

HORACIO SANCHEZ

d/b/a El Rodeo,

Case No. 14CV3515

Petitioner,

v.

CITY OF MILWAUKEE and
JAMES R. OWCZARSKI,Respondents.

JUDICIAL REVIEW BRIEF OF RESPONDENTS

El Rodeo Bar located at 1586 South Pearl Street, Milwaukee, Wisconsin was a Class “B” Tavern and Public Entertainment Premises licensed by the City of Milwaukee in 2013-2014. On or about March 18, 2014, Milwaukee Chief of Police Edward Flynn, by Police District 2 commander, Captain Alfonso Morales, signed sworn charges seeking the revocation of El Rodeo licenses pursuant to Wis. Stat. § 125.12(2)(ag)2 and Milwaukee Code of Ordinances (MCO) §§ 85-4-4, 90-12 and 108-11. The factual basis for the sworn charges seeking revocation of the licenses included a July 20, 2013 shooting of patrons after they had left the premises, the licensee’s keeping the tavern open after hours, repeated violations of the Public Entertainment Premise license requirements, the licensee’s admission of violations of the Public Entertainment License requirements and concession to the local alderperson that such violations would cease, continued Public Entertainment Premises license violations of February 8, 2014 as well as the cocaine found both in the premise and on the licensee’s person by police on February 8, 2014. (See, City Clerk License Division (“CCLD”) certified record of revocation proceedings at Bates Stamp pgs. 4-9). On or about March 31, 2014, the Milwaukee City Clerk issued a summons to

the licensee requesting his presence at a revocation hearing scheduled before the Common Council Licenses Committee on April 8, 2014. (*See*, City Clerk License Division (“CCLD”) certified record of revocation proceedings at Bate Stamp pgs. 2-26).

An evidentiary hearing was conducted by the Common Council Licenses Committee on April 8, 2014, which resulted in the issuance of findings of fact and conclusions of law dated April 10, 2014. (*See*, CCLD record at Bate Stamp pgs. 34-38). These findings of fact and conclusions of law formed the basis for the recommendation to the Common Council by the licenses committee to revoke the licenses based on evidence heard at the April 8, 2014 hearing. Written objections were filed with the Common Council. (CCLD record at Bate Stamp pg. 39). On April 22, 2014, having reviewed the Licenses Committee findings of fact and conclusions of law, as well as the licensee’s objections to same, and hearing arguments of counsel, the Common Council adopted the licenses committee recommendation to revoke said licenses on April 22, 2014. (CCLD record at Bate Stamp pg. 40-42).

The petitioner then filed this case on April 25, 2014 as an appeal to the circuit court for judicial review of the City of Milwaukee’s discretionary determination to revoke petitioner’s Class “B” Tavern and Public Entertainment Premises licenses. The license revocation process of petitioner’s Class “B” Tavern license is governed by Wis. Stat. §125.12 and Milwaukee Code of Ordinances (MCO) §90-12. The revocation of petitioner’s municipal Public Entertainment Premises license is governed by MCO §108-11 and §85-4-4.

A certified copy of the City of Milwaukee City Clerk Licenses Division (CCLD) record of the license revocation proceedings was previously filed with the circuit court on May 9, 2014; a copy of the License Committee hearing transcript was filed with the circuit court on or about

May 20, 2014 and the transcript of the Common Council meeting was filed with the court on or about June 3, 2014.

I. STANDARD OF REVIEW

Wisconsin Statutes § 125.12(2)(d) authorizes judicial review of an action by a municipal governing body to suspend, revoke, renew or not renew an alcohol beverage license. The City of Milwaukee's decision to revoke the Tavern and Public Entertainment Premises licenses of petitioner Horacio Sanchez for El Rodeo is entitled to a presumption of correctness and validity. *See generally, Nowell v. City of Wausau*, 2013 WI 88, ¶ 24, 351 Wis. 2d 1 (citation omitted). Judicial review of that decision is by *certiorari*, *Nowell* at ¶ 48, and is governed by Wis. Stat. § 125.12(2)(d) (for the tavern license) and Wis. Stat. §§ 68.02(2) and 68.13 (for municipal Public Entertainment Premises license).

