

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 25, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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.

Appeal No. 2016AP640

Cir. Ct. No. 2015CV3429

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

LAXMI MA, LLC, D/B/A/ DUNKIN' DONUTS,

PETITIONER-APPELLANT,

v.

CITY OF MILWAUKEE,

RESPONDENT-RESPONDENT.

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

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 BRASH, J. LAXMI MA, LLC (Laxmi) appeals from an order of the circuit court that affirmed the decision of the City of Milwaukee denying Laxmi's application for the renewal of its extended hours license. Laxmi argues (1) that the Common Council failed to follow procedural requirements set forth in

the Milwaukee Code of Ordinances in reaching its decision; and (2) that the Council's decision was not supported by the evidence and was arbitrary and unreasonable, representing its will and not its judgment.

¶2 The City contends that it acted according to law in making its decision, and further, that the decision was based on credible evidence and was not unreasonable or arbitrary. We affirm.

BACKGROUND

¶3 Laxmi has operated a Dunkin' Donuts restaurant, located at 622 West Wisconsin Avenue in Milwaukee, for approximately thirty years. Throughout this time of operation, Laxmi has held an extended hours license issued by the City, which permits the restaurant to remain open between midnight and 5:00 a.m.; thus, Dunkin' Donuts was open twenty-four hours a day. Additionally, the agent for Laxmi, Rekha Gabhawala, owns and operates a convenience store located on the same block as Dunkin' Donuts, which also has an extended hours license and is open twenty-four hours a day.

¶4 Laxmi timely filed an application to renew the extended hours license for Dunkin' Donuts, as well as for the convenience store, with the City Clerk's office. A hearing before the Licenses Committee was scheduled for April 6, 2015, and residents living within a 250-foot radius of the properties were sent notice of the hearing.

¶5 Twelve people testified at the hearing. Six of them related problems they associated with the businesses staying open twenty-four hours a day, such as aggressive panhandling, loitering, noise, and litter. Six others testified in favor of allowing both businesses to stay open for extended hours, stating that they

attributed these problems to the bus stop located in the same area rather than the businesses, as well as noting that the extended hours are convenient for them.

¶6 One of the residents testifying in favor of renewing the extended hours license acknowledged that she had been an employee of Dunkin' Donuts for the past two years. She stated that she regularly makes sure that any non-customers leave the premises, and has called the police for assistance at times. Additionally, the manager for both establishments, who lives above Dunkin' Donuts, also testified in favor of renewing the extended hours license. She stated that she regularly addresses loitering issues around both properties by contacting police, and that she believed the problems are directly related to the bus stop in that area. The manager further indicated that if the Licenses Committee or Common Council determined that only one of the extended hours licenses should be renewed, Laxmi's preference was for Dunkin' Donuts to receive the renewal rather than the convenience store.

¶7 Alderman Bauman also addressed the Committee on this matter. He stated that the area has a significant loitering problem, and that while some of those who loiter may come from the bus stop, the "majority" come from either Dunkin' Donuts or the convenience store. He further noted that other bus stops in and around the downtown area do not have similar issues. In fact, he declared that buses do not even run during the extended hours time frame at issue, between midnight and 5:00 a.m.; however, Laxmi contends that this information is patently false, in that the bus schedule affirmatively shows buses running along that route until well after 2:00 a.m.

¶8 After the hearing, the Licenses Committee concluded that the extended hours license for Dunkin' Donuts should be renewed, but with a thirty-

day suspension imposed. Although the Committee acknowledged that no police reports relating to nuisance behavior from either property had been found, it stated that the suspension was warranted based on the testimony of the neighborhood residents. It recommended the same course of action, renewal with a thirty-day suspension, for the convenience store as well.

¶9 However, at the Common Council meeting subsequently held on April 21, 2015, Alderman Bauman moved for outright denial of the renewal of the extended hours license for Dunkin' Donuts, notwithstanding the recommendation of the Licenses Committee for just a suspension. The motion prevailed, and the license renewal was denied. In contrast, the renewal of the extended hours license for the convenience store was approved without any suspension.

