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Municipal Liquor Liability

By Leonard J. Schweich

Following the end of prohibition, the Minnesota Legislature authorized the establishment of municipal liquor stores in 1934. Presently, there are over 225 cities in Minnesota that have municipal liquor operations. Long before the abrogation of sovereign immunity for municipalities, the Minnesota Supreme Court held that a municipality could be sued for a dram shop claim under the Civil Damage Act/Liquor Act. *Hahn v. City of Ortonville*, 238 Minn. 428, 57 N.W.2d 254 (1953).

The same relatively large class of parties who have standing to sue a private bar or liquor store can also sue a municipal liquor store or bar. This includes a spouse, child, parent, guardian, employer or other injured person. Minn. Stat. § 340A.801, subd. 1. The elements of a plaintiff's cause of action against a municipal liquor vendor are the same as a dram shop action against a private liquor vendor. The basic elements of a cause of action against a liquor vendor are as follows: 1) an illegal sale of intoxicating liquor; 2) the illegal sale caused or contributed to the allegedly intoxicated person's intoxication; 3) the alleged intoxicated person's (AIP's) intoxication was a direct cause of the plaintiff's injury; 4) the plaintiff sustained damages recoverable under the Civil Damage Act; and 5) proper notice must be provided to the liquor vendor pursuant to Minn. Stat. § 340A.802. It is possible, however, that a municipality may have greater protection than a private vendor depending on the application of the liability caps set forth in Minn. Stat. § 466.04, subd. 1, which, for example, limits damages to $300,000.00 when the claim is one for death. A municipality is deemed to have waived the statutory limits if it purchases insurance from a private insurance carrier in excess of those limits.

The question of whether an illegal sale occurred is likely the most litigated issue while interpretation of the notice element seems to be one of the most complicated issues in dram shop cases.

An illegal "sale" can be established regardless of whether the alleged intoxicated person bought the liquor himself or the liquor was purchased for him by others. *Fette v. Peterson*, 404 N.W.2d 862, 866 (Minn. App. 1987). The types of illegal sales include: 1) a sale to an obviously intoxicated person; 2) a sale to a person under the age of 21; 3) a sale to a non-member of a club; 4) a sale after hours; 5) a sale on a prohibited day; and 6) an on-sale of an alcoholic beverage that is consumed off the premises.

Two common misunderstandings are associated with the question of a sale to an obviously intoxicated person. One misunderstanding relates to the difference between obvious intoxication for purposes of a dram shop lawsuit and being under the influence of intoxicating liquor for purposes of Minnesota traffic statutes. The standard that imposes criminal liability for purposes of driving a vehicle while intoxicated (a blood alcohol level of .08 or above) is not the same standard that will satisfy the requirement of "obvious intoxication" for dram shop liability. *Hartwig v. Loyal Order of Moose*, 253 Minn. 347, 364, 91 N.W.2d 794 (1958). Obvious intoxication for purposes of a dram shop claim requires proof that an AIP exhibited outward manifestations of intoxication which would put a person using reasonable powers of observation on notice that such a person has become intoxicated. *Strand v. Village of Watson*, 245 Minn. 414, 72 N.W.2d 609 (1959). Obvious intoxication does not require proof of any specified amount of drinking or any degree of intoxication. *Murphy v. Hennin*, 264 Minn. 457, 199 N.W.2d 489 (1963).

The other common misunderstanding with regard to the element of "obvious intoxication" is that the sale is only deemed to be an illegal sale if the AIP was a driver of a motor vehicle. Bartenders, for example, sometimes serve an obviously intoxicated patron because he or she knew or believed that the patron would not be operating a vehicle. Simply put, an illegal sale can occur regardless of the mode of transportation utilized by an AIP. In other words, the fact that an AIP may have a "designated driver" is irrelevant for purposes of an illegal sale.

The notice provisions of the Liquor Act have been described as being "hopeless, confusing, inequitable, nonsensical and rather difficult to apply." A plaintiff must serve a notice of claim upon a liquor vendor within 240 days of the date of entering into an

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Comments or inquiries may be directed to Shannon Banaszewski.

Considering a Cell Tower Permit?