Judicial *certiorari* review of the City of Milwaukee's discretionary determination to revoke El Rodeo's licenses is limited to the following inquiry:

- (1) Whether the municipality kept within its jurisdiction;
- (2) Whether it acted according to law;
- (3) Whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and,
- (4) Whether the evidence was such that it might reasonably make the order or determination in question.

Nowell v. City of Wausau, 2013 WI 88, ¶ 48, 351 Wis. 2d 1 (citation omitted).

Judicial review of the City of Milwaukee's municipal Public Entertainment Premises MCO Chp. 108 license revocation process is likewise by *certiorari*. Wisconsin Statute §§ 68.02(2) & 68.13 permits judicial *certiorari* review of the City's decision to revoke petitioner's municipal Public Entertainment Premises license in this case. This court may affirm the decision of the City of Milwaukee, reverse, or remand for further proceedings. Wis. Stat. § 68.13(1).

Wisconsin courts have repeatedly stated that on *certiorari* review, there is a presumption of correctness and validity to a municipality's decision. *Nowell v. City of Wausau*, 2013 WI 88, ¶ 24, 351 Wis. 2d 1 (citation omitted); *Lamar Central Outdoor, Inc. v. Bd. of Zoning Appeals*, 284 Wis. 2d 1, ¶ 16, 700 N.W.2d 87, 92; *State ex rel. Ziervogel v. Wash. Cnty. Bd. of Adjustment*, 2004 WI 23, ¶ 13, 269 Wis. 2d 549, 559, 676 N.W.2d 401, 405; *Herman v. Cnty. of Walworth*, 2005 WI App 185, ¶ 9, 286 Wis. 2d 449, 455, 703 N.W.2d 720, 723; *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 48, 332 Wis. 2d 3, 28, 796 N.W.2d 411, 423. “The presumption of correctness and validity is appropriate because it recognizes that locally elected officials are especially attuned to local concerns.” *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 51, 332 Wis. 2d 3, 29, 796 N.W.2d 411, 424. The petitioner bears the burden to overcome the presumption of correctness of the Common Council’s decision. *Id.* at ¶ 50.

A *certiorari* court may not substitute its view of the evidence for that of the municipality. *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 53, 332 Wis. 2d 3, 29-30, 796 N.W.2d 411, 424. When evaluating the weight of the evidence on *certiorari* review, a court will affirm the agency's view of the evidence if “reasonable minds could arrive at the same conclusion” reached by the agency. *Jackson v. Buchler*, 2010 WI 135 ¶ 39, 330 Wis. 2d 279, 295, 793 N.W.2d 826, 834. *See also*, *State ex rel. Mitchell Aero, Inc. v. Board of Review of the City of Milwaukee*, 74 Wis. 2d 268, 281, 282, 246 N.W.2d 521, 528 (1976); *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 24, 498 N.W.2d 842 (1993). The term “acted according to law” found in the second consideration has been interpreted to mean the common law concepts of due process and fair play. *Marris* at 24.

An administrative agency engages in an arbitrary and capricious action “when it can be said that such action is unreasonable or does not have a rational basis.” *State ex rel. Smits v. City of DePere*, 104 Wis. 2d 26, 37, 310 N.W.2d 607, 612 (1981). In *Smits*, the supreme court further

clarified arbitrary action as “the result of an unconsidered, willful and irrational choice of conduct, and not the result of ‘winnowing and sifting’ process.” *Id.* at 37-38.

Thus, the action of the Milwaukee Common Council should be upheld if it has a rational basis and is supported by substantial evidence in the record. “Substantial evidence” in support of an agency’s conclusion does not mean a preponderance of the evidence test, but whether, taking into consideration all of the evidence in the record, “reasonable minds could arrive at the same conclusion.” *Madison Gas and Electric Company v. Public Service Commission*, 109 Wis. 2d 127, 133, 325 N.W.2d 339, 342-43 (1982). A reviewing court may not question the weight placed by the agency upon the evidence, but only may pass on the reasonableness of the agency findings. *Copeland v. Wisconsin Department of Taxation*, 16 Wis. 2d 543, 555, 114 N.W.2d 858, 864 (1962).

