

*This opinion is nonprecedential except as provided by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
A22-0855**

In re Approving Adverse Action Against the Cigarette/Tobacco Licenses
Held by Narjis, LLC,
d/b/a East Side Grocery, at 1340 Payne Avenue.

**Filed March 27, 2023
Affirmed
Larson, Judge**

City of St. Paul
File No. RES PH 22-87

Wayne B. Holstad, Craig J. Beuning, White Bear Lake, Minnesota (for relator Jaber Albadry)

Lyndsey M. Olson, St. Paul City Attorney, Theresa A. Skarda, Assistant City Attorney,
St. Paul, Minnesota (for respondent City of St. Paul)

Considered and decided by Reilly, Presiding Judge; Reyes, Judge; and Larson,
Judge.

NONPRECEDENTIAL OPINION

LARSON, Judge

In this certiorari appeal, relator Jaber Albadry challenges respondent City of St. Paul's decision to revoke a tobacco-shop license held by his business, Narjis, LLC, d/b/a East Side Grocery (ESG). Because the city did not deny ESG procedural due process, the penalty ordinance is not unconstitutionally vague, and ESG admitted to the conduct underlying the license revocation, we affirm.

FACTS

Since 2014, relator has owned and operated ESG, a grocery store located in St. Paul, Minnesota, that provides groceries and supplies to local residents. ESG received a “tobacco shop license” from the city, permitting ESG to sell certain tobacco products. *See* St. Paul, Minn., Legislative Code (SPCO) § 324.03(16) (2022).¹ But the license did not allow ESG to sell flavored-tobacco products. *See* SPCO § 324.07(j) (2022).² The presumptive penalty when a business impermissibly sells flavored-tobacco products is: (1) a short license suspension for a first violation and (2) license revocation if a second violation occurs within 24 months after the first violation. SPCO § 324.10(b)(2) (2022).

On March 3, 2021, the city inspected ESG and found ESG was impermissibly selling flavored-tobacco products. ESG admitted the violation when it paid a \$500 fine.³ Ten months later, the city again inspected ESG and found ESG was impermissibly selling flavored-tobacco products. On February 24, 2022, the city sent a license-revocation notice that explained the city’s presumptive penalties and cited the relevant ordinances. The

¹ The record provides that ESG sold tobacco under a “cigarette/tobacco shop license,” but the city’s legislative code uses the term “tobacco shop license.” *See* SPCO § 324.03(16). We use the legislative code’s terminology throughout this opinion.

² Relator argues for the first time on appeal that ESG held a “tobacco products shop license” that allowed ESG to sell flavored-tobacco products. *See* SPCO §§ 324.03(17) (defining “tobacco products shop license”); 324.07(l)(3) (providing an exception to the flavored-tobacco restriction for retail stores with a “tobacco products shop license”) (2022). This argument is forfeited because we do not address arguments raised for the first time on appeal. *In re A.D.*, 883 N.W.2d 251, 261 (Minn. 2016) (“Generally, we will not consider an issue not addressed below.”). Further, relator’s argument is inconsistent with the record which shows ESG sold tobacco under a tobacco shop license and ESG admitted its license did not allow it to sell flavored-tobacco products. *See* SPCO § 324.03(16).

³ The city imposed a fine, rather than a short license suspension, for ESG’s first license violation for selling flavored-tobacco products pursuant to SPCO § 310.05(m)(2) (2022).

notice offered ESG three options: (1) do nothing and the matter would proceed uncontested to the city council; (2) admit the alleged facts but contest the revocation penalty in a public hearing before the city council; or (3) request a hearing before an administrative-law judge (ALJ), which would allow ESG to present evidence and witnesses, and cross-examine the city's witnesses.