By Jessica E. Schwie

Wireless communication facilities allow cellular phones, pagers, wireless faxes, and wireless internet to work. FCC Fact Sheet, http://wireless.fcc.gov/siting/fact1.html (visited Aug. 9, 2006). Antennas placed within a defined area comprise a cellular system, and the number and location of antennas within a given area affect the service available. Service areas are carved into cells and at least one cellular antennae is placed per cell. Where there are no existing structures high enough to accommodate an antennae, telecommunications companies must build a tower. Shannon L. Lopata, Note, Monumental Changes: Stalling Tactics and Moratoria on Cellular Tower Siting, 77 Wash. U. L.Q. 193, 196-197 (1999).

Congress enacted the Telecommunications Act of 1996 ("TCA"), 47 U.S.C. §332, in order to provide a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications market to competition." H.R. Rep. No. 104-458, at 1 (1996) (Conf. Rep.); *APT Minneapolis, Inc. v. Stillwater Township*, 2001 WL 1640069 (D. Minn.); *Sprint Spectrum, L.P. v. Town of Easton*, 982 F.Supp. 47, 49 (D. Mass. 1997). As a part of the Act, providers are under a federal mandate to provide coverage.

While the federal government seeks to expand wireless services, the TCA balances the need for unified federal policy with the interests of local governments in retaining appropriate use of the land through local land use controls. *See Voicestream Minneapolis v. St. Croix County*, 342 F.3d 818, 829 (7th Cir. 2003) (citing H.R. Conf. Rep. No. 104-458, at 207-08 (1996)). As to the local review of a permit application, the TCA requires that:

- review take place "within a reasonable period of time." 47 U.S.C. §332(c)(7)(B)(ii). In addition to the timing requirements provided for in federal statute, Minn. Stat. §15.99 provides a specific time period of review which is applicable to cell tower applications. *American Tower v. City of Grant*, 636 N.W.2d 309 (Minn. 2001).

- the governmental entity maintain a "written record" and give reasons for any denial "in writing." §332(c)(7)(B)(ii), (iii);

- any basis for denial may not:
  - be related to the environmental effects of radio frequency, §332(c)(7)(B)(iv);
  - discriminate or have effect of unreasonably discriminate among providers of functionally equivalent services, §332(c)(7)(B)(i)(I); and/or
  - prohibit or have the effect of prohibiting the provision of personal wireless services, §332(c)(7)(i)(II).

Because federal statute regulates cell towers, federal courts have original jurisdiction over lawsuits challenging the denial of a permit to erect a cell tower. The Eighth Circuit has recently issued its first decision under the TCA in *USCOC of Greater Iowa, Inc. v. Zoning Board of Adjustment of the City of Des Moines*, ____ F.3d ____, 2006 WL 2873048 at *3 (8th Cir. Oct. 11, 2006).

The court in *USCOC* confirms that it is the permit-seeker who carries the burden of proving that a governmental entity's decision to deny a permit was either discriminatory, has the effect of prohibiting cell towers, or is unsupported by substantial evidence. *USCOC*, 2006 WL 2873048 at *2. Review of the governmental entity's decision is limited to the record that was developed before, and that made up, the governmental entity's decision to grand or deny a permit. *Id.* To the extent that there is conflicting evidence in the record, the court shall not second-guess the decision of the governmental entity; but rather, it should defer to the decision of the governmental entity. *USCOC*, 2006 WL 2873048 at *3.

The following is a list of considerations that courts have held are legitimate in determining whether to issue a cell tower permit.

- Protection of historical buildings.
  - Proven where there was evidence that tower could be seen from historic building nominated to National Register of Historic Places. *Voicestream*, 342 F.3d at 829; see also *Sprint Spectrum L.P. v. Bd. of Zoning Appeals of Town of Brookhaven*, 244 F.Supp.2d 108 (E.D.N.Y. 2003).
  - Not proven where letter from the Minnesota State Historic Preservation Office stated that project did not adversely affect historic properties in the area. *APT Minneapolis, Inc.*, 2001 WL 1640069 at *3.

- Protection of protected lakes, riverways, wetlands or other preserved areas.
  - Proven through testimony of numerous citizens and organizations that "focused on the incompatibility of a 185-foot tower on the river bluff extending noticeably above the tree line with extraordinary scenery of the National Scenic Riverway." *Voicestream*, 342 F.3d at 831-32. Among the numerous groups and individuals opposing the plan, the National Park Service (NPS) presented maps and other photographic evidence that the proposed tower would be visible and interfere with unique scenery of the locality. *Id.* at 832.
  - Not proven where proposed site was outside of protected boundary for National Scenic Riverway. *APT Minneapolis, Inc.*, 2001 WL 1640069 at *3.

