COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2006AP1470 **Cir. Ct. No. 2005CV9315**

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

TERRY LEE'S CORPORATION,

PLAINTIFF-APPELLANT,

V.

CITY OF MILWAUKEE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 CURLEY, J. Terry Lee's Corporation (Terry Lee's), through its agent, Terry Heinemeier (collectively, Heinemeier), appeals the grant of summary judgment to the City of Milwaukee (the City). Heinemeier had sought an order requiring the City to grant him a Class B tavern license after his renewal

application had been denied, and requesting damages. Heinemeier contends that summary judgment should not have been granted because: (1) he did not receive proper notice of the license renewal hearing, which resulted in his not appearing before the Utilities and Licenses Committee (Licenses Committee); (2) the Common Council acted improperly in refusing to remand the matter to the Licenses Committee for a full hearing; and (3) the City failed to comply with State law and City ordinances that govern renewal procedures.

¶2 We conclude that the applicable procedural and notice requirements were followed, and that the Licenses Committee's conclusion that the evidence supported the determination that the tavern was a danger to the health, safety and welfare of the community, was not arbitrary, capricious or discriminatory. As a result, the City's assertions that the notice of claims requirements were not satisfied is a moot point. Consequently, we affirm the dismissal of Heinemeier's complaint, and thus also affirm the nonrenewal of his Class B license.

I. BACKGROUND.

¶3 Heinemeier operated a tavern called Terry Lee's Bar, located at 5516 West Center Street in Milwaukee, and was also the agent of Terry Lee's and the holder of a Class B liquor license. On December 21, 2004, Heinemeier filed with the office of the city clerk a renewal alcohol beverage license application because his previous license was to expire on February 7, 2005.

¶4 Heinemeier's application was forwarded to the Milwaukee Police Department for a routine police record check performed on all renewal

applications, pursuant to WIS. STAT. § 125.04(5) (2003-04).[1] On December 29, 2004, a police report was issued that revealed several incidents that had taken place at Terry Lee's during 2003 and 2004, including two shootings, one of which the personnel denied took place in the bar; several "fights," one of which involved an individual carrying a weapon; one instance of an individual carrying a concealed weapon; three incidents of serving alcohol to underage persons; and citations for operating amusement machines: a juke box, cigarette machine, and pool table, without proper licenses. Additionally, on January 26, 2004, Tammy Banks, the mother of a former patron who had been (non-fatally) shot at Terry Lee's, had filed a neighborhood objection to the renewal of the tavern's license.

¶5 On January 7, 2005, the City Licenses Committee[2] issued a notice stating that Heinemeier's renewal application would be considered on January 18, 2005. The same day, the city clerk sent a notification to Heinemeier, addressed to the address he had provided on the renewal application, informing him that, as agent of Terry Lee's, he was personally requested to attend the hearing; and that due to the information in the police report and neighborhood objections,[3] there was "a possibility that [his] application may be denied." The notification also informed Heinemeier that "[f]ailure to appear at the meeting may result in the

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] The Utilities and Licenses Committee has since been renamed simply Licenses Committee.

[3] The notice lists neighborhood objections to "loud music and noise, fights, shootings, and conduct which is detrimental to the health, safety, and welfare of the neighborhood." It is unclear what neighborhood objections the notice refers to because the only neighborhood complaint in the record is the one submitted by Tammy Banks, dated January 24, 2004.

denial of [his] application." Enclosed were copies of the police report and the citizen complaint.

¶6 The hearing took place as scheduled on January 18, 2005. Heinemeier did not attend. It was first established that the notification had been sent to Heinemeier on January 7, 2005, and that it had not been returned. The police report was then made part of the record. Two citizen witnesses, Tammy Banks and Nina Banks Jackson, the mother and aunt of a former patron of the tavern, testified, explaining that their son/nephew had been shot inside Terry Lee's on April 25, 2003. Alderman James Bohl moved for denial of the application based on the contents of the police report and the nonappearance of Heinemeier. When asked by City Attorney Bruce Schrimpf whether Bohl was recommending that the neighborhood objections not be included, Bohl responded: "That is correct. Mr. Schrimpf, I didn't want to include hearsay testimony, in addition to the fact that this is a 2003 incident. So it is not within the same licensed year. I don't want to create any more problems for you than I think you would want."

¶7 On January 20, 2005, the Licenses Committee issued a report on Heinemeier's application, setting forth findings of fact and conclusions of law, and recommending that the license not be renewed "to protect the health, safety and welfare of the citizens of the City of Milwaukee," based on the police report and Heinemeier's nonappearance at the hearing.

