



Request for City Council Committee Action From The City Attorney's Office

Date: May 8, 2002

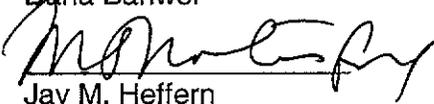
To: Public Safety & Regulatory Services Committee

Referral to: Ways & Means/Budget

Prepared by: Dana Banwer

Phone: 673-2014

Approved by:


Jay M. Heffern
City Attorney

Subject: Status Report on Administrative Law Judge (ALJ) Pilot Project

Presenters in Committee: Dana Banwer and James Moncur

Recommendations:

1. That the City Council receives and files the attached Status Report (and attachments thereto) related to the ALJ Pilot Project.
2. That the City Council directs the following:
 - (a) City Attorney's Office and the Licenses and Consumers Services Division refine the process of referring licensing matters to the Office of Administrative Hearings for hearings to determine cause for adverse license action, by developing standards for referral of matters to the Office of Administrative Hearings;
 - (b) City Attorney's Office and Licenses and Consumer Services Division review and report back to this Committee on alternatives to using the ALJ process, for those matters that do not meet the ALJ referral standards, including a potential "administrative" action by the department or similar options;
3. That the City Council adopts the ALJ process as the City's standard means of taking adverse license action in those cases where a basis exists for adverse license action, and directs the City Attorney's Office to draft any necessary amendments to the Minneapolis Code of Ordinances to codify the ALJ process and to present any such ordinance amendments to the City Council within 60 days.
4. That the City Council directs the City Attorney's Office to draft any necessary amendments to the License Adverse Action Procedures Manual, and the present the Manual to the City Council for approval within 60 days.

Financial Impact (Check those that apply)

- No financial impact (If checked, go directly to Background/Supporting Information)
- Action requires an appropriation increase to the Capital Budget
- Action requires an appropriation increase to the Operating Budget
- Action provides increased revenue for appropriation increase
- Action requires use of contingency or reserves
- Other financial impact (Explain): Requires funds to pay OAH for costs related to ALJ hearings.
- Request provided to the Budget Office when provided to the Committee Coordinator

Community Impact:

Neighborhood Notification
City Goals: Build Community

Background/Supporting Information: See attached report.

**STATUS REPORT TO PUBLIC SAFETY & REGULATORY SERVICES
COMMITTEE ON ADMINISTRATIVE LAW JUDGE (ALJ) PILOT PROJECT**

BACKGROUND

Prior to 1999, and pursuant to City Council direction, the Division of Licenses and Consumer Services of the Regulatory Services Department initiated adverse license action against business licensees in appropriate cases. In most cases, the initial adverse action consisted of a Technical Advisory Committee or "TAC" hearing. This process involved a meeting (rather than a hearing) among the licensee, representatives of the City department or departments involved, and occasionally a representative of the City Attorney's Office. Occasionally, the licensee was represented by counsel. The most common outcome of this process was an agreement between the licensee and the City, which was presented to the City Council for approval, in the form of Findings of Fact, Conclusions and Recommendations, or in a letter form. If violations of City ordinances were found, typically, the licensee agreed to some type of sanction, including payment of an administrative fine, a suspension, or continued operation of the business with conditions imposed by the City.

In those cases where a more severe sanction was deemed necessary (revocation, non-renewal or denial of the license), due to either the severity of the situation or to a licensee's continued non-compliance with conditions imposed under a TAC agreement, the Licenses and Consumer Services Division "called in" the licensee for a hearing before a three-person sub-committee of the Public Safety and Regulatory Services Committee. While no written standards existed for conduct of these hearings, the call-in hearings were held to afford a licensee notice of the violations that the City alleged against the licensee, and an opportunity to be heard by the sub-committee. Typically, staff of the City Attorney's Office and the Licenses and Consumer Services Division presented the case to the three-person panel of the PS&RS Committee, along with any written evidence or documents. The licensee was given the opportunity to respond to the evidence presented and to make his or her case to the panel. Early on, it was not very common that the licensee was represented by counsel. Representation by an attorney became more common as the process continued. In those matters where the licensee was represented by counsel, the hearings often became protracted, sometimes continuing for several days.

Following the call-in hearing, the sub-committee that heard the matter made a recommendation to the full PS&RS Committee as to a proposed penalty or other actions. This recommendation, prepared by the Assistant City Attorney assigned to present the matter to the three-person panel, took the form of Findings of Fact, Conclusions, and Recommendations. After action by the PS&RS Committee, the full City Council considered the action. If the result was the revocation of the license or licenses in question, the licensee was notified once the action became final that the City Council had voted to revoke the license. The licensee was then required to close the

business. It is important to note that, without a court order permitting the City to physically shut down a licensed establishment, no City employee has the authority to do so, even after the City Council has acted to revoke a license. If the licensee refuses to voluntarily close his or her business, the City must apply to the appropriate court for a writ of mandamus, or other appropriate relief.

Due to concerns about safeguarding the due process rights of license applicants or license holders in the City, the lack of neutrality in the process existing at the time, as well as a concern about the increasing number of hearings, and the length of time required to hear these actions, the Licenses and Consumer Services Division, the Minneapolis Police License Division, and the City Attorney's Office began to explore alternatives to the then-existing process. We met with representatives of the St. Paul City Attorney's Office and learned that the St. Paul City Attorney's Office had been using the Office of Administrative Hearings (OAH) to conduct St. Paul's adverse license actions since 1992. We also learned that St. Paul was satisfied with this process.

In addition, as we gathered information with which to recommend a pilot ALJ program to the City Council, we met with Chief Administrative Law Judge, Kenneth Nickolai and Administrative Law Judge George Beck, the administrative law judge primarily responsible for hearings involving municipalities. During this meeting, we were given assurances that the OAH could handle the hearings that the City of Minneapolis anticipated referring to the OAH for potential adverse license action.

In 1999, the Division of Licenses and Consumer Services and the City Attorney's Office made a joint recommendation to the City Council proposing that the City Council authorize an ALJ pilot project to conduct administrative hearings related to adverse license actions. The City Council authorized the pilot project on July 16, 1999. It was anticipated that the pilot project would run for 6 months, and that the Division of Licenses and Consumer Services and the City Attorney's Office would report back to the City Council upon completion of the pilot project.

RESULTS OF PILOT PROJECT

Since the beginning of the pilot project, the Division of Licenses and Consumer Services and the Police License Division have referred 19 matters to the City Attorney's Office for consideration of adverse license action. A table summarizing all matters referred to the City Attorney's Office for adverse license action is attached as Exhibit A. Of these matters, hearings before an administrative law judge have been held in 10 matters to date. One additional hearing is scheduled to occur in June, 2002. Of the 10 hearings conducted, the City Council has taken action in eight (8) matters, and recommendations in two (2) additional matters will come before this Committee in the near future.

Of the initial 19 matters referred to the City Attorney's Office, hearings were not held on approximately 8 matters for the reasons stated in Exhibit A. The most common reasons that hearings were not scheduled, include either the assigned attorney found no basis

for adverse license action, or the matter was settled informally, due sometimes to voluntary withdrawal of the application by the licensee or voluntary closure of the business by the licensee.

As indicated above, not every matter referred to the City Attorney's Office by the Licenses and Consumer Services Division or by the Police Department has been heard before an ALJ. Occasionally, the City is able to obtain the licensee's attention only after the City threatens to take adverse license action. The threat of adverse license action sometimes gives the licensee a strong incentive to cooperate with the City, where previous attempts to gain compliance have not. In such cases, and because the cost of a hearing before an ALJ is not insignificant, it is sometimes more appropriate to negotiate a settlement between the parties than to hold a hearing before an ALJ. Attached as Exhibit B is the Office of Administrative Hearings fiscal year 2002 billing rates. The rates reported in Exhibit B reflect a 50% increase in rates charged by the OAH through 2001. For all ALJ hearings held to date, the City paid the OAH \$21,188 in 2000, \$21,802 in 2001, and to date in 2002 the City has paid the OAH \$13,547 for costs associated with the hearings.

APPEALS FROM CITY COUNCIL DECISIONS

In the seven (7) matters on which the City Council has taken adverse license action since the beginning of the ALJ Pilot Project, the licensee has appealed the City Council's decision to the Minnesota Court of Appeals in three (3) of the matters (Hard Times Café, CUP Foods, and Imman Conoco). Recently, the licensee withdrew his appeal after the Court of Appeals denied his request for a stay of revocation pending the appeal, and closed the business in the Imman Conoco matter.

In the Hard Times Café matter, the licensee appealed the City Council's decision to the Court of Appeals on the grounds that the "good cause" standard of the ordinances violated due process and that the City Council was exposed to material outside the record in making its decision. Upon review, the Court of Appeals determined that the "good cause" standard did not violate due process, but that the Court of Appeals could not determine the extent to which the consideration of material outside the record tainted the decision of the City Council. The case was remanded to the District Court to conduct an investigation into the effect the irregularities in procedures had on the decision of the City Council. This matter was settled by the City agreeing to renew the license, in return for which, the licensee dismissed its appeal.