- Negative impact on property values.
  - Proven where real estate expert provided analysis for the area based upon local figures, *Michael Linet, Inc. v. Village of Wellington*, 408 F.3d 757, 762 (11th Cir. 2005), but not proven by either mere comments, or even by real estate expert who relied upon an analysis for two other cities. *Id.*
  - Proven where "the proposed tower was not designed to blend in with its surroundings," *Minnesota Towers, Inc. v. City of Duluth,* 2005 WL 1593044, 8 (D. Minn. 2005); but not proven where proposed tower was to be constructed as flagpole. *PrimeCo Pers. Commo'ns v. City of Mequon*, 352 F.3d 1147, 1152-53 (7th Cir. 2003).
  - Proven where proposed tower was within feet of apartment complex; and, thus limiting views from the complex to almost exclusively the tower itself. *USCOC*, 2006

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NEWS FLASH

Schroeder v. St. Louis County, 708 N.W.2d 497 (Minn. 2006).

A road grader was grading a county road in the evening hours and collided with a vehicle. When the accident occurred, the road grader was grading while traveling against the traffic. The court held that the County was entitled to statutory discretionary immunity from the negligence claim challenging the act of grading while traveling against traffic because policy level employees debated this method of grading and decided to permit grading against traffic because of cost factors and the fact that it took longer to always grade with traffic.

In addition to claiming that the county was negligent because it permitted graders to grade against traffic, the Plaintiff claimed that the operator was negligent for failing to use the lights on the grader on a cloudy evening. There was a factual dispute as to whether the operator had been using the lights. Even if it was assumed that the lights were not used, the court held that the use of lights is not a discretionary act; it is ministerial. The court held that operator was not entitled to official immunity; and, consequently, the County was not vicariously immune from the negligence claim challenging the failure of the road grader to turn on the road grader's lights.

Congratulations to Joseph E. Flynn and Lawrence M. Rocheford

Jardine, Logan & O'Brien, P.L.L.P. congratulates **Joseph E. Flynn** and **Lawrence M. Rocheford** as our newest 2006 *Minnesota Law & Politics* Super Lawyers along with repeatedly recognized Super Lawyers **Gerald M. Linnihan**, **Alan R. Vanasek**, **Eugene J. Flick** and **Pierre N. Regnier**.

Timothy S. Crom receives favorable ruling at the Minnesota Supreme Court:

In *Prochnow v. Robert Gibb and Sons, Inc.,* the Supreme Court of Minnesota summarily affirmed a denial of the expansion of monetary and other employer payments to an employee to be included as part of the calculation of the average weekly wage. The claimant sought to include, among other things, specific negotiated amounts for health insurance, pensions and other employer funded but non-wage items as part of his average weekly wage. The Supreme Court affirmed the rejection of inclusion of these amounts. For a full discussion of the issues, see *Neil Prochnow v. Robert Gibb and Sons, Inc.*, WCCA, Slip Op. April 27, 2006.

Watch for **Marlene S. Garvis** and **Elisa M. Hatlevig's** article in the upcoming issue of DRI's publication For the Defense entitled: ***Winds of Change*: Title VII Retaliation Claims after *Burlington Northern***.

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WL 2873048 at *3.

- ° Not proven where basis for reduced value was based on perceived fear of health effects from facility. *AT&T Wireless Services v. City of Carlsbad*, 308 F. Supp.2d 1148 (S.D.Cal. 2003).

- Inconsistent with regional plan/local ordinances.
  - ° Proven where inconsistent with county zoning ordinances that attempt to minimize adverse visual effects. *Voicestream*, 342 F.3d at 831-32.
  - ° Not proven inconsistent where no regional study in place, it was only being contemplated. *APT Minneapolis, Inc.,* 2001 WL 1640069 at*3.

- Unsafe structure is proposed.
  - ° Proven where evidence indicated danger of ice falling from tower onto cars parked in parking lot below tower; and, in close proximity to residential building. *USCOC*, 2006 WL 2873048 at *3.
  - ° Not proven where there was no engineering evidence that tower as designed might fall over. *USCOC of New Hampshire v. City of Franklin*, 413 F.Supp.2d 21 (D.N.H. 2006).