ESG responded in a letter dated March 30, 2022, choosing the second option. ESG admitted the alleged facts but requested to appear before the city council to contest the revocation penalty. The letter also proposed an alternative penalty. The city council held a public revocation hearing on April 13, 2022. ESG's counsel spoke first, repeating that ESG admitted to the violation and requesting a less-severe alternative to revocation. A city attorney then spoke, describing the two violations and recommending the city council impose the presumptive penalty. The city council voted unanimously for revocation.

This appeal follows.

DECISION

Relator challenges the city's decision to revoke ESG's tobacco-shop license. "City council action is quasi-judicial and subject to certiorari review if it is the product or result of discretionary investigation, consideration, and evaluation of evidentiary facts." *Staheli v. City of St. Paul*, 732 N.W.2d 298, 303 (Minn. App. 2007) (quotation omitted). "When the municipal proceedings were fair and the record clear and complete, review is on the record." *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 180 (Minn. 2006). We limit our certiorari review to "questions affecting the jurisdiction of the board, the regularity of its proceedings, and, as to merits of the controversy, whether the order or

determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.” *Staehele*, 732 N.W.2d at 303 (quotation omitted).

An appellate court’s “authority to interfere in the management of municipal affairs is, and should be, limited and sparingly invoked.” *White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 175 (Minn. 1982). “As a reviewing court, we will not retry facts or make credibility determinations, and we will uphold the decision if the lower tribunal furnished any legal and substantial basis for the action taken.” *Staehele*, 732 N.W.2d at 303 (quotation omitted).

Relator argues the city improperly revoked ESG’s license because (1) the city denied ESG procedural due process and (2) the penalty ordinance is unconstitutionally void for vagueness. We address each argument in turn below.

I.

Relator first argues that ESG was denied procedural due process. We review this issue de novo. *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). Once it has been determined that a constitutionally protected property interest exists, “the question remains what process is due.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also Sweet v. Comm’r of Hum. Servs.*, 702 N.W.2d 314, 320-22 (Minn. App. 2005), *rev. denied* (Minn. Nov. 15, 2005). In the context of license

revocation, “[s]ufficient due process generally requires reasonable notice and a hearing.” *Id.* at 563.

Relator argues ESG was denied due process because the city council decided to revoke ESG’s tobacco-shop license without a prior ALJ hearing. We disagree. A government entity satisfies due process when it “provide[s] an individual with notice and an ‘*opportunity* to be heard at a meaningful time and in a meaningful manner.’” *E.g., Sawh,* 823 N.W.2d at 632 (emphasis added) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). Relator fails to cite any binding authority, and we are aware of none, that concludes a government entity violates procedural due process when an individual chooses to forgo the opportunity to be heard.⁴ The relevant inquiry, therefore, is whether the proceeding the city offered ESG satisfied due process.

Here, the record shows the city offered ESG a hearing before an ALJ, which would have allowed ESG to present evidence and witnesses and cross-examine the city’s witnesses. We have concluded on several occasions that an ALJ hearing constitutes a meaningful opportunity to be heard. *E.g., CUP Foods, Inc.*, 633 N.W.2d at 563. Because

⁴ Federal courts have consistently concluded that procedural due process is satisfied by the availability of a proceeding. *E.g., Padda v. Becerra*, 37 F.4th 1376, 1383 (8th Cir. 2022) (noting a party “cannot complain about lacking due process when the privation (forgoing escalation and judicial review) was [their] own choice” (citing *Sahara Health Care, Inc. v. Azar*, 975 F.3d 523, 533 (5th Cir. 2020))); *Roslindale Co-op. Bank v. Greenwald*, 638 F.2d 258, 261 (1st Cir. 1981) (“The availability of the statutory proceeding satisfies the requirements of due process. We cannot be sympathetic to a party who elects to forego the hearing provided him, and then complains he received none.”); *FDIC v. Am. Bank Trust Shares, Inc.*, 629 F.2d 951, 954 (4th Cir. 1980) (concluding due process was satisfied when judicial review and hearings were available upon application).

the city offered ESG the opportunity for an ALJ hearing, and ESG freely chose to forego that option, we conclude the city did not violate ESG's procedural-due-process rights.