In the CUP Foods matter, the ALJ concluded that the City had shown "good cause" for taking adverse license action, but recommended that the City consider placing conditions on the CUP Foods licenses, rather than revoking the licenses outright. The City Council adopted the ALJ's report, but rather than placing conditions on the licenses, it revoked all the licenses, stayed on the condition that CUP Foods (1) close for six months and (2) take additional specified crime prevention measures upon re-opening. The City Council, however, waived 90 days of the closure period, upon CUP

Foods' payment of a \$10,000 administrative fine. CUP Foods appealed this decision to the Court of Appeals.

On review, the Court of Appeals ruled that the evidence presented at the hearing, while "hardly overwhelming", supported the conclusion that the City Council had "good cause" to take adverse license action against the licensee. However, because the City Council adopted the ALJ's findings but significantly deviated from the ALJ's recommendation without explaining its reasons for significantly deviating or without making findings explaining its decision to deviate, the City Council's decision was "arbitrary and capricious". This matter was remanded to the City Council to make findings explaining its decision to deviate from the ALJ's recommendation. Currently, the parties are in settlement negotiations.

It is difficult to obtain accurate figures as to the number of hearings held by the City; however, statistics maintained by the Division of Licenses and Consumer Services indicate that in the three years prior to 1999, approximately 37 matters were heard by a sub-committee of the PS&RS Committee. The records maintained by the City Clerk's Office indicate that approximately 20 matters were heard by sub-committees of the PS&RS Committee. In some of these matters, a TAC agreement was reached between the City and the licensee, either before the hearing commenced, during the hearing, or prior to any action by the City Council. In most cases, the agreement involved some form of adverse action ranging from imposition of an administrative fine or penalty, to suspension for a period of time with conditions placed on holding the license. During this same period, two licensees appealed the City Council's decision to the Court of Appeals. One of these appeals derived from action taken by the Division of Licenses and Consumer Services against a provisional taxicab license, and was not the result of a hearing before a PS&RS sub-committee. The City Council's decisions were upheld in both cases.

ROLE OF CITY COUNCIL MEMBERS

When taking action on a license, the City Council acts as a court would. In such circumstances, the City Council takes action in a quasi-judicial setting. The parameters within which the City Council, acting in a quasi-judicial capacity must remain are discussed in a letter dated January 3, 2002, from Jay Heffern to Mayor R.T. Rybak and City Council Members. This letter, which is attached to this report as Exhibit C, more fully sets out procedural due process requirements, as well as additional requirements related to quasi-judicial decisions of the City Council.

In addition, during the pendency of the ALJ pilot project, the parties have been operating under the License Adverse Action Procedures Manual. A copy of the manual is attached as Exhibit D. By way of review, in order for a quasi-judicial decision of the City Council to withstand judicial scrutiny based on a due process challenge, the process and record supporting the decision should affirmatively answer the following questions:

- Is there a complete record of the proceedings?
- Was fair notice of the hearing and opportunity to be heard provided?
- Were *ex parte* contacts avoided or properly disclosed?
- Was prejudgment bias avoided?

Each of these principles is more fully discussed in the January 3, 2002 letter, and we urge members of the City Council to review the letter carefully. If there are any questions concerning the advice given in the letter, please contact the City Attorney's Office for clarification.

CONCLUSIONS

In order to best preserve the decision-making autonomy of the City Council, care should be taken to provide adequate safeguards for the due process rights of applicants/licensees appearing before duly constituted quasi-judicial bodies. The following is a list of "best practices" to be utilized by Council members and other City officials in connection with quasi-judicial matters over which they may have decision-making authority.

- Keep a record of all verbal or written contacts relating to the matter.
- Refer questions, complaints and information you receive on quasi-judicial matters to the department staff person responsible for the matter.
- Submit the record of contact, along with any documents received regarding the matter, into the official record of the proceedings.
- Maintain neutrality and refrain from taking a position on quasi-judicial matters in community fora or elsewhere prior to the official City Council proceedings for such matters.
- In the unusual situation where your beliefs, relationship or activities in connection to a particular issue or application are such that you are unable to serve as a neutral decision-maker for a quasi-judicial matter, you should recuse yourself from a decision-making role.
- Make quasi-judicial decisions based only on the information that has been included in the formal record of the proceeding.
- State the factual findings and reasons that support your quasi-judicial decisions on the record at the time that you make your decision.

RECOMMENDATIONS

It is the joint recommendation of the City Attorney's Office, the Division of Licenses and Consumer Services of the Regulatory Services Department, and the Minneapolis Police License Division:

1. That the City Council receives and files the attached Status Report (and attachments thereto) related to the ALJ Pilot Project.
2. That the City Council directs the following:
 - (a) City Attorney's Office and the Licenses and Consumers Services Division refine the process of referring licensing matters to the Office of Administrative Hearings for hearings to determine cause for adverse license action, by developing standards for referral of matters to the Office of Administrative Hearings;
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3. That the City Council adopts the ALJ process as the City's standard means of taking adverse license action in those cases where a basis exists for adverse license action, and directs the City Attorney's Office to draft any necessary amendments to the Minneapolis Code of Ordinances to codify the ALJ process and to present any such ordinance amendments to the City Council within 60 days.
4. That the City Council directs the City Attorney's Office to draft any necessary amendments to the License Adverse Action Procedures Manual, and to present the Manual to the City Council for approval within 60 days.

ALJ HEARINGS

	<u>Licensee/Establishment</u>	<u>Referred to City Attorney</u>	<u>Hearing Date(s)</u>	<u>Attorney</u>	<u>ALJ Recommendation</u>	<u>Status</u>
1.	Hard Times Café	1/27/00	3/9 and 3/28/00	Skarda & Bachun	ALJ found "good cause" existed for adverse license action.	Court of Appeals remanded case to district court on issues related to Council's conduct. Settled by granting license.
2.	Ghani Habib taxicab driver's license	1/10/00	1/31 and 4/25/00	Reimer	Adverse license action	License revoked by City Council in 2000.
3.	Uptown Antiques	3/18/99	5/11 and 7/16/01	Reimer	Adverse license action	License denied by City Council in 2001.
4.	CUP Foods	2/15/00	3/28, 3/30, 3/31, 5/5, 5/15/00	Reeves	ALJ found "good cause" existed for adverse license action, but recommended action less than revocation or suspension	Court of Appeals reversed and remanded to City Council to explain reasons for deviating from ALJ's recommendation; presently in settlement negotiations.
5.	Jubbaland Restaurant	1/10/00	3/7/01	Halbert	Adverse license action	License revoked/denied by City Council on 6/22/01.
6.	510 Groveland	11/8/00	11/1/01	Reimer	No adverse license action	No adverse license action taken.
7.	Pizza Lucé	4/18/00	11/5/01	Reimer	Adverse license action	City Council imposed \$500 fine.
8.	Imman Conoco		1/10/02-1/12/02	Dunning	Adverse license action justified - no specific recommendation	License revoked by City Council on 3/1/02; Licensee's request for stay pending appeal denied. Appeal to COA withdrawn by licensee.
9.	Starr Automotive	1/16/01	1/9/02	Skarda	Adverse license action justified - no specific recommendation	To be scheduled before PS&RS.
10.	Las Americas	6/28/01	3/18-3/2002 and 3/25-3/26/02	Reeves	N/A	Awaiting submission of written closing arguments to ALJ, then ALJ's decision - by approximately June, 2002.
11.	Crown Plaza Northstar Hotel	11/16/01	Scheduled for 6/20/02	Reimer	N/A	Awaiting hearing before ALJ.

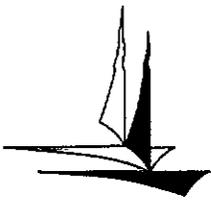
REFERRED TO CITY ATTORNEY'S OFFICE; NO HEARING

	<u>Licensee/Establishment</u>	<u>Attorney</u>	<u>Reason for No Hearing</u>			
1.	Rick's Cabaret	Reimer	No basis due to decision in criminal case that ordinance was unconstitutional. Lower court decision upheld on appeal. One additional criminal case pending. Without criminal convictions, likelihood of success doubtful.			
2.	Seville Hotel	Reeves	No ALJ hearing – no basis 4/27/01			
3.	Pepperoni Pub	Reeves	Licensee evicted open by property owner, licensee then withdrew application – no hearing 5/29/01			
4.	Northside Food Market	Bachun	No hearing – settled			
5.	Paradise Auto	Skarda	No hearing – business closed voluntarily			
6.	Wamo Café	Halbert	8/1/00 restaurant sold, department withdrew request			
7.	Multi-Media Planet	Trammell	No hearing per Minneapolis Police Department Licenses			
8.	200 Club	Bachun	No hearing – sale of business			

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
Suite 1700
100 Washington Square
Minneapolis, Minnesota 55401**

FISCAL YEAR 2002 BILLING RATES

	Rate:
Rates for Administrative Law Judge Services:	
Employee administrative law judges	\$150 per hour
Staff attorneys	\$ 75 per hour
All travel expenses	State approved rates
Contract administrative law judges	\$150 per hour
Paralegal	\$ 40 per hour
Filing fee	\$ 50 per case opening
Sign Language Interpreter Services	Contract price
Rates for Court Reporters and Transcription Services:	
Contract court reporter appearance fee	M-contract price
Contract transcript preparation	M-contract price
Contract court reporter expenses	State approved rates
Rates for General Support Services will remain unchanged, as listed below:	
Sale of Xerox copies	\$.25 per page with \$1.00 minimum billing fee
Sale of copy of hearing tapes	\$10 per tape
Preparation of subpoenas	\$ 5 per subpoena



Minneapolis
City of Lakes

TO: James Moncur
Clara Schmit-Gonzalez

FROM: Dana Banwet, Assistant City Attorney

DATE: July 30, 2001

RE: Office of Administrative Hearings Hourly Rate Increases

Office of the City Attorney
Jay M. Heffern
City Attorney

333 South 7th Street - Suite 300
Minneapolis MN 55402-2453

Office 612 673-2010
Civil Division Fax 612 673-3362
Criminal Division Fax 612 673-2189
MCDA Fax 612 673-5112
TTY 612 673-2157

INTEROFFICE MEMORANDUM

Attached is a copy of a letter this Office received from the State of Minnesota, Office of Administrative Hearings (OAH) recently concerning rate increases for Administrative Law Judge (ALJ) hearings. Also attached is a new rate schedule. It appears that the rate increases, which went into effect on July 1, 2001, were necessitated by the failure of proposed legislation during the 2001 legislative session. The proposed legislation would have enabled the OAH to fund its administrative law functions either entirely or partly with a general fund appropriation.