A reviewing *certiorari* court has three dispositional choices upon review of the record: affirm, reverse or remand for limited purposes. *State ex rel. Lomax v. Leik*, 154 Wis. 2d 735, 741, 454 N.W.2d 18, 21 (Ct. App. 1990). That limited purpose may include the direction to take additional evidence as long as it does not offend the considerations of due process or fair play. *Id.*

II. THE CITY OF MILWAUKEE’S RECOVATION OF PETITIONER’S CLASS “B” TAVERN AND PUBLIC ENTERTAINMENT PREMESES LICENSES.

Based upon the testimony heard and evidence received at the license revocation hearing on April 8, 2014, the Licenses Committee made the following findings of fact and conclusions of law in its committee report to the Common Council regarding El Rodeo’s tavern and public entertainment premises licenses renewal application. 9CCLD record, Licenses Committee Report of Findings of Fact, Conclusions of Law, Bates-Stamp pp. 34-38):

- A. On July 20, 2013 at 2:54 a.m. Milwaukee police district #2 was advised of a shooting at South 17th Street and West Lapham Street, The first officers on the scene discovered a shooting had taken place at 1733 West Arrow Street. The investigation revealed the victim had been at El Rodeo Bar until bar close.

When the business closed, the victim exited the bar and was hanging out with some friends on the west side of the building. An unknown subject fired shots into the air and towards the group the victim was standing with. The victim was shot in the chest and the leg. The rest of the crowd “jumped” the person they believed to be the shooter. Milwaukee police incident report was filed.

- B. On August 9, 2013 at 12:50 p.m. a Milwaukee police officer met the applicant at 1586 South Pearl Street (El Rodeo Bar) regarding the shooting that took place on July 20, 2013. The applicant told the officer that he was aware of the shooting from news reports the next day, but he had no additional information regarding the incident.
- C. On October 27, 2013 at 2:49 am. Milwaukee police responded to a tavern violation at 1586 South Pearl Street (El Rodeo Bar). Officers initially had a difficult time entering the business because the door was locked and no one inside the business came to the door. Once officers entered the business, they discovered the bar was open because the applicant believed that daylight savings time had begun and it was actually only 1:49 a.m. Officers pointed out that daylight savings time began the next week, and the applicant closed for the night. No additional reports or citations were filed.
- D. On February 7, 2014 at 11:52 p.m. Milwaukee police responded to an aldermanic complaint at 1586 South Pearl Street (El Rodeo Bar). The complaint stated that the business was conducting drug sales and advertising that they would have erotic dancers, the bar does not have the appropriate License for this type of entertainment. Officers discovered two females inside the business that were wearing only an undergarment and stockings. Initially, officers spoke to the applicant’s wife, Estella J. Hernandez, who told officers she was not aware that the business’s existing public entertainment license did not cover such an event and advised officers that the applicant was inside the business and that they should speak to him. After speaking with the applicant, officers conducted a licensed premise check. During this check, near a trash can officers discovered women’s undergarments belonging to one of the previously mentioned females. Near these undergarments was an unclaimed jacket that had three corner cut baggies containing cocaine. In the trash can officers observed two corner cut plastic baggies that contained a white powder substance that the officer believed to be cocaine. A consent search of the applicant uncovered a folded \$1.00 bill which contained a white powder substance the officer believed to be cocaine. The applicant told officers it was cocaine and that it was for his personal use. The applicant was arrested for Possession of Cocaine/Coca §961.41 (3g)(c) and cited for Public Entertainment Premises-License Required.

Charge	1:	Possession of Cocaine/Coca
	2:	Public Entertainment Premises-License Required
Finding:	1:	Due for Plea/Sentencing Hearing 05/06/2014 8:30 am