II.

Relator also argues we should overturn the city's decision to revoke ESG's tobacco-shop license because the penalty ordinance is unconstitutionally void for vagueness. We review this issue de novo. *Hard Times Cafe, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171-72 (Minn. App. 2001) (quotation omitted).

Both the federal and Minnesota constitutions prohibit vague ordinances under their due-process clauses. *Id.* (quotation omitted); U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. A municipal ordinance is presumed constitutional, and the burden to prove otherwise rests with the party attacking its validity. *Hard Times Cafe, Inc.*, 625 N.W.2d at 171-72. Courts exercise "extreme caution" before declaring that an ordinance is void for vagueness. *Id.* An ordinance is void for vagueness if it "defines an act in a manner that encourages arbitrary and discriminatory enforcement," or is so indefinite that people "must guess at its meaning." *Humenansky v. Minn. Bd. of Md. Exam'rs*, 525 N.W.2d 559, 564 (Minn. App. 1994) (citations omitted), *rev. denied* (Minn. Feb. 14, 1995). The use of general language in an ordinance does not make it vague. *Hard Times Cafe, Inc.*, 625 N.W.2d at 171-72. An entity challenging the constitutionality of an ordinance on vagueness grounds must show the ordinance lacks specificity as to its own behavior rather than some hypothetical situation. *Ruzic v. Comm'r of Pub. Safety*, 455 N.W.2d 89, 92 (Minn. App. 1990) (citation omitted), *rev. denied* (Minn. June 26, 1990).

Relator argues that a reasonable licensee would conclude the applicable penalty for a second license violation for selling flavored-tobacco products was a fine rather than revocation and that the revocation ordinance is unclear because ESG's first violation predated the ordinance amendment that created revocation as the presumptive penalty for a second violation within a 24-month period. We are not persuaded.

In its ordinance, the city has set forth the presumptive penalties for violations of its tobacco licenses. SPCO § 324.10 (2022). The city enacted this ordinance "to establish a standard by which the city council determines the amount of fines, length of license suspensions and the propriety of revocations for licensees." SPCO § 324.10(a). The city presumes that these penalties are "appropriate for every case," but the city council "may deviate therefrom in an individual case where the council finds and determines that there exist substantial and compelling reasons which make it appropriate to do so." *Id.*

With regard to impermissibly selling flavored-tobacco products, the city ordinance provides a chart that explains the presumptive penalty is: (1) a "10-day [license] suspension" for a first violation and (2) "[r]evocation" for "[a] second violation within twenty four (24) months." SPCO § 324.10(b), (d). We conclude that the city's penalty ordinance makes clear that a second violation for impermissibly selling flavored-tobacco products within 24 months after the first violation results in revocation. SPCO § 324.10(b), (d).

Further, relator has failed to show the ordinance lacked specificity as to ESG's behavior. *Ruzic*, 455 N.W.2d at 92 (citation omitted). ESG admitted to its March 3, 2021 violation for impermissibly selling flavored-tobacco products when it paid the imposed

fine. Between the two violations, the city updated the ordinance to include license revocation as the presumptive penalty for a second violation that occurs within 24 months after the first violation. SPCO § 324.10(b) (amended Jan. 28, 2022). The record shows the city notified ESG of the proposed changes and invited the public to attend hearings on the proposed changes. After the updated ordinance went into effect, ESG received the notice of its second violation, which specifically informed ESG that the city intended to pursue license revocation. And throughout the proceedings before the city council, ESG, through counsel, acknowledged that revocation was the presumptive penalty.

We discern neither that the penalty ordinance invites arbitrary or discriminatory enforcement, nor that it requires an ordinary person to guess at the penalty for a second violation within 24 months. Therefore, we conclude the penalty ordinance is not void for vagueness.

Affirmed.