¶8 The findings of fact established that notice of the hearing, as well as a copy of the police report, were sent to Heinemeier to the address he provided on his application on January 7, 2005, that the envelope was not returned, and that Heinemeier failed to appear at the hearing on January 18, 2005. The findings of fact then listed eight incidents from the police reports: (1) on March 8, 2003,

police responded to a report of a man with a gun, and a security guard informed them that four men had been fighting, and that one of the men pulled a gun and pointed it at a victim, but left when the security guard pulled the victim behind the bar; (2) on April 19, 2003, an underage police aide purchased beer from the bartender, as a result of which the bartender was found guilty of sale of alcohol to an underage person; (3) on April 25, 2003, police were informed that someone had been shot inside Terry Lee's, and the bartender and numerous patrons acknowledged that there had been a fight, but denied hearing or seeing a shooting—police later learned that there was a shooting victim at a local hospital who told them he had been shot inside Terry Lee's; (4) later on April 25, 2003, police were dispatched to Terry Lee's to investigate a person with a gun and found a gun on a man's barstool; (5) on May 11, 2003, officers responded to a bomb threat at The Silver Spring Tap (also owned by Heinemeier), but an investigation revealed that a patron had been refused service because he was intoxicated; (6) on September 17, 2004, Heinemeier was found guilty of allowing an underage person upon a Class B premises and fined, and on July 30, 2004, the bartender was found guilty of sale of alcohol to an underage person and fined;[4] (7) on August 18, 2004, police were dispatched to Terry Lee's, and upon arrival, observed blood on the floor and were told by the bartender that a woman had struck another woman in the head with a pool stick—police also noticed amusement machines, a pool table,

[4] The total number of underage drinking incidents in the police report was three. On April 19, 2003, and March 31, 2004, incidents involving the sale of alcohol to underage police aides took place. A third underage drinking incident is also listed as having occurred on June 8, 2004. It is unclear why the findings of fact lists only one underage drinking incident, the one on April 19, 2003. The findings of fact does, however, list one incident of Heinemeier being found guilty of allowing an underage person on the premises on September 17, 2004, and the bartender being found guilty of sale of alcohol to an underage person on July 30, 2004. It appears from the police report that these two convictions both stem from the June 8, 2004 incident.

a juke box and a cigarette machine that were not properly licensed, and Heinemeier was issued five citations and later found guilty of one of them; (8) on September 16, 2004, there was a fight that caused the bartender to call the police, and, while on the phone with the police, the officer heard a gunshot—upon arrival police found a victim lying on the ground with a gunshot wound to his chest.

¶9 Despite Alderman Bohl's indications that the testimony of Banks and Banks Jackson be excluded, the findings of fact contains the following paragraph:

> J. The Committee heard testimony from one Tammy Banks and a Lena [sic] Banks Johnson [sic] who were related to the individual who was shot in the incident of September 16, 2004.[5] Although the individual did not die from the incident, it is obvious that the continued operation of these premises will be detrimental to the health, safety and welfare of the citizens of the City of Milwaukee.

(Footnote added.)

¶10 The report then contains conclusions of law that read in part:

> 2. Based upon the above facts found, the Committee concludes that the licensee, Terry L. Heinemeier, agent for … Terry Lee's[] has not met the criteria of Chapter 90 of the Milwaukee Code of Ordinances and Chapter 125 of the Wisconsin Statutes to allow renewal of his Class "B" Tavern license. The Committee finds that the police report and neighborhood objections to be true.
>
> 3. In order to protect the health, safety and welfare of the citizens of the City of Milwaukee, it is the recommendation of the Utilities and Licenses Committee that the full

[5] The findings of fact incorrectly states that the Committee heard testimony from "Tammy Banks and Lena Banks Johnson who were related to the individual injured in the September 16, 2004 incident." The record reveals that the name of the victim's aunt was Nina Banks Jackson, and Banks and Banks Jackson testified that their son/nephew was shot at Terry Lee's on April 25, 2003, not September 16, 2004.

> Common Council of the City of Milwaukee should exercise its discretion to not renew the Class "B" Tavern License of Terry L. Heinemeier for … Terry Lee's[].

¶11 The same day the Licenses Committee issued its report (January 20, 2005), the City received notification from Heinemeier that his address had changed. A copy of the report was sent to Heinemeier's new address, along with a notification that the Common Council would hold a hearing on February 1, 2005, to consider his application and informing Heinemeier that he could file a written objection to the Licenses Committee's recommendation or present an oral argument at the hearing. On January 25, 2005, Heinemeier filed a written request to present an oral argument.[6]

¶12 The hearing took place on February 1, 2005, as scheduled. Heinemeier attended and addressed the Common Council. He first explained that he did not attend the hearing before the Licenses Committee because his mail was forwarded, and he thus did not get the notice until after the hearing, but would have attended had he been aware of the hearing. He stated, however, "I know it's my fault and my responsibility." He then addressed one underage drinking incident, one fight and one shooting listed in the Licenses Committee's report. Heinemeier told the Common Council essentially that although he realizes that the reported incidents are serious, it is hard to stop them before they happen, and said the underage drinking incident was merely an experienced bartender "le[tting] his

[6] Curiously, this request by Heinemeier was a handwritten letter, submitted on Alderman Michael S. D'Amato's letterhead. It is somewhat unclear why the request was presented on Alderman D'Amato's letterhead. The record contains a document from the Licenses Committee explaining that "[t]he letterhead was not used at the knowledge or consent of the alderman's office," and that "[b]ecause the document was received in this manner, it could not be altered." Heinemeier was asked about the letterhead at the hearing before the Common Council and he stated that the letterhead had been given to him at city hall when he requested a piece of paper on which to write a request for an opportunity to address the Common Council.

guard down." He also explained that he hopes to maintain his business in the area, and would be willing to close his tavern early for an extended period if necessary. Heinemeier did not request that the matter be remanded to the Licenses Committee for another hearing.