- E. On February 27, 2014 at 1:12 p.m. Milwaukee police Captain Alfonso Morales met with Estella Hernandez in his office at Milwaukee police district #2 at Ms. Hernandez's request. Ms. Hernandez explained that she is the owner of the building at 1586 South Pearl Street (Rodeo Tavern), but the father of her children is the business's licensee. During this meeting, Captain Morales answered questions Ms. Hernandez had regarding the meaning of being categorized a drug house, and if it were legal for a police dog to be brought into a tavern without a warrant, Ms. Hernandez also asked what she could do to "soften the blow." Captain Morales explained that Ms. Hernandez needed to follow the steps provided in the letter sent to her by the police department and that he could not help her "soften the blow." The meeting ended at 1:28 p.m.
- F. Estella Hernandez, 2750 South 13th Street is the significant other of the licensee. She is aware of an individual named Alfonso from a promotion company called All Star Talent Management. The promoter offers exotic dancing and "shot girls". The promoter was hired to provide shot girls for the establishment, not exotic dancers. She stated the dancers were wearing boy shorts, fishnet stockings, and bikini tops. She stated that police did not speak to her for several weeks regarding the July 20th shooting. She closed the business that evening with a friend. She stated that she never told anyone that she worked for the sheriff or that she would get anyone deported.
- G. Sally Perez, 1659 South 6th Street stated that she placed the cocaine in the licensee's jacket. She stated that she told a police officer that it was her cocaine.
- H. Alderman Jose Perez stated he spoke with Ms. Hernandez on January 14th. He advised her to retrieve a copy of the license file to determine if there were any discrepancies. He was made aware of a flyer advertising adult entertainment for the establishment. On January 29, 2014 he received a phone call regarding cocaine at the establishment. The complainant stated that the licensee's wife told people that she works for the sheriff's department and could see who called to complain about the establishment.
- I. Officer Keith Miller testified that he visited the establishment on February 8, 2014. He observed two females in undergarments dancing on the bar. He did not observe any exposed genitalia. He spoke with the dancers, Lakeyda Perkins and Amanda Enea, and the promoter, Alfonso Mene. He spoke with the licensee and his spouse that evening and advised them that adult entertainment is not an approved form of entertainment on the Public Entertainment Premises license, He continued the premise check after the licensee stated there was nothing illegal in the establishment. He located two

white baggies that later tested positive for cocaine. The licensee then gave permission to search him. A dollar bill with a white powdered substance was found on the licensee and he stated to police that it was cocaine. Three baggies of cocaine were also found in a jacket in the premises.

- J. Captain Alfonso Morales testified to an incident where a group of patrons who had left the establishment were approached by someone on a bicycle. The confrontation resulted in a shooting. The police department was later unable to locate the victim, despite the fact that he previously had been a frequent patron of the establishment. They reached out to Mr. Sanchez, but he did not assist in the search. He later received a complaint forwarded from the alderman's office about exotic dancing, cocaine, and a statement that a female from the establishment worked for the police and would have anyone who "snitched" be deported. On a later date, he met with Ms. Hernandez regarding issues at the establishment and she asked him how she could "soften the blow." He stated that he is concerned that drug use will bring more violence to the area. He is also concerned that the adult entertainment could lead to sex trafficking and prostitution.
- K. Officer Guadalupe Velasquez stated that Mr. Sanchez said he closed the bar the evening of July 20th with a female bartender.

Based upon the above evidence, the Licenses Committee recommended to the Common Council to revoke the petitioner's licenses. On April 22, 2014, the common council adopted the committee recommendation and revoked renew the petitioner's tavern and public entertainment license renewal licenses. [CCLD record, p. 40-42].

III. The Common Council of the City of Milwaukee lawfully and properly determined to revoke El Rodeo's tavern and public entertainment premises licenses and its process satisfies the four-prong *certiorari* review test.

1. The City of Milwaukee Common Council acted within its jurisdiction.

The Common Council of the City of Milwaukee holds the discretion and authority to revoke a municipal alcohol beverage license. Wis. Stat. § 125.5112(2)(ag)1(a) and MCO § 90-12. Under the broad sweep of the Twenty-First Amendment, states are endowed with "something more than the normal" police power in regulating the sale of liquor in the interest of public

health, safety, morals and general welfare. *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 217, 313 N.W.2d 805, 812 (1982).

When the Milwaukee Common Council considered the Sworn Charges by the Chief of Police for Revocation of a Tavern license, the Council could have revoked the license, suspended the license between 10 and 90 days, or not revoke the license. MCO § 90-12; Wis. Stat. § 125.12(2)(b). If proceedings are held before a committee of a city council pursuant to § 125.12(2)(b)3, the committee must submit a report and recommendation to the city council. If a complaint is found to be true by the municipal governing body, then the license shall be revoked or suspended as provided in § 125.12(2)(b)2. Section 125.12(2)(b)2 limits the disposition a municipal governing body may impose to a suspension of a license for not less than 10 days nor more than 90 days or revoke it.

