

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 11, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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

No. 99-1801

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**EAST OF THE RIVER ENTERPRISES II, A MINNESOTA
LIMITED LIABILITY COMPANY,**

PLAINTIFF-APPELLANT,

V.

CITY OF HUDSON, A MUNICIPAL CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for St. Croix County:
ERIC J. LUNDELL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. East of the River Enterprises II (ERE) appeals a judgment upholding the City of Hudson's denial of a liquor license for its sexually oriented business. Among other reasons, the common council found that the secondary effects of adding alcohol to a sexually oriented business would be

detrimental to the public health, safety and welfare of the City's residents. Four days after denying the liquor license, the city enacted an ordinance prohibiting live nude dancing in establishments licensed to sell alcoholic beverages. The ordinance addressed the secondary effects of live nude dancing in bars, including the increase in prostitution and sex related offenses, other crimes, depreciation of property values, health risks associated with sexually transmitted diseases and the infiltration of organized crime. The ERE argues that by adopting the ordinance, the city eliminated any lawful basis for denying the liquor license because its stated concerns were now prohibited by the ordinance. It also argues that denying the license violated the ERE's First and Fourteenth Amendment rights, that secondary effects cannot be considered in licensing decisions and that the evidence does not sustain the city's findings on the secondary effects. We reject these arguments and affirm the judgment.

¶2 Enactment of the ordinance has no effect on this court's review of the City's decision to deny the liquor license. ERE's argument implies that it is entitled to a license if the reasons given by the City for denying its license are no longer applicable. The grant of a liquor license is not a matter of entitlement, but a matter of privilege. See *State v. Bayne*, 100 Wis. 35, 38, 75 N.W. 403 (1898). If the circumstances have changed, ERE should again request a liquor license from the city based on the new circumstances. It should not circumvent the application process by asking the court to overturn the common council's decision based on the new circumstances. The circuit court properly limited its review to the decision the common council made, not the decision it might have made if the ordinance had been in effect. ERE notes that WIS. STAT. § 125.12(2)(d) (1997-98) allows the court to consider additional "evidence" when reviewing the City's decision. That evidence, however, should be limited to the issues on review:

whether the council stayed within its jurisdiction; whether it acted according to law; whether its action was arbitrary, oppressive or unreasonable; and whether the evidence supports the determination. *See State ex rel. Smith v. City of Oak Creek*, 131 Wis. 2d 451, 455, 389 N.W.2d 366 (Ct. App. 1986). The newly enacted ordinance does not constitute “evidence” and does not relate to any of these issues.¹

¶3 ERE attempts to characterize the City’s decision denying a liquor license as an infringement on its First and Fourteenth Amendment rights to present sexually explicit entertainment. It cites cases in which the City prohibited sexually explicit entertainment in ordinances that were deemed overbroad. The City of Hudson’s ordinance is not before this court. It was passed after the decision denying the liquor license. The common council’s decision to deny the liquor license does not prohibit sexually explicit entertainment. Therefore, the cases holding that ordinances are overbroad when they ban all nude entertainment are inapposite.

¶4 ERE argues that “secondary effects” have been properly considered when the government is enacting an ordinance of general application such as a zoning ordinance, but cannot be applied on an ad hoc basis when exercising discretion such as licensure. The cases it cites are again inapposite because they deal with the cities’ attempt to directly regulate the protected activity by licensing it. Because the City of Hudson has not attempted to impose licensing requirements on sexually explicit entertainment and selling alcoholic beverages is not protected by the First Amendment, we perceive no reason for denying the City

¹ In addition, the common council recited other reasons for denying the liquor license and, regardless of the ordinance, could further develop those reasons and deny the application.

the right to consider secondary effects when issuing a liquor license. Contrary to ERE's argument, the City did not condition the granting of a liquor license upon silencing free speech. It merely denied the liquor license in recognition of the adverse secondary effects supported by numerous studies and specifically recognized as valid concerns of a municipality, as discussed in *City of Renton v. Playtime Theaters Inc.*, 475 U.S. 41, 50 (1985).

¶5 Sufficient evidence supports the City's decision. It relied on sixteen studies in other cities that correlate combining liquor with sexually oriented business to crime, neighborhood deterioration and property values. While ERE attempted to contradict or distinguish those studies, the weight to be accorded the conflicting evidence is a matter for the City council to determine. See *Town of Pleasant Prairie v. City of Kenosha*, 75 Wis. 2d 322, 333, 249 N.W.2d 581 (1977). The totality of the evidence presented to the council reasonably supports its finding that adverse secondary effects can be observed when liquor is served at adult entertainment establishments.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