Please do not hesitate to contact me if you have any questions.

DB:hhp

Attachment

cc: Michael Norton
Peter Ginder



STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
100 Washington Square, Suite 1700
100 Washington Avenue South
Minneapolis, Minnesota 55401-2138

July 20, 2001

City of Minneapolis
Minneapolis City Attorney's Office
333 South 7th Street
Suite 300
Minneapolis, MN 55402-2453

Subject: OAH Hourly Rate Increases as of July 1, 2001

The Office of Administrative Hearings bills local governments and State agencies for mediations, hearings, and rule-making work. The hourly rates for that work increased on July 1, 2001. The new rate schedule is attached.

While the rates are substantially higher than in previous years, they are commensurate with private sector rates for experienced attorneys working to resolve disputes through mediation or deciding contested issues through arbitration.

During the 2001 Legislative Session, legislation was introduced in both the Senate and the House that would have enabled OAH to fund its administrative law functions either entirely or partly with a general fund appropriation. If it had passed, it would have had the effect of reducing your hearing costs. Although the legislation was passed unanimously by the policy committees in both houses of the legislature, the bills were not passed out of either finance committee. Moreover, the finance committees of both houses took the position that the rates we would be charging for FY 02-03 were subject to legislative approval.

Consistent with the legislature's action on July 2, 2001, we submitted a new set of rates to the Minnesota Department of Finance for its approval. On July 10, 2001, the Department approved the attached rate structure for OAH for Fiscal Year 2002, beginning on July 1, 2001.

We regret the need to increase our rates and will strive to keep your hearing costs as low as possible. To that end, we will be reminding our administrative law judges of the need for efficiency in providing hearing services and we will also be using lower-cost staff attorneys to assist in the preparation of our proposed decisions wherever possible. We also hope that in future years the legislature may be more receptive to re-examining how OAH's administrative law function is funded.

If you have any questions about these new rates or any of the services the Office of Administrative Hearings provides to local governments, please call me at 612-341-7640.

Sincerely yours,


KENNETH A. NICKOLAI
Chief Administrative Law Judge

Enc.

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS**
Suite 1700
100 Washington Square
Minneapolis, Minnesota 55401

FISCAL YEAR 2002 BILLING RATES

Rates for Administrative Law Judge Services:

Rate:

Employee administrative law judges	\$150 per hour
Staff attorneys	\$ 75 per hour
All travel expenses	State approved rates
Contract administrative law judges	\$150 per hour
Paralegal	\$ 40 per hour
Filing fee	\$ 50 per case opening

Sign Language Interpreter Services

Contract price

Rates for Court Reporters and Transcription Services:

Contract court reporter appearance fee	M-contract price
Contract transcript preparation	M-contract price
Contract court reporter expenses	State approved rates

Rates for General Support Services will remain unchanged, as listed below:

Sale of Xerox copies	\$.25 per page with \$1.00 minimum billing fee
Sale of copy of hearing tapes	\$10 per tape
Preparation of subpoenas	\$ 5 per subpoena

Administrative Hearings Costs 2000

description	year	fund	agency	org	object	code	trans_number	dollar amt
CUP FOODS	2000	0100	835	8360	5040	PV	83606000958	\$ 18.20
CUP FOODS	2000	0100	835	8360	5040	PV	83606000991	\$ 2,319.85
CUP FOODS	2000	0100	835	8360	5040	PV	83606000920	\$ 373.10
CUP FOODS	2000	0100	835	8360	5040	PV	83606001034	\$ 937.30
CUP FOODS	2000	0100	835	8360	5040	PV	83606001100	\$ 2,453.80
CUP FOODS	2000	0100	835	8360	5040	PV	83606001022	\$ 794.20
CUP FOODS	2000	0100	835	8360	5040	PV	83606000990	\$ 2,229.50
CUP FOODS	2000	0100	835	8360	5040	PV	83606001012	\$ 745.80
CUP FOODS	2000	0100	835	8360	5040	PV	83606001011	\$ 200.20
CUP FOODS	2000	0100	835	8360	5040	PV	83606001103	\$ 2,824.60
CUP FOODS	2000	0100	835	8360	5075	PC	82500012496	\$ 1,262.50
							Sub total	\$ 14,159.05
GHANI HABIB-TAXI	2000	0100	835	8360	5040	PV	83606000947	\$ 5.00
GHANI HABIB-TAXI	2000	0100	835	8360	5040	PV	83606001057	\$ 471.90
GHANI HABIB-TAXI	2000	0100	835	8360	5040	PV	83606000937	\$ 163.80
GHANI HABIB-TAXI	2000	0100	835	8360	5040	PV	83606001043	\$ 191.10
GHANI HABIB-TAXI	2000	0100	835	8360	5040	PV	83606001042	\$ 72.80
GHANI HABIB-TAXI	2000	0100	835	8360	5040	PV	83606001041	\$ 414.60
							Sub total	\$ 1,319.20
HARD TIMES CAFE	2000	0100	835	8360	5040	PV	83606000997	\$ 1,392.30
HARD TIMES CAFE	2000	0100	835	8360	5040	PV	83606001023	\$ 2,314.00
HARD TIMES CAFE	2000	0100	835	8360	5040	PV	83606001081	\$ 1,476.00
							Sub total	\$ 5,182.30
JUBBALAND-806 FRA	2000	0100	835	8360	5040	PV	83606001164	\$ 36.40
							Sub total	\$ 36.40
NORTH SIDE FD MKT	2000	0100	835	8360	5040	PV	83606001082	\$ 491.40
							Sub total	\$ 491.40
							Total	\$ 21,188.35

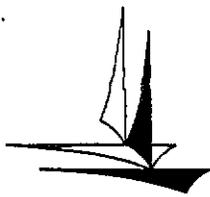
Administrative Hearings Costs 2001

description	year	month	fund	agency	org	object	code	trans number	dollar amt
510 GROVELAMD	2001	11	0100	835	8360	5075	PV	83606001416	\$ 115
510 GROVELAND	2001	10	0100	835	8360	5075	PV	83606001401	\$ 50
510 GROVELAND	2001	11	0100	835	8360	5075	PV	83606001436	\$ 1,553
510 GROVELAND	2001	12	0100	835	8360	5075	PV	83606001474	\$ 12
								Sub Total	\$ 1,729
IMMAN CONOCO	2001	09	0100	835	8360	5075	PV	83606001379	\$ 45
IMMAN CONOCO	2001	10	0100	835	8360	5075	PV	83606001402	\$ 60
IMMAN CONOCO	2001	10	0100	835	8360	5075	PV	83606001401	\$ 60
IMMAN CONOCO	2001	11	0100	835	8360	5075	PV	83606001416	\$ 90
IMMAN CONOCO	2001	12	0100	835	8360	5075	PV	83606001474	\$ 3,293
								Sub Total	\$ 3,548
JUBBALAND	2001	03	0100	835	8360	5075	PV	83606001195	\$ 15
JUBBALAND	2001	05	0100	835	8360	5075	PV	83606001296	\$ 413
JUBBALAND	2001	06	0100	835	8360	5075	PV	83606001325	\$ 3,078
								Sub Total	\$ 3,506
LAS AMERICAS	2001	10	0100	835	8360	5075	PV	83606001401	\$ 60
LAS AMERICAS	2001	10	0100	835	8360	5075	PV	83606001400	\$ 1,200
LAS AMERICAS	2001	11	0100	835	8360	5075	PV	83606001436	\$ 270
LAS AMERICAS	2001	11	0100	835	8360	5075	PV	83606001416	\$ 1,725
LAS AMERICAS	2001	08	0100	835	8360	5075	PV	83606001369	\$ 50
LAS AMERICAS	2001	12	0100	835	8360	5075	PV	83606001474	\$ 285
								Sub Total	\$ 3,590
PIZZA LUCE'	2001	12	0100	835	8360	5075	PV	83606001442	\$ 10
PIZZA LUCI	2001	10	0100	835	8360	5075	PV	83606001401	\$ 50
PIZZA LUCI	2001	11	0100	835	8360	5075	PV	83606001436	\$ 45
PIZZA LUCI	2001	11	0100	835	8360	5075	PV	83606001416	\$ 120
PIZZA LUCI	2001	12	0100	835	8360	5075	PV	83606001474	\$ 1,043
								Sub Total	\$ 1,268
STARR, GERALD A V	2001	08	0100	835	8360	5075	PV	83606001360	\$ 50
STARR, GERALD A V	2001	11	0100	835	8360	5075	PV	83606001436	\$ 10
								Sub Total	\$ 60
UPTOWN ANTIQUES	2001	03	0100	835	8360	5075	PV	83606001194	\$ 64
UPTOWN ANTIQUES	2001	05	0100	835	8360	5075	PV	83606001274	\$ 1,976
UPTOWN ANTIQUES	2001	05	0100	835	8360	5075	PV	83606001296	\$ 109
UPTOWN ANTIQUES	2001	06	0100	835	8360	5075	PV	83606001325	\$ 598
UPTOWN ANTIQUES	2001	08	0100	835	8360	5075	PV	83606001363	\$ 555
UPTOWN ANTIQUES	2001	10	0100	835	8360	5075	PV	83606001401	\$ 2,250

