

**MEMORANDUM
OFFICE OF THE CITY ATTORNEY
ROOM 800 — CITY HALL**

TO: Alderman Jeffrey Pawlinski
Alderman Michael D'Amato
~~Linda Elmer~~
James Copeland

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

DATE: July 10, 2002

RE: H&H Assad v. City of Milwaukee, et al.
Case No. 01-CV-010491

Attached please find the Judge Hansher's Order and April 25, 2002 court transcript in the above-captioned matter.

BDS:wt:54181
Enclosures

H&H ASSAD, LLC,

Petitioner,

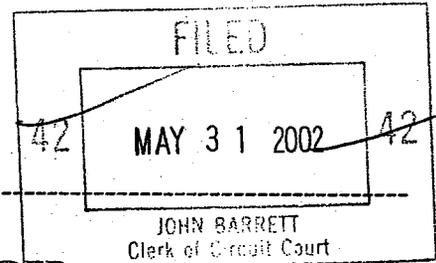
Case No. 01-CV-010491

vs.

Case Code 30707

CITY OF MILWAUKEE
and RONALD D. LEONHARDT,
City of Milwaukee City Clerk,

Respondents



FINDINGS OF FACT AND ORDER

The captioned matter came before the court on April 25, 2002, on petitioner's motion for an order directing the City of Milwaukee, by and through its Utilities & Licenses Committee, to conduct a *de novo* hearing on petitioner's application for a Class A Liquor & Malt license. After considering the pleadings and papers on file and the arguments of counsel, the Court finds as follows:

1. No nexus exists between the materials presented to the Committee and the Committee's decision.
2. The Committee failed to explain any differences between the evidence presented at the first and second hearings which caused the Committee to vote unanimously to recommend granting Assad's license application after the

first hearing and 3 to 1 to recommend denying the license application after the second hearing.

Based on these findings, the Court orders:

1. The denial of Assad's Class A Liquor & Malt license application is hereby vacated.
2. The matter of Assad's license application is remanded to the Utilities & Licenses Committee.
3. On remand, the 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 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.

Dated this 31 day of May, 2002.

BY THE COURT:

DAVID A. HANSHER
DAVID A. HANSHER
Circuit Court Judge

THIS DOCUMENT DRAFTED BY:

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civilassadorder

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

H&H ASSAD, LLC,

Plaintiff,

-vs-

COPY

CASE NO. 01-CV-010491

CITY OF MILWAUKEE and
RONALD D. LEONHARDT,

Defendants.

Proceedings had before the Honorable David A.

Hansher, Circuit Judge, Branch No. 42, on April 25, 2002.

APPEARANCES:

GIMBEL, REILLY, GUERIN & BROWN by FRANKLYN M. GIMBEL, ESQ.,
appearing on behalf of the plaintiffs.

BEVERLY TEMPLE, ESQ., Assistant City Attorney, appearing on
behalf of the Defendants.

1 PROCEEDINGS

2 (Whereupon the following proceedings were
3 had:)

4 THE CLERK: 01-CV-10491, H & H Assad LLC,
5 petitioner, versus City of Milwaukee and Ronald
6 Leonhardt, Respondent. Appearances.

7 MR. GIMBEL: For the plaintiff, Your Honor,
8 Attorney Franklyn Gimbel.

9 MS. TEMPLE: Grant F. Langley, City Attorney,
10 by Beverly A. Temple, Assistant City Attorney for the
11 City of Milwaukee.

12 THE COURT: Okay. The H & H Assad has filed
13 a motion for a de novo hearing from the previous
14 hearing held before the City of Milwaukee Licensing --
15 what's the actual title of the committee?

16 MR. GIMBEL: Utilities and Licensing
17 Committee.

18 THE COURT: Utilities and Licensing
19 Committee. These were -- and they denied the
20 application of H & H Assad for an additional license to
21 sell basically hard liquor. They're presently selling
22 beer. The court is familiar with the facts and has
23 viewed the videotapes from the previous hearing -- or
24 the initial hearing and the present hearing.

