COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1057

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

MARK KIVLEY, TERRY KIVLEY AND KIVLEY INVESTMENTS, LLC.,

PETITIONERS-APPELLANTS,

V.

THE CITY OF MILWAUKEE, A MUNICIPAL CORPORATION, THE CITY OF MILWAUKEE DEPARTMENT OF BUILDING INSPECTION-CONDEMNATION SECTION AND LEE JENSEN, COMMISSIONER OF BUILDING INSPECTION,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Mark and Terry Kivley and Kivley Investments, LLC (collectively "the Kivleys"), appeal from the circuit court's order dismissing their petition for a writ of certiorari requesting reversal of the City of Milwaukee Common Council's revocation of their rooming house license. On appeal, the Kivleys argue that: (1) their right to a fair and impartial hearing was denied; and (2) the common council's decision to revoke their rooming house license was arbitrary and capricious. We affirm.

I. BACKGROUND.

¶2 The Kivleys own and operate a rooming house on North Farwell Avenue in Milwaukee. The Kivleys and their predecessors have operated the rooming house under a license granted to them by the City of Milwaukee for the past forty years. Until the common council revoked the Kivleys' rooming house license effective August 1, 1998, the rooming house provided housing for low-income residents.

¶3 The revocation proceedings began in November of 1996 when Michael D'Amato, a Milwaukee alderman, filed a complaint with the City's Utilities and Licensing Committee seeking to revoke the Kivleys' rooming house license. The committee held several hearings regarding the complaint. At the hearings, neighbors and other interested parties testified regarding the rude and illicit behavior of the residents, the poor condition of the property and the unprofessional manner in which the Kivleys operated the rooming house. The Kivleys presented some contrary evidence in opposition to the revocation of their rooming house license. Following the testimony, the committee voted not to revoke the Kivleys' rooming house license, but it did recommend that the maximum number of lawful occupants be reduced from 67 individuals to 38. At

the time of these proceedings, D'Amato was a member of the committee; however, each time the committee was called to order, D'Amato recused himself from the deliberations on the advice of the assistant city attorney.

¶4 The common council then reviewed the committee's report and recommendation. The common council heard arguments from the Kivleys, as well as D'Amato's attorney and the assistant city attorney. After considering their arguments, the common council amended the committee's recommendation and voted to revoke the Kivleys' rooming house license. D'Amato, as a member of the common council, voted on procedural issues concerning the committee's recommendation on the Kivleys' rooming house license, but he did not participate in the votes on substantive matters.

¶5 Following the common council's decision, the Kivleys filed a circuit court action for a writ of certiorari seeking reversal of the common council's decision. The circuit court dismissed the petition for writ of certiorari.

II. ANALYSIS.

¶6 On appeal, the Kivleys argue that the common council's decision to revoke their rooming house license should be reversed because D'Amato's conduct prevented a fair and impartial hearing. The Kivleys also argue that the common council's decision was arbitrary and capricious because the only evidence before the common council demonstrated that any problems involving the building had been resolved prior to the common council's decision and the identical evidence heard by the committee resulted only in a recommendation that the number of tenants be reduced. The Kivleys' contend this discrepancy between the committee's recommendation and the common council's decision to revoke

proves that the common council's decision was arbitrary and capricious. We reject the Kivleys' arguments.

¶7 On appeal from a decision on a writ of certiorari, this court reviews the record and findings of the administrative board, here the common council, not the judgment and findings of the circuit court. *See* ***State ex rel. Harris v. Annuity & Pension Bd.***, 87 Wis. 2d 646, 651, 275 N.W.2d 668 (1979). When reviewing a decision on a writ of certiorari, there is a presumption that the common council acted according to law, the official decision is correct and the weight and credibility of the evidence cannot be assessed. *See* ***State ex rel. Ruthenberg v. Annuity and Pension Bd.***, 89 Wis. 2d 463, 473, 278 N.W.2d 835 (1979). Our review is limited to whether: (1) the common council kept within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) the evidence was such that it might reasonably issue the order or make the determination in question. *See* ***Clark v. Waupaca Cty. Bd. of Adjustment***, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994).