								Sub Total	\$ 5,552
								Total	\$ 19,252

2002 Administrative Hearings

description	fisc_year	month	fund	agency	org	object	trans_code	trans_number	amount
IMMAN CONOCO	2002	02	0100	835	8360	5075	PV	83606001501	\$ 2,550.00
LAS AMERICAS	2002	02	0100	835	8360	5075	PV	83606001501	\$ 120.00
LAS AMERICAS	2002	03	0100	835	8360	5075	PV	83606001510	\$ 660.00
LAS AMERICAS	2002	04	0100	835	8360	5075	PV	Not available	\$ 600.00
LAS AMERICAS	2002	04	0100	835	8360	5075	PV	83606001538	\$ 3,990.00
LAS AMERICAS	2002	04	0100	835	8360	5075	PV	83606001545	\$ 130.00
STARR, GERALD	2002	03	0100	835	8360	5075	PV	83606001510	\$ 1,905.00
STARR, GERALD	2002	04	0100	835	8360	5075	PV	83606001538	\$ 1,995.00
STARR, GERALD A	2002	02	0100	835	8360	5075	PV	83606001501	\$ 2,197.50
STARR, GERALD A	2002	04	0100	835	8360	5075	PV	Not available	\$ 50.00
								Total to May 8	\$ 14,197.50



Minneapolis
City of Lakes

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January 3, 2002

The Honorable R.T. Rybak
Mayor of Minneapolis
Room 331, City Hall
350 South Fifth Street
Minneapolis, MN 55415

Council President Paul Ostrow
and Members of the City Council
Room 307, City Hall
350 South Fifth Street
Minneapolis, MN 55415

Re: Quasi-Judicial Proceedings: Due Process Considerations and Conduct of Council Members

Dear Mayor Rybak, Council President Ostrow, and Members of the City Council:

The purpose of this letter is to provide guidance on what conduct is appropriate for the City's elected officials when a quasi-judicial proceeding is in progress. This question relates to the procedural due process rights of the people who will be affected by the quasi-judicial decision.

INTRODUCTION AND SUMMARY

In many instances members of the City Council and other City officials take action in a quasi-judicial setting. In such circumstances the officials act as a court would. In quasi-judicial matters the public officials will receive factual evidence, arrive at conclusions based upon the evidence, apply a legal standard to the factual conclusions and, thereby, arrive at a decision. Examples of quasi-judicial decisions include decisions on certain zoning applications, such as conditional use permits and variances, and decisions that effect license status, such as license revocations. Quasi-judicial proceedings must be conducted in a manner that comports with the requirements of due process. While the full panoply of the rules of judicial procedure are not applicable to the City's quasi-judicial

proceedings, the attitude and conduct of members of the board, commission, committee or council making the decision should be judicial and impartial. See McQuillin, *Municipal Corporations*, Zoning §25.262, p. 350.

Quasi-judicial decisions of municipalities have been challenged in the courts based on allegations of due process violations related to the conduct of the hearing, reliance of the decision-makers on matters not in the record ("ex parte" contacts), and prejudgment bias of the decision-makers. Challenges have also been made based on allegations that a decision-maker had a conflict of interest. A conflict of interest is generally defined as a financial or other personal interest which is incompatible with the proper discharge of official duties or which would tend to impair independence of judgement or action in the performance of official duties. See the City's "Ethics Ordinance," MCO §15.20(d). Conflict of interest issues have been separately addressed in a letter from the City Attorney to the Mayor and City Council, dated January 3, 2002, regarding "Ethics and Conflicts of Interest."

In order for a quasi-judicial decision of the City to withstand judicial scrutiny based on a due process challenge, the process and record supporting the decision should affirmatively answer the following questions.

- Is there a complete record of the proceedings?
- Was fair notice of the hearing and opportunity to be heard provided?
- Were ex parte contacts avoided or properly disclosed?
- Was prejudgment bias avoided?

These questions are discussed in detail below.

DISCUSSION

A Record Of The Proceedings Must Be Made

A complete record must be kept of the quasi-judicial proceeding. In many cases where a quasi-judicial decision of the City is challenged in court, the court will limit its review to the record that was made in front of and by the City Council or other decision-making body. If a complete and contemporaneous record is not available, however, the court may conclude that the City's decision was arbitrary or may require a full trial. Neither statute nor case law has defined precisely what is required to be in the record, and the nature of the record will vary depending on the particular type of matter being decided. At a minimum, the following information and materials should be part of the preserved record:

- A copy of all documents presented as part of the decision-making process which were submitted by the City, the applicant, a person appealing a City decision, or others regarding the decision.

- The reasons for the decision should be articulated on the record contemporaneously with the decision. Where feasible or otherwise required by law, findings of fact should be prepared in written form.
- Any notices, agendas, marked agendas or minutes of hearings.
- Audio or video tapes should be made and preserved for all public hearings and other proceedings in front of the City Council, Council Committee or other City body that considered the matter.

Fair Notice And Opportunity To Be Heard Must Be Provided

The basic requirements of procedural due process are fair notice of a hearing and a reasonable opportunity to be heard. *Barton Contracting Co. Inc. v. City of Afton*, 268 N.W.2d 712, 716 (Minn. 1978). City officials should give due regard to the individuals' rights to testify or call witnesses on their own behalf, and should grant continuances of a hearing where justice requires. The petitioner should be afforded the right to rebut evidence or testimony presented in opposition to the petition.

State statute or City ordinance may also establish specific requirements for notice and public hearing for some types of quasi-judicial matters. For example, §525.150 of the City's Zoning Code sets forth the notice and hearing requirements for land use applications. Failure to comply with notice and hearing procedures established by statute, ordinance or other rules applicable to the particular quasi-judicial matter under consideration could be the basis for a reviewing court to overturn the City's decision. *See Hard Times Cafe, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 173 (Minn. Ct. App. 2001) (City's adverse license action was reviewable under Minnesota Administrative Procedures Act which allows court to reverse or modify decision made upon unlawful procedure where substantial rights have been prejudiced).

Ex parte Contacts Shall Be Avoided

"Ex parte contacts" refers to contacts or information that a decision-maker receives from interested parties outside of the formal decision-making process. It is improper for decision-makers in a quasi-judicial proceeding to rely on information outside of the record because a hearing does not provide interested parties with a fair opportunity to be heard if they are not aware of and do not have an opportunity to rebut non-record information. Often a constituent or other interested party to a quasi-judicial decision will initiate contact with elected and appointed officials to plead their case prior to the hearing. In the interest of fairness and impartiality, officials who are charged with making quasi-judicial decisions should avoid "ex parte" communications with interested parties. Council members, however, must balance the need for a fair proceeding with the right of constituents to petition their elected officials.

Applications and enforcement actions relating to zoning and licensing matters are often subjects of discussion at community and neighborhood association meetings, and council members generally attend meetings such as these in the normal course of their duties. In general, Council members do not need to avoid such meetings simply because a matter that may come before them for a quasi-judicial decision will be discussed. To the contrary, council members have sometimes facilitated

such discussions by providing information about City processes or arranging for City staff involved with the subject matter to attend the meeting. Council members should be extremely careful, however, to maintain neutrality and refrain from taking a position on quasi-judicial matters in community forums or elsewhere prior to the official City Council proceedings for such matters in order to avoid the appearance of prejudgment bias, as discussed further in the next section of this letter.

When Council members and other quasi-judicial decision-makers do have ex parte contacts or otherwise receive information about a hearing matter, they should disclose such contacts and information on the record. It is common, for instance, for neighborhood residents to phone, write or e-mail their Council member to express their opinions about applications that have been made to the City for zoning and license approvals. Written communications and phone logs can be forwarded to the committee clerk prior to the hearing for distribution to all members of the governing body. (When such contacts simply seek public information such as "when and where is the hearing" or "where can I get a copy of the staff report," the contact does not need to be included in the record.) Where there is not sufficient time prior to the hearing, or where the contacts are verbal, the council or board member can disclose the information on the record at the time of hearing. If members of a hearing body have other personal knowledge that is relevant to a decision on the hearing matter, such as familiarity with a particular property that is the subject of a zoning application, that information should also be disclosed on the record.