¶13 Attorney Schrimpf argued that the recommendation for nonrenewal was supported by the evidence set forth in the findings of fact. Alderman Donovan moved to refer the matter back to the Licenses Committee. The Common Council however, by a vote of fourteen to one, voted not to remand the matter to the Licenses Committee. The Common Council then voted to approve the recommendation of the Licenses Committee to not renew the license, and adopted the Licenses Committee's findings of fact and conclusions of law.

¶14 On October 18, 2005, Heinemeier, on behalf of Terry Lee's, filed a complaint against the City, *see* WIS. STAT. § 125.12(2)(d), alleging that the City "did not follow the relative [sic] statutes and law of the State of Wisconsin in denying said tavern license renewal," and that while "Terry Lee's had not previously filed a claim with the defendant pursuant to Wis. Stats., 839.80, … failure to file said claim has not been prejudicial to the defendant." Heinemeier demanded judgment against the City, an order that the City issue Terry Lee's a Class B liquor license,[7] and "damages, if any, in the sum to be determined by the court." The City filed an answer and subsequently moved for summary judgment,

[7] Although Heinemeier requested that the trial court order the City to issue a Class B license, WIS. STAT. § 125.51(1)(a) clearly states that only municipal government may issue such licenses. In reviewing the Licenses Committee's and the Common Council's decisions, a court may remand the matter to the Common Council if it determines that it erred, but may not substitute its judgment for the Common Council's and order the issuance of a license. *See* WIS. STAT. § 125.12(2)(d); ***State ex rel. Ruffalo v. Common Council***, 38 Wis. 2d 518, 525, 157 N.W.2d 568 (1968).

arguing that Heinemeier had failed to file a notice of claim required by WIS. STAT. § 893.80 when seeking damages from a municipal corporation, and that there was an adequate basis to deny renewal of the license because the correct statutory procedures were followed and there was adequate evidence to support nonrenewal.

¶15 The trial court heard the motion on March 6, 2006.[8] Heinemeier's counsel informed the court that the reason Heinemeier had to change his address, as a result of which he did not receive the notice, was that he was unexpectedly forced to move due to an armed standoff at his home. He argued that the statute did not afford him any room to explain his nonappearance at the hearing, and failure to renew the license as a result is unduly harsh. Heinemeier also claimed that the notice did not adequately inform him that the Licenses Committee "intended" not to renew his license because it stated only that there was "a possibility that [his] application may be denied" and that "[f]ailure to appear at this meeting may result in the denial of your application."

¶16 The City responded that at the Common Council Heinemeier could have, but did not, request that the matter be remanded to the Licenses Committee, adding that even if the Licenses Committee had reviewed the application, again it would not have approved it because the tavern had an extensive police record, his security system was not working because guns still made their way into the bar, and relatives of a shooting victim testified against renewal of the license. The City

[8] At the hearing, the parties stipulated to the substitution of Terry Heinemeier as the plaintiff in place of Terry Lee's Corporation, which had up until then been listed as the plaintiff. Despite the stipulation, on appeal the parties nevertheless refer to Terry Lee's as the party in this case. For readability reasons, we refer to the party as Heinemeier.

felt that the Licenses Committee's conclusion was reasonable, calling Heinemeier's willingness to close early "too little too late."

¶17 The trial court concluded, with respect to the notice issue, that "[i]f there was a lack of notice … that is due to a situation that is entirely of his making," because Heinemeier failed to give prompt notice to the city clerk of his address change, as is required. As to Heinemeier's claim that the notice did not contain the words "intend not to renew," the court concluded that the notice complied with the requirement that he be told why there is a problem with his license. The court concluded:

> I am satisfied from the grounds that we have been presented here with the gun incidents, the fights, serving under aged patrons, selling them alcohol on the premises, that the Common Council was not being arbitrary or capricious or discriminatory in revoking the license of Mr. Heinemeier in this instance.

The court also concluded that insofar as Heinemeier was seeking monetary damages, he had failed to give proper notice of claim by not satisfying the requirements of WIS. STAT. § 893.80. The trial court hence granted summary judgment to the City, dismissing Heinemeier's complaint. This appeal follows.

II. ANALYSIS.

¶18 We review a summary judgment *de novo*, using the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

¶19 Here, the trial court's determination was the result of its review of the Common Council's determination. In this situation we employ the same standard of review as the trial court; namely, that we "cannot substitute [our] judgment for the legal discretion of the Common Council on the merits of the application or review the adequacy of the grounds for its decision other than in the context of determining whether the action of the licensing authority was arbitrary, capricious or discriminatory." ***State ex rel. Ruffalo v. Common Council***