25 Mr. Gimbel?

1 MR. GIMBEL: Thank you very much, Judge.

2 Just for the record, I would indicate by way of a very
3 brief factual history in this case, the Assad family
4 purchased a business on Park and Murray which prior to
5 the time of their purchase had been originally a
6 pharmacy, and then it kind of grew into a convenience
7 store because a pharmaceutical business had kind of
8 gone away from the neighborhood individual proprietor
9 type of business, and they loss all their prescription
10 business to Walgreens and to Osco; and the owner of
11 that business who had been there for years and years
12 and years had a -- originally a license that went to
13 pharmacies that permitted the sale of intoxicating
14 liquors, and then got a full Class A liquor license; so
15 when the Assad Corporation purchased this real estate
16 from the person who had operated it previously, it was
17 a fully licensed facility, selling all forms of
18 intoxicating beverages.

19 The Assads closed the building down for a
20 period of time to do extensive remodeling in there, and
21 their expressed intention was to open up a full service
22 neighborhood grocery store. When they went to get
23 their license, the alderman proposed that they accept a
24 malt beverage liquor Class A license to begin with and
25 that's what happened. They accepted that and the

1 business opened with malt beverages.

2 When there was an application made to expand
3 that Class A license to include all intoxicating
4 beverages, the alderman opposed that additional feature
5 of the license. There was a hearing held before the U
6 and L Committee, and the outgrowth of that hearing was
7 that even in the face of the alderman's strenuous
8 objection to granting the license, there was a
9 unanimous recommendation to approve the full Class A
10 license to the Common Council.

11 When that went to the Common Council for its
12 consideration, Alderman DiMotto, the local alderman,
13 made a motion on the floor of the Common Council
14 hearing to move the action of the Committee from
15 recommending granting of the license to recommending
16 denial of the license.

17 And now we get to the part where Your Honor
18 gets involved. When that discussion occurred on the
19 floor of the Common Council, Alderman DiMotto made an
20 impassioned pitch to his colleagues on the Common
21 Council, the essential effect of which was to say I'm
22 opposed to this, you should be opposed to it because we
23 have enough outlets in this area, and he circulated
24 some diagrams and maps at the time.

25 He enlisted at that time a dialogue on the

1 floor of the Common Council debating this motion to
2 move from recommend to deny from members of the
3 Committee who had so voted in favor of granting the
4 application who essentially said, well, okay, as a
5 reaction to the fact that Alderman DiMotto is entitled
6 to have licenses treated in the way he wants them in
7 his neighborhood, we'll go with him; and so the Common
8 Council voted to deny the license and the Assad Company
9 was sent a notification that your license has now been
10 denied, you can re-apply in three years. That prompted
11 coming to you, Your Honor, asking you for a mandamus on
12 the grounds that the actions of the Common Council were
13 illegal.

14 After the submission of substantial volumes
15 of material including videotapes of the proceedings and
16 in fact printed transcripts of the proceedings and
17 argument by counsel, there was a discussion before you
18 on November 26th in the year 2001, and the outgrowth of
19 that was that you signed an order which was dated on
20 December 11, 2001, causing a writ of mandamus to be
21 issued directing the Clerk of the City of Milwaukee to
22 reschedule this matter before the Utilities and
23 Licensing Committee.

24 So now what I've done is I've set the stage
25 for you to understand that this particular motion flows

1 from that order.

2 During the course of our discussion, what had
3 occurred that prompted filing the writ of mandamus
4 before you, Judge, there was extensive argument by
5 Mr. Schrimpf of the City Attorney's Office and myself
6 on behalf of the Assad Corporation, and part of the
7 things that were said by you at that time -- and now
8 I'm referring to a transcript of the proceedings of the
9 arguments and your decision which was as I indicated on
10 November 26, 2001, you said --

11 THE COURT: What page?

12 MR. GIMBEL: Page 49. And if you look at
13 beginning on Line 3: Bringing up the fact of
14 aldermanic privilege, as far as I'm concerned, and I
15 September the arguments of Mr. Gimbel, completely taint
16 the proceedings. Also on the narrower lines, the court
17 also agrees with Mr. Gimbel.

