Appellant's Brief in Support of Appeal of Cost Referral Letter

Appellant, MRG Group, LLC, through its attorney, Kendrick B. Yandell, submits the following brief in support of its appeal of the Milwaukee Police Department's denial of MRG's Abatement Plan regarding the premises located at 1619 S 1st St., Milwaukee, WI 53204, and the underlying determination of this premises as a nuisance.

The Milwaukee Police Department's rejection of MRG's Abatement Plan is improper. This Plan was timely submitted under Wisconsin Statutes and went above and beyond the requirements of the Milwaukee Code of Ordinances. The Milwaukee Police Department arbitrarily and capriciously refused to even consider this Plan of actions already performed. The refusal by the Milwaukee Police Department unreasonably foreclosed Appellant's ability to appeal the nuisance designation to this Board or the circuit court. It is in the interest of justice for this Board to either rule the Milwaukee Police Department accept MRG's Abatement Plan or allow Appellant to be heard on its nuisance designation appeal.

I. MRG'S ABATEMENT PLAN WAS TIMELY SUBMITTED.

The Abatement Plan submitted by MRG was timely under Wis. Stat § 801.847(1)(b) and MCO 80-10-3-c. The Milwaukee Police Department refused to even consider MRG's Abatement Plan and provided no reasonable basis for their rejection. The Police Department acted arbitrarily and capriciously in denying the Plan.

The Milwaukee Police Department sent MRG a Notice of Nuisance Premises on March 10, 2020. MRG then filed an appeal with this Board per MCO 80-10-5-a. This appeal was pending for several months. Before the appeal was heard before the board, the parties agreed to dismiss the appeal and file an abatement plan under MCO 80-10-3-c instead. MCO 80-10-3-c requires that a

"written course of action outlining the abatement actions the premises owner… will take in response to the notice" be submitted to the chief of police within 10 days of receiving the Notice. (emphasis added). On September 16th, 2020, City Attorney Hough agreed to the 10-day submission deadline described in MCO 80-10-3-c. The Abatement Plan was submitted to Attorney Hough on September 30th, 2020. The Milwaukee Police Department ruled this submission untimely and subsequently sent a cost referral letter to MRG.

This rejection of the Abatement Plan as untimely is improper. The calculating of time under a Milwaukee ordinance cannot be more restrictive than a Wisconsin state statute, especially where the ordinance does not state that time is of the essence. Wisconsin Statute §801.847(1)(b) states in pertinent part,

> . . .in computing any period of time prescribed or allowed by chs. 801.847, by any other statute governing actions and special proceedings, or by order of court, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a day the clerk of courts office is closed. When the period of time prescribed or allowed is less than 11 days, Saturdays, Sundays and holidays shall be excluded in the computation.

According to this statute, the day from which the time period begins is not included in the calculation, meaning that the clock started on September 17th. Weekends are also not included in the calculation since the time allowed was under 11 days. Ten days after September 17th excluding weekends is September 30th. Therefore, the filing of the Abatement Plan was timely.

Further, the Plan sent by MRG exceeded the requirements of abatement plans laid out in MCO 80-10-3-c. MCO 80-10-3-c requires that nuisance abatement plans state actions that the premises owner "will take in response" to the notice of nuisance premises. The Plan submitted by MRG was not a list of things that they were going to do, but rather a list of actions they had already implemented.

MRG increased security from 5 security guards to 8-10 depending on the night of the week and installed additional security cameras around the premises bringing their total to 16 cameras. MRG's owner hired two additional managers to work alongside him during peak hours, oversee the security operations, and respond to potential incidents. The security guards patrol area was expanded to include the parking lot and the sidewalk surrounding the premises up to Lapham Blvd and 2nd Street, to decrease the potential for car break-ins and discourage persons from lingering around the premises. MRG hired a female security guard to assist with pat-downs and metal detection of female patrons. Additional security fencing was installed around the perimeter of the premises to control ingress and egress of persons. A no parking rule was implemented in the alley behind the premises to deter people lingering after bar close. MRG also implemented a strict dress code with a mandatory mask requirement. Lastly, MRG hired a security consultant with extensive combat, special operations, and military background to periodically evaluate security guards and protocols and to provide guidance on revising training and implementation of security protocols. This security consultant found no deficiencies with the security operations at MRG's premises. This Plan is expansive, exhaustive, and expensive, but the Milwaukee Police Department never even looked at it.