¶8 The Kivleys first argue, relying on ***Marris v. City of Cedarburg***, 176 Wis. 2d 14, 24, 498 N.W.2d 842 (1993), that D'Amato's conduct precluded a fair and impartial hearing. In ***Marris***, our supreme court asserted that "a clear statement 'suggesting that a decision has already been reached, or prejudged, should suffice to invalidate a decision.'" ***Id.*** at 26 (citation omitted). The Kivleys argue that during the proceedings, D'Amato not only "voiced his opposition to the Kivleys and the presence of the rooming house" in his district, but also voted on several motions before the common council. Further, the Kivleys allege that D'Amato held "public hearings" in order to "'whip-up' the neighbors against Mr. Kivley." The Kivleys conclude that, taken as a whole, D'Amato's conduct

"exceeded the standard set forth in ***Marris***," by creating an impermissibly high risk of bias, *see* ***id.*** at 25, depriving them of their right to a fair and impartial hearing. We disagree.

¶9 ***Marris*** is factually distinguishable from the instant case. ***Marris*** involved a biased board member who voted on the central substantive issue before the board. ***Marris*** instructs that "[when] a Board member prejudges the facts or the application of the law, then [the] right to an impartial decision-maker is violated." ***Id.*** at 26. In that case, over Marris' objection, the board member who made the prejudicial comments refused to recuse himself from the final vote, which decided the central issue. Thus, "Marris assert[ed] that because the totality of the comments indicate prejudgment, the chairperson's refusal to recuse himself denied her a fair hearing." ***Id.*** at 28. Here, D'Amato recused himself from the final vote on the license revocation.

¶10 Although, as noted, we review the common council's decision, not the circuit court's, here we find the circuit court's decision helpful. In the instant case, the record clearly indicates that D'Amato recused himself from all substantive votes on the revocation issue before the committee, as well as the common council. In distinguishing our facts from those found in ***Marris***, the circuit court found that "Alderman D'Amato was responding to concerns in the neighborhood about what was going on at this building and held the neighborhood meetings to see what could be done or what should be done." The circuit court observed that the common council heard argument from both sides before deciding to proceed with the revocation. The circuit court also stated that D'Amato had a right to act as both the complainant and the prosecutor, as long as he recused himself from the substantive votes. In deciding against the Kivleys, the court asserted, "[t]his was not obviously a greased proceeding whereby the

outcome was already determined before it got started." We agree, and we adopt the circuit court's reasoned analysis.

¶11 Like the circuit court, we also reject the Kivleys' argument that D'Amato's conduct was sufficiently egregious to "overcome the presumption of honesty and integrity that would ordinarily be applied to this case." ***Id.*** at 30; *see also* ***Guthrie v. WERC***, 111 Wis. 2d 447, 455, 331 N.W.2d 331 (1983) (construing ***Withrow v. Larkin***, 421 U.S. 35 (1975), in which the Supreme Court held that combining investigatory and adjudicatory functions in a single tribunal did not necessarily create an impermissible risk of bias sufficient to overcome the presumption of honesty and regularity). D'Amato had a right, indeed, an obligation, to take action against a property he believed constituted a nuisance in his district. Thus, we conclude that D'Amato's conduct did not deprive the Kivleys of their right to a fair and impartial hearing.

¶12 The Kivleys next argue that the common council's decision to revoke their rooming house license was arbitrary and capricious, and the circuit court erred in dismissing their petition for writ of certiorari. Again, we disagree.

¶13 "'Arbitrary or capricious action on the part of an administrative agency occurs 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 (1981) (citation omitted). Further, "'[a]rbitrary action is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the winnowing and sifting process.'" ***Id.*** at 37-38 (citation omitted).