18 Thereafter on Line 12 you say: define the
19 fitness of location was the basis of the rejection.
20 And on 16 you say: The Committee vote put the
21 application in a catch twenty-two where they're
22 supposed to say that they weren't rejected for location
23 reasons over the past three years when the applicant
24 doesn't know, based upon this record, the reason, even
25 though again I admit it was discussed -- the fact it

1 was discussed does not mean there was a basis for the
2 determination.

3 On the next page you say on Line 9: I find,
4 therefore, that the decision of the Common Council is
5 not supported by the record. I find the proceedings
6 were flawed.

7 And Line 14 -- beginning on Line 14: But
8 they have a valid basis -- if they have a valid basis,
9 they have to do it based upon a record that is not
10 flawed and tainted by remarks of certain alderpersons
11 who are sending a message to other alderpersons saying
12 support your local alderman, take off on support your
13 local sheriff, I guess. Okay. That is the -- that is
14 the astrict portion of your remarks.

15 Now what happens after you've sign this
16 order? Consistent with your dictates, the Clerk of the
17 City in fact did schedule a hearing before the
18 Utilities and Licenses Committee which was held on
19 February 19th in this year, '02. At that hearing I
20 represented again the Assad family, and Alderman
21 DiMotto appeared very clearly as a prosecuting attorney
22 seeking to derail or to cause a denial of the
23 application.

24 And the tape shows more clearly then I can
25 articulate the level of passion that I think Alderman

1 DiMotto had in this matter. It had become a personal
2 thing with him. I quite frankly think he was somewhat
3 offended by the fact that this thing came back and that
4 he was kind of in the focal point of creating the flaw
5 in the proceedings that Your Honor recognized in your
6 decision in this matter.

7 THE COURT: I think you indicated he's also
8 your local alderman.

9 MR. GIMBEL: He is. That's correct.

10 THE COURT: I guess you won't be getting any
11 favors from him in the future.

12 MR. GIMBEL: I probably won't, but I know the
13 guy who picks up the garbage personally so I can
14 override him on that score. But other than that I
15 probably am in trouble, right. If I need any other
16 special favors from the alderman I probably won't get
17 them.

18 In any event, we have a hearing before this
19 Committee. The individuals from the community who
20 testify at that hearing, four of them I believe,
21 made -- now this is obviously advocacy at work, they
22 made a very feeble attempt to show that this location
23 wasn't necessary. One person who testified was a
24 priest from a church which was six or seven blocks
25 away, and he said that there were beer bottles that he

1 saw in the neighborhood of his parish, couldn't testify
2 on cross whether any of those things came from this
3 particular grocery store or from taverns in the
4 neighborhood or from other licensed facilities.

5 Another person who testified really was
6 against licenses being issued to anybody. She was an
7 teetotaler.

8 The third person who testified was a resident
9 of the -- or an officer of the East Side Association.
10 I think that was probably a political support
11 organization of Alderman DiMotto probably started by
12 him. And then the last person who testified was a
13 person who just felt that this wasn't necessary.

14 On the favorable side, there were a great
15 number of folks who testified, and several that were
16 there that acknowledged when the chairperson asked if
17 they were essentially going to say the same things,
18 yes, in order to shorten the length of the hearing.
19 There was one, two, three, four, five, six, seven,
20 eight people who testified as I recall.

21 And most significantly the one person who
22 testified was a person who had worked in the previous
23 operation for like fifteen years. This was a woman who
24 worked for the pharmacist and was there during the time
25 of the operation of the pharmacy and into the time of

1 the transition to the convenience store and talked
2 about the fact of the location being one that had the
3 qualities of neighborliness and was a convenience place
4 for a lot of people. It's a pretty high-density area -
5 a lot of apartment buildings around there, Judge.

6 THE COURT: For the record I lived there on
7 Frederick -- the twenty-six hundred block of Frederick
8 which is half a block away for four years, so I'm very
9 familiar with the neighborhood.

