

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 23

GRANDVIEW WINDOWS
OF WISCONSIN, INC.,

Petitioner,

v.

Case No.: 06 CV 5015

CITY OF MILWAUKEE,

Respondent.

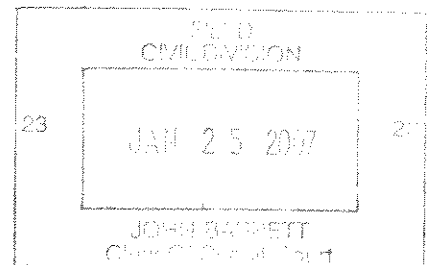
DECISION AND FINAL ORDER

INTRODUCTION

Petitioner Grand View Windows of Wisconsin, Inc. filed a petition for a writ of certiorari requesting review and relief by this court from a decision issued by the City of Milwaukee. On April 25, 2006, the Licenses Committee of the Milwaukee Common Council recommended denial of a home improvement contractor's license to James Milner as an agent of Grand View Windows of Wisconsin, Inc. On May 9, 2006, the Milwaukee Common Council adopted that recommendation, and denied the license. This court issued a writ of certiorari granting review of this matter on May 30, 2006.

Petitioner moved to strike portions of the record. On September 13, 2006, this court determined that the record was properly submitted and established a briefing schedule.

All briefs have been filed as of November 3, 2006.



BACKGROUND

The City of Milwaukee requires that home improvement contractors obtain a home improvement license before engaging in home improvement contracting within the city. Mil. City Ord. 95-14-2-a.

In the spring of 2005, James Milner appeared on two occasions before the City of Milwaukee Licenses Committee (Committee) in support of a home improvement license application by petitioner Grand View Windows and Siding, Inc., (Grand View Siding). R. Ex. 98 and 99.* On April 19, 2005, James Milner testified before the Committee that he was the sole owner of the corporation, Grand View Siding. R. Ex. 98, p. 5. However, a dissatisfied customer testified that that Joseph Milner, James's son, was president of Grand View Siding and was a co-owner with his father. *Id.* at p. 14. The Committee also heard testimony that the son, Joseph, had demanded payment for an incomplete project. *Id.* at pp. 18-19. The Committee determined that Grand View Siding had violated City of Milwaukee ordinances by conducting home improvement work in Milwaukee without a license, and had, at the initial hearing, misrepresented the number of times it had performed unlicensed work. Ultimately, the Committee voted to deny the license to Grand View Siding. *Id.* at pp. 24, 31-34.

On June 21, 2005, James Milner again appeared before the Licenses Committee requesting a license, this time on behalf of his new company, New Vinyl Windows, Inc. R. Ex. 97, p. 1. After hearing testimony regarding James Milner's work, the Licenses Committee recommended that he be granted a license. *Id.* at p. 24. This recommendation was premised on the understanding that the company was independent

* References to "R. Ex." are to the record as transmitted to this court via the Affidavit of Rebecca Barron.

from Joseph Milner, and would not operate as a conduit for home improvement projects in the City of Milwaukee for his son's business, Grand View Siding. *Id.* at pp. 22-23.

Almost a year later, on April 25, 2006, James Milner appeared before the Licenses Committee to request a home improvement license for a new company, Grand View Windows of Wisconsin (Grand View Wisconsin). R. Ex. 118, p. 1. Counsel for Grand View Wisconsin and Milner explained that Grand View Siding (the company that had been denied a license) advertises in southeastern Wisconsin. *Id.* at p. 6. However, since Grand View Siding is not licensed in Milwaukee, it cannot do home improvement work in the City of Milwaukee. Grand View Wisconsin outlined a projected course of conduct whereby Milwaukee customers who sought Grand View Siding could be referred to Grand View Wisconsin, which would be licensed to do that work. In other words, James Milner wanted to utilize the good will and advertising of Grand View Siding for Grand View Wisconsin. *Id.* at pp. 6-7.

The Milners did not want to refer Milwaukee customers to New Vinyl (the licensed company), because they wanted not to have to explain to customers that Grand View Siding is not licensed in Milwaukee. *Id.* at p. 8. The Committee was told that there was no kickback or internal relationship between the two companies that could lead to abuse, and that James Milner had no involvement in his son's business, Grand View Siding. *Id.* at pp. 8, 11.

An aldermanic legislative aide speaking on behalf of constituents indicated that Grand View Siding, Joseph Milner's company, had used strong arm tactics to obtain payment for incomplete, unsatisfactory work. *Id.* at p. 9. The aide also stated that the customers had complained that Grand View Siding had threatened to sue or to place a

lien on customers in order to get paid on incomplete work. Customers paid Grand View Siding though they felt the work was not finished. *Id.* at pp. 9, 13. According to what the aide had learned, James Milner had inspected Grand View Siding's work. James Milner admitted that his son had asked him to assist, and that he, James, had inspected property with customers to address their complaints and to determine how to fix poor quality work. *Id.* at p. 12. Contrary to the testimony that subcontractors do not work for both James and Joseph Milner, the Committee learned that some employees have worked for both companies. *Id.* at p. 19. The Committee also heard testimony that James Milner, who at one time was the sole owner and an agent of Grand View Siding, retained a 10% ownership interest in Grand View Siding. *Id.* at p. 4; R. Ex. 97, p. 23.

