STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1557

Richard Wise for MGA Susu, Inc. d/b/a 418 Club & Whispers,
Relator,

vs.

City of Minneapolis Regulatory Services, Licensing Division,
Respondent.

Filed August 12, 2008
Affirmed
Collins, Judge[*]

Minneapolis Department of Regulatory Services
Citation No. 07-0552591

Mark J. Kallenbach, 2260 Ridge Drive, Suite 13, Minneapolis, MN 55416 (for relator)

Jay M. Heffern, Minneapolis City Attorney, Joel M. Fussy, Assistant City Attorney, 333 South Seventh Street, Suite 300, Minneapolis, MN 55402-2453 (for respondent)

Considered and decided by Wright, Presiding Judge; Klaphake, Judge; and Collins, Judge.

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

COLLINS, Judge

Relator appeals a citation for violation of the Minneapolis smoking-ban ordinance, arguing that there was no factual basis for the citation and, even if there was, the

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

application of the smoking ban to its facility is a violation of its equal-protection rights. We affirm.

FACTS

The 418 Club is a non-alcoholic adult-entertainment establishment.[1] The 418 Club holds three licenses from the City of Minneapolis: (1) Place of Entertainment, (2) Restaurant, and (3) Tobacco Dealer. The facility occupies four floors and features female nudity, a juice bar, food and non-alcoholic beverage service, and, on the fourth floor, a smoking lounge. The entertainment license is specific to the lower two floors and the basement. The restaurant and tobacco licenses are not facially restricted to any particular areas of the facility.

On March 9, 2007, a Minneapolis licensing official paid the cover charge and entered the 418 Club on the ground level. He did not identify himself. He spoke to some dancers, and they indicated that he would be permitted to smoke on the fourth floor. The dancers accompanied the licensing official to the fourth floor, where he observed several persons smoking cigarettes and smoked a cigarette himself. Thereafter, the City of Minneapolis issued a citation to the 418 Club for violation of the smoking-ban ordinance, which was upheld on review by the licensing division of the City of Minneapolis. This certiorari appeal follows.

[1] The facility is also referred to as Whispers. Richard Wise for MGA Susu, Inc., is the principal party to this suit. Relator is referred to as "418 Club" throughout this opinion.

D E C I S I O N

I.

The 418 Club challenges the sufficiency of the factual basis for upholding the citation. A quasi-judicial decision is "'the product or result of investigation, consideration, and deliberate human judgment based upon evidentiary facts of some sort commanding the exercise of [an agency's] discretionary power.'" *City of Shorewood v. Metro. Waste Control Comm'n*, 533 N.W.2d 402, 404 (Minn. 1995) (quoting *Oakman v. City of Eveleth*, 163 Minn. 100, 108-09, 203 N.W. 514, 517 (1925)). Quasi-judicial decisions of an administrative agency are judicially reviewable exclusively by this court on a writ of certiorari. *See Micius v. St. Paul City Council*, 524 N.W.2d 521, 522 (Minn. App. 1994) ("Unless otherwise provided by statute or appellate rule, to obtain judicial review of an administrative agency's quasi-judicial decision, a party must petition the court of appeals for a writ of certiorari.").

"Certiorari review is limited 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." *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 303 (Minn. App. 2007) (quotation omitted). A reviewing court will not retry facts or make credibility determinations, and the decision will be upheld "if the lower tribunal furnished any legal and substantial basis for the action taken." *Id.* at 303-04 (quoting *Senior v. City of Edina*, 547 N.W.2d 411, 416 (Minn. App. 1996)).

The Minneapolis ban on indoor smoking came into effect on March 31, 2005. Minneapolis, Minn., Code of Ordinances § 234.100 (2008).[2] The ban prohibits smoking in liquor and food establishments and requires that proprietors of such establishments post "No Smoking signs, ensure that ashtrays, lighters, and matchbooks are not provided, and ask people to refrain from smoking or take appropriate action to remove them from the premises." *Id.*, §§ 234.20, .30 (2008). A food establishment is any "establishment[] licensed pursuant to Title 10 of th[e Minneapolis] Code." *Id.*, § 234.10 (2008). Title 10 dictates that a food establishment "shall be defined including Minnesota Rules 4626.0020 subpart 35(c), [which identifies establishments that are not considered "food establishments" for purposes of the Minnesota Rules,] in addition to those facilities listed in Minnesota Rules 4626.0020 subpart 35 (a) and (b)." Minneapolis, Minn., Code of Ordinances § 186.50 (2008). In relevant part, the specified Minnesota Rules define a food establishment as follows:

> A. "Food establishment"" means an operation that:
>
> (1) stores, prepares, packages, serves, vends, or otherwise provides food for human consumption, including a restaurant, satellite or catered feeding location, market, grocery store, convenience store, special event food stand, school, boarding establishment, vending machine and vending location, institution, and retail bakery; or
>
> (2) relinquishes possession of food to a consumer directly or indirectly through a delivery service, including the home delivery of grocery orders or restaurant takeout orders, and a delivery service that is provided by common carriers.

[2] Because the relevant provisions of the smoking ban remain unchanged since the 418 Club's violation, we cite to the 2008 supplement of the Minneapolis Code.

Minn. R. 4626.0020, subp. 35(A) (2007). Therefore, an "operation" that "provides food for human consumption" is a "food establishment" that must prohibit smoking. *Id.*; Minneapolis, Minn., Code of Ordinances § 234.20.

