). As such, existing nonconforming uses are afforded "constitutional protection" and "grandfathered" against later changes or restrictions in the laws, so long as the owners continue to abide by the law. *See id.* at 325; *see also Hooper v. City of St. Paul*, 353 N.W.2d 138, 140 (Minn. 1984). Obviously, any alternative rule would place the continued existence of legally operating businesses at the whim of the current popular or governmental notions of what is "right for the neighborhood," without any legal recourse or compensation.

These principles are equally applicable in the context of restrictions on liquor licenses. Indeed, the Minnesota Supreme Court, in *Wajda v. City of Minneapolis*, found

it was arbitrary and capricious for the City to deny a liquor license application based on a determination that the premises were “unsuitable” for an on-sale beer establishment, when the locale in question had been occupied by a bar for some 20 years and had been grandfathered as a bar even after the surrounding neighborhood’s zoning had changed.

246 N.W.2d 455, 459 (Minn. 1976). Specifically, the Court stated:

[W]e hold the council’s determination that the premises are unsuitable for an on-sale beer establishment to be contrary to the evidence contained in the record. Prior to the 1963 rezoning, the existing zoning specifically permitted the very use being made of the premises. Such nonconforming use was allowed to continue under the grandfather provisions of the new zoning law, and the city attorney conceded on oral argument that Mrs. Wajda had not abandoned the property’s nonconforming use nor done anything else to bring about the termination of that use.

...

No substantial evidence indicated that the premises themselves were inherently unsuitable as the location of a tavern if the tavern were lawfully and properly managed and operated. We therefore hold that the city council’s second reason for denying Mrs. Wajda’s 3.2 beer license application is also clearly arbitrary, capricious and unreasonable. *Id.* at 459 (emphasis added).

Thus, an existing liquor establishment is protected from changes in neighborhood circumstances or views respecting “suitability,” so long as the establishment continues to be lawfully and properly managed and operated.

Similarly, a City may not impose conditions on a liquor license that preclude a licensee from conducting its business precisely as in the past, especially when the proposed change in use will diminish the value of the business. *See Hawkinson v. County of Itasca*, 304 Minn. 367, 372, 231 N.W.2d 279, 282 (1975) (stating that property owner has right to continue the “precise” use that is the “very nature” of business); *Hawkins v.*

Talbot, 248 Minn. 549, 552-54, 80 N.W.2d 863, 865-67 (1957) (stating that, in cases involving potential diminishment of an asset, property owner is entitled to continue uses of the same nature, purpose, and extent). Imposition of conditions regarding permissible hours of operation, type of music played, and maximum occupancy all would unlawfully change the precise use of the property and thereby deprive the property owner of its right to engage in its existing, legal use. *Cleveland v. Rice County*, 238 Minn. 180, 185, 56 N.W.2d 641, 642 (1952) (noting that restriction on the hours during which a bar can operate constitutes a restriction on “use”).

Under these principles, the City may not lawfully impose conditions on Gabby’s liquor license based merely on perceptions of the bar’s suitability for its neighborhood – as is the present case. Before issuing Gabby’s license more than twenty years ago, the City considered potential neighborhood impacts by means of public meetings and public comments. Since the issuance of its license, Gabby’s has continued to lawfully manage and operate its business and has remained a conforming use in its neighborhood for 22 years. Even if the City were to change the applicable zoning in the neighborhood, Gabby’s precise, existing use would be grandfathered as a non-conforming use and, absent illegal conduct by Gabby’s would be protected from any efforts by the City to modify or restrict that use – by license action or otherwise. Certainly, the City cannot violate Gabby’s property rights under the present circumstances.

Of course, the City can seek to modify Gabby’s use of its property, and thereby “take” Gabby’s property rights for a public purpose, but only by making its case in a condemnation proceeding. *See* Minn. Stat. § 117.184(a) (“[T]he removal of a legal

nonconforming use as a condition or prerequisite for the issuance of a permit, license, or other approval for any use . . . constitutes a taking and is prohibited with the payment of just compensation.”); *County of Freeborn*, 203 N.W.2d at 325. Any such taking, however, would require the City to reasonably compensate Gabby’s for the loss of its going business value as well as for the value of its real property. *State v. Saugen*, 169 N.W.2d 37, 39-42, 46 (Minn. 1969).