A rule of "no ex parte contacts" must be strictly adhered to, however, when a formal adverse license action has been initiated. Often, these matters are referred to an Administrative Law Judge ("ALJ") for a hearing. In these ALJ proceedings, the factual record is developed before the ALJ, rather than before a City commission or Council committee, and then the ALJ presents findings of facts to the Council. Although the Council is the ultimate judge of how the law applies to the facts and makes the final decision on whether to take an adverse license action, the procedures that the City has established for these license actions do not allow the Council to supplement the factual record developed by the ALJ. Instead, if the Council believes that new or other information should be evaluated by the ALJ, the matter could be returned to the ALJ for additional fact finding. Information obtained by Council members outside of the ALJ process may not be considered and such ex parte contacts should be carefully avoided in order to comply with the procedures the City has established to provide for a fair hearing, and to minimize the potential for legal challenge to the Council's ultimate decision in the matter. See *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165 (Minn. Ct. App. 2001). The full procedures manual for adverse license actions involving hearings before an ALJ may be obtained from the City Attorney's Office.

Avoiding Prejudgment Bias; Participation of Decision-Makers as Witnesses

In the context of a quasi-judicial proceeding, "prejudgment bias" means that a decision-maker has made up her or his mind on a matter before receiving all the evidence at the hearing. Prejudgment bias could constitute a due process violation because a hearing is not "fair" if it is futile.

Courts that have considered claims of prejudgment bias have not gone so far as to require quasi-judicial decision-makers to be totally without knowledge of the facts or opinions prior to the hearing for matters that come before them. A commentary on zoning processes has summarized the standard as follows:

Prior statements made by adjudicative decisionmakers generally favoring or opposing a particular land use have been held insufficient to constitute prejudgment bias. To show an invalidating bias in zoning cases, courts generally have required that such statements be linked with advocacy of a position in the particular case in question, as demonstrated by hearing conduct or by the course of proceedings, that makes plainly evident the "closed mind" of the zoning decision-maker.

Rathkopf, *The Law of Zoning and Planning*, §22.04[5] (citations omitted).

In a Missouri case challenging the decision of a Board of Zoning Adjustment granting a special use permit for underground mining, the plaintiffs claimed that two of the board members had prejudged the matter by deciding to approve the permit before the hearing. *Wagner v. Jackson County Bd. of Zoning Adjustment*, 857 S.W.2d 285, 289 (Mo. Ct. App. 1993). One board member testified that, although he had concluded before the hearing that the permit should be granted, his mind was open to change based upon the evidence presented at the hearing. The other board member testified that he favored the permit prior to the hearing, but that he made his decision based upon the evidence presented at the hearing. *Id.* at 289-90. The court held that the plaintiffs had failed to show bias on the part of the board members. In its decision, the court commented that, although administrative decision-makers must impartial, they are also expected to have preconceived notions concerning policy issues within the scope of their agency's expertise. *Id.* at 289. "Familiarity with the adjudicative facts of a particular case, even to the point of having reached a tentative conclusion prior to the hearing, does not necessarily disqualify an administrative decisionmaker, in the absence of a showing that the decisionmaker is not capable of judging a particular controversy fairly on the basis of its own circumstances." *Id.*

Where a decision-maker goes beyond simply forming an opinion prior to a hearing and acts in an advocacy role, the likelihood increases that a court may find that prejudgment bias existed and that the decision should be invalidated. This was the result in a Pennsylvania case in which the municipal council denied applications for a conditional use and site plan for construction of a shopping center where the court concluded that the actions of the ward councilman in opposition to the applications prior to the hearing clearly demonstrated his bias and should have precluded him from participating in council's vote on the applications. *Prin v. Council of the Municipality of Monroeville*, 645 A.2d 450 (Pa. 1994). The councilman had spoken in opposition to the applications at the planning commission hearings and the planning commission subsequently voted to recommend that the council deny the applications. Prior to the council hearing, the councilman "wrote to his constituents twice on Council stationery, expressing strong opposition to the project and calling on them, in one letter, to attend the Council meeting where a vote was scheduled on the applications to "send the message" of their disapproval and encourage Council to "[hammer in] the next nail in the coffin of this ill-conceived project," and in another letter urged constituents to help

"defeat this latest example of a greedy developer." *Id.* at 451. The applicants' attorney requested recusal of the councilman because of his previously voiced disapproval of their applications, but the request was ignored and the council denied the applications.

The Minnesota court has similarly remanded a decision by the Minneapolis City Council for further proceedings when the court determined, among other concerns, that a Council member had prejudged an adverse license action and advocated his or her position to other Council members prior to the Council hearing on the matter. See *Hard Times Café*, 625 N.W.2d at 174.

There may be some unusual matters for which a council member believes that he or she can best serve the interests of the City by taking an active role in resolving disputes between parties interested in a quasi-judicial matter ("brokering a deal") or by advocating for a particular outcome at the board or commission level. When a council member's involvement with a quasi-judicial matter goes beyond such neutral activities as facilitation of discussion and information-sharing, the council member should strongly consider the need to recuse him or herself from a decision-making role in the process.

In addition to raising the specter of prejudgment bias on the part of the council member, the participation of a council member as a "witness" in hearings before boards or commissions could be the basis for a claim that the decision of the board or commission was unduly influenced by the council member. See *Barkey v. Nick*, 161 N.W.2d 445 (Mich. Ct. App. 1968); *Place v. Board of Adjustment*, 200 A.2d 601 (N.J. 1964). The concern that a council member may have undue or prejudicial influence arises where the council has a role in the appointment of members to the board or commission that is making the decision. Although in both *Barkey* and *Place* a city official acted improperly because the official appeared as a personal representative of an applicant before a zoning board, the courts in both cases expressed concern, not only for the improper behavior of the official, but also for the potential for undue influence that the official could have on the decision of the zoning board due to the official's authority to appoint members to the board. Thus, even when there is no question of improper representation of an applicant's personal interest on the part of a council member who chooses to address a City board or commission on a quasi-judicial matter, the council member should be sensitive to the fact that his or her support for a particular outcome could be perceived as prejudicial to the independence of judgment that should be exercised by the board or commission.

A special situation exists with respect to the dual role of the council member who also sits as a planning commissioner. Pursuant to the City Charter, Chapter 13, §1, one planning commissioner shall be a member of the City Council. The state statute that authorizes municipalities to create a planning commission states that municipal officials may be among its members. Minn. Stat. §462.354, subd. 1. Pursuant to Mpls. City Ord. §525.180, decisions of the Planning Commission may be appealed to the City Council. Thus, when a decision of the Planning Commission is appealed to the Council, the council member who sits on the Commission will also hear and decide the appeal. So long as that council member is able to keep an open mind and give fair consideration to any new information or argument that is presented on the record in the appeal

phase, that council member's earlier vote as a planning commissioner should not be considered to constitute improper "prejudgment bias."

It is important that the City's quasi-judicial decision-makers take care to avoid the appearance of bias in order to ensure confidence in the City's decision-making processes, as well as to forestall successful legal challenges to their decisions. City officials should not participate in quasi-judicial proceedings in the role of advocate or personal representative of a party to that hearing. If, for any reason, a council, board or commission member feels that they have so prejudged a matter that they can not review the evidence presented at the hearing in an unbiased manner, he or she should recuse him or herself from the decision. Because the City Council acts as an appellate body for the decisions of several of the City's boards, commissions and hearing bodies, council members should be especially cautious and aware of how their participation in the proceedings of those lower hearing bodies could be perceived. Council members should refrain from making statements for or against a particular outcome in a quasi-judicial matter until that matter has had a hearing before the Council or one of its Committees.

CONCLUSION

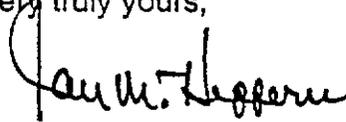
In order to best preserve the decision-making autonomy of the City, care should be taken to provide adequate safeguards for the due process rights of applicants/petitioners appearing before duly constituted quasi-judicial bodies. The following is a list of "best practices" to be utilized by council members and other city officials in connection with quasi-judicial matters over which they may have decision-making authority.

- Keep a record of all verbal or written contacts relating to the matter.
- Refer questions, complaints and information you receive on quasi-judicial matters to the department staff person responsible for the matter.
- Submit the record of contacts, along with any documents received regarding the matter, into the official record of the proceedings.
- Maintain neutrality and refrain from taking a position on quasi-judicial matters in community forums or elsewhere prior the official City Council proceedings for such matters.
- In the unusual situation where your beliefs, relationship or activities in connection to a particular issue or application are such that you are unable to serve as a neutral decision-maker for a quasi-judicial matter, you should recuse yourself from a decision-making role.
- Make quasi-judicial decisions based only on the information that has been included in the formal record of the proceeding.
- State the factual findings and reasons that support your quasi-judicial decisions on the record at the time that you make your decision.