These actions were implemented in good faith while the appeal proceedings were still pending. MRG took these steps because they take the safety and security of their patrons very

seriously. MRG continues to maintain that the underlying nuisance designation is faulty, but it withdrew its appeal because they believed the Milwaukee Police Department was also acting in good faith, and that it was better to cooperate than to litigate. In response, the Police Department refused to even consider their Plan.

This refusal by the Milwaukee Police Department is arbitrary and capricious. Wisconsin courts have repeatedly held that arbitrary and capricious action occurs when such action is unreasonable or does not have a rational basis. *Nicolet High School Dist. V. Nicolet Educ. Ass'n*, 118 Wis. 2d. 707, 715, 348 N.W. 2d 175 (Wis. 1984). The actions of the Milwaukee Police Department meet this definition. The Police Department gave no reason that they rejected the Abatement Plan other than the fact that they believed it was untimely. The Police Department was made aware that their refusal to consider the Abatement Plan was contrary to Wis. Stat. § 801.847(1)(b), but they maintained their belief with seemingly no reason or basis. The Milwaukee Police Department has never indicated that the Plan was insufficient not have they ever made any suggestions for improvements.

The Police Department was not prejudiced by when the Abatement Plan was submitted. The Milwaukee Police Department has never given any reason why they believe that having the Plan on the 27th was necessary or how they, or the community, were harmed by the submission on the 30th. Since the Plan MRG submitted was a list of actions already taken, the community and the Police Department were better off than they would have been had MRG submitted a proposed plan of actions that could have taken weeks or even months to implement. It is arbitrary and capricious for the Milwaukee Police Department to deny this plan when the plan goes above and beyond what was required of MRG and is better for the community, MRG, and the Department.

This rejection of the Plan is also bad faith on the part of the Milwaukee Police Department. MRG withdrew its appeal of the nuisance designation because it was under the impression the Milwaukee Police Department would be willing to work together to make their premises a safer place. Instead, the Milwaukee Police Department rejected the Abatement Plan without even reviewing it. MRG is now stuck with this nuisance determination because of the improper actions of the Milwaukee Police Department.

II. THE BOARD SHOULD REVIEW MRG'S NUISANCE APPEAL BECAUSE IT IS IN THE INTEREST OF JUSTICE.

The Milwaukee Police Department's arbitrary and capricious rejection of MRG's Abatement Plan has foreclosed MRG's opportunity to appeal the nuisance to this Board. Further, since no final determination was made under the meaning of Wis. Stat. § 68.12[1], MRG cannot seek certiorari in the circuit court to review the nuisance determination. If the Board does not allow MRG to be heard on their appeal of the nuisance designation, MRG will be out of options.

Appellant in good faith withdrew its appeal to this Board and submitted an Abatement Plan of actions taken to abate the alleged nuisance activities because it favored cooperation to litigation. The Milwaukee Police Department denied the Plan which foreclosed their opportunity to appeal the nuisance determination. If this determination is allowed to stand it will have far-reaching, and costly, effects on MRG. It is therefore in the interest of justice that the Board relieve MRG from this nuisance determination and allow them to appeal it to the Board.

68.12 Final determination.
(1) Within 20 days of completion of the hearing conducted under s. 68.11 and the filing of briefs, if any, the decision maker shall mail or deliver to the appellant its written determination stating the reasons therefor. Such determination shall be a final determination.
(2) A determination following a hearing substantially meeting the requirements of s. 68.11 or a decision on review under s. 68.09 following such hearing shall also be a final determination.

