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MEMORANDUM
OFFICE OF THE CITY ATTORNEY
ROOM 800 - CITY HALL

TO: Ronald D. Leonhardt, City Clerk
Alderman James A. Bohl
Alderman Michael D'Amato
Alderman Joe Davis, Sr.
Alderman Fredrick Gordon
Alderman Joe Dudzik
Alderman Terry Witkowski

FROM: Bruce D. Schrimpf, Assistant City Attorney *BDS*

DATE: September 4, 2003

RE: *Assad v. City of Milwaukee, et al.*
Appeal No. 03-0199

Attached please find a copy of the decision of the Wisconsin Court of Appeals dated September 3, 2003 reversing and remanding with directions this matter to the Circuit Court of Milwaukee County, the Honorable Jeffrey A. Kremers. The Court of Appeals, as did Judge Kremers, determined that there was a sufficient basis in fact for the decision of the Utilities and Licenses Committee and the Common Council to deny this license. As a result this matter must be dismissed.

H&H Assad, LLC now has 30 days in which to file a petition for review with the Wisconsin Supreme Court.

The enclosed decision is instructive. So long as the Utilities and Licenses Committee provides a fair hearing, and bases its decision on facts found in the record of the hearing itself, whatever recommendation it comes to will be factually supported. So long as the Common Council provides a similarly fair forum, and bases its decision on the facts before it, its final decision on a license matter is, from a legal point of view, factually supported. That is true even though, as was the case in this matter, the Council reversed the first recommendation of the Utilities and Licenses Committee to grant this license, and denied the license.

A "fair" hearing is characterized by the following elements:

- The members making the decision have not come to a decision on a contested matter one way or the other before hearing the evidence.

- Whatever decision is arrived at, it is based on testimony and physical or documentary evidence provided at the hearing.
- The rules of evidence have been adhered to during the hearing. That means testimony of witnesses not in the hearing room has not been used in any way, whether introduced by the adherents or opponents of any particular license.
- The recommendation of the Committee and the decision of the Council are grounded in facts provided at the hearing. Facts are based on qualified testimony or other evidence, as differentiated from unsupported conclusions and speculation. Facts can be and usually are disputed. The Committee and Council members must come to a decision on which sets of facts they believe. "Believability" is really "credibility." The Committee and the Council are triers of facts and therefore decide credibility issues. Some credibility issues turn on whether or not someone has a particular bias. Some also turn on whether or not the witness really could have observed or heard the matters to which they are testifying.

The work of the Committee and the Council on licensing matters is complex and time consuming. Hearing contested licensing cases is one of the hardest things the Committee and the Council does. This is true for a variety of reasons. First the very livelihood of the license applicants and the welfare of the adjoining neighbors is directly affected by the outcome of the recommendations of the Committee and the decisions of the Council. Second, the actions of the Committee and the Council are directly reviewable in courts of law. Third the hearings, in order to provide for due process for all concerned, must of necessity take time. The members must be, and usually are patient.

I believe that in this case the members of the Committee and the Council were unnecessarily ridiculed. Unwarranted and baseless accusations were made regarding the motives of the Committee and Council members that was based on the fact that the Committee the first time recommended granting this license, and all recommendations of the Committee and decisions of the Council after that were against granting this license. That set of facts led to suggestions, if not outright allegations, that the members were being influenced inappropriately in a manner referred to as "aldermanic privilege." A closely parallel argument was made that there were no facts upon which to base a denial of a Class "A" Liquor and Malt License at this location (2700 North Murray Avenue). Both claims were hyperbolae to the hilt and totally without factual base.

The simple fact was that the recommendation of the Utilities and Licenses Committee the first time around was, while factually supportable, nonetheless, against the great weight of the evidence provided by the objecting neighbors. The recommendations and decisions of the Council made thereafter were consistent with that evidence. Finally, the law is clear that even if a license could be located at a particular location or to a particular applicant, that does not equate to the Council being required granting such a license. Essentially that was the argument that the Plaintiffs in this action put forward. (The Committee and Council had no facts upon which to deny a Class "A" Liquor and Malt License.) The Committee and the Council

certainly did and the neighbors supplied it. Liquor licensing decisions are reposed to the sound discretion of the governing body of a municipality. They are not matters of "right."