- Alternatives exist with less negative impact.
  - ° Alternative forms of technology exist obviating need for tower.
    - Proven where evidence indicated that although there was evidence of dropped calls, there was evidence that poor service was a result of nearby facility not operating at capacity or that problem could be corrected by new antenna or additional antenna. *Nextel of New York, Inc. v. City of Mount Vernon*, 361 F.Supp.2d 336 (S.D.N.Y. 2005).
  - ° Alternative locations exist for proposed tower with less impact.
    - Proven where proposed location was seventh out of eight preferred site locations and was 1/4 mile from town's historic district. *Cellco Partnership v. Town of Grafton*, 336 F. Supp.2d 71 (D. Mass. 2004); *see also USCOC*, 2006 WL 2873048 at *3.
    - Proven where evidence that provider could incorporate multiple cell towers, just at lower heights, thus minimizing the visual impact. *Voicestream*, 342 F.3d at 824.

- Adequate service is already in existence obviating need for tower.
  - ° Proven through anecdotal testimony of residents that they had service. *MetroPCS, Inc. v. City of San Francisco,* 259 F.Supp.2d 1004, *aff'd in part, rev'd in part and remanded*, 400 F.3d 715 (9th Cir. 2003); *see also USCOC*, 2006 WL 2873048 at *3.
  - ° Proven where RF engineering showed that service would not complete a void, it would only improve indoor service. *VoiceStream PCS I LLC v. City of Hillsboro*, 301 F.Supp2d. 1251 (D.Or. 2004).

Many governmental entities encourage providers to co-locate on existing towers, or to locate on existing governmental structures. Even though a governmental entity may encourage providers, by ordinance or otherwise, to locate on governmental structures, at least one court has concluded that the governmental entity does not have to lease government-owned property in order to afford service. *Omnipoint Communications Enterprises, LP v. Township of Nether Providence*, 232 F.Supp.2d 430 (E.D. Pa. 2002). However, where a governmental entity interferes with a provider's attempt to locate on existing towers or governmental structures as it is encouraged to do, the court will closely scrutinize any decision to deny a permit. *See USCOC,* 2006 WL 2873046 at *3.

Finally, it had been previously feared that an improper denial of a permit carried with it the danger that the governmental entity could be subjected to compensatory damages and attorneys fees. The United States Supreme Court has recently ruled that a violation of the TCA is remedied only by the issuance of the requested permit; it does not permit compensatory damages, nor attorney's fees and costs under 42 U.S.C. §1983. *City of Rancho Palos Verdes, Cal. v. Abrams,* 544 U.S. 113 (2005). •

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attorney/client relationship. Minn. Stat. § 340A.82, subd. 2. In the case of claims for contribution or indemnity, the notice must be served upon a liquor vendor within 120 days after the injury occurs or within 60 days after receiving written notice of a claim for contribution or indemnity, whichever is applicable.

The effect of the notice provision on claims for contribution and indemnity can be harsh. For example, assume that a plaintiff was injured by an AIP who had been drinking both at bar A and bar B. Assume further that the plaintiff gave notice to bar A only more than 120 days after the date of injury, but short of 240 days of entering into an attorney/client relationship. Under this scenario, bar A would be precluded from bringing a claim for contribution and indemnity against bar B because more than 120 days had elapsed from the date of injury. Accordingly, all efforts must be made whenever possible to identify early any and all involved liquor establishments upon learning of any actual or potential dram shop contribution claims.

A relatively recent change in the Minnesota comparative fault laws under Minn. Stat. § 604.02 has had a significant impact on dram shop claims. The change, which took effect on August 1, 2003, established that in order to be jointly and severely liable for the whole award, a person's fault must be greater than 50%. This has a significant impact on dram shop cases because the intoxicated person who caused the damage or injury is typically found to have the greatest percentage of fault by a jury. Prior to the amendment, a liquor vendor who was 16% or more at fault could be jointly and severely liable for the entire verdict. •

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Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. All of our attorneys are qualified to handle matters in Federal Court. We are trial lawyers dedicated to finding litigation solutions for our clients.

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If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

Coming in the Winter 2006 Issue...

Motor Vehicle and Workers' Compensation Issues

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