¶10 Laxmi timely filed a summons and complaint with the Milwaukee County Circuit Court, initiating a *certiorari* action for judicial review of the Common Council's decision pursuant to WIS. STAT. § 68.13(1) (2015-16).¹ Laxmi argued that the Council failed to follow the procedures outlined in MILWAUKEE, WIS., CODE OF ORDINANCES (MCO) § 85-5-4 (1986), specifically those parts which state: (1) that the council shall consider the report and recommendations of the Committee; (2) that each member of the Council shall verbally confirm that they have read the reports and recommendations of the Committee; and (3) that the Council shall vote whether to adopt the recommendation of the Committee. Laxmi specifically argued that the Council members had not confirmed that they had read the report and recommendations,

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

and that the Council president presented a vote for Alderman Bauman's motion as opposed to a vote on the Committee's recommendations.

¶11 Laxmi further argued that the decision of the City should be reversed because it was arbitrary and oppressive. It based this argument on the fact that there had been no progressive discipline imposed prior to the renewal denial, that there were no police reports offered in support of the contentions related to nuisance behavior, and that Alderman Bauman had given erroneous information to the Council about the bus schedule when he stated that the buses do not run between midnight and 5:00 a.m.

¶12 The circuit court affirmed the Common Council's decision. It found that the procedures required by the Milwaukee Ordinances for consideration of the matter were followed. It further found that Laxmi had failed to demonstrate that the decision was arbitrary, and that the record in fact showed that the Council had properly considered the Licenses Committee's report, particularly regarding the public testimony heard. This appeal follows.

DISCUSSION

¶13 A municipality's decision related to licensing may be appealed directly to the circuit court by the person adversely affected by that decision. WIS. STAT. §§ 68.01, 68.10(1)(b). The non-renewal of an existing license is one such reviewable decision. WIS. STAT. § 68.02(2). The judicial review of municipal licensing decisions is by *certiorari*. WIS. STAT. § 68.13(1).

¶14 On *certiorari* review, this court is "limited to determining whether: (1) the governmental body's decision was within its jurisdiction, (2) the body acted according to law, (3) the decision was arbitrary or oppressive, and (4) the evidence of record substantiates its decision." See *State ex rel. Bruskevitz v. City*

of Madison, 2001 WI App 233, ¶11, 248 Wis. 2d 297, 635 N.W.2d 797. We review *de novo* the municipality’s decision, not the decision of the circuit court. *See id.*

¶15 It is well-settled law that on *certiorari* review “there is a presumption of correctness and validity to a municipality’s decision.” *Ottman v. Town of Primrose*, 2011 WI 18, ¶48, 332 Wis. 2d 3, 796 N.W.2d 411. The petitioner bears the burden of overcoming this “presumption of correctness.” *Id.*, ¶50.

1. *The Common Council acted according to law and properly considered the recommendations of the Licenses Committee.*

¶16 Laxmi’s first argument is that the Common Council “disregarded” several ordinances in its consideration and vote on whether to renew the extended hours license for Dunkin’ Donuts, and therefore did not act according to law. Specifically, Laxmi contends that the Council violated the following subsections of MCO § 85-5 License and Permit Procedures:

- MCO § 85-5-4-a, which requires the Common Council to consider the report and recommendations of the Licenses Committee;
- MCO § 85-5-4-b, which requires that the Common Council affirm that each member has read the report and recommendations of the Licenses Committee; and
- MCO § 85-5-4-e, which requires that the Common Council call the vote as to whether to adopt the recommendations of the Licenses Committee.

¶17 In general, Laxmi contends that the Council did not consider the recommendation of the Licenses Committee, but rather only considered Alderman Bauman's motion to deny the renewal of the extended hours license. The record does not support this contention.

¶18 While the record does indeed reflect some confusion on the part of certain Council members at various times during the proceedings, overall the record demonstrates that the members had a clear understanding of the distinction between the recommendations of the Licenses Committee and Alderman Bauman's motion. In particular, Laxmi focuses on Alderman Bauman's misstatement that Laxmi was willing to forego renewal of the extended hours license for Dunkin' Donuts in favor of a renewal for the convenience store, when in fact Laxmi had proposed the opposite: it preferred that the extended hours license for Dunkin' Donuts be renewed, and would be willing to forego the renewal for extended hours license for the convenience store in exchange for the renewal of Dunkin' Donuts's license. Nevertheless, Alderman Bauman proposed that the extended hours license for Dunkin' Donuts be denied renewal, paving the way for renewal of the extended hours license for the convenience store.

