

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0581**

In the Matter of the Cigarette/Tobacco and Gas Station licenses held by Midway University & Hamline, LLC d/b/a Midway Amoco BP for the premises located at 1347 University Avenue West in St. Paul License ID #: 20100000243.

**Filed February 16, 2021
Affirmed
Reilly, Judge**

Office of Administrative Hearings
File No. 60602036320

V. John Ella, Anna M. Koch, Trepanier MacGillis Battina P.A., Minneapolis, Minnesota (for relator Midway University & Hamline, LLC, d/b/a Midway Amoco BP)

Lyndsey M. Olson, City of St. Paul Attorney, Lisa L. Veith, Assistant City Attorney, St. Paul, Minnesota (for respondent City of St. Paul)

Considered and decided by Bratvold, Presiding Judge; Worke, Judge; and Reilly, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

Respondent-city cited relator-licensee with violating city ordinances and the conditions of its cigarette/tobacco and gas station licenses. An administrative-law judge held a hearing on the violations, found that licensee had violated city ordinances, and recommended that the city council revoke the licenses at issue. The city council unanimously adopted the findings of fact, conclusions of law, and recommendation of the administrative-law judge and revoked the cigarette/tobacco and gas station licenses.

Licensee appeals the revocation of its licenses arguing that (1) the revocations violate due process, (2) substantial evidence does not support findings that it violated city ordinances, and (3) the city's decision to upwardly depart from the penalty matrix was arbitrary and capricious. We affirm.

FACTS

Relator Midway University & Hamline, LLC (licensee) purchased an Amoco BP gas station (the gas station) in St. Paul in 2010 and operated it through 2019. In 2010, respondent City of St. Paul (the city) granted licensee cigarette/tobacco and gas station licenses subject to conditions that required it to maintain clean premises and working video surveillance cameras, and to provide the St. Paul Police Department (the SPPD) and the Department of Safety and Inspections (DSI) with copies of surveillance recordings within 24 hours of a request.

The city served licensee with a Notice of Violation and Recommendation for Upward Departure to Revocation (notice of revocation) on July 26, 2019. The notice of revocation alleged that licensee had violated Minnesota law and six city ordinances in a number of ways: (1) selling single cigarettes outside their packaging, (2) selling flavored tobacco products, (3) selling tobacco products to a person under the age of 18 years, (4) failing to comply with the laws related to the licensed activity, (5) operating the business in a manner that unreasonably annoys or endangers the comfort or repose of the public, and (6) permitting unsafe conduct or conditions. The city also alleged that licensee violated the conditions of its cigarette/tobacco and gas station licenses by failing to maintain clean premises and to provide DSI with surveillance video.

As a penalty for these alleged violations, the city stated that it would argue for an upward departure from the second-matrix penalty of a \$1,000 fine to the fourth-matrix penalty of revocation of licensee's cigarette/tobacco and gas station licenses.¹ This notice of revocation was the second adverse action taken against licensee's licenses in a 12-month period.²

In response to the notice of revocation, licensee requested a hearing before an administrative-law judge (the ALJ). During the three-day hearing, licensee admitted to selling flavored tobacco products in violation of St. Paul, Minn., Legislative Code § 324.07(f) (2018), and operating the gas station in a manner that unreasonably annoys the comfort and repose of the public in violation of St. Paul, Minn., Legislative Code § 310.06(b)(8) (2018). Licensee contested all other alleged violations.

The ALJ found that the city failed to show by a preponderance of the evidence that licensee violated the conditions of its licenses.³ But the ALJ determined that the city demonstrated by a preponderance of the evidence that licensee violated St. Paul Legislative Code sections 324.07(a) (2018) (sale of single cigarettes), 324.07(f) (sale of flavored

¹ St. Paul Code of Ordinances provides a penalty matrix for licensing violations that is akin to the presumptive sentences provided in the Minnesota Sentencing Guidelines. St. Paul, Minn., Legislative Code § 310.05(m)(1) (2018). Under the penalty matrix, the penalty for a first violation is a \$500 fine. *Id.* For a second violation, the penalty is a \$1,000 fine. *Id.* For a third violation, the penalty is a \$2,000 fine and a 10-day suspension. *Id.* And for a fourth violation, the penalty is a revocation of the license. *Id.*

² In July 2019, the city council imposed a first-violation penalty of a \$500 fine against licensee for possession of flavored tobacco products.