My congratulations to all of you on attaining this fine victory.

BDS:wt:71839

Attachment

c(w/attachment):

Jim Copeland, Manager, License Division
Sgt. John Hogan, MPD License Investigation

1033-2001-3333.001

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 3, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-0199

Cir. Ct. No. 01CV010491

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

H&H ASSAD, LLC,

PETITIONER-RESPONDENT,

v.

**CITY OF MILWAUKEE AND
RONALD D. LEONHARDT,**

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. KREMERS, Judge.¹ *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¹ The Honorable David A. Hansher presided over the petition for a writ of mandamus and entered the first order remanding H&H Assad's application for a Class "A" Liquor and Malt beverage license to the City of Milwaukee Utilities and Licenses Committee. The Honorable Jeffrey A. Kremers presided over the motion to compel and entered the order vacating the City of Milwaukee Common Council's denial of Assad's Class "A" Liquor and Malt beverage license application.

¶1 PER CURIAM. The City of Milwaukee and the City Clerk, Ronald D. Leonhardt (collectively, “the City”), appeal from the December 4, 2002 circuit court order vacating the Milwaukee Common Council’s denial of H&H Assad, LLC’s (“Assad”) application for a Class “A” Liquor and Malt beverage license and remanding the application to the Utilities and Licenses Committee for further proceedings. The City argues, among other things, that “[o]nce the court concluded that there was an adequate basis for the action of the Milwaukee Common Council in denying this license, it had no choice but to affirm the Common Council.” The City is correct and, therefore, we reverse the order and remand for further proceedings consistent with this opinion.

I. BACKGROUND

¶2 In 1999, Assad, d/b/a Parkside Liquor and Grocery, purchased the convenience store located at 2700 North Murray Avenue in Milwaukee and, on August 23, 2000, applied for a Class “A” Liquor and Malt beverage license.² The City of Milwaukee Utilities and Licenses Committee conducted a hearing on January 23, 2001. Despite neighbors’ concerns about the concentration of liquor outlets in this residential area and the potential for problems resulting from an expanded liquor license for Assad, the Committee voted 4-0 to recommend granting the application and referred the matter to the Common Council. At the February 6, 2001 Common Council hearing, however, the alderman representing the district where Parkside Liquor and Grocery was located moved to remove the store from “the grant list as an applicant[] for a Class “A” Liquor and Malt

² Assad had a Class “A” *Malt* license but was applying for a Class “A” *Liquor and Malt* license, which would have enabled it to operate a “full service liquor store.”

license” and, after hearing additional argument, the Common Council voted 15-1 to deny Assad’s application.

¶3 On September 7, 2001, Assad filed another application for a Class “A” Liquor and Malt license. When the City informed Assad that, under Milwaukee Code of Ordinances § 90-5-9-a,³ the application could not be acted upon until 2004, Assad petitioned the circuit court for a writ of mandamus ordering the Utilities and Licenses Committee to consider its new application. The City moved to dismiss the petition. At the hearing on Assad’s mandamus petition, Judge David A. Hansher questioned the dramatic difference between the 4-0 vote to recommend granting the license by the Utilities and Licensing Committee and the 15-1 vote to deny the license by the Common Council and questioned whether “aldermanic privilege,” rather than the merits, may have influenced the Common Council’s action. Judge Hansher granted Assad’s mandamus petition and ordered the Utilities and Licenses Committee to consider Assad’s new application “without regard to the fact that such license application was denied previously by the Common Council.” The City did not appeal that order.

³ Section 90-5-9-a, of the Milwaukee Code of Ordinances, states in relevant part:

DISQUALIFICATION

Whenever an applicant for a new license has had his or her application denied for a reason relating to the fitness of the location of the premises to be licensed, no other application for an alcohol beverage license for such location shall be recommended for approval by the utilities and licenses committee within 3 years of the date of the denial unless the applicant has demonstrated a change of circumstances since the prior denial.