¶19 The Council voted to deny the extended hours license for Dunkin' Donuts by a vote of twelve to two, with no discussion beyond Alderman Bauman's motion. However, as the Council president was about to call the next vote on Alderman Bauman's motion regarding the renewal of the extended hours license for the convenience store, there were several questions relating to that motion that required clarification. For instance, Alderman Puente inquired whether the motion for renewal included the thirty-day suspension for the convenience store that had been recommended by the Licenses Committee as well,

with Alderman Bauman responding that he was proposing renewal without the suspension.

¶20 Alderman Stamper then asked for clarification on Alderman Bauman's statement regarding Laxmi's proposal during the Licenses Committee hearing to concede non-renewal for one business if it allowed renewal for the other business. Specifically, Alderman Stamper inquired as to whether Laxmi had offered to accept non-renewal for Dunkin' Donuts in order to renew the convenience store license. Alderwoman Coggs declared that she recalled Laxmi's proposal being that if the extended hours license for only one of the businesses was to be renewed, its preference was renewal for Dunkin' Donuts. Alderwoman Coggs's account was confirmed as correct by Alderman Zielinski, the chairman of the Licenses Committee.

¶21 The Council members then proceeded to have a discussion regarding the hearing before the Licenses Committee on this matter, and how its recommendations compared to Alderman Bauman's motion to deny renewal for Dunkin' Donuts instead of the convenience store. This discussion included a reiteration of the concerns of the neighborhood residents who were heard at the committee hearing, who indicated that they believed there were more problems that stemmed from Dunkin' Donuts than the convenience store. The discussion also involved the consideration of the purposes of each business and their value to neighborhood; specifically, it was noted that it was more useful to people in the neighborhood to have the convenience store open twenty-four hours a day as opposed to Dunkin' Donuts. Also, there are several hotels located in that area, and the convenience store provided a place where those staying at the hotels were able to procure certain necessities between the hours of midnight and 5:00 a.m.

¶22 By the nature of this discussion, it is evident that the Council members had a clear and complete understanding of the report and recommendations of the Licenses Committee, and how they were different from the motion proposed by Alderman Bauman. We note that this discussion did not take place until *after* the vote on Dunkin’ Donuts’s license; however, after the discussion, none of the Council members requested to reconsider the vote on Dunkin’ Donuts. The Council then proceeded with the vote on the convenience store’s license without further questions from the members. Therefore, we find that the record sufficiently establishes that the Common Council complied with MCO § 85-5-4-a.

¶23 Furthermore, we find that the record indicates that the Common Council acted in accordance with the other ordinances that Laxmi contends were “disregarded” as well. For example, Laxmi alleges that MCO § 85-5-4-b, requiring affirmation that the Council members had read the report and recommendations of the Licenses Committee, was not properly followed, but this allegation is directly contradicted in the record. In particular, the transcript of the Common Council meeting held on April 21, 2015, describes how the ordinance requirements were addressed as the meeting progressed.

¶24 The transcript begins with the clerk reading through all of the recommendations of the Licenses Committee, including those for Dunkin’ Donuts and the convenience store.² Alderman Hamilton moved for approval on a recommendation of the Licenses Committee regarding the first license issue read

² There were also other license matters for properties owned by different entities considered at that Common Council meeting; they are not involved in this case.

by the clerk that involved an unrelated business. However, the Council president indicated that procedurally it was not the appropriate time for a motion, and instead inquired as to whether the Council members had read the report with the recommendations of the Licenses Committee; based on his use of the plural “recommendations,” it is reasonable to presume that he was referring to all of the recommendations that had previously been read by the clerk. The members collectively stated that they had in fact read the report, and the clerk proceeded with a roll call to record the individual members’ answers. The Council president then returned to Alderman Hamilton’s motion relating to the unrelated license issue. Once that issue was resolved, Alderman Bauman made his motion regarding Dunkin’ Donuts.