Mayor Rybak, Council President Ostrow
and Members of the City Council
January 3, 2002
Page 8 of 8

In addition to following these best practices, City officials are encouraged to contact the City Attorney's Office if they have any questions regarding their role or conduct related to quasi-judicial matters.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Jay M. Heffern".

JAY M. HEFFERN
City Attorney

cc: David Fey, Deputy Mayor
Kathleen O'Brien, City Coordinator
John Moir, City Coordinator – designate
Merry Keefe, City Clerk

CEL/01A-00967

CITY OF MINNEAPOLIS
CITY ATTORNEY'S OFFICE
Jay M. Heffern
City Attorney



**LICENSE
ADVERSE ACTION
PROCEDURES MANUAL**

Prepared by the Office of the City Attorney,
August, 1999; Revised February, 2002.

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I. INTRODUCTION

City Licensing Power

The City of Minneapolis, under the broad grant of legislative power conferred by its home rule charter, has extensive power to license and regulate occupations and businesses whose impact or potential impact on the public health and welfare require such action. These powers include actions to correct and discipline licenseholders for violations of the law, and the determination, subject to law, of who is and who is not fit to engage in such businesses and occupations.

This is especially true with respect to the sale of intoxicating liquor. See, for example, Country Liquors, Inc. v. City Council of the City of Minneapolis, 264 N.W.2d 821, 824 (Minn. 1978); and Moskovitz v. City of Saint Paul, 218 Minn. 543, 16 N.W.2d 745 (1944). Similar language as to the broad powers to regulate and deal with licensees can be found in Miller v. City of Saint Paul, 363 N.W.2d 806, 812 (Minn. App. 1985); , 363 N.W.2d 806, 812 (Minn. App. 1985); Hymanson v. City of Saint Paul, 329 N.W.2d 324 (Minn. 1983); and Sabes v. City of Minneapolis, 265 Minn. 166, 120 N.W.2d 871, 875 (1963).

Country Liquors, Inc., supra, makes it clear that the scope of the discretion in licensing decisions given to municipalities is so broad that such decisions will not be overturned unless patently arbitrary and capricious. 264 N.W.2d at 826.

Ordinances.

Establishment of the substantive rules and regulations under which licensed persons and businesses operate in Minneapolis is done by ordinance.

Resolutions.

The final decision to discipline, condition or take adverse action regarding a licensee or applicant is embodied in a resolution. The Mayor's signature is required for both ordinances and resolutions by Charter.

Council's Role.

The Council's role in license actions is central, and its responsibilities are complex and varied. These duties and responsibilities are covered in detail in this Manual. The Council sits as the judge and ultimate fact-finder in taking action against licenseholders.

Adverse Action.

The term "adverse action" is used to cover all of the possible punishments and sanctions which might be taken against a licenseholder or its business, and includes the imposition of conditions upon a license, as well as reprimands. The term is defined as:

"The revocation or suspension of a license, the imposition of conditions upon a license, the denial of an application for the grant, issuance, renewal or transfer of a license, and any other disciplinary or

unfavorable action taken with respect to a license, licensee or applicant for a licensee."

The Council is authorized to take adverse action against any license or permit under various sections of the Minneapolis Code of Ordinances (MCO). Whenever there is a possibility that the Council will consider taking an adverse action against a licenseholder, the procedures in this Manual are followed.

In those cases in which an independent hearing examiner¹ is used, the Council may choose to adopt or modify the report of the examiner, and may, depending upon its view of the record in the case, adopt and/or modify the findings, conclusions and recommendations made by the hearing officer. Use of a hearing examiner takes no power away from the Council. The Council retains the ultimate decision-making power in all adverse actions. However, to the extent that the Council modifies the findings, conclusions or recommendations made by the hearing officer the Council should state in detail the factual basis for its decision.

Purpose and Authority.

¹ The generic term is "independent hearing examiner." In practice, the City of Minneapolis has retained the services of the Minnesota Office of Administrative Hearings. That Office provides on contract with the City the service of administrative law judges, who are experienced in conducting contested case hearings, and making findings of fact, conclusions of law and recommendations for action based on the evidence received.

In an effort to make the adverse hearing process fairer and more efficient, the Council has authorized the use of an independent hearing examiner in all contested cases to hear evidence and make findings, conclusions and a recommendation. Use of an independent hearing examiner achieves two primary goals. First, the process makes more efficient use of the Council's time. Secondly, this process establishes a fair and equitable procedure whose result likely will survive court challenge.

II. COMPLAINTS AND INVESTIGATION

A. Procedures

The majority of proceedings to impose adverse actions initially stem from complaints made by City staff, citizens or police officers. The City does not have sufficient staff to conduct comprehensive, periodic inspections and investigations of the conduct of all licensed businesses or persons within the City of Minneapolis. Complaints of alleged violations are most often received directly by the City department that has the investigation and enforcement responsibilities.

B. Council Role

It is, however, also possible that citizens will choose to contact their Council Member to register a complaint. Caution should be exercised in dealing with complaints or charges of violations in any matter likely to be considered by the Council

in a license hearing. It is always preferable for Council members to refer complaints to the Director of Licenses and Consumer Services, rather than seek to investigate or develop the facts for action themselves.² Any Council Member who has investigated a complaint, talked to witnesses, and decided that the complaint is worthy of further action, should consider recusing his or her self from the consideration of any adverse action regarding complaint. An appeals court may decide that such Council members formed an opinion or judgment on the merits of the complaint before hearing both sides, and overturn any disciplinary action taken by the Council.

Once a proceeding to impose adverse action has been initiated, it will ultimately come to the Council for final determination. If any Council Member, either directly or through a member of his or her staff, has played a significant role in the investigation or initiation of this complaint, his or her actions as a judge of the facts and penalty will presumed to be tainted. It may appear that he or she has already prejudged the case, and this appearance alone could result in otherwise legitimate Council action being overturned upon appeal to the appellate courts.

² The Appendix contains a form for use by a council member in referring a complaint to the Division of Licenses and Consumer Services for investigation and action. See Form 1.

Due process requires that the Council remain unprejudiced as to the particulars of any case before the public hearing. Each member should refrain from discussing the evidence or opinions about any particular case outside of the hearing process. The Council is legally required to make decisions as to the appropriate penalty in every case without any Council person having either a preexisting opinion or facts not received in the established hearing process.

It is always permissible for a Council Member to discuss the policies and procedures of the adverse action process in general, licensing ordinances and regulations, and all other matters of concern, where there is no focus on a particular establishment against which an adverse action might be sought.

III. FORMAL PROCEEDINGS

A. Initiation

1. Whose decision

Who can request that adverse action be started?

The Council may, if it chooses, initiate proceedings to impose adverse action. In addition, the Director of Licenses and Consumer Services and department directors are empowered themselves to initiate adverse action proceedings.

In cases where the Director of Licenses and Consumer Services declines to proceed to begin a proceeding to impose adverse action, the Council may also initiate the action.³

2. City Attorney Role

A request for action by the Director of Licenses and Consumer Services, the Council or other authorized officers will be reviewed by the City Attorney for (1) sufficiency of evidence and (2) adequate legal basis for action. If the case meets both criteria, a proceeding for adverse action will be started. In addition, when a case involves use of criminal history information, the City Attorney will also review and determine if the criminal history information is both relevant and a legally permissible use of such information.

The Assistant City Attorney assigned to prosecute proceedings for adverse actions will prepare and present the City's case. Preparation of the case would typically involve interviewing witnesses, determining what evidence to present, and requesting any additional investigation that would be required prior to the commencing of the matter by formal Notice.

³ In cases where the Council or an individual council member wishes to initiate such a proceeding, it is suggested that the form and sample resolution included in the Appendix be used. See Forms 2 and 3. These forms make clear that neither the Council nor an individual member has prejudged the merits of the complaint.

3. How started

(a) Notice of Complaint Letter (Form A)

When it has been determined that there is cause to begin such a proceeding, the first notice is sent to the licenseholder.⁴ This notice is called the Notice of Complaint Letter.⁵

The Notice of Complaint Letter serves two primary functions. First, it notifies the licensee that the City believes there are grounds for adverse action against the license, and those grounds are described in the letter. Second, the Notice of Complaint Letter offers the licensee the opportunity to admit or to contest the allegations and facts set forth in the letter.⁶

⁴ The terms "licenseholder" or "licensee" when used in this Manual also include a license applicant. A proceeding to deny an application for a license, or to impose conditions upon the grant of a license, is also included within the due process and hearing requirements of the ordinance.

⁵ It has also been widely referred to as the "Form A" letter. Two sample Form A letters have been included in the Appendix. See Forms 4a and 4b.

⁶ In some cases, the Notice of Complaint Letter will, for reasons for timing, establish a hearing date without the delay of time for the response of the applicant. This most often occurs in cases of denials of licenses for delinquent state taxes, or in other cases where it is clear that the applicant will demand a hearing. In such cases the Notice of Complaint Letter and the Notice of Hearing Letter are merged, and the hearing date is established. The applicant does not lose any procedural rights, as the net effect is to eliminate a procedural delay.

(b) Response of Licenseholder

The response of the licenseholder to the Notice of Complaint Letter determines the future course of the action.