³ The ALJ found that the city failed to prove that the gas station violated the conditions of its license by failing (1) to provide requested surveillance video to DSI, and (2) to maintain a clean site with adequate fencing.

tobacco products), 324.07(g) (2018) (tobacco sales to underage persons), 310.06(b)(6)(c) (2018) (engaging in a pattern of noncompliance with license regulations), 310.06(b)(7) (2018) (operating the business in a manner that unreasonably annoys the comfort and repose of the public), and 310.06(b)(8) (2018) (permitting unsafe conduct or conditions that present a serious danger to the public). The ALJ recommended that the city council upwardly depart from the presumptive penalty and revoke licensee's licenses.

The city council held a public hearing. Prior to the hearing, both licensee and the city submitted proposed resolutions. The resolution submitted by the city adopted the findings of fact, conclusions of law, and recommendation of the ALJ to upwardly depart and revoke licensee's licenses. The resolution submitted by licensee mirrored the city's, except for the remedy. Licensee proposed an upward departure to a \$2,000 fine and a ten-day suspension, or in the alternative, a stay of revocation of all licenses pending review by this court. To support its proposed remedy, licensee argued that mitigating factors supported a less severe upward departure. After the city council heard arguments of the parties, the councilmembers unanimously adopted the findings of fact, conclusions of law, and recommendation of the ALJ and revoked licensee's cigarette/tobacco and gas station licenses. This appeal followed.

DECISION

I. The city did not violate licensee's procedural-due-process rights.

Licensee argues that the city failed to provide it with timely, adequate notice of the alleged wrongdoings. Licensee asserts that this failure violated licensee's right to due process and prejudiced licensee because had it received notice, it "could have addressed

[the city's] concerns by promptly making changes to its business operation, security, and policies.” We review de novo whether the government has violated procedural-due-process rights. *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012). “The foundational principle of the right to due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.” *Gams v. Houghton*, 884 N.W.2d 611, 618 (Minn. 2016) (quotation omitted). “Sufficient due process generally requires reasonable notice and a hearing.” *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 563 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001).

After a review of the record, we conclude that licensee was afforded sufficient procedural due process. On July 26, 2019, the city served licensee with notice of revocation which provided notice of licensee’s alleged violations. The notice of revocation contained 13 factual references that supported the alleged violations. All of the factual references, except for one, occurred between April and June 2019.⁴ Four months later in November 2019, counsel represented licensee at a three-day hearing before the ALJ. And in March 2020, licensee, through counsel, submitted a proposed resolution and presented argument to the city council on the appropriate penalty for these alleged violations. Because licensee

⁴ To support its claim that licensee violated St. Paul Legislative Code sections 310.06(b)(6)(c), 310.06(b)(7), and 310.06(b)(8), the city included seven different dates police responded to the gas station. The calls included a shooting where a person was killed in the parking lot (June 19, 2019), and behavior involving fighting, assaults, disorderly conduct, drug transactions and drug use (June 15, 22, 25, 26, 28 and 29, 2019). Between late April 2019 and the end of June 2019, the SPPD received more than 100 calls for service to the gas station.

received notice of the specific violations and the opportunity to be heard on those violations, we conclude that the city did not violate licensee's due-process rights.

II. Licensee forfeited its claim that the code violations are not supported by substantial evidence.

Licensee argues that the city lacked substantial evidence to support its finding that licensee violated St. Paul Legislative Code sections 324.07(a), 324.07(g), 310.06(b)(6)(c), and 310.06(b)(7). The city counters that because licensee failed to exercise its right under Minn. Stat. § 14.61, subd. 1 (2018), to challenge the findings of the ALJ before the city council, licensee is precluded from doing so on appeal. The Minnesota Administrative Procedures Act (MAPA), Minn. Stat. §§ 14.001-14.69 (2018), provides that unless a report of an ALJ constitutes the final decision in a contested-case, the party adversely affected must be allowed "to file exceptions and present argument to a majority of the officials who are to render the decision." Minn. Stat. § 14.61, subd. 1. It is unclear whether the city has adopted rules specifying that MAPA's contested case provisions govern its administrative proceedings. Thus, we cannot conclude that Minn. Stat. § 14.61, subd. 1, applies here. *Cf. Hard Times Cafe, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 173 (Minn. App. 2001) (applying judicial-review provisions of MAPA because city attorney notified party that hearing would be conducted in accordance with Minn. Stat. §§ 14.57-.62).