Here, the 418 Club argues that because food was served only on floors one and two, the fourth floor tobacco store was a separate establishment, and thus there is no factual basis for the citation. A Minneapolis Administrative Enforcement Appeal hearing officer determined that these were not two discrete establishments within the same building, but were instead two areas in the same singly operated facility. In making this determination, the hearing officer relied on the following: Although there was a separate entrance to the smoking room, it involved a "circuitous route through a parking lot, hallway, basement and elevator devoid of any signage"; the proprietor testified that the smoking room was not always staffed and that it had no name or identity separate from the rest of the facility; public advertising refers to the smoking lounge and the rest of the club as a single entity; and some portions of the fourth floor are used as storage areas for the remainder of the facility.[3] The hearing officer also noted that the smoking lounge contained ash trays, that guests were permitted to bring drinks from downstairs into the room, and that there was no merchandise such as cigarettes, cigars, or other smoking materials displayed for sale there. The hearing officer's findings are based on substantial evidence supported by documents and testimony submitted at the hearing.

[3] Although the hearing officer made no specific finding on the point, it is notable that the record does not show that there were any separate financial records or any specific employees assigned to staff the "smoking lounge." Additionally, the 418 Club's restaurant license is granted for the entire building, including the fourth floor.

The 418 Club contends that (1) it is legal to bring non-alcoholic beverages into a smoke shop; (2) cross-advertising is a common practice; (3) the tobacco store was stocked as the proprietor deemed appropriate; and (4) because the tobacco business was word-of-mouth, there was no reason to have any signage. While all of that may be true, the 418 Club was not cited for allowing patrons to carry drinks from one floor to another, its advertising practices, or a failure to display appropriate signage. Those were merely facts that the hearing officer relied on in finding that the smoking room was not a distinct tobacco store but, instead, was a part of the same enterprise or entity as the lower floors. Those are all facts that rationally and logically support the determination that the smoking lounge and the rest of the 418 Club functioned as a single unit.

The 418 Club is an "operation" that "provides food for human consumption." There is no indication in the record that the smoking room was an entity independent of the rest of the facility, despite its location on a separate floor. Therefore, the hearing officer's determination had a substantial basis and is affirmed.

II.

We next address whether the application of the smoking ban to the 418 Club violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, article I, section 2 of the Minnesota Constitution, or the Privileges and Immunities Clause of the United States Constitution.[4]

[4] These arguments were never raised prior to this certiorari appeal. Because agencies do not generally have subject matter jurisdiction to decide constitutional issues, there is no requirement that such issues be raised to the agency before they may be heard on appeal. *See Neeland v. Clearwater Mem'l Hosp.*, 257 N.W.2d 366, 368 (Minn. 1977).

The equal protection clauses each require that persons similarly situated are treated alike under the law. *State v. Richmond*, 730 N.W.2d 62, 71 (Minn. App. 2007), *review denied* (Minn. Jun. 19, 2007). "The government may treat similarly situated persons differently when a distinction in treatment bears a 'rational relation to a legitimate government objective.'" *Kottschade v. City of Rochester*, 537 N.W.2d 301, 306 (Minn. App. 1995) (quoting *Bannum, Inc. v. City of St. Charles*, 2 F.3d 267, 271 (8th Cir. 1993)), *review denied* (Minn. Nov. 15, 1995).

In Minnesota, to show a rational basis for a distinction imposed by law, the following elements are required: (1) a genuine and substantial distinction between those included and those excluded from the classification, (2) a classification which is genuine or relevant to the purpose of the law, and (3) a statutory purpose that the legislature can legitimately attempt to achieve. *State v. Garcia*, 683 N.W.2d 294, 299 (Minn. 2004). "A facially neutral statute can violate the guarantee of equal protection if it is applied in a way that makes distinctions between similarly situated people without a legitimate government interest." *Richmond*, 730 N.W.2d at 71. An essential element of an equal protection claim is that the persons claiming disparate treatment must be similarly situated to those to whom they compare themselves. *Id.* (quotation omitted).

The 418 Club does not compare itself to a similarly situated establishment that is treated differently. The 418 Club inaptly compares itself only to a downtown Minneapolis restaurant that happens to have an independently owned and operated tobacco store located one floor above it. At the hearing, counsel for the 418 Club stated:

> I don't see this being a whole lot different than the cigarette – than the tobacco store that's in the 6th and Marquette that sits right on top of Manny's Steak House, the name of which I can't remember.

We see the clear difference. The comparison is unpersuasive support for the 418 Club's equal-protection claim.

The 418 Club next argues that the ban, as applied, deprived it of its equal-protection rights because there is no "genuine and substantial distinction between those included and excluded from the classification." *See Garcia*, 683 N.W.2d at 299. As applied here, the ban applies to "food establishments." The distinction that controls whether the ban applies is whether the establishment serves food. This is a genuine and substantial distinction. The 418 Club does not argue that the classification is not relevant to the purpose of the law or whether the statutory purpose is permissible, thus there is no need to address those factors.

Lastly, the 418 Club alludes to the Privileges and Immunities Clause. "The privileges and immunities clause requires that a state accord residents and non-residents equal treatment in activities bearing on the operation of the nation as a single entity." *In re Petition of Dolan*, 445 N.W.2d 553, 559 (Minn. 1989) (citation omitted). The 418 Club's intended application of the clause here is unclear. An assertion that is not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997).

We do not find such obvious prejudicial error upon inspection and, accordingly, do not further address the 418 Club's ambiguous allusion.

Affirmed.