B. The Imposition of Conditions Would Deprive Gabby’s Of Its Constitutionally Protected Property Right In Its License.

In his Memorandum, the ALJ found that the City has authority to impose conditions on Gabby’s existing liquor license “because there is no property right in a liquor license” and “no citizen has an inherent or vested right to sell intoxicating liquors.” (See ALJ Mem. at 13 & n. 49-51.) The ALJ’s finding is unsupported by the authority upon which he purports to rely and is contrary to the case law of this and several other jurisdictions.

Not a single case cited by the ALJ, nor the cases cited therein, stand for the proposition that there is no property interest in an *active* liquor license in good standing – which is exactly the situation here. Instead, those cases involve circumstances where: (1) a liquor license had expired;⁴ (2) a liquor license had been revoked for reasons specified under a liquor statute or ordinance;⁵ or (3) a liquor statute or ordinance had been

⁴ *Country Liquors, Inc.*, 264 N.W.2d at 826; *Arens v. Village of Rodgers*, 240 Minn. 386, 388, 401 (1953) (cited in *Country Liquors*); *Paron v. City of Shakopee*, 226 Minn. 222, 288 (1948) (cited in *Country Liquors*); *Cervený*, 16 N.W.2d at 781; see also *Crowley v. Christensen*, 137 U.S. 86, 87 (1890) (cited in *Sabes*).

⁵ *Sabes*, 256 Minn. at 170-71; *Abelin v. City of Shakopee*, 224 Minn. 262, 263-64 (Minn. 1947) (cited in *Country Liquors*); *Bourbon Bar*, 466 N.W.2d at 439.

challenged as unconstitutional.⁶ Not one of those cases held that there is no property right in an *active* liquor license.

In *Country Liquors*, a case upon which the ALJ relied, the Minnesota Supreme Court in fact observed that a person may have a “tacit property right in an existing license.” 264 N.W.2d at 826. In doing so, the Minnesota Supreme Court relied on *Perry v. Sindermann*, wherein the United States Supreme Court held that a “property interest” exists if there are such “rules or mutually explicit understandings that support [a] claim of entitlement to the benefit.” 408 U.S. 593, 601 (1972) (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972)). A law providing that a license can be suspended or revoked only upon proof of certain contingencies “has engendered a clear expectation of continued enjoyment of [the] license absent proof of culpable conduct” and thus provides the license holder with a “legitimate claim of entitlement.” *Berry v. Barchi*, 443 U.S. 55, 64 n. 11 (1978).⁷ Based on this precedent, courts in several states have held that there is a property right in an *active* liquor license. *See, e.g., Goldrush II v. City of Marietta*, 267 Ga. 683, 694-96 (Ga. 1997); *Bosselman, Inc. v. State of Neb.*, 432 N.W.2d 226, 228-29 (Neb. 1988); *Anderson v. Utah County Bd. of County Comm’rs*, 589 P.2d 1214, 1216 (Utah 1979); *Bundo v. Walled Lake*, 238 N.W.2d 154, 160 (Mich. 1976);

⁶ *Fed’l Distillers, Inc. v. State*, 304 Minn. 28, 32 (1975) (cited in *Country Liquors*); *Anderson v. City of St. Paul*, 226 Minn. 186, 188 (1948); *Cervený*, 16 N.W.2d at 781.

⁷ Notably, each of the authorities cited by the ALJ in support of his contention that a property interest does not exist pre-date the United States Supreme Court’s decisions in *Perry* and *Roth*.

Frontier Saloon, Inc. v. Alcoholic Beverage Con. Bd., 524 P.2d 657 (Alaska 1974);
Manos v. City of Green Bay, 372 F. Supp. 40, 49 (E.D. Wis. 1974).⁸

Minnesota's liquor license statute and the liquor license itself establish the "rules of mutually explicit understandings" and "clear expectation of continued enjoyment of [the] license absent proof of culpable conduct" sufficient to support a claim of entitlement to, and thus property interest in, an active liquor license. *See Perry*, 408 U.S. at 601; *Berry*, 443 U.S. at 64 n. 11. As such, Gabby's has a constitutionally protected property right in its active liquor license and the City cannot unilaterally impose conditions or restrictions on the license that deprive Gabby's of its property right, as doing so would be tantamount to a "taking" of Gabby's property. Any such taking, however, can only be done through a condemnation proceeding, whereby the City must reasonably compensate Gabby's for the deprivation. In the case of a liquor licensee, that deprivation would require the City to compensate for the loss of the going business as well as the value of the real property. *See County of Freeborn*, 203 N.W.2d at 325; *Saugen*, 169 N.W.2d at 39-42, 46.