10 MR. GIMBEL: Absolutely. And then we made
11 our closing remarks, and there was a break, and the
12 next thing that happens is we come in and -- I don't
13 know, Alderman DiMotto disappeared and came out, and
14 then lo and behold the aldermen voted four to one to
15 recommend denial. Apparently somebody -- I don't --
16 I'm just saying apparently because of the quirk in
17 circumstances. The quirk of circumstances are that
18 when this matter is scheduled to go before the Common
19 Council to be acted upon, and that date was --

20 MS. TEMPLE: March 5th.

21 MR. GIMBEL: -- March 5th. Lo and behold
22 they said this has to go back to Committee first for
23 reconsideration. They adopted it for reconsideration.
24 They went back to the Committee for reconsideration.
25 They held no testimony. What they did is they just

1 rearticulated the fact that they were voting four to
2 one to deny and inserted as a predicate for their vote
3 that the reason for the finding of denial was that it
4 was the over abundance of outlets and the unsuitability
5 of location.

6 We think -- I think as an advocate for the
7 Assad Company that what happened in this period in
8 February and March of 2002 was essentially a
9 repackaging of what happened in the Common Council
10 meeting that led to Your Honor's issuing the writ of
11 mandamus. It was repackaged to get around the
12 deficiencies in the record that had been developed at
13 that time.

14 Now what I recall at the time that I was
15 drafting this petition and trying to fashion a method
16 to get this matter back before Your Honor -- remember
17 the words of Fernando Lamas, who was not noted for the
18 fact he was married to Esther Williams, not noted for
19 the fact that he was a handsome Latin fellow, but he
20 was remembered for a comment that he made when he said:
21 It's not how you feel, it's how you look that is
22 important.

23 And what happened in this case is that there
24 appears to have been a conspiracy to make the denial of
25 this license in the year 2002 look like it was based on

1 a -- essentially a finding that is an appropriate
2 reason for denying the license when in truth and in
3 fact if you look at the record that was developed in
4 the proceedings prior to the time that Your Honor made
5 a specific finding of flaw in the proceedings, denial
6 of due process in the proceedings, there is less of a
7 case in 2002 than there was in 2001.

8 And so what we're asking this court to do
9 here is to say you can't just put a label on your
10 decision when you deny an applicant a right, you must
11 articulate a basis from the record that's been
12 developed in front of you to support your decision like
13 all courts have to do today when they articulate
14 decisions.

15 I know you're too young, but I remember a
16 time when I started to practice law in Milwaukee County
17 there was a Judge Schulz, and I don't know if you've
18 ever heard the stories about Judge Schulz, but you
19 would articulate a case in front of Judge Schulz and
20 he'd say gentlepersons -- he usually said gentlemen,
21 but there weren't too many women lawyers at that time
22 when I started practicing law. But he'd say:
23 Gentlemen, I will render my decision in the mail. And
24 he would send out postcards, and it would say I find
25 for the plaintiff -- and you would get the postcard in

1 the mail -- or I find for the defendant.

2 Well, that practice was not looked upon by
3 the appellate courts with favor. They said you can't
4 do that, how can anybody appeal from your decision if
5 you don't articulate what it is that you based your
6 finding for the plaintiff or you based your finding for
7 the defendant upon.

8 And so I'm asking you, Judge Hansher, to stop
9 the Judge Schulz practice of the Common Council
10 Utilities and Licenses Committee and say: You,
11 Committee, listen to evidence, and then based on what
12 you hear, and based on exercising judgment, not will,
13 articulate your decision on whether an application for
14 a license should be granted or denied based on findings
15 which have some foundation in the material or evidence
16 that comes before you. And that will then avoid the
17 sham of what we have here.

18 We have a set of proceedings where there was
19 a finding in favor of the applicant, albeit it got
20 submarined by the local alderman clearly in the Common
21 Council, goes back and the local alderman as the
22 prosecutor wins his case the second time around with
23 the nice form of an articulation in a motion -- in a
24 hearing reconsidering this that comports with the
25 ordinance language and there's no record to support it.

1 So I believe it's within your authority,
2 Judge, to do this and to essentially, as a follow up to
3 the decision that you reached that led to the order
4 that you signed on December 11th last year.

5 THE COURT: What more could the alderperson
6 say? I watched the tape. I mean Alderman Gordon
7 spoke, Alderman Pawlinski and Herron spoke, and they
8 articulated their belief that there was an over
9 concentration of Class A licenses in the UWM area.
10 There wasn't the statement which I think sunk it the
11 first time about we have to support our Alderman
12 DiMotto our local alderman.