2. The City of Milwaukee Common Council acted according to law.

Typically speaking, the continued licensure of taverns often depends on the tavern's effect on the surrounding neighborhood's peace and tranquility. Wisconsin Statutes § 125.12(2)(ag)2 states that tavern licenses may be revoked if the premises are riotous or disorderly. Milwaukee Code of Ordinances § 90-11-2-c-1-d identifies evidence of neighborhood problems due to the management or location and § 90-11-2-c-1-g identifies or any other factor which reasonable relates to the public health, safety and welfare as probative evidence concerning the nonrenewal of a tavern license. Often times, it is not behavior of the license applicant that warrants suspension or nonrenewal of the tavern license, but that of the behavior of tavern patrons at closing time. *See, Ruffalo v. Common Council of the City of Kenosha*, 38 Wis. 2d 518, 525-526, 157 N.W.2d 568 (1977). The behavior of intoxicated and loud patrons after they leave the tavern is usually the major concern to neighbors.

Wisconsin statutes authorize a municipality to revoke an alcohol beverage license for the reasons set forth in §125.12(2)(ag). For purposes of this case, this includes evidence that the licensee has violated the alcohol beverage licensing chapter of the Wisconsin Statutes or municipal regulations adopted pursuant to the state statutes and/or that the licensee keeps or maintains a “disorderly or riotous, indecent or improper house.” Wis. Stat. § 125.12(2)(ag)2; *City of Cudahy v. DeLuca*, 49 Wis. 2d 90, 93-94, 181 N.W.2d 374 (1970) [“A house the inmates of which behave so badly as to become a nuisance to the neighborhood is esteemed, at common law, a disorderly house, and so of one which is kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular neighborhood, or the passers-by...”]; *Ruffalo v. Common Council of the City of Kenosha*, 38 Wis. 2d 518, 525-526, 157 N.W.2d 568 (1977). [Disturbances happening outside of a tavern in the street may be attributed to a licensed premise in determining the continued licensure of the tavern].

Pursuant to the authorization granted by Wis. Stat. § 125.10, the City of Milwaukee has prescribed additional regulations regarding the sale of alcohol beverages in addition to the state statute requirements found in Chapter 125. The Milwaukee Code of Ordinances (MCO) Chapter 90 sets forth the liquor and tavern regulations pertinent to this case. MCO §90-12 outline the procedures for the revocation of alcohol beverage and tavern licenses.

Pertinent to the above-captioned matter, MCO § 90-12 contains the procedure the City of Milwaukee must follow in revoking or suspending a liquor license. Specifically, tavern and other liquor licenses may be revoked or suspended based on evidence presented at the hearing. Probative evidence concerning the nonrenewal of a tavern license is specifically set forth in MCO 90-12:

MCO 90-12. Revocation or Suspension of Licenses.

1. CAUSES. Any license issued under this chapter may be suspended or revoked for cause by the common council after notice to the licensee and a hearing. Such licenses shall be suspended or revoked for the following causes:

- a. The making of any material false statement in any application for a license.
- b. The conviction of the licensee, his agent, manager, operator or any other employe for keeping a gambling house or a house of prostitution or any felony related to the licensed operation.
- c. A showing that such licensee has violated any state law or city ordinance prohibiting the sale of intoxicating liquors or fermented malt beverages to underage persons, or to any person intoxicated or bordering on the state of intoxication.
- d. The violation of the provisions in ss. 90-7 through 90-10 and 90-13 through 90-31.
- e. The violation of any of the excise laws of this state.
- f. The licensed premises is operated in such a manner that it constitutes a public or private nuisance or that conduct on the licensed premises, including but not limited to loud and raucous noise, has had a substantial adverse effect upon the health, safety or convenience and prosperity of the immediate neighborhood; or
- g. If the licensee is a corporation or licensed limited partnership, the conviction of the corporate agent, officers, directors, members or any shareholder holding 20% or more of the corporation's total or voting stock, or proxies for that amount of stock, of any of the offenses enumerated in s. 125.12(2)(ag), Wis. Stats., as amended.
- h. Failure of the licensee to operate the premise in accordance with the floor plan and plan of operation submitted pursuant to s. 90-5-1-c.
- i. For any other reasonable cause which shall be in the best interests and good order of the city.