C. The Unilateral Imposition of Conditions Would Violate Gabby's Constitutional Right to Equal Protection.

The equal protection clause of both the federal and state constitutions "requires equality of application of the laws; that all similarly circumstanced be treated alike."

⁸ Some courts have gone further and recognized that a property interest exists in the *renewal* of a liquor license. *See Bundo*, 238 N.W.2d at 160 (holding that once a liquor license issues, the holder no longer has a probationary status and could "reasonably assume . . . that there was a great likelihood that his license would be renewed"); *see also Manos*, 372 F. Supp. at 49 (holding that, given "his investment in the tavern business," a license holder had a property interest in the renewal of his liquor license when "the existing understanding is such that once a liquor license is granted, the likelihood that it will be renewed is very great").

Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37 (1928); *see also Anderson v. City of St. Paul*, 226 Minn. 186, 194, 32 N.W.2d 538, 543 (1948). When a law on its face or as applied draws a classification on the basis of a “suspect class,” such as race, the law is subject to strict scrutiny and will only survive if the law is necessary to promote a compelling state interest. *See State v. Frazier*, 649 N.W.2d 828 (Minn. 2002) (discussing facial and as applied classifications and strict scrutiny review). Even if a constitutional challenge to the statute does not involve a suspect classification, an equal protection challenge to a regulation will be sustained if the distinction between two similarly situated groups is arbitrary and capricious and bears no relation to any legitimate regulatory purpose. *City of St. Paul v. Dalsin*, 71 N.W.2d 855, 859 (Minn. 1955).

As fully set forth above in Gabby’s Factual Exceptions, the City is attempting to single out Gabby’s and unilaterally impose conditions on its existing liquor license under authority purportedly conferred upon it by MCO § 259.250(9) because of the alleged *off-premises* conduct of Gabby’s *alleged customers*, the majority of whom, as the City acknowledges, are African-American. The City has admitted that it is not now attempting, nor has it in the past attempted, to “condition” *any* other existing license holder under MCO § 259.250(9). It is clear that the City has singled Gabby’s out for special application of MCO § 259.250(9) simply because it caters to an African-American population. The City has not and cannot establish that such a racially motivated classification is necessary to promote a compelling state interest and, accordingly, that classification violates Gabby’s constitutional right to equal protection.

Alternatively, even if the City's imposition of conditions under authority purportedly conferred upon it by MCO § 259.250(9) were subject to the most deferential standard of review, rational basis review, the City's has failed to identify any legitimate regulatory purpose, much less a rationally related one, to justify its differing treatment of Gabby's. *See Dalsin*, 71 N.W.2d at 859. The City seeks to impose the following conditions on Gabby's: (1) an earlier closing time (midnight); (2) an earlier end to liquor sales (11 p.m.) (3) a reduced occupancy (400); (4) a change in music entertainment from hip-hop to country music; and (5) an increased cover charge and elimination of drink specials—even though all of Gabby's current practices in these regards are lawful. (*See* ALJ Mem. at 8.)

1. Earlier Closing Time and End to Liquor Sales.

Gabby's is currently licensed to operate and sell liquor until 2:00 a.m. (Glampe Dep. Tr. at 124:15-125:4.) The Legislature has specified that no sale of intoxicating liquor for consumption on the licensed premises may be made between 2:00 a.m. and 8:00 a.m. on Mondays through Saturdays, or after 2:00 a.m. on Sundays. Minn. Stat. § 340A.504, subd. 2. The Legislature has also provided that a municipality “may further limit the hours of on and off sales of alcoholic beverages, provided that *further restricted on-sale hours* for intoxicating liquor *must apply equally* to on-sale hours of 3.2 percent malt liquor.” *Id.* § 340A.504, subd. 6 (emphasis added). The Legislature unquestionably intended that any such further limitations regarding on-sale hours must apply equally to all, not just Gabby's, and the City has not even suggested that imposition of a different closing time on Gabby's relates to any legitimate regulatory purpose.

