

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 14, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**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.

**Appeal No. 2016AP418  
STATE OF WISCONSIN**

**Cir. Ct. No. 2015CV5374**

**IN COURT OF APPEALS  
DISTRICT I**

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**RICOCHET ON, INC.,**

**PETITIONER-APPELLANT,**

**V.**

**CITY OF MILWAUKEE, CITY OF MILWAUKEE COMMON COUNCIL AND  
JAMES R. OWCZARSKI, CITY CLERK,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Milwaukee County:  
JOHN J. DiMOTTO, Judge. *Affirmed.*

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

¶1 PER CURIAM. Ricochet On, Inc., appeals a circuit court order upholding the City of Milwaukee Common Council's decision to deny renewal of Ricochet's tavern license and public entertainment premises license. Ricochet argues that the circuit court erred because the Common Council's decision was

arbitrary and capricious and not supported by credible evidence. We reject the arguments and affirm.

### **Background**

¶2 Ricochet On, Inc., operated a Milwaukee tavern. In April 2015, the company's agent, Daniel D. Groholski, applied to renew Ricochet's Class B tavern license and several related licenses. The City of Milwaukee Common Council Licenses Committee held a hearing on the application. In advance of the hearing, the Milwaukee Police Department's License Investigation Unit submitted a synopsis of incidents related to the tavern, and a councilman filed written complaints about the tavern submitted by city resident Lisa Falsetti.

¶3 At the hearing, Falsetti testified that her home is near the tavern, and she described the foul language, multiple gunshots, and fighting by tavern patrons that she heard outside her bedroom window. In response to a question about whether she had discussed her concerns with Groholski, she responded that she thought she had called him "once this year," but then gave up trying to talk to him because "he hung up on [her]" and "basically call[ed her] a liar."

¶4 Orlandus Jackson, who lives adjacent to the tavern, echoed Falsetti's complaints about loud noise and fighting by tavern patrons, but he said it was "mostly the gunshots" that concerned him. He said he had been hearing gunfire for three years, and he went on to describe an incident several months earlier when "an officer asked [him] to come outside to help him find the bullet casings." Jackson said he refused because the situation appeared too dangerous. Remikah Gray, another neighbor, described loud music and cursing coming from the tavern and tavern patrons urinating outside. All of the neighbors who testified said they had called the police during the past year to complain about the disturbances

connected with the tavern. Falsetti and Jackson described making numerous such calls.

¶5 Groholski testified in favor of license renewal and said he had taken steps to reduce noise and improve security at Ricochet. James Henry, who described himself as a security guard and the head of Ricochet's security team, also testified in favor of license renewal. He said he had worked at Ricochet for a year and that he was familiar with incidents where police had been called to the tavern. He claimed, however, that Ricochet's patrons did not cause the disturbances described by the neighbors, and he suggested that the problems arose because Ricochet is on a bus stop and close to another establishment that "tend[s] to have parties."

¶6 The Committee chairman asked Falsetti to respond to Henry's testimony:

[Q]: What makes you sure that the problems you're testifying to emanated from [Ricochet] and not any other location?

[A]: Because it's specifically right outside of this bar. I've never even heard of this other place. I've never had an issue with this place that he's mentioning. These bus stops, they're not running at two o'clock in the morning. There is nothing else interesting over there. There is nothing else besides that bar that is attracting these people. And it's funny, because the 30 days that he was closed down it was very peaceful.

The chairman remarked: "that sounds pretty convincing."

¶7 Jackson also responded to Henry's suggestion that an establishment other than the tavern was responsible for the neighborhood disturbances. Jackson explained that the problems occurred early in the morning, and the tavern was "the only business that's open at that time."

¶8 At the conclusion of the hearing, the Licenses Committee reviewed Ricochet’s disciplinary history, which included a license suspension and multiple warning letters. The Committee then voted unanimously to recommend nonrenewal of Ricochet’s licenses based on the testimony from neighborhood residents. The Common Council followed the recommendation and denied renewal.

¶9 Ricochet petitioned for circuit court review. Following briefing and an examination of the municipal proceedings, the circuit court entered a written order affirming the Common Council’s decision. Ricochet appeals.

### Discussion

¶10 The tavern license proceedings here are governed by WIS. STAT. ch. 125 (2015-16).<sup>1</sup> WISCONSIN STAT. § 125.12(2) provides that a municipality may refuse to renew a license for a number of reasons, including, as relevant here, that the licensee “keeps or maintains a disorderly or riotous, indecent or improper house.” See § 125.12(2)(ag)2. and (3). Section 125.12(2)(d) allows judicial