3. STATE LAW APPLICABLE. Except as hereinafter provided, the provisions of ss. 125.12(2)(ag) to (c), Wis. Stats., shall be applicable to proceedings for the suspension and revocation of all licenses granted under this chapter.

The City of Milwaukee municipal Public Entertainment Premises license is codified Milwaukee Code of Ordinances Chapter 108. Sections 108-11 and 85-4-4 set forth the procedures for the renewal and/or nonrenewal or suspension or revocation of the Public Entertainment Premise license. MCO 85-4-4 states in pertinent part:

MCO 85-4-4. Grounds for non-renewal, suspension or revocation.

The recommendations of the committee regarding the applicant shall be based on evidence presented at the hearing. Unless otherwise specified in the code, probative evidence concerning non-renewal, suspension or revocation may include evidence of:

- a. Failure of the applicant to meet municipal qualifications.

b. Pending charges against or the conviction of any felony, misdemeanor, municipal offense or other offense, the circumstances of which substantially relate to the circumstances of the particular licensed or permitted activity, by the applicant or by any employee or other agent of the applicant.

c. If the activities of the applicant involve a licensed premise, having been the source of congregations of persons which have resulted in any of the following:

c-1. Disturbance of the peace.

c-2. Illegal drug activity.

...

c-22. Any other factor which reasonably relates to the public health, safety and welfare.

The incidents documented in the Milwaukee Police Department License Investigation Unit's Synopsis Report and the pertinent MPD PA-33 Licensed Premises reports (CCLD Bates-Stamp pgs. 10-26) were properly considered. *Questions, Inc. v. City of Milwaukee, et al.*, 2011 WI App 126, ¶ 21, 336 Wis. 2d. 654, 807 N.W.2d 131. Sworn testimony from the licensee, the licensee's agent, police personnel and the alderman corroborated various items in the synopsis police report. Taken together, there was substantial evidence to support the Common Council's adoption of the Licenses Committee's factual findings relative to its recommendation for the revocation of El Rodeo's licenses. *Id.*

Petitioner's argument that because the sworn charges seeking revocation of the petitioner's licenses did not allege that the chief of police, or his designee, were residents of the City of Milwaukee, that the entire proceedings are defective. That is simply not a reasonable reading of the case law cited.

Wisconsin Statute § 125.12(1) states: "Any municipality may enact regulations incorporating any part of this chapter and may prescribe additional regulations for the sale of alcohol beverages, not in conflict with this chapter. The municipality may prescribe forfeitures or license suspension or revocation for violations of any such regulations. Regulations providing

forfeitures or license suspension or revocation must be adopted by ordinance . . .” Based upon this statutory authority, MCO § 90-12-4 permits the commencement of revocation proceedings to be instituted “upon sworn written charges made and filed with the city clerk by the chief of police.” In this case, Milwaukee Police Department Captain Alfonso Morales, Commander of Milwaukee Police District 2, executed the sworn charges by the chief of police for revocation of licenses on behalf of the chief of police. Therefore, the petitioner’s assertion that the initiation of the license revocation progress was without legal authority is without merit. *Park Six, LLC v. City of Racine*, 2012 WI App 123, 344 Wis. 2d 661, 824 N.W.2d 903, does not stand for the proposition that a resident of the municipality must be the sole source of a complaint seeking revocation of a tavern license. Rather, *Park Six* simply held that if such a revocation complaint was filed, it had to be sworn to pursuant to statute. *Id.* at. ¶¶ 10-11.

Petitioner has failed to assert any other claims to which relief by the circuit court can be granted. The City of Milwaukee’s decision to revoke the tavern and public entertainment premises licenses of Horatio Sanchez, d/b/a El Rodeo Bar, is entitled to a presumption of correctness and validity. *See, Nowell v. City of Wausau*, 2013 WI 88, ¶ 24, 351 Wis. 2d No. 1 (citation omitted). Furthermore, the extensive evidentiary record summarized in the Common Council Licenses Committee report of its findings of fact and conclusions of law, along with the evidence as described in the transcripts of the April 8, 2014 Licenses Committee hearing shows there is more than adequate evidence to support the City of Milwaukee’s decision to revoke the petitioner’s licenses.