The Committee expressed concern that licensing this new company would cause customer confusion. A customer calling Grand View Siding for work in Milwaukee would be transferred to Grand View Wisconsin, a supposedly separate company. Given the similarity in names and other factors, the customer likely would think that he or she was dealing with only one company (not a mistaken assumption, but rather the intended result).

Committee members expressed a variety of concerns. They stated that they were confused about the differences between the two Grand View companies, and that confusion about the character of these companies likely would make it difficult for the City's Common Council to inspect and enforce building codes within the City of Milwaukee. James Milner's ownership interest in Grand View Siding, his involvement in its projects, created substantial doubt that the two Grand View companies would remain separate entities.

In sum, the Committee saw the new company, and efforts to obtain for it a home improvement license, as a ploy to circumvent its earlier denial of a license to Grand View Siding. By creating Grand View Windows of Wisconsin, and then operating under the reduced name Grand View, the Milners could avoid the negative consequences of the earlier denial. Not surprisingly, a motion to deny Grand View Windows a home improvement license passed. *Id.* at pp. 20-22. On May 9, 2006, the Common Council voted to deny a license to James Milner as agent of Grand View Windows of Wisconsin. This is a review of these determinations.

Standard of review

A certiorari review is narrow in scope and limited to the record made before the Board. *Old Tuckaway Assoc. Ltd. P'Ship v. City of Greenfield*, 180 Wis. 2d 254, 273 (Wis. Ct. App. 1993). The reviewing court is limited to determining four issues: (1) whether the board acted within its jurisdiction and authority; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable; and (4) whether the evidence was such that the board might reasonably make the determination it did. *Id.* In considering whether the council's decision might reasonably have been made on the evidence, the reviewing court can inquire only whether there is substantial evidence to support the decision. *State ex rel. Smith v. City of Oak Creek*, 131 Wis. 2d 451, 455 (Wis. Ct. App. 1986). Substantial evidence is relevant, credible and probative evidence upon which a reasonable person could reach a conclusion. *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54 (1983)

Analysis

Petitioner Grand View Wisconsin presents two arguments. First, Grand View Wisconsin claims that the Milwaukee ordinance requiring home improvement contractors to be licensed to perform work in the City of Milwaukee is anticompetitive, and void pursuant to state law. Second, Grand View Wisconsin contends that the decision to deny it a home improvement license was unreasonable. Petitioner argues that the Licensing Committee erroneously concluded that Grand View Windows' name constituted an unfair trade practice. Both arguments lack merit.

Grand View Wisconsin claims that the record of this case is so limited that the License Committee's earlier experiences with the Milners and their companies are outside the record. On August 28, 2006, this court ruled on this argument, determining that the record reveals that the proceedings below involved consideration of the Milners' earlier efforts to obtain home improvement licenses. In essence, the decisions below with respect to subterfuge are related to the Milners' earlier failures to obtain home improvement licenses. This court noted that while it is impermissible to expand the record on certiorari, petitioner's view of what constitutes the record was unduly narrow. Respondent's earlier experiences with the Milners and their companies were properly considered, and made a part of the record. Indeed, the record reveals substantial evidence that the earlier denials of home improvement licenses prompted this latest incarnation of Grand View.

Petitioner asks this Court to invalidate the Milwaukee City ordinance that creates a regulatory scheme for home improvement contractors by finding that it is conflict with Wis. Stat. § 133.01 because it limits legitimate competition; and Wis. Stat. § 134.03

because it prevents James Milner from performing lawful work.. Petitioner has failed to show that the regulatory scheme is invalid, and must therefore decline to invalidate the ordinance.

Section 133.01 provides that the intent of the *Trusts and Monopolies* section of the Wisconsin statutes is to promote fair competition and to prevent the formation of monopolies. The purpose of the city ordinance is not to prevent competition, but to protect the public. In fact, the licensing ordinance operates by default to grant licenses to applicants. While Grand View Wisconsin is disappointed by the Milwaukee Common Council's denial, it has failed to demonstrate that the ordinance impermissibly disfavors fair competition. For a court to invalidate a municipalities' ordinance, the illegality of the municipalities' ordinance must be clear. *Highway 100 Auto Wreckers, Inc. v. City of West Allis*, 6 Wis. 2d 637, 643 (1959). "It is an elementary rule of construction that an ordinance will be held constitutional unless the contrary is shown beyond a reasonable doubt and the ordinance is entitled to every presumption in favor of its validity." *Id.* at p.646.