¶14 At the time the complaint was filed in these proceedings, the revocation of a rooming house license within the City of Milwaukee was governed

by MILWAUKEE CODE OF ORDINANCES No. 275-20 (19)(a), which provided in pertinent part:

> REVOCATION, SUSPENSION, OR DENIAL OF RENEWAL OF LICENSE. a. Any license issued under this chapter may be denied, suspended or revoked for cause by the common council. Such licenses shall be denied, suspended or revoked for any of the following causes:
>
> …
>
> a-2 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 a substantial adverse effect upon the health, safety or convenience and prosperity of the immediate neighborhood . . .
>
> …
>
> a-4 For any other reasonable cause which shall be in the best interests and good order of the City.[1]

After the hearing, the committee ultimately concluded that D'Amato's complaint was true, and that the operation of the rooming house "ha[d] a substantially adverse effect upon the health, safety, convenience and property interest of the immediate neighborhood if operated at more than 38 tenants." Despite a finding that the rooming house adversely effected the health, safety, convenience and property interests of others, the committee recommended not to revoke the Kivleys' license and, instead, limited the Kivleys' license to a maximum number of not more than 38 tenants. Following a hearing, the common council rejected the committee's recommendation and voted in favor of revocation.

[1] During these proceedings MILWAUKEE CODE OF ORDINANCES No. 275-20 was amended and 275-20 (19) no longer exists. The relevant provisions now appear in 275-20-9. There have been no substantive changes relevant to these proceedings.

¶15 Because of this inconsistency between the committee's recommendation and the common council's ultimate decision, the Kivleys maintain that "[d]espite having the same information before it as did [the committee], [the common council] decided to revoke [the Kivleys'] license." Thus they argue, "it cannot be said [that the committee's decision was] predicated on reasoned analysis or evidence." The Kivleys assert that "even at the committee level it was apparent that whatever problems were alleged to have existed at the Kivley building they were resolved." Therefore, the Kivleys conclude that the common council acted arbitrarily and capriciously because: (1) the common council reviewed the same evidence that the committee reviewed, but arrived at the opposite conclusion; and (2) the only evidence presented demonstrated that any problems involving the rooming house had been resolved for almost a year prior to revocation. We reject the Kivleys' arguments.

¶16 The Kivleys argue that the common council's decision was arbitrary and capricious because it considered the same evidence that was before the committee, but arrived at the opposite conclusion. However, the Kivleys have not provided this court with any authority, nor are we aware of any authority, requiring the common council to accept the committee's recommendation. The common council was able to accept or reject the committee's recommendation as it deemed appropriate. We must uphold the common council's decision as long as that decision is reasonable and supported by substantial evidence in the record.

¶17 We are satisfied that the common council's decision to revoke the Kivleys' rooming house license is supported by substantial evidence in the record. The record contains an abundance of evidence – witnesses' testimony and letters about the tenants' inappropriate and threatening conduct, as well as fire department and police reports noting a high incidence of complaints about the

tenants and the property – that supports the common council's conclusion that the Kivleys' rooming house constituted a nuisance.

¶18 The record indicates that dozens of individuals registered at the initial hearings before the committee. Specifically, 49 individuals filled out registration forms; 48 indicated that they were in favor of revocation; 1 indicated that he opposed revocation. Of the 48 individuals in favor of revocation, approximately 40 indicated that they wished to testify before the committee. Twenty-three witnesses testified before the committee on December 18, 1996, and another 16 were registered to testify, but could not be heard due to time constraints. At the continuation of the hearing on July 31, 1997, the committee heard testimony from several other witnesses, including Lee C. Jensen, the Commissioner of the Department of Building Inspection; Milwaukee Police Officer Robert Ring; John Hufnagel, Deputy Chief of the Milwaukee Fire Department; and another citizen witness, all of whom testified in favor of revocation.