3. The decision of the City of Milwaukee Common Council was not arbitrary or oppressive.

Revocation of the petitioner’s licenses was a rational decision based upon the evidence summarized in the Licenses Committee report of its Findings of Fact, Conclusions of Law.

An administrative agency engages in an arbitrary and capricious action “when it can be said that such action is unreasonable or does not have a rational basis.” *State ex rel. Smits v. City of DePere*, 104 Wis. 2d 26, 37, 310 N.W.2d 607, 612 (1981); *see also*, *Ruffalo*, 38 Wis. 2d at 524-525 (municipal licensing decisions are subject to judicial review only for a clear abuse of discretion or if legislative judgment is exercised capriciously or arbitrarily). In *Smits*, the supreme court clarified that arbitrary action is “the result of an unconsidered, willful and irrational choice of conduct, and not the result of ‘winnowing and sifting’ process.” *Id.* at 37-38; *see also*, *Jabs v. State Board of Personnel*, 34 Wis. 2d 245, 251, 148 N.W.2d 853, 857 (1967). (An arbitrary or capricious action was one that was so unreasonable as to be without a rational basis or the result of an unconsidered, willful or irrational choice). A licensing decision based upon an erroneous interpretation of applicable law is also arbitrary and an abuse of discretion. *State ex rel. Boroo v. Town Board of Barnes*, 10 Wis. 2d 153, 162, 102 N.W.2d 238, 243 (1960).

A circuit court may not review or second guess the motives, inducements or reasons of legislators regarding their votes on legislative matters. *Tilly v. Mitchell and Lewis Co.*, 121 Wis. 1, 98 N.W. 969, 972-973 (1904); *Ballenger, et al. v. Door County*, 131 Wis. 2d 422, 432-33, 388 N.W.2d 624, 630 (1986), *citing*, *Peterson v. National Resources Board*, 94 Wis. 2d 587, 599, 288 N.W.2d 845, 851, and, *Rosenberg v. Village of Whitefish Bay*, 199 Wis. 214, 218, 225 N.W. 838, 840 (1929) (rule applies equally to municipal ordinances as it does to state laws); *See also*, *Brown v. Lake Geneva*, 919 F.2d 1299, 1302 (7th Cir. 1990). “Neither the motives of the members nor the influences under which they acted can be shown to nullify an ordinance duly passed in legal form, within the scope of their corporate powers.” *Tilly*, 98 N.W. at 973, quoting, *McQuillin, Municipal Ordinances* § 161. Only in the case of fraud, corruption or oppression while performing an act pursuant to their duties will the motives of municipal authorities be

inquired into by courts. *State ex rel. Boroo v. Town Board of Barnes*, 10 Wis. 2d. 153, 162, 102 N.W.2d 238, 243 (1960), citing, 2 *McQuillin, Municipal Corporations*, p. 660, § 10.35.

The transcript of the April 8, 2014 hearing before the Licenses Committee regarding the police department's request to revoke the petitioner's licenses demonstrates careful consideration of the evidence before the Licenses Committee and does not suggest an arbitrary or capricious action. At the conclusion of the hearing Alderman Kovac, a Licenses Committee member, stated:

“If all the facts were: one shooting; a small amount of personal use cocaine; pushing the envelope with an outside promoter on whatever was going on in there, if that's all it as, you know, that's all serious and, frankly, the stuff with not cooperating over the shooting is that much more serious. But the lying, the bald-face lying, the, ‘I don't know what cocaine looks like.’ ‘Well, that's odd isn't it?’ ‘Oops, I have a CCAP record, I forgot.’ We can't have any faith that anything you said was credible. I mean, based on that exchange and based on several other exchanges, there's just not credibility here.” ‘Yeah, I was convicted of possession, but I didn't use it, and I still don't know what it looked like until a month ago.’ And that's just—I don't know how to describe that, but if I was a police officer trying to solve a crime, don't know if that's obstruction, but it's certainly not cooperation. So for me, the sun's already down, I guess we could go all night. But the context of how this bar manager responded along with their attorney...”

