

Freedom to Breathe Act & Outdoor Patios for Liquor License Holders

The Freedom to Breathe Act (FBA) will take effect on October 1, 2007. The FBA expands the Minnesota Clean Indoor Air Act to prohibit indoor smoking in all workplaces that employ two or more people or serve the general public. Bars, restaurants and “any other food or liquor establishment” are explicitly listed in the FBA as places where smoking is forbidden.

As a result of the FBA, cities may receive requests from on-sale liquor license holders to install outdoor patio areas with tables and chairs for the convenience of their customers. The FBA does not prohibit outdoor smoking on these types of patios. However, it is important to note that certain *sheltered* patios with *roofs and walls* may actually be considered *interior* areas that are subject to the FBA.

Typically, cities are receiving two types of requests for patios. In some instances, the patio is intended as a smoking area only, where no food or beverages will be served or consumed. In other instances, the patio is intended to be an expansion of the bar area, where customers may order and consume alcohol. Both types of patio may be regulated by the city.

Patios Where Alcohol is Served & Consumed. Under Minnesota Rule §7515.0430 construction of a new patio addition where alcohol will be served and/or consumed requires the license holder to seek an amendment to their on-sale liquor license from the city. The Rule requires that a liquor license specifically describe the premises where liquor will be served. If liquor will be served *or merely consumed* on a patio or outdoor area, the liquor license must explicitly describe the additional area. If approved by the city, the amended license must be filed with the MN DPS Alcohol Enforcement Division. Failure to comply with the license amendment requirements may result in a liquor license holder being cited for illegal sales.

Under state law, the patio must be compact and contiguous with the existing facility and cannot be separated from the actual bar by streets or alleys. Cities may impose additional restrictions to limit the potential negative effects of moving indoor bar activities to an outdoor patio. Liquor licenses are a grant and a privilege, not a property right. As a result, cities may require license holders to meet certain conditions as an element of their licenses (or in this case, license amendments). Cities may wish to impose conditions that relate to:

- Fencing & screening
- Hours, days & months of operation
- Noise & entertainment
- Minor access
- Patio size, placement & aesthetics
- Rubbish
- Recreational fires & barbecues
- Lighting & illumination levels

- Security & supervision
- Insurance
- Signage

Cities should document any restrictions on the patio area and the rationale for such restrictions as findings of fact in the formal resolution approving the amendment to the liquor license.

Smoking Only Patios. Some cities may not wish to allow alcohol service or consumption on outdoor patios for public safety and health reasons. These cities may still receive requests to install smoking only patios where drinking is not allowed. Cities have the authority to decide whether or not to allow smoking on outdoor patios and regulate the placement of these patios in relation to other buildings.

To exercise their authority, cities must pass a local ordinance to regulate outdoor smoking, including smoking patios. The FBA specifically grants cities the authority to pass ordinances that are more restrictive than state law. As a result, a city may pass a local ordinance that prohibits all smoking on business patios, sidewalks or parking lots or within a certain amount of feet from the entrance or air intake of a building. Alternatively, the city may pass an ordinance that allows the conduct, but imposes conditions upon outdoor patios and other outdoor smoking areas. These conditions may address a variety of concerns, already highlighted above, including fencing, noise, screening and public safety. Violation of the local ordinance may be designated as a misdemeanor or petty misdemeanor.

Additional Regulatory Concerns. When receiving requests for patio additions, the city should also determine whether the patio meets local zoning or building requirements. Depending on the local zoning ordinance, a patio may be a permitted use, a conditional use or prohibited altogether as an unauthorized accessory use. Some license holders may need to apply for both a liquor license amendment to operate the patio and submit a zoning application.

Cities should also review whether the patio addition meets the setback requirements, performance standards and parking standards imposed by local zoning ordinance. License holders with limited lot space may be tempted to build patios that encroach upon required setbacks, parking areas, ingress/egress or to otherwise fall below required zoning and building performance standards.

More Information. The League has more information on the FBA available on our website at <http://www.lmnc.org/advocacy/062007focus.cfm>. Please call the Research Department at 651-281-1200 for an additional information packet, including sample ordinances.