MILWAUKEE, WIS., ORDINANCE § 90-5-9-a (1998). In this case, no “change of circumstances” is at issue.

¶4 Thus, on February 19, 2002, the Utilities and Licenses Committee held another hearing, again hearing testimony from neighbors opposing the application. This time, however, by a 4-1 vote, the Committee recommended denial of a Class "A" Liquor and Malt license for the location. On March 5, 2002, the Common Council, adopted the Committee's recommendation and voted to deny Assad's application.

¶5 On April 5, 2002, Assad returned to circuit court with a motion for a *de novo* hearing, claiming that the Utilities and License Committee's action was flawed and asserting that the evidence was insufficient to support the denial. On April 25, 2002, Judge Hansher, commented that the Committee "just can't turn on a dime with a ... wink and a nod based upon [the local alderman's] objections," and, on May 31, again remanded the matter, ordering:

[T]he Committee shall reconsider its recommendation denying Assad's license application. The Committee shall explain on the record the inconsistency between the Committee's votes and recommendation made after the first hearing and the Committee's votes and recommendation made after the second hearing, based on upon [sic] the evidence presented before it. Alternatively, the Committee shall modify its recommendation denying the license application to a recommendation granting the application to comport with the evidence before it.

Again, the City did not appeal.

¶6 Thus, on October 15, 2002, the Utilities and License Committee considered the matter a third time. In support of the denial, Alderman Jeffrey Pawlinski, Committee Chairman, read a prepared statement outlining the evidence, including testimony from Parkside Liquor and Grocery's neighbors, presented at the hearings on Assad's two applications. He did not, however, explicitly address what Judge Hansher's order termed the "inconsistency" between the Utilities and

Licenses Committee's initial 4-0 vote to recommend granting the liquor license and its subsequent 4-1 vote to recommend denying the license.

¶7 On November 18, 2002, Assad again challenged the denial by filing a motion for a hearing on what it alleged was the City's failure to comply with Judge Hansher's May 31 order. The City moved to dismiss the motion and requested that the court affirm the Common Council's denial of Assad's application. The case then came to Judge Jeffrey A. Kremers who, following judicial rotation, had inherited Judge Hansher's calendar.

¶8 Reviewing the motions, Judge Kremers declared, "I don't think there is any question there is enough information in the record to sustain a denial of the license." But Judge Kremers also observed that the "[p]roblem" was that the Committee had not been ordered to address the merits of the application but, rather, "to explain the inconsistencies." Therefore, he concluded, the Committee had failed to comply with Judge Hansher's order. Accordingly, in an order of December 4, 2002, Judge Kremers vacated the Common Council's denial of the application and remanded the matter to the Utilities and Licenses Committee to "particularly follow the dictates of the prior order of [Judge Hansher]."⁴ It is from that December 4 order that the City appeals.

II. DISCUSSION

¶9 "[T]here is no right to an alcoholic beverage license and ... the ultimate question of whether to issue such a license to a particular applicant is a matter of local concern." *State ex rel. Smith v. City of Oak Creek*, 139 Wis. 2d

⁴ The order also required the City to pay \$250 "as terms" to Assad's attorney.

788, 801, 407 N.W.2d 901 (1987). Granting or denying an application for a liquor license is a “legislative function.” *State ex rel. Ruffalo v. Common Council*, 38 Wis. 2d 518, 524, 157 N.W.2d 568 (1968). “The reviewing court cannot substitute its judgment for the legal discretion of the Common Council on the merits of the application or review the adequacy of the grounds for its decision other than in the context of determining whether the action of the licensing authority was arbitrary, capricious or discriminatory.” *Id.* at 525.

¶10 Absent arbitrary, capricious or discriminatory actions, the licensing authorities “are not answerable to the courts for their conduct and discharge of duties, but to the people who conferred the power upon them to regulate and control the liquor traffic and clothed them with the discretion to grant or refuse liquor licenses.” *State ex rel. Boroo v. Town Bd.*, 10 Wis. 2d 153, 160, 102 N.W.2d 238 (1960) (internal quotation marks and quoted source omitted). Moreover, courts’ concerns about legislative motives such as aldermanic privilege are “immaterial ... because the motives which actuate municipal authorities in performing an act within the scope of their power will not be inquired into by the courts in the absence of fraud, corruption, or oppression.” *Id.* at 162.