There are two choices:

1. Admit the facts, and schedule a hearing in front of the Public Safety and Regulatory Services Committee of the City Council ("Committee"), to argue what the penalty, if any, should be; or
2. Contest the facts, and request a hearing before an administrative law judge for the purpose of presenting testimony and witnesses, and confronting the witnesses on behalf of the license inspector.

If the licensee does not contest the facts, a hearing is scheduled before the Committee at the earliest possible date. The hearing is handled as described below in this Manual.

If the licensee does contest the facts, or does not wish to admit that they are true, a hearing is arranged before an independent hearing examiner. The City, by agreement with the Minnesota Office of Administrative Hearings, uses both the full-time and contract administrative judges employed by that office. Assignment of judges is controlled by the state office, and not by either party to the hearing. The hearing and other procedures are described below in this Manual.

B. Uncontested Facts

When the grounds for the proceeding to impose adverse action spelled out in the Notice of Complaint letter are not

contested by the licensee and the licensee has so notified the city attorney, the matter will be brought directly before the Committee, where the appropriate punishment or corrective action can be determined. The Office of the City Attorney contacts the city clerk for a hearing date, and notifies the licensee by mail of the time and date he or she is to appear before the Committee.

1. Information submitted to the Committee.

The office of city attorney prepares and submits to the city clerk a packet of material for the Committee's use in uncontested cases. The packet will contain:

- (a) the police report(s) or other factual information which make up the facts in the case;
- (b) the letter from the licensee stating that he or she does not contest the facts, together with any additional information in the letter or attachments that the licensee may wish to submit in advance;
- (c) a summary of the past actions of the Council in cases involving similar violations;
- (d) a summary of current license information on the licensee or licensed business; and
- (e) a resolution for consideration by the Council.

The licensee is notified by first class mail of the date, time and place of the Committee Hearing, and given a copy of the proposed resolution and attached materials prior to the hearing. This letter is also sent to the community organizer for the

district organization covering the area in which the licensed activity is located.

2. Committee Hearing.

At the Committee hearing the licensee and/or counsel for the licensee is given the opportunity to make a brief presentation on what penalty if any the City Council should impose. Similarly, the appropriate City officer may make a brief presentation on what penalty the City Council should impose. No evidence⁷ is received since the licensee has already admitted to the facts and does not dispute that a violation occurred. The Committee is free to ask questions of either side during and after the arguments have been made.

After hearing arguments from both sides, the "public" portion of the hearing is concluded⁸ and the Committee then deliberates as to the appropriate penalty, if any, to impose. The sanction imposed will be in the form of a resolution.⁹ The

⁷ Evidence refers to documents or testimony about the facts of the case. Argument or presentation refers to the attempt to persuade the Council that the facts require or do not require a particular penalty or other outcome.

⁸ Normally the Council does not hear from members of the public who may have complaints about the licensee or the licensed business at a hearing on uncontested facts. Such persons are encouraged to bring their complaints and information to the license division, which can then investigate and follow up on those matters in separate proceedings if warranted by the facts.

⁹ A sample resolution is included in the Appendix. See Form 9A.

Committee should make this decision at the conclusion of the hearing in an open discussion.

C. Contested Facts

1. Scheduling of Hearing.

The Assistant City Attorney assigned to prosecute a case will schedule the hearing before an Administrative Law Judge within the timelines specified in the Service Agreement between the Department of Regulatory Services and the Office of the City Attorney.

2. Notice of Hearing.

If the licensee or applicant, in response to the Notice of Complaint Letter, indicates that he or she contests the facts, or does not wish to agree with them or the recommendation of the license division, then the Notice of Hearing Letter¹⁰ is sent to the licensee. In most cases the hearing is set thirty (30) days following receipt of the Notice of Hearing Letter.

3. Community Participation

Neighborhood groups may indicate their desire to be notified of hearings by contacting the Director of Licenses and Consumer Services. Representatives of neighborhood groups that have indicated a desire to be notified, will receive a copy of the Notice of Hearing from the Director of Licenses and Consumer

Services, so that they may inform interested residents of the time and date of the Hearing.

All members of the community who believe that they have information or personal knowledge about the case are urged to contact the assistant city attorney handling the file regarding that information. As a practical matter it would be best to channel these persons through the community organizer who will in turn contact the assistant city attorney with the information. The assistant city attorney handling the case will determine if additional charges should be brought based on the new information, and what witnesses will need to be called to testify at the administrative hearing on the new charges.

When new or additional charges are brought an amended Notice of Hearing Letter will be sent. This will most likely occur because additional information has been discovered, or supplied by citizens, that requires the City to amend the specific charges listed in the Notice of Hearing. The bringing of additional charges may result in a delay of the hearing date, a factor which is taken into account in deciding whether to add additional charges, or to use the additional matters in a new and separate proceeding.

¹⁰ A sample Notice of Hearing Letter is included in the Appendix. See Form 5.

4. No ex-parte contacts

When a case has been scheduled for a hearing all members of the Council, including Council staff members, are subject to the rule forbidding ex-parte contacts. An ex-parte contact occurs when one party to a dispute, or any person with an interest in the outcome of the case, contacts a judge, jury or any other judicial official¹¹ about the case, and discusses the case or conveys information about the case in the absence of the other side. This is unfair in adversary proceedings, and violates the basic law on procedural due process.

In addition to avoiding ex-parte contacts, the Council is required to make its final decision as to the sanction(s) imposed at or after the hearing. No Council member should have made up his or her mind ahead of time. While the rule barring ex-parte contacts applies once a hearing is scheduled, the requirements of due process are applicable at all phases of the process leading to license sanctions.

5. Administrative Hearing

The hearings held before the administrative law judge ("ALJ")¹² are similar to trials in that evidence is introduced

¹¹ Council members in license hearings function as quasi-judicial officers, and are subject to the same due process requirements as judges and other hearing officers.

through witnesses and documents, and witnesses are placed under oath and are subject to cross-examination. The hearing will be conducted in accordance with the requirements of Minnesota Statutes §§ 14.57 to 14.62; and such parts of the procedures under Minneapolis City Charter Chapter 4, § 16, and Minneapolis Code of Ordinances § 188.350 as may be applicable. The hearing is open to the public and interested parties may attend to observe. Testimony would not normally be taken from the public, except where members of the community can testify to facts that are both relevant to the charges made and personally known to the individual. The ALJ may admit and give probative effect to evidence that possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs. The ALJ will give effect to the rules of privilege recognized by law. The ALJ may exclude incompetent, irrelevant, immaterial and repetitious evidence. Although the ALJ acts at the finder of fact and the City Council decides what, if any, adverse action to take regarding the license in question, the ALJ may allow probative evidence regarding the history of the licenseholder, impact of the licensed business on the community and other relevant factors to be included in the record as an aid to the subsequent decision by the City Council. The ALJ will not,

¹² An administrative law judge is an independent hearing examiner, and satisfies the requirements of constitutional due

however, be asked to make any finding or conclusion regarding any proposed sanction.

The administrative law judge is a lawyer who is employed by or under contract to the Minnesota Office of Administrative Hearings, a state agency. The city contracts with that agency to provide an ALJ for each hearing. The ALJ hears all evidence presented by the assistant city attorney, the licensee or applicant and the attorney for the licenseholder or applicant. The proceedings are less formal than district court trials, but are governed by evidentiary rules and procedures mandated by state law and administrative rules. The burden of proof is on the department initiating the proceedings. In other words, the ALJ must be satisfied by a preponderance of the evidence that the case against the licensee has been proved. The hearings are taped, and a transcript can be ordered by either party at its own expense.

6. Rescheduling of Administrative Hearing: Costs.

Any party who requests the continuance or rescheduling of a hearing within 72 hours of the date of the hearing or when the Office of Administrative Hearings imposes a cancellation fee is responsible for all fees or charges associated with the continuance or rescheduling of the hearing. Unless agreed to between the parties, the decision to grant or deny a request for

process.

a continuance is within the sole discretion of the Office of Administrative Hearings.

7. Administrative Law Judge Report

After the hearing has been closed and the Administrative Law Judge has had the opportunity to review the record, he or she will prepare a written report for the Council. While the hearing record is generally closed at the conclusion of the trial, in some cases it will remain open for an additional length of time to allow for the filing of additional evidence or briefs. The ALJ Report to the Council will consist of findings of facts, and conclusions of law. In the majority of cases, the ALJ also prepares a brief memorandum explaining the reasoning behind the findings, conclusions and recommendations in the Report. This Report is sent to the licensee or his or her attorney of record, the City Clerk and the assistant city attorney who presented the City's case.

The ALJ Report, when received by the city clerk, is also copied and distributed to all members of the Committee. If a Council member reads the Report before the Committee hearing, a final decision should not be made until after he or she has read the written exceptions and listened to the arguments made before the Committee.¹³

8. Written exceptions.

After the parties receive a copy of the ALJ Report, each side has the right to file what are called exceptions to the Report. Written exceptions are a list, description or brief on the points in the ALJ Report that the attorney or his or her client may disagree with. Either or both sides may file written exceptions with the City Clerk, who will then distribute a copy to each Committee member. As with the ALJ Report, each Committee member must withhold final judgment until after the Committee hearing and arguments of the licensee and counsel.