13 MR. GIMBEL: That's correct.

14 THE COURT: If they make those statements,
15 who am I to go beyond -- you know, even if I have the
16 feeling that it's -- they're basically -- using an
17 analogy it's maybe fake leather not real leather, not
18 Carinthian leather as Fernando Lamas would say. But
19 how do I know, you know, they're making the statement
20 here -- who am I to go beyond the statements? They can
21 go beyond -- challenge what they're saying. It can be
22 a wink and an nod here, but where is it on the tape?
23 Where is it on the transcript?

24 MR. GIMBEL: Where is -- the lack of any
25 factual basis to tie in the conclusions that there is?

1 In other words I think what they should be required to
2 do is to say that we find witness A, B, C and D to have
3 been credible or anyone of them, and based on their
4 testimony -- and we find the witnesses who testified
5 that there's a lack of a near, proximate, convenient
6 locations for the outlet to be incredible, and so we
7 find, weighing that evidence, that it is reasonable to
8 assume, based on the record, that there's an over
9 abundance of outlets here. They didn't to that. They
10 just came from no evidentiary foundation.

11 THE COURT: I don't think they're required -
12 they're not a court of law - to say we find this
13 witness credible that witness not credible. There --
14 as I said they're a Licensing Committee -- Utilities
15 and Licensing Committee, they're not a court of law.
16 And they did make statements based upon I believe was
17 it graphs or information provided by the local alderman
18 that there was an over concentration of Class A
19 fermented -- Class A -- was it Class A dash fermented
20 malt beverage --

21 MR. GIMBEL: Class A license, and there's a
22 subcategory of fermented beverages.

23 THE COURT: Class A licensing facilities or
24 stores in the area. They did make those statements on
25 the record.

1 MR. GIMBEL: Here's the problem. The problem
2 is that they -- a better record existed for their
3 consideration in the first hearing that you found to
4 have created a flaw in the proceeding. And I think
5 that because of the fact that there was a judicial
6 review of the sufficiency of due process being afforded
7 to the applicant, that the second time around they
8 should be obligated and must be obligated essentially
9 to come up with a factual connection to their
10 conclusion from the materials that are legitimately in
11 front of them and not say that the deal was made in the
12 hall because the alderman said I need this one, I need
13 to save face, I need to kill this application.

14 And I'm suggesting to Your Honor that the
15 circumstances in this case reflect that this was a fix,
16 and that the only way around the fix is to say: You,
17 decision maker, have to articulate with some degree of
18 specificity what the basis of your decision is; and,
19 absent doing that, you can't help avoid the fix.

20 THE COURT: Okay. I'll hear from Ms. Temple.

21 MS. TEMPLE: Judge, is it all right if I do
22 it from the table?

23 THE COURT: Sure. I have no problem.

24 MS. TEMPLE: All right. Judge, what
25 Mr. Gimbel has said is basically correct in terms of

1 the procedure. However, what we have here is a
2 request -- the initial request, and what you ordered
3 was a hearing before the Utilities and Licensing
4 Committee. That was held.

5 If you look at the transcript of the
6 proceedings held before you on November 26th, where you
7 ordered that to occur, on Page 13, Line 18, Mr. Gimbel
8 stated to the court: If the Utilities and Licensing
9 after hearing where the Assad Corporation has a chance
10 to confront its objectors and cross-examine them and
11 the Committee in the face of that says we recommend
12 that this license be rejected and the Common Council
13 supports that, I have no lawsuit for my client.
14 There's nothing to do. That would have been a
15 appropriate road.

16 Well, basically the U and L Committee did
17 that. They had a hearing. The applicants had an
18 opportunity to cross-examine witnesses. They likewise
19 presented witnesses.

20 Now we're here on a request that the court
21 again order another de novo hearing, and the procedural
22 problems are that the -- this applicant being a new
23 applicant for a new license, has no right of appeal to
24 the courts. The court cannot supplement its decision
25 for that of the Utilities and Licensing Committee and

1 the Common Council for both their votes.

2 Now it may be a problem for the applicants
3 ing that they were denied, but I don't think as
4 Mr. Gimbel states that the Committee must articulate in
5 its reasons for denial every single reason and
6 reiterate every single thing a witness stated to reach
7 its conclusion.