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<sup>1</sup> Ricochet asserts in its opening brief that, in addition to challenging the nonrenewal of the tavern license, Ricochet also challenges the decision not to renew Ricochet’s public entertainment premises license. In support of the latter claim, Ricochet argues only that it must prevail if the tavern license is reinstated. We accept Ricochet’s position that the status of the public entertainment premises license is tied to the status of the tavern license. Cf. CITY OF MILWAUKEE, WIS. ORDINANCE § 108-11(5) (2015) (requiring suspension of a public entertainment premises license for the same period as the suspension of an alcohol beverage license). Accordingly, we do not separately discuss the nonrenewal of the public entertainment premises license. We add that, although the Common Council declined to renew Ricochet’s food dealer’s license, and although Ricochet apparently raised a challenge to that decision in circuit court, Ricochet does not mention the nonrenewal of its food dealer’s license on appeal. To the extent, if any, that Ricochet might seek to challenge nonrenewal of its food dealer’s license, we deem the issue abandoned and discuss it no further. See *Reiman Assocs. v. R/A Advert., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (matters not briefed or argued are deemed abandoned). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

review of municipal decisions on licenses. Review is by *certiorari*. *Nowell v. City of Wausau*, 2013 WI 88, ¶3, 351 Wis. 2d 1, 838 N.W.2d 852.

¶11 *Certiorari* review is limited to determining:

- (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.

*Id.*, ¶24 (brackets omitted). On appeal, we review the decision of the municipality, not the circuit court. *See State ex rel. Bruskewitz v. City of Madison*, 2001 WI App 233, ¶11, 248 Wis. 2d 297, 635 N.W.2d 797. We presume the municipality’s decision was correct, and the petitioner has the burden to overcome that presumption. *See Ottman v. Town of Primrose*, 2011 WI 18, ¶50, 332 Wis. 2d 3, 796 N.W.2d 411.

¶12 Ricochet argues here that the adverse licensing decision was not supported by sufficient evidence and that the decision was arbitrary and capricious. *See Nowell*, 351 Wis. 2d 1, ¶24. Ricochet does not dispute that the Common Council kept within its jurisdiction and acted according to law. *See id.*

¶13 We begin with Ricochet’s challenge to the sufficiency of the evidence. A court conducting *certiorari* review does not weigh the evidence but rather assesses whether substantial evidence in the record supports the municipality’s determination. *Cohn v. Town of Randall*, 2001 WI App 176, ¶26, 247 Wis. 2d 118, 633 N.W.2d 674. “Substantial evidence does not mean a preponderance of the evidence. Rather, the test is whether, taking into account all the evidence in the record, ‘reasonable minds could arrive at the same conclusion as the [municipality].’” *Madison Gas & Elec. Co. v. PSC*, 109 Wis. 2d 127, 133,

325 N.W.2d 339 (1982) (citation omitted). Accordingly, we must uphold the municipality's findings unless "a reasonable trier of fact could not have reached them from all the evidence before it, including the available inferences from that evidence." *See Nestle USA, Inc. v. DOR*, 2011 WI 4, ¶23, 331 Wis. 2d 256, 795 N.W.2d 46.

¶14 Ricochet emphasizes that the Milwaukee Police Department's synopsis of incidents connected with the tavern did not include any incidents reported to police during the previous licensing year. Ricochet argues that the synopsis conclusively refutes the testimony offered by neighborhood residents who described calling the police to complain about disturbances at the tavern. In Ricochet's view, the synopsis reveals either that the neighbors never reported the disturbances, or that police investigated the reports and determined that the disturbances "had no connection whatsoever to the licensed establishment." We are not persuaded.

¶15 First, assuming without deciding that the synopsis discredits the neighbors' testimony about calling the police, that conclusion would not require the Licenses Committee to reject the neighbors' testimony describing the incidents that the neighbors saw and heard. A fact finder may believe some parts of a witness's testimony without accepting the entirety of the testimony. *See Nabbefeld v. State*, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978).

¶16 Second, the record shows that Falsetti contacted a councilman by email some months before the hearing to report ongoing problems with Ricochet's patrons. In her message, she advised that, although she had called police "a couple of times," the police would not respond unless she said she was "willing to testify against these people in court (which [she was] not)." Similarly, Jackson

testified at the hearing that when he called the police to report gunshots, the officers “asked [him] to come outside at two in the morning, which [he] didn’t feel comfortable doing, putting [him]self in that situation.” Thus, the record permits a reasonable inference that the neighbors reported incidents that the police did not pursue in light of a perceived lack of cooperation from witnesses. The neighbors’ reluctance to expose themselves to investigative inquiry, however, does not mean the neighbors did not make the calls they described to the Licensing Committee, nor does such reluctance mean that the neighbors did not accurately report their observations at the hearing.

¶17 The record here reflects that the neighbors provided substantial evidence about problems associated with the tavern. The Common Council was entitled to consider that evidence and give it greater weight than the police synopsis. See *State ex rel. Harris v. Annuity & Pension Bd.*, 87 Wis. 2d 646, 659, 275 N.W.2d 668 (1979) (on *certiorari* review, court must defer to fact finder’s determinations as to weight of evidence and credibility of witnesses). Accordingly, Ricochet’s challenge to the sufficiency of the evidence must fail.