The home improvement licensing ordinance was enacted to protect the welfare of the public of the City of Milwaukee, reserved by the state legislature has expressly reserved for municipalities. Wis. Stat. 62.11(5) states:

Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall

be in addition to all other grants, and shall be limited only by express language.

This statutory language envisions municipal authority to protect the public; the City of Milwaukee has done this by way of the challenged ordinance. From a practical perspective, Grand View Wisconsin's argument is factually weak in that New Vinyl Windows is licensed to work and compete in the Milwaukee home improvement market.

In addition, Grand View Wisconsin argues that the ordinance prevents a person from performing lawful work through coercion and intimidation. Comparing the city to an unruly 'union boss', Grand View Wisconsin contends that Milwaukee has violated Wis. Stat. § 134.03. This statute provides that "any person who by threats, intimidation, force or coercion of any kind shall hinder or prevent any other person from engaging in or continuing in any lawful work or employment" is liable for a fine and possible jail time. Grand View Wisconsin's argument here has no merit. James Milner, New Vinyl's supposed principal, has not been denied the ability to perform lawful work. The city ordinance operates in such a way that applicants, presuming that they have clean background checks and have not violated any law that relates to the home improvement business, are automatically granted a license. Mil. City Ord. 95-14-6. Grand View Wisconsin has not established that the city ordinance prevents the pursuit of lawful, competent work.

The City of Milwaukee requires that home improvement contractors be licensed by the city to perform home improvement projects within the city. Mil. City Ord. 95-14-2-a. If there is a chance of a denial of a license, the Licensing Committee will hold a hearing to take probative evidence to determine if the committee should recommend to

the Common Council that a license should be or not be granted to an applicant. *Id.* at 2-

b. Probative evidence may be presented on the following subjects:

c-1-a. Whether the applicant is of good professional character or has been charged with or convicted of any felony, misdemeanor, municipal offense or other offense, the circumstances of which substantially relate to the particular activity for which the license is issued.

c-1-b. Whether the applicant has violated any of the required and prohibited practices set forth in this section.

c-1-c. Whether the applicant's previous license has not been renewed, suspended or revoked for any reason whatsoever.

c-1-d. Whether there is an inability of the applicant to substantially understand the required business regulations set forth in this section.

c-1-e. Whether the applicant has failed in the past to act in accordance with this section.

c-1-f. Whether the applicant has been issued a warning letter or had the imposition of administrative sanctions by the Wisconsin department of agriculture, trade and consumer protection.

c-1-g. Whether a judgment has been rendered against the applicant by any court of competent jurisdiction regarding violations of ordinances of the city or laws of the state of Wisconsin the nature of which substantially relate to the particular activity for which the license is issued, or a judgment has been rendered against the applicant regarding improper work.

c-1-h. Any other factors which reasonably relate to the public health, safety and welfare.

The Committee's recommendation to deny the license was founded on a concern for public welfare, and the likelihood of confusion by customers and regulators. It reasonably concluded that the closeness of names and other factors, such as the intertwined relationships, would make it difficult for the public to discern a distinction between the two entities. Indeed, at the hearing and in the briefs to this court, Grand

View Wisconsin admitted that this was the reason for the creation of Grand View

Wisconsin:

Jim and Joseph Milner are not intending to mislead the public into believing they are dealing with a different establishment. To the direct contrary, the Milners are intending to lead the public into believing they are dealing with the same Grand View Windows' product, service and good will.

Brief of Plaintiff on Certiorari, p. 17. This is precisely the concern that animates the denial--that the two separate companies, one of which had been denied a license, would masquerade as one entity. The Committee was concerned that this confusion would mislead the public, and this reasoning is supported by substantial evidence.

Furthermore, the Committee determined that the Milners were attempting to circumvent the authority of the Common Council to deny Grand View Siding a license by creating a new company, Grand View Wisconsin, whose name conveniently could, and would, be reduced in common parlance to "Grand View", and would function as an interchangeable moniker for both companies. At the hearing, James Milner testified that there was no kickback scheme and that these two companies would be run separately. However, the record in its totality supports a conclusion that the two companies, if not two halves of one united whole, are hardly distinct. The desire for companies so similar in appearance that business could flow from one to another seamlessly is at core of the existence of Grand View Wisconsin. This notion is supported not only by the closeness in names and the familial relationship between principals, but also by evidence regarding how the businesses operated, who they employed, how disputes with customers were resolved, and intertwined ownership interests. The Committee's finding that James Milner was attempting to circumvent its efforts to protect the public is supported by

substantial evidence. In light of this, this court cannot but conclude that the Common Council, in adopting the recommendation, acted within its authority.

CONCLUSION

Based on review of the record, briefs and arguments of the parties, this Court finds that the Common Council's decision is supported by substantial evidence.

Accordingly, IT IS ORDERED that the decision of the Common Council is affirmed.

Date this 25th day of January, 2007, in Milwaukee, Wisconsin.

BY THE COURT:

/S/ELSA C. LAMELAS

Elsa C. Lamelas
Circuit Judge