8 I think the hearing was sufficient in terms
9 of both the witnesses and the reasons and that they
10 were apparent, although there were a lot of witnesses
11 in favor of granting the license, there also were some
12 witnesses who were not in favor. However the Committee
13 reached its decision and the Common Council approved
14 that decision to deny this license is there. It's a
15 fact.

16 The problem is what does the court do with
17 it? Procedurally to order another hearing, I guess we
18 can come back here again and again and the court can
19 keep ordering a hearing until maybe the court or
20 Mr. Gimbel and the clients think they have it right.
21 But I'm not sure that that is the intent of the law
22 here, Judge.

23 The problem is the hearing was held pursuant
24 to the court order, the recommendation of the Committee
25 to deny the license, that was upheld by the Common

1 Council, and I don't think it's within the purview of
2 the court to reorder another hearing de novo.

3 THE COURT: Okay. Mr. Gimbel? I mean what
4 -- I mean how many hearings -- let's assume I buy your
5 argument and send it back again. I mean it's --
6 they're going to say theoretically okay, we believe
7 this witness or that witness -- and I'm not even sure
8 you're right on that. I don't see how eventually
9 you're going to win. I mean you could keep winning the
10 battles, but I don't know from a realistic standpoint
11 you'll ever win the war on this.

12 MR. GIMBEL: I may not win the war. What I'm
13 concerned about, Judge, is just what I said a few
14 moments ago. What I said back when I appeared before
15 you last year and what led to your order was read
16 appropriately by Ms. Temple, and what is missing here
17 is the nexus between the material that was presented to
18 the Committee and the conclusion that they reached, and
19 had there not been a prior hearing with a different
20 result, I wouldn't be here today.

21 In other words if they'd have had this
22 hearing the first time, and then this matter had gone
23 to the Common Council and there had been an approval of
24 the recommendation to deny the application, there
25 wouldn't be any judicial proceeding.

1 But because there was a record made that was
2 in my view no different from the best case scenario of
3 the City to support denial, and you found those
4 proceedings to be flawed after the Committee found that
5 there was not a basis to deny the application, in fact
6 they unanimously recommended the application, then they
7 have another hearing, the same human beings making the
8 decision with a record that is less persuasive than the
9 first time, and coming to a different conclusion, it
10 looks as though they're just trying to sidestep your
11 decision and that the fix can occur without some
12 articulation of the basis of the record.

13 You know one of the really troublesome things
14 that our procedures put people into and lawyers into is
15 that there really isn't an opportunity for the
16 decisions of administrative agencies or legislative
17 agencies to be overruled by the court in kind. In
18 other words I told you the last time I was here and I
19 will reiterate today, you can't grant the license to
20 the Assad Company. But what you can do and what I'm
21 asking you to do is you can assure that the Assad
22 family gets a due process consideration of its
23 application before this legislative body.

24 And I'm saying to you that we didn't get
25 that, and our only remedy is to come back to you and

1 say if you compare side by side the record that existed
2 when they recommended approval with the record that
3 existed when they recommended denial, you're going to
4 find that there is not a difference that one can
5 recognize to justify the different conclusion.

6 And so why did they reach a different
7 conclusion? And I'm suggesting to you they reached a
8 different conclusion because you told them that the
9 record the first time was flawed. It was flawed
10 because they reacted to the local alderman's
11 recommendation rather than the support in the record.
12 And here we don't have anybody saying what they said
13 that time that led to Your Honor's decision, but their
14 action essentially echoes that. There's nothing other
15 than the local alderman support for denial that
16 supports their denial.

17 And the only remedy that I can see is for you
18 in this case, with this fact situation which is very
19 unique, to say I am concerned by the fact it's -- side
20 by side looking at the factual record that was brought
21 to me last year and this year, there doesn't look to be
22 a basis for a different result; and so I need to have
23 something more than just your articulated reason. I
24 need to have you demonstrate somehow what findings you
25 make from the record that support the different

1 decision you reached and absent that we're in the fix.