¶18 Ricochet next argues that the decision to deny license renewal was arbitrary and capricious. In this regard, Ricochet first suggests that the Common Council acted arbitrarily and capriciously because it relied on the testimony of the neighborhood residents rather than on the favorable inferences that Ricochet believes could be drawn from the police department’s synopsis. We must reject this position. As Ricochet emphasizes, our supreme court describes an arbitrary and capricious action as one that is “so unreasonable as to shock the sense of

justice and indicate lack of fair and careful consideration.”<sup>2</sup> See *Westring v. James*, 71 Wis. 2d 462, 477, 238 N.W.2d 695 (1976) (citations and some quotation marks omitted). We have already explained, however, that the record includes substantial evidence and permits reasonable inferences from that evidence supporting the Common Council’s decision. Accordingly, we cannot conclude that the Common Council acted arbitrarily or capriciously in relying on that evidence. See *id.* at 476 (explaining that a decision supported by substantial evidence will virtually never be held arbitrary or capricious).

¶19 Ricochet also contends that the decision to deny license renewal was arbitrary and capricious because the Common Council treated Ricochet more harshly than other license holders allegedly similarly situated. Relying on *Westring*, Ricochet reminds us that “[t]ypical of the cases in which the epithet capricious may properly be applied are those where an agency has given different treatment to two respondents in identical circumstances.” See *id.* at 477 (citation omitted). To support the claim of unequal treatment, Ricochet cites *Questions Inc. v. City of Milwaukee*, 2011 WI App 126, 336 Wis. 2d 654, 807 N.W.2d 131, pointing out that the Common Council imposed only a twenty-five-day license suspension in that case even though the tavern at issue had been the site of multiple incidents reported to and synopsisized by the Milwaukee Police Department. See *id.*, ¶¶9-11. Ricochet argues that its own infractions were fewer and less well-documented than those described in *Questions*, so Ricochet too

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<sup>2</sup> Ricochet points out that the municipal parties cite an unpublished *per curiam* opinion of this court when discussing the standards applicable to an assessment of arbitrariness. We remind the parties that unpublished *per curiam* opinions may not be cited in any court of this state except to support a claim of claim preclusion, issue preclusion, or the law of the case. See WIS. STAT. RULE 809.23(3)(a)-(b).



should have been granted license renewal with no more than a short suspension as a condition.

¶20 Ricochet ignores a key distinction between the facts described in *Questions* and Ricochet's own situation: *Questions* does not reflect prior discipline imposed on the tavern. By contrast, the record here shows that Ricochet received a twenty-day license suspension as a condition of the previous year's license renewal and that Ricochet received warning letters in each of the three prior years. Indeed, the Licenses Committee expressly took into consideration the suspension and warnings previously imposed before recommending nonrenewal of Ricochet's license. Thus, Ricochet fails to show that its circumstances were similar to those described in *Questions*, let alone that Ricochet was treated too harshly in comparison to the license holder in that case.<sup>3</sup>

¶21 Moreover, the Licenses Committee members here were particularly concerned about facts unique to Ricochet, namely, that its agent Groholski admittedly called Falsetti a liar and hung up on her when she contacted him

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<sup>3</sup> Ricochet also compares its circumstances to those of a tavern discussed in *Lady Bug Club, LLC v. City of Milwaukee*, No. 2010AP725, unpublished slip op. (WI App Aug. 18, 2011). That case involved a sixty-day suspension of a tavern license following numerous incidents reported to and synopsized by the Milwaukee Police Department. We are not required to distinguish or discuss unpublished but citable decisions of this court. See WIS. STAT. RULE 809.23(3)(b). Nonetheless, we observe that the facts of *Lady Bug Club* do not include allegations of public urination or multiple complaints about gunfire such as those underlying the Common Council's decision in this case.

directly about disturbances at the tavern.<sup>4</sup> As one member observed: “when you have an owner that actually says I don’t even want to talk to neighbors, hangs up on neighbors when they call ... there is no way this is going to get better. Based on neighborhood testimony, I’ll move nonrenewal.”

¶22 In sum, the record reflects that the Common Council’s actions were not arbitrary, but rather demonstrated a reasoned and reasonable response to the particular circumstances that Ricochet presented. Accordingly, we affirm.

*By the Court.*—Order affirmed.

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

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<sup>4</sup> It should be noted that Ricochet’s appellate counsel misstates the record in regard to Falsetti’s efforts to talk directly to Groholski. Specifically, appellate counsel asserts: “the [C]ity further contends that [Groholski] admitted hanging up on the neighbor, Ms. Falsetti. No such admission is in the record.” The record shows, however, that a Licenses Committee member directly questioned Groholski about Falsetti’s allegations in this regard, and Groholski responded: “this was before the— the last meeting here.” The member clarified: “so she’s not making it up that you called her a liar and hung up on her. You’re just disputing when it happened.” Groholski responded: “right.” In light of the unambiguous transcript, we caution appellate counsel that we expect litigants and advocates in this court to give scrupulous attention to their descriptions of the record.