2. Reduced Occupancy (400).

The State Fire Marshal has permitted Gabby's to have up to 689 occupants in its premises under the State Fire Code. (See Glampe Dep. Tr. at 124:15-125:4.) The State Fire Code ("SFC") incorporates the 2006 International Fire Code ("IFC") and applies "throughout the state and in all political subdivisions and municipalities therein." Minn. Stat. § 299F.011, subs. 1, 4; Minn. R. 7511.0090. The SFC, which has been adopted by the City under MCO § 173.380, specifies the maximum occupant load for particular spaces. See IFC § 1004.1, Table 1004.1.1; Minnesota State Department of Public Safety, State Fire Marshal Division, "Assembly (Group A) Occupancies," available at <http://www.dps.state.mn.us/fmarshal/FireCode/2007AssemOccupInfoSheet.pdf>. Under state law, any local ordinance or regulation that differs from the State Fire Code "*must be directly related to the safeguarding of life and property from the hazards of fire*" and "*must be uniform for each class or kind of building covered.*" Minn. Stat. § 299F.011, subd. 4 (emphasis added).

The City's proposed lower occupant load (400) would certainly differ from the occupancy load regulations provided in the State Fire Code. When the City seeks to impose restrictions that differ from the State Fire Code, it must do so by ordinance or regulation – not based on whim. *Id.* § 299F.011, subd. 4. More importantly, however, any such ordinance or regulation "*must be directly related to the safeguarding of life and property from the hazards of fire*" and "*must be uniform for each class or kind of building covered.*" *Id.* (emphasis added). Here, the City has not suggested, and cannot suggest, that the proposed occupant load restriction on Gabby's is related to the hazards

of fire, which § 299F.011, subd. 4 makes clear, would be required to assert a legitimate regulatory purpose.

3. Change in Music Entertainment.

Gabby's currently offers rap/hip-hop music as entertainment for its customers. The City seeks to impose a condition on Gabby's liquor license to prohibit rap/hip hop music, and instead require Gabby's to play country or some other type of music. Incredibly, the City believes that Gabby's choice of entertainment attracts a certain demographic of our population (*i.e.*, young African-Americans) who are the alleged cause of the purported disturbances in the neighborhood around Gabby's. The City apparently believes that a change in Gabby's entertainment, to a country-music format, will attract a different demographic of our population, who supposedly will not cause the alleged neighborhood disturbances. Not only should the City be ashamed of the offensive and racist views of its licensing officials, it cannot credibly maintain that conditioning Gabby's music format is even remotely related to a legitimate regulatory purpose.⁹

4. Increased cover charge and elimination of drink specials.

⁹ Any such restriction on the entertainment provided at Gabby's would also violate Gabby's First Amendment rights. The United States Supreme Court has consistently held that "*entertainment*" including musical and dramatic works, fall within the First Amendment guarantee. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981) (emphasis added). Therefore, as the esteemed Judge Posner has written, "[i]f the [city council] passed an ordinance forbidding the playing of rock and roll music...they would be infringing a First Amendment right...even if the music had no political message – even if it had no words – and the [city] would have to produce a strong justification for thus repressing a form of 'speech.'" *Reed v. Village of Shorewood*, 704 F.2d 943, 950 (7th Cir. 1983) (citations omitted). Indeed, the City's attempt to regulate the type of music Gabby's may play is the most offensive form of speech suppression, content-based regulation, and is presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Gabby's currently charges a \$5 to \$10 cover charge and provides various drink specials. The City seeks to impose a condition on Gabby's liquor license to increase the cover charge to \$15 to \$20 and eliminate drink specials. Startlingly, the City believes that Gabby's current cover charge and drink specials, like its choice in music format, attract a certain demographic of our population (*i.e.*, some young African-Americans) which includes those people causing the alleged disturbances in the area around Gabby's. The City further believes that an increase in the cover charge and elimination of drink specials will dissuade customers from that demographic from patronizing Gabby's, which, in turn, will lead to a decrease in the alleged disturbances. Like the proposed restriction on Gabby's music entertainment, not only should the City be ashamed of the offensive and racist views reflected in this proposed license condition, but it cannot credibly maintain that conditioning Gabby's cover charge or drink specials is even remotely related to a legitimate regulatory purpose.¹⁰

IV. The City's Proposed Conditions on Gabby's Liquor License Constitute an Unfair Discriminatory Practice Under the Minnesota Human Rights Act.