2 THE COURT: Basically you're saying the first
3 time they unanimously voted approval.

4 MR. GIMBEL: Yes.

5 THE COURT: I send it back. It's 4-1 I think
6 against the second time.

7 MR. GIMBEL: Correct.

8 THE COURT: They use the catch-all overdue
9 concentration, but they never explain or distinguish
10 between the first hearing where they approved it and
11 the second one because the undue concentration was also
12 discussed during the first hearing.

13 MR. GIMBEL: That's correct.

14 THE COURT: And basically it's a wink and a
15 nod. I don't like the word fix. That's a Chicago
16 term. There's a wink and a nod here, and they just
17 basically said we'll jump on that.

18 Ms. Temple, what about that? What bothers
19 the court is the fact that the first hearing there was
20 more evidence offered by Alderman DiMotto, there was
21 more opposition, there was evidence -- the same
22 evidence of the number of Class A licenses that were in
23 the area, and in spite of that they voted unanimously
24 to approve it. After I send it back, it's 4-1 against.
25 And there's no question since I saw both tapes that

1 less evidence was offered, but they're not required to
2 bring the same witness back I understand.

3 But again suddenly the -- they say
4 concentration is the problem here. It was discussed
5 the first time. Shouldn't they be required to explain
6 why concentration didn't bother them the first time and
7 then when they heard it the second time the over
8 concentration of premises suddenly bothered them? I
9 mean it wasn't -- it didn't bother them the first time
10 and suddenly it's used as a reason the second time.

11 MS. TEMPLE: I think that's the substance of
12 Mr. Gimbel's argument, Judge, and I can't answer for
13 the minds of the Committee members or the Common
14 Council members. I don't think the court can either,
15 and I see that as the problem.

16 THE COURT: Right. I don't want to
17 substitute -- and I don't think it's the law that I can
18 substitute my judgment for their judgment and my
19 evaluation for their evaluation. But what bothers
20 Mr. Gimbel is -- I used the catch twenty-two phrase the
21 first time which the Committee -- the problem the
22 Committee put itself in is voting based upon
23 substantial evidence against licensing -- 4-0 I think
24 it was to approve it or 5-0. I don't remember how many
25 people were there the first time. It was unanimous.

1 And then basically it's revisited and it's 4-1 against,
2 and we have the local alderman who's there who
3 Mr. Gimbel said was acting as a prosecutor, and I think
4 it's evident from the videotape he was. But it's his
5 district. I think he has a right to do so. But
6 suddenly again it's 4-1 against.

7 He said to me read between the lines, Judge.
8 It's substance, not form. You know, they're sort of
9 mouthing the right words, but they never explain the
10 change of heart. You know, they use over concentration
11 and then moved on. Ms. Cameron -- I think that was the
12 only vote, was Ms. Cameron --

13 MR. GIMBEL: She was consistent, yes.

14 THE COURT: Right, and she discussed some
15 problems she had with I think Alderman Gordon's vote
16 but said she'll discuss it with him afterwards which I
17 found a little bizarre. If there was a disagreement or
18 she didn't understand why he switched his vote, she
19 should have discussed it on the record. But that's not
20 part of the decision here. That the thing that bothers
21 Mr. Gimbel and sort of bothers the court.

22 But I don't want to keep sending it back and
23 say explain the difference. I mean it -- you know, the
24 City can argue Mr. Gimbel is trying to wear down the
25 Licensing Committee and eventually, you know, I think

1 the Committee can basically hear the same facts if not
2 less as pointed out by Mr. Gimbel -- or less witnesses,
3 and then change its vote and never explain why it
4 changed its vote.

5 I looked at the tape and I thought Alderman
6 Herron and Gordon spoke well in talking about
7 concentration, but against that was before -- in the
8 first time when they voted for it they never explained
9 on the tape or the transcript what changed their mind
10 except -- and we can't ignore the hearing before the
11 full counsel where basically everything was turned on
12 its head and they voted against it, and they weren't
13 allowed to -- at that time that's when I think fatal
14 statements were made that we have to support our
15 local -- the local alderman, i.e. aldermanic privilege
16 where a local alderperson can in fact veto certain
17 things including licensing in his local district.

18 It's -- and Mr. Schrimpf agreed that a local
19 alderman can't invoke aldermanic privilege to block
20 licensing, so it was sent back.