¶11 On appeal, the parties present several interesting issues. The City, for example, argues that once the Utilities and Licenses Committee complied with the first mandamus order for a second hearing, the circuit court had no further jurisdiction. Assad responds, however, that the City, at several stages, failed to challenge jurisdiction, therefore waiving this argument, and, in any event, that the court had continuing jurisdiction by virtue of its inherent authority to enforce its order. The parties debate the standard of review on mandamus, the distinction between mandamus and certiorari, and the authority of the circuit court to intrude

into what otherwise would be a city committee's legislative function. Although these issues are intriguing, in this case they are moot.

¶12 “An issue is moot when its resolution will have no practical effect on the underlying controversy.” *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425. Here, these issues are moot because their resolution cannot alter the undisputed fact that the record includes a sufficient evidentiary basis for the Common Council's denial of Assad's application for a Class “A” Liquor and Malt beverage license.

¶13 Neighborhood circumstances, including the location of other liquor outlets in the area, are among the proper considerations underlying a city council's discretionary determination of whether a liquor license is compatible with “the welfare of the community.” *State ex rel. Edge v. Meyer*, 249 Wis. 154, 160, 23 N.W.2d 599 (1946) (citation omitted). Here, it is undisputed that the evidentiary record, including neighbor objections, is sufficient to sustain the Common Council's denial of the license.⁵ Thus, the Utilities and Licenses Committee's

⁵ At the October 15, 2002 Utilities and Licenses Committee hearing, Alderman Pawlinski summarized portions of the testimony, citing specific pages of the earlier, transcribed hearings:

Community neighbors have testified as to undesirable neighborhood problems. ... [T]his is an inappropriate location for a Class “A” Liquor and Malt license. Additionally, it will cause undesirable neighborhood problems as cited by Father Joe of St. Peter and Paul Catholic Church.

Father Joe also testified to litter. And Miss Kate Baldwin, a neighbor, is concerned about parking, loud noise between the hours of 11:00 p.m. and 4:00 a.m., as it relates to UWM students in the area, and unruly behavior by those students as it relates to the concentration issue.

(continued)

explanation of the difference between the 4-0 vote to recommend granting the application for the Class "A" Liquor and Malt license and 4-1 vote to recommend denying the application could have no impact on the controversy.

¶14 Judge Kremers found that the record provided a sufficient basis for the denial. Indeed, notwithstanding his concern over the compliance with Judge Hansher's order, he commented, "I don't think there is any question there is enough information in the record to sustain a denial of the license." Assad does not disagree. If the record provides a sufficient basis for a city council's denial of a liquor license application, a court, without inquiring into legislative motives, must affirm the denial. *See State ex rel. Boroo*, 10 Wis. 2d at 160-62. Thus, given the evidence supporting the Common Council's denial, the Utilities and

Furthermore, with the Class "A" Malt liquor [license H&H already had] ..., the neighbors have experienced some problems with the store as it currently exists with public urination in their front yard and vomiting on their doorsteps and litter consisting of empty beer bottles and beer cans.

The area has numerous parties as frequently as two or three per night regarding UWM, some so bad that the police must be called.

Trash has been cited as a neighborhood objection. This neighborhood has too many loud parties, according to the neighbors, which, adding a full service liquor store, will cause exacerbation of the problem.

Miss Janice Ramos, who lives in the neighborhood, has problems with beer and liquor bottles on her property.

There is, additionally, an adequate number of alcohol outlets in this area. This area is currently served by the Downer Wine and Spirits, Gilbert Liquor, Smith Beer and Liquor, Beans and Barley, licensed as a Class "B" with packaged goods, and One Stop Pantry, Pick 'N Save, and Otto's Beverage.

(Citations omitted.)

Licenses Committee's explanation of its votes would make no difference and could not alter the outcome.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.