The Minnesota Human Rights Act reflects Minnesota's public policy that persons in Minnesota are to be free from discrimination in "public accommodations because of race, color, creed, religion, national origin, sex, sexual orientation, and disability." Minn. Stat. 363A.02, subd. 1(a). Specifically, the statute states that it is an unfair discriminatory

¹⁰ In fact, were Gabby's to comply with the conditions the City seeks to impose, it would be in violation of federal law, state law and the MCO. *See, e.g.*, 42 U.S.C. § 2000a (prohibiting discrimination or segregation in places of public accommodation); Minn. Stat. § 363A.11 (same); MCO § 139.40(i) (same). Indeed, the liquor-licensing statute itself prohibits the very conduct the City seeks to "condition" Gabby's to do. *See* Minn. Stat. § 340A.410, subd. 6. ("No retail license to sell alcoholic beverages may be issued or renewed by a municipality or county to a club which discriminates against members or applicants for membership or guests of members on the basis of race.")

practice to “deny any person the *full and equal enjoyment* of the *goods, services, facilities*, privileges, advantages, and *accommodations* of a place of public accommodation because of *race*.” *Id.* § 363A.11, subd. 1(a)(1) (emphasis added).

A “place of public accommodation” includes “a *business*, accommodation, refreshment, *entertainment*, or transportation facility of any kind, whether licensed or not, whose *goods, services, facilities*, privileges, advantages or accommodations *are extended, offered, sold, or otherwise made available to the public*.” *Id.* § 363A.03, subd. 34 (emphasis added). The statutory prohibition unquestionably applies to Gabby’s since it is a business and entertainment facility whose goods, services, and facilities are offered, sold, and made available to the public. Gabby’s is therefore precluded from denying any person the “full and equal enjoyment” of its goods, services, and facilities based on race.

More significantly, the statute provides that the City is prohibited from requiring Gabby’s to engage in any conduct that would violate the statute. The statute expressly states that it is an unfair discriminatory practice for any person (1) “intentionally to aid, abet, incite, *compel, or coerce* a person to engage in any of the practices forbidden by this chapter,” (2) intentionally to *attempt* to aid, abet, incite *compel, or coerce* a person to engage in any of the practices forbidden by this chapter,” or (3) to intentionally obstruct or prevent any person from complying with the provisions of this chapter.” *Id.* § 363A.14.

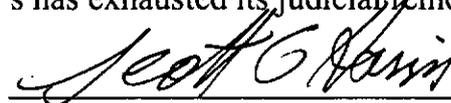
The threat and imposition of the proposed conditions, as discussed above, represent an effort to alter the availability and nature of Gabby’s services and facilities so

as to preclude African-Americans from enjoying the establishment. The City's purported efforts to reduce neighborhood complaints by changing Gabby's music format, maximum occupancy, hours of operation, hours of liquor sale and cover charge are a transparent attempt to create an environment that will reduce the number of African-Americans frequenting Gabby's. By seeking to impose these conditions, the City is either intentionally compelling and coercing Gabby's to engage in unlawful discrimination, or is intentionally attempting to do so. These efforts are expressly prohibited by the Minnesota Human Rights Act and constitute discrimination on the basis of race.

CONCLUSION

For the foregoing reasons, Gabby's respectfully requests that this Committee and the City Council reject the ALJ's recommendation that the City take adverse action against Gabby's license pursuant to Minneapolis Ordinance § 259.250(9). Alternatively, should this Committee determine that adverse action is appropriate, Gabby's requests that it stay enforcement of any action until Gabby's has exhausted its judicial remedies.

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