¶19 The citizen witnesses testified extensively regarding the poor condition of the rooming house and the negative effect it had on the surrounding property, as well as the outrageous behavior of the residents and their guests. The citizen witnesses related incidents of verbal and physical abuse by the Kivleys' tenants, including unwelcome remarks to passers-by and several incidents of forcible panhandling. Many of the witnesses related that, out of fear, they would cross the street rather than walk in front of the rooming house. The citizen witnesses informed the committee that the Kivleys' tenants regularly congregated on the premises drinking alcoholic beverages and engaging in disruptive behavior. The owners of neighboring buildings and operators of near-by businesses testified that they have had to remove the Kivleys' tenants from their properties and

businesses and that the tenants' constant presence harmed their properties and businesses. They also testified that the Kivleys' tenants had been involved in robberies of individuals in the neighborhood as well as residents of the adjoining properties. One property owner testified that he witnessed the Kivleys' tenants urinating and vomiting, in broad daylight, in front of the rooming house, as well as in between adjoining buildings. Finally, the witnesses testified regarding litter and garbage strewn about the Kivleys' property, which often spread or was thrown onto neighboring properties.

¶20 Jensen testified at length regarding the condition of the rooming house. Jensen indicated that although the various code violations issued against the rooming house had been corrected, in his opinion the building was not being managed in an acceptable and efficient manner. Jensen informed the committee that the Kivleys had undertaken minimal maintenance, making shoddy repairs that did nothing more than meet the minimum code requirements. He asserted that the limited repairs that have been made reflect "a total lack of concern [for] any quality or any concern for how the building looks or how the building is finished." The Kivleys point out that Jensen testified that the rooming house received "average" ratings by the Department of Building Inspection. However, Jensen clarified that the rating system was completely subjective and, he opined, if the Kivleys' rooming house constituted an "average" rooming house in the City of Milwaukee, then the "average" rooming house was a public nuisance. Finally, Jensen told the committee of an unpleasant personal experience he had had while jogging past the rooming house when one of the Kivleys' tenants stopped him and demanded money.

¶21 Milwaukee Police Officer Ring and Deputy Chief Hufnagel also testified regarding the problems caused by the Kivleys' rooming house. Both

Ring and Hufnagel testified regarding the disproportionate number of calls requesting police and fire department assistance at the rooming house. Ring related that the calls on record involved incidents of loitering, violence, theft, and drunkenness. Ring's testimony was supported by records indicating complaints of drunkenness, break-ins, requests for police assistance in removing individuals from the premises, and complaints involving drug activity. Hufnagel told of the high number of calls the fire department received involving the rooming house. Hufnagel asserted that only the City Jail and various other public housing high-rises generated more calls than the Kivleys' rooming house. He informed the committee that a typical call took 30 to 40 minutes and that it was time consuming and extremely expensive to answer these calls. Finally, the record also contains approximately thirty letters, addressed to D'Amato, supporting revocation and citing numerous complaints about the Kivleys' rooming house.

¶22 Nevertheless, the Kivleys argue that all the evidence indicated that the problems surrounding the rooming house diminished after 1996. The Kivleys assert that since the maximum occupancy was reduced to 38 individuals from 67, the number of incidents involving the rooming house declined and, as a result, they maintain that the common council's finding was not supported by the evidence. We are not persuaded.

¶23 The fact that the number or frequency of the incidents has diminished does not preclude the common council's finding that the rooming house constituted a nuisance. *Cf.* ***State v. H. Samuels Co.***, 60 Wis. 2d 631, 635, 211 N.W.2d 417 (1973) ("The fact the defendant has made some efforts to cut down the amount of noise does not go to the question of the existence of a nuisance. A defendant may use all the means possible in the operation of a legitimate business and yet that operation can cause damage and constitute a

nuisance."). Although the Kivleys' efforts reduced the problems related to the rooming house, the property remained a nuisance.

¶24 We are satisfied that the common council's decision, although contrary to the committee's recommendation, was reasonable and supported by substantial evidence. Therefore, we conclude that the common council properly revoked the Kivleys' rooming house license, and we affirm the circuit court's dismissal of the Kivleys' petition for writ of certiorari.

By the Court.—Order affirmed.

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