Further, MRG has a legitimate argument for why their premises is not a nuisance. MRG later withdrew their appeal but not, because they did not have a meritorious defense to the Milwaukee Police Department's claims. MRG is now unable to make their legitimate and reasonable argument because their attempts to cooperate were thwarted by the Milwaukee Police Department. It is therefore in the interest of justice for MRG to be allowed to present their arguments to the Board.

The City will argue that since this nuisance designation is about to expire the Board should not consider this matter any further. However, the consequences of this nuisance designation extend far beyond the next few months. If this property is declared a nuisance that will be a factor considered at every licensing hearing at the premises and be a stain of MRG's record which would impact MRG's ability to conduct business at its premises. Further, if any other activities occur where the Police are called, MRG could be declared a chronic nuisance which would also impact MRG's business at the premises. So while this determination may be expiring soon, MRG should still be allowed to be heard on its appeal because of these potentially far-reaching and costly effects.

III. MRG'S PREMISES IS NOT A NUISANCE

Upon reviewing MRG's appeal of its nuisance designation, the Board should find that MRG is not a nuisance based on the facts or spirit of the law. MRG, and its commercial tenant Werk Investments, LLC, DBA Points View Boîte ("PVB"), have worked proactively with the Milwaukee Police Department to substantially decrease undesirable incidents and has taken aggressive and reasonable steps to ensure the safety of patrons, staff, community members, and police officers.

The Milwaukee Police Department based its nuisance determination on five incidents that occurred at the premises that they determined to be nuisance activities. These incidents, and the reasons they do not support a nuisance determination, have already been briefed by Appellant in both appeals filed to the Board. However, there was a mistake made when describing Incident No. 1 so that incident will be briefed here. For the other incidents, the Appellant directs the Board to refer back to its previously filed appeals.

Despite the mistake in facts, Incident No. 1 is still extremely mitigated and not a nuisance activity as a matter of law. The Police Report regarding Incident No. 1 describes an altercation between two parties that occurred on April 7, 2019. According to the complaining witness's statement, when she entered PVB she saw a woman with who she has had a "quarrel" for years. Immediately upon seeing each other the two women engaged in a physical altercation but were quickly separated by their friends. Later, when the complaining witness was leaving the premises at bar close she saw the other woman, the aggressor, waiting around the corner and as she approached the aggressor struck the complaining witness over the head with a glass bottle.

However, the police report leaves out crucial details of the incident. The police report fails to mention that the aggressor was removed from the premises by PVB's security staff immediately following the initial altercation inside the bar. Further, the report does not mention that once the aggressor was removed she later returned to the premises, armed herself, lied in wait, and then attacked the complaining witness. With these additional facts, it is clear that the aggressor was not a "person associated with the premises" as defined in MCO 80-10-2-e. Her return to the premises after being removed is too far attenuated from the time she was associated with the premises as a guest and visitor of PVB to consider her associated with the premises.

Additionally, PVB's security team took every conceivable step to deescalate the situation and to avoid further altercations. They removed the aggressor from the premises and that should have been the end of it. It was completely unforeseeable that the aggressor, once she was escorted from the premises, would lie in wait for an extended period of time to strike the complaining witness with a glass bottle on the street.

PVB has taken significant actions to prevent any other similar incidents from occurring in the future. PVB has almost doubled their security staff on most nights, increased their patrol areas, installed more cameras, and taken other actions to prevent anything like this from occurring again. It would be inequitable to hold PVB accountable for a situation that was completely unforeseeable especially given the fact they have implemented extensive procedures to prevent future incidents.

Based on the facts and law of this incident, together with the facts and circumstances of the other incidents described in the appeal, 1619 S 1st St. is not a nuisance. It would be against the spirit and the letter of the law to declare their property a nuisance.