But we conclude that under St. Paul Legislative Code section 310.05(c)(c-1) (2018) and forfeiture principles, licensee forfeited its sufficiency-of-the-evidence claim. St. Paul Legislative Code section 310.05(c)(c-1) provides

After receipt of the hearing examiner's findings, conclusions, and recommendations, the council shall provide the applicant

or licensee an opportunity to present oral or written arguments alleging error on the part of the examiner in the application of the law or interpretation of the facts, and to present argument related to the recommended adverse action.

On appeal, licensee argues that there is no evidence that it sold single cigarettes outside of the packaging, that the city did not prove by substantial evidence that licensee sold tobacco to an underage person, and that the city “failed to present substantial evidence to show a *pattern or practice of conduct* of failure to comply” with laws reasonably related to the licensee’s cigarette/tobacco and gas station licenses. Licensee additionally contends that the city was biased against licensee in three ways. First, the city “sought a scapegoat for its own inability to control the crime.” Second, the SPPD accused the owner of licensee of being a terrorist and laundering money. And third, the SPPD refused to allow licensee to hire off-duty officers to protect the gas station and threatened licensee’s private security firm. Licensee, however, did not exercise its right to challenge the findings of the ALJ or present any of these arguments to the city council despite the opportunity to do so. Instead, licensee filed two proposed resolutions that licensee concedes, “did adopt the factual findings of the ALJ.” During oral argument before the city council licensee again failed to challenge the ALJ’s findings and stated that its proposed resolutions were “merely a mirror image” of the city’s proposal which adopted the findings of fact, conclusions of law, and recommendation of the ALJ, except that licensee proposed a different remedy and argued that there were mitigating factors that supported a downward deviation from the ALJ’s recommended penalty.

An appellate court generally will not consider matters not addressed below. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating matters that were not argued to and considered by the district court will not be considered on appeal); *see also In re A.D.*, 883 N.W.2d 251, 261 (Minn. 2016) (applying *Thiele* in a certiorari appeal). Thus, because licensee failed to challenge the sufficiency of the evidence supporting the code violations to the city council or argue that the city was biased, we conclude that licensee forfeited these arguments on appeal.

III. The city’s decision to upwardly depart on the presumptive penalty matrix was not arbitrary or capricious.

Licensee argues that the city’s “decision to deviate from both the second and third matrix penalty options to effectively put [licensee] out of business was arbitrary and capricious” because the city was biased and because the upward departure violates norms of penalty administration. “Generally, decisions of administrative agencies, including cities, enjoy a presumption of correctness and will be reversed only when they reflect an error of law or where the findings are arbitrary, capricious, or unsupported by substantial evidence.” *CUP Foods*, 633 N.W.2d at 562. “An agency decision is arbitrary and capricious if it is an exercise of the agency’s will, rather than its judgment, or if the decision is based on whim or is devoid of articulated reasons.” *Id.* at 565. When there is more than one option, an agency’s choice of one course of action over another is not arbitrary or capricious. *Id.* “A city council may affirm, reject, or modify an ALJ’s findings or conclusions.” *Id.* (citing *Hymanson v. City of St. Paul*, 329 N.W.2d 324, 326-27 (Minn. 1983)).

In concluding that revocation was the appropriate penalty, the city found that licensee committed all alleged code violations and that “severe aggravating circumstances support[ed] a greater-than-double upward departure from the presumptive penalty.” The severe aggravating circumstances included licensee’s unwillingness or inability to operate the gas station in a safe and law-abiding manner, troubling events including “gun fire, illicit drug transactions, large disruptive crowds gathering in the early morning hours, physical assaults, and ultimately a homicide” occurring at the gas station, and that licensee fostered this criminal activity by selling single cigarettes and drug kits. The city ultimately found that “[t]he shootings, illicit drug transactions, large disruptive crowds gathering in the early morning hours, and the sale of flavored tobacco products and single cigarettes” constituted severe, aggravating, and factually atypical circumstances that supported a departure from the presumptive penalty.

“We must uphold a city’s decision if the city has explained how it derived its conclusion and [the city’s] conclusion is reasonable on the basis of the record” and cannot substitute our judgment for that of the decision-maker. *Sawh*, 823 N.W.2d at 635 (quotation omitted). Because the city explained how it determined that a revocation of licensee’s licenses was the appropriate remedy and because the revocations were reasonable based on the record, we conclude that the city’s decision was not based on whim or devoid of articulated reasons and thus was not arbitrary or capricious.

Affirmed.