¶25 This procedural posture, while perhaps slightly irregular, indicates that the Council members all affirmed that they had read the report and recommendations of the Licenses Committee for *all* of the cases pending before it at that meeting. Therefore, the requirements of MCO § 85-5-4-b were met.³

¶26 With regard to MCO § 85-5-4-e, requiring the Council to call the vote on whether to adopt the recommendations of the Licenses Committee, Laxmi asserts that the vote was instead called on Alderman Bauman’s motion, and thus is

³ Laxmi asserts that distinguishing the Common Council’s actions in this case from its actions in *Questions, Inc. v. City of Milwaukee*, 2011 WI App 126, 336 Wis. 2d 654, 807 N.W.2d 131, a case where we reviewed a decision of the Common Council regarding a license issue, demonstrates the Council’s lack of proper procedure here. We disagree. The procedures followed by the Common Council in *Questions* were not so dramatically different from this case so as to provide a compelling reason to reverse the decision. Similarly, Laxmi’s reference to *Lady Bug Club, LLC v. City of Milwaukee*, No. 2010AP725, unpublished slip op. (WI App Aug. 18, 2011), where we again reviewed a license issue decided by the Common Council, is unpersuasive for the same reason. Instead, our review of this case focuses on the record, which is factually sufficient to demonstrate that the Common Council followed proper procedure.

invalid. This is a rather circular argument that is not compelling: a vote for one of the options is clearly a vote against the other. Moreover, we have already established that the Council members understood the issues surrounding the Committee's recommendation as well as Alderman Bauman's motion, and made their decision accordingly.

¶27 Therefore, we find that the Common Council complied with the applicable ordinances during these proceedings, and thus acted according to law.

2. *The Common Council's decision is supported by credible evidence and is not arbitrary or unreasonable.*

¶28 Next, Laxmi argues that the Common Council's decision is not supported by credible evidence and is arbitrary, oppressive, and unreasonable, representing its will and not its judgment. These allegations are based on the lack of progressive discipline imposed prior to the renewal denial, the fact that there were no police reports offered in support of the contentions related to nuisance behavior, and that Alderman Bauman had misstated certain facts about the bus times when he introduced his motion to the Council.

¶29 “[A]n agency does not act in an arbitrary ... manner if it acts on a rational basis”; rather, “[a]rbitrary action is the result of an unconsidered, wilful or irrational choice, and not the result of the sifting and winnowing process.” *Smith v. City of Milwaukee*, 2014 WI App 95, ¶21, 356 Wis. 2d 779, 854 N.W.2d 857 (citation and one set of quotation marks omitted; brackets and ellipses in original). In this case, the record reflects that the Common Council's determination was made on a rational basis after “sifting and winnowing” through the evidence. *See id.*

¶30 Laxmi's first argument, that there was no progressive discipline imposed prior to non-renewal of the extended hours license, is not persuasive. While the Common Council has a general policy of applying progressive discipline prior to non-renewal, it is not required under the ordinances. The fact that there were no police reports on file relating to problematic incidents at Dunkin' Donuts is not a definitive criterion for utilizing progressive discipline; it is merely one aspect for consideration by the Council. Moreover, although the Licenses Committee had suggested the progressive measure of imposing a thirty-day suspension on Dunkin' Donuts's extended hours license, the Council is not required to follow the recommendations of the Licenses Committee. The Council is simply not obligated to follow a progressive course of action under the ordinances.

¶31 Laxmi also emphasizes Alderman Bauman's incorrect statement that buses do not run in that area during the extended hours license time frame as being indicative of a decision that was not based on credible evidence. However, the transcript demonstrates that the Council considered other relevant, credible evidence. Indeed, the Council's decision focused primarily on the testimony of the witnesses who had appeared before the Licenses Committee and the concerns that were voiced relating to loitering, which the Council members believed was attributable to Dunkin' Donuts given that it is a restaurant with tables where people can linger. Members also underscored the value that extended hours at the convenience store would provide to the residents of the neighborhood and other businesses in the area. We therefore find that the Council's decision was based on credible evidence with a rational basis that was not unreasonable or arbitrary. *See Smith*, 356 Wis. 2d 779, ¶21.

¶32 In sum, we find that the Common Council in making its decision not to renew the extended hours license for Dunkin' Donuts followed all of the requisite procedures set forth in the Milwaukee Code of Ordinances, and further, that its decision was based on credible evidence and was not unreasonable or arbitrary. Therefore, we affirm the order of the circuit court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