...

“The motion is for revocation of both licenses based on the police report, the police testimony, and the aldermanic testimony. And, frankly, mostly based on the testimony of the applicants themselves.

(*See*, April 8, 2014 transcript, pgs. 111-112).

As the various committee members discussed the motion, Alderman Kovac reiterated “Could I—I'm going to point out if all they were lying about, frankly, even under oath and sober, was whether or not it was their cocaine or not and they just were trying to beat a cocaine charge, that would be one thing. But mixed into this is an unsolved shooting that they didn't cooperate

with police on, and I would point out. So to me, I'm not setting a standard that anyone who comes here and lies about personal drug use will be shut down, but if you lie to the police and don't cooperate on a shooting, I guess that's my standard. Then yeah, you better watch out." (See, April 8, 2014 transcript, pgs. 115).

Committee Chairman Zielinski said: "I'm going to add, you know, to that. It's not just lying. I agree with you. If we just said that we're going to revoke this just for lying, okay, I would agree with you. But that's not the case here. We're talking about some serious stuff that happened at this bar and as triers of fact, we need to take into account the credibility of the various witnesses and the people that are testifying. And that, you know, casts a big shadow over it, you know, the credibility for me, over some serious issues." (See, April 8, 2014 transcript, pgs. 114-115).

Alderwoman Coggs stated:

"So . . . so that's not the biggest piece for me. The biggest piece for me, and I say this often, is: things may have happened, but what is being done to make sure that those things never happen again? And I've heard nothing this whole two hours of what actions are being taken to prevent drugs in the club, to prevent the situation with the dancers and the bad promoter, or anything ever again. So then you have to put that with the lies it's— I have to believe to support, you know, a license in any way, that there is a possibility or opportunity for negative things that happen to get cleaned up, to get abated, to get taken care of. I have no faith that that's going to happen in this case. In fact, I believe if we are going to give you a license back, it's probably going to get worse. So that's a problem for me. So it's less about her lying and more about I heard nothing about what you're going to do about the drugs in the club and the dancers and the whole; nothing."

(See, April 8, 2014 transcript, pgs. 115-116).

Based upon the above comments of the various committee members prior to the final vote being taken, recommending revocation of the licenses, the committee sifted through the

various forms of evidence, and relied heavily on the lack of credibility of the witnesses for the licensee in determining to recommend revocation of the licenses.

4. **The Common Council Licenses Committee Report of its Findings of Fact and Conclusions of Law, based upon witness testimony and the police synopsis report offered at the hearing, demonstrated substantial evidence that warranted the Common Council's decision to revoke El Rodeo's tavern and public entertainment premises licenses.**

The decision of the Milwaukee Common Council should be upheld if it has a rational basis and is supported by substantial evidence in the record. "Substantial evidence" in support of an agency's conclusion does not meet a preponderance of the evidence test, but whether, taking into all account of the evidence in the record, reasonable minds could arrive at the same conclusion. *Madison Gas and Electric Company v. Public Service Commission*, 109 Wis. 2d 127, 133, 325 N.W.2d 339, 342-43 (1982). A reviewing court may not question the weight placed by the agency upon the evidence, but may only pass on the reasonableness of the agency findings. *Copeland v. Wisconsin Dept. of Taxation*, 16 Wis. 2d 543, 555, 114 N.W.2d 858, 864 (1962). The agency's decision must be sustained even if an alternative, but equally reasonable view of the evidence exists. *Wisconsin Dept. of Revenue v. Lake Wisconsin Country Club*, 123 Wis. 2d 239, 242-43, 365 N.W.2d 916, 918 (Ct. App. 1985).

V. CONCLUSION

The evidentiary record before the Milwaukee Common Council, and now this court, demonstrates that the petitioner violated the licensing requirements of Wisconsin Statutes §125.12 and Milwaukee Code of Ordinances §§ 90-11-2-c and 108-11-3. The court should defer to the discretionary determination of the Milwaukee Common Council to revoke the petitioner's

Class “B” Tavern and Public Entertainment Premises licenses. The City of Milwaukee therefore respectfully requests the court to dismiss this case with prejudice and to assess statutory costs.

Dated at Milwaukee, Wisconsin this 5th day of June, 2014.

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