21 So the court first of all agrees with the
22 City that it can't substitute my judgment for the
23 judgment of the Committee. I agree the Committee does
24 not have to articulate every single reason in support
25 of their decision. I agree that the Committee also --

1 or the -- does not -- or the people opposed to it do
2 not have to bring every single witness who was at the
3 first hearing back or have overwhelming evidence or
4 match the number of witnesses.

5 But this record still bothers me from a legal
6 standpoint in that it seems that the alderpersons said
7 the right thing for the second hearing. If this was an
8 original hearing Mr. Gimbel would be in and out of here
9 in thirty seconds. I would just say you had your
10 hearing, so be it, you're out, I'm not substituting my
11 judgment.

12 But as he points out, we have a record here,
13 and they're sort of stuck, the alderpersons -- the
14 Committee specifically, obviously -- the Committee is
15 stuck with the statements they made at the first
16 hearing. They're sort of stuck with their vote. And
17 they just can't turn on a dime with a, quote, wink and
18 a nod based upon Alderman DiMotto's objections, and
19 that's what it looked like to the court.

20 And Mr. Gimbel sort of hits it -- the nail on
21 the head when he talks about the nexus -- the lack of a
22 nexus between the materials presented to the Committee
23 and its decision. It was like they were going through
24 a charade where Alderman DiMotto and others were going
25 to be there, and here's enough for you to change your

1 decision, but never said -- what bothers the court, and
2 I find that the decision did not reflect reason or give
3 sufficient reasons why -- and I think they're required
4 to, once they voted against it the first time, and
5 because of the fact that it's all part of one package.
6 This is not a hearing three years apart. These were --
7 this is within the last -- when was the first hearing?

8 MR. GIMBEL: Last year.

9 THE COURT: Last year. It's all within a
10 year, so it's not the three year rule.

11 The court finds that because of the lack of
12 the nexus between the materials presented to the
13 Committee and its decision and the fact the Committee
14 did not explain what -- why they changed their vote
15 between the first time and the second time, that again
16 the Committee has denied the petitioners due process of
17 the law.

18 I find there are inconsistency between the
19 first and second proceedings, and the court is
20 remanding this back to the Committee again with the
21 order that -- and I don't know if additional material
22 has to be presented, and we'll discuss that. What I'm
23 sending it back to the Committee for, a decision based
24 upon the facts from the first -- I think they have a
25 right to consider the testimony from witnesses and the

1 charts and diagrams from the first and second hearing,
2 and I think they're required -- and I'm going to order
3 them to explain the difference between the votes the
4 first and second time to make sure that this is not, to
5 use Mr. Gimbel's term, not my term, a Chicago fix, and
6 I don't want that in any order.

7 MR. GIMBEL: No. No.

8 THE COURT: But to explain the inconsistency
9 here. And I'm doing this because we don't want this to
10 happen in the future. And I'm ordering again them to
11 explain their denials. And I think they're required to
12 explain the differences or the reason they changed
13 their mind from the first hearing to the second
14 hearing. It was like: Well, the court -- what bothers
15 me is like the court's reversed us because of the
16 finding basically from the court that you were bound to
17 pressure from Alderman DiMotto. Okay, fine, we'll just
18 say it the other way. We'll just say, quote, the right
19 things, fill in the forms, and it's substance over
20 form; and I think they followed the form but not the
21 substance.

22 So the court's remanding this back; however I
23 think eventually, I don't know if -- as I've explained
24 to Mr. Gimbel, he keeps winning the battles but
25 eventually I don't know if he'll ever win the war. I

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don't know if this Committee will ever grant them a Class A license based upon what has happened here. I think there's probably going to be some anger here, and they have to make a reasoned and rationale choice again.

And I'm emphasizing it the third time, I'm not substituting my judgment here. If I was exercising my judgment I would deny it, but that is just based on personal opinions of too many Class A licenses in the City of Milwaukee.

So the court is granting the motion here and is remanding this back to the Licensing -- the Utilities and Licensing Committee. Mr. Gimbel, prepare an order to that effect.

MR. GIMBEL: Thank you very much, Judge.

MS. TEMPLE: Thank you, Judge.

(Whereupon the proceedings were concluded.)

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