9. Notice of Committee Hearing.

The City Clerk upon receipt of the Report of the ALJ will, in conjunction with the Office of the City Attorney, schedule a date for the Committee hearing on the ALJ Report, taking into account the opportunity for each party to file written exceptions within 10 days from the receipt of the Report. The Notice of Committee Hearing Letter is drafted and mailed by the

¹³ A Council member may do additional research, such as listen to the tapes of the proceeding, study the documents which were received into evidence in the hearing, and read any other materials submitted by the parties at the hearing. The ALJ sends over the complete record of the hearing at roughly the same time as the Report is sent. Normally, the tapes of the hearing are not transcribed, unless the case is controversial or complex, likely to result in an appeal to the courts regardless of outcome.

City Attorney's Office.¹⁴ This letter does not serve any purpose other than notice to the other side of the time, date and place of the Committee hearing. The Notice of Committee Hearing should indicate that if adverse action is recommended by the Committee the Committee will consider any request for a stay of the enforcement of the adverse action.

10. Committee Hearing.

The attorney for the license division during the administrative hearing is the assistant city attorney who will be advocating the "prosecution" position, this is, the position of the office or department that has initiated the action. There will often be an attorney representing the licenseholder at contested hearings.

The Committee should recognize and hear arguments only from the parties who appeared at the hearing before the ALJ or their counsel. The hearing before the Committee is a public hearing only in the sense that anyone may attend or listen. The Committee should not consider any factual testimony, witnesses, or evidence at the Committee hearing which were not presented earlier at the ALJ hearing.

¹⁴ A sample Notice of Committee Hearing Letter is included in the Appendix. See Form 6B.

At the Committee hearing, the parties can make arguments as to their view of the Report, and what penalties, if any, are appropriate.

The attorneys who appear before the Committee advocates for their side. As such they argue the facts, the law, and try to persuade the Committee that their view of the ALJ Report and the evidence is correct. They must try to put things in the best possible light for their position. But the Committee is finally and ultimately the judge of the facts, law and recommendations.

11. The Basis for the Committee Decision.

The Committee must make its decision on the "record." The record consists of all the information that has been submitted to the Committee through the hearing processes. The following is a summary of that information.

Hearing Testimony. All of the testimony of the witnesses at the ALJ hearing is a part of the record, and is available for the Committee's consideration. All hearings are recorded, most on tapes which are available for playback of the testimony of particular witnesses. The tapes are not routinely transcribed, because of lack of need and cost considerations. A transcript of the hearing before the ALJ will be supplied and provided to the Committee by the City Attorney unless in the best professional judgment of the City Attorney a transcript will not

be necessary. The cost of such transcription is normally borne by the party or agency requesting it.

Exhibits and Documents. All of the exhibits, documents and other physical evidence that was received into evidence at the contested ALJ hearing are transmitted to the City Clerk following the Report of the ALJ. All of these materials are available for examination by the members of the Committee in reaching a decision.

ALJ Report. The report of the administrative law judge, containing findings of fact, conclusions of law and a recommendation for action, together with a memorandum in support of the Report, are also part of the record.

Written Exceptions. The written submissions of the parties, while not factual evidence, are part of the record, and help point out the strengths and weaknesses of the ALJ Report.

Information not in the Record. Testimony or statements from individuals, documents, exhibits, e-mail, letters and communications of any type whatsoever that were not submitted to the Administrative Law Judge are not part of the record and should not be considered by the Committee or Council as forming the basis for its decision.

12. Role and Duty of Committee.

The Committee sits in these hearings in the same role and to the same effect as appellate judges. The Committee should

listen carefully to the arguments made by the parties and/or their attorneys. Members may ask questions to clarify points, to test the arguments of the attorneys, or to seek information useful for decision.

Committee members should not make comments, statements or speeches indicating a position or opinion before the Committee hearing is concluded. It is preferable not to argue with the attorneys or the parties, or express reaction to their line of argument before the hearing is concluded.

The function of the Committee is to hear everything first; and then decide. Even tentative opinions or judgments are best left unsaid until after the hearing is closed.

13. Committee Decision.

Once the hearing is concluded, the Committee should proceed to make the necessary decision. The decision must be based on the record, that is, the Report of the ALJ, the written exceptions, if any, the arguments just made, and the exhibits and documents introduced at the ALJ hearing itself.

Once the Committee hearing is closed, the Committee should make its final deliberations and reasoning a matter of public record, immediately following the arguments and questions.

Before the final decision is made, a majority of those making the decision should have read the ALJ report, read the written exceptions, if any, and listened to the oral argument

made at the hearing before the Committee. Each member is free, in addition, to go into the tapes or transcripts, or physical evidence, to the extent that he or she believes would be helpful.

The decision must be in writing. This will be done in the form of a resolution with specific finding of fact with references to the record before the Committee. The resolution and findings of fact will usually incorporate and adopt the findings and conclusions of the ALJ, except as amended by the Committee. In a situation where the Committee amends the findings of fact, conclusions or recommendations of the ALJ the reason for the amendment should be stated in detail with citation to evidence in the record supporting the amendment. The resolution and findings of fact will be prepared by the assistant city attorney and brought back to the Committee for adoption, either under suspension of the rules, or at the earliest possible date following the decision.¹⁵ The resolution and finding of fact will be sent by the Committee to the full City Council for final action.

14. Final City Council Action.

In the case of either a contested or a non-contested matter, the action taken by the Committee is sent to the City

¹⁵ A sample resolution following a contested hearing before the Council is included in the Appendix. See Form 9B.

Council, in the form of a resolution, for adoption by the full City Council. For purposes of appeal, the City Council action is final upon public publication.

The City Council must make its decision based on the record, that is, the Report of the ALJ, the written exceptions, if any, the arguments made by the parties to the Committee, and the exhibits and documents introduced at the ALJ hearing. All rules set forth above regarding the Committee hearing regarding due process, prejudgment of a matter, and ex-parte communications are applicable to matters considered by the City Council. These rules were previously discussed in this manual.

IV. APPEAL.

A licenseholder may appeal the decision of the Council by serving a petition for a writ of certiorari upon the City. The appeal proceeds in the manner provided by the rules of civil appellate procedure. Rule 115.01 of the Rules of Civil Appellate Procedure provides that the appeal period is governed by the applicable statute. Minnesota Statutes § 14.63 provides that in proceeding under the Administrative Procedures Act a writ of certiorari must be filed and served within 30 days after the party receives the final decision. A decision of the City Council is final at publication. The period during which a licenseholder may appeal expires 30 days after publication.

V. STAY OF THE COUNCIL ACTION UPON APPEAL.

The rules of civil appellate procedure grant the Court of Appeals the power to stay the enforcement of the underlying action pending the resolution of the appeal. In practice, the Court of Appeals will not act upon a motion for a stay before the City Council has acted upon the request for a stay. If the City Council does not act upon a request for a stay or denies a stay without articulating detailed reasons for the denial the Court of Appeals will issue a temporary stay and remand the case to the City Council with an Order that the stay be considered by the City Council. C.L. Hinz, Inc. v. City of St. Paul, 1996 WL 438808 (Minn. App. 1996); Howe v. City of St. Paul, 1995 WL 59224 (Minn. App. 1995); and, Minn. App, June 27, 2000, Pers. Comm.

Because it would not be practical to consider a request for a stay in a separate proceeding before the Committee or Council, the request for a stay should be considered by a separate resolution after the decision on the underlying action. The licenseholder should be notified in the Notice of Committee Hearing that if adverse action is recommended by the Committee the licenseholder's request for a stay of enforcement will be considered immediately after the decision on the underlying action. Testimony may be taken from the parties for the limited

purpose of obtaining additional information regarding the reasons for granting or denying a stay.

There are two suggested alternatives to handle the request for a stay:

1. A 30 day stay from the effective date of the Resolution may be granted. At the end of 30 days the stay will expire. If the licenseholder has timely served and filed a petition for writ of certiorari the stay will continue until a final resolution of the appeal.
2. A stay may be considered and denied. If a stay is denied, the resolution denying the stay must articulate the reasons for denying the stay.

Conditions may be placed upon any stay granted by the Council or Committee. If appropriate, the Committee should recommend conditions to be followed by the licenseholder while the stay is in effect. Conditions may include a prohibition of the type of activities that gave rise to the adverse action. The conditions should be set forth in the resolution granting the stay. The conditions may be challenged by the licenseholder on appeal if onerous, arbitrary or capricious.

IV. COST OF APPEAL.

Rule 139 of the Rules of Civil Appellate Procedure provides that costs, disbursements and attorney's fees may be recovered

by the prevailing party on appeal by order of the appellate court.

V. COST OF HEARING.

When a licensee has requested a hearing, all costs associated with the hearing are paid for by the City of Minneapolis. The funds are allocated to the license division by the Council during the normal budget process. The license division maintains the accounting procedures for tracking costs that are a result of the adverse hearing process.

In every adverse action that is contested by the licensee the City will incur costs for the service of an Administrative Law Judge and a tape of the proceedings. In some cases additional expenses will be incurred for transcription of the tape, witness fees, or in special circumstances a court reporter. The State of Minnesota, Office of Administrative Hearings supplies the Administrative Law Judge. Either the Office of Administrative Hearings or the City provides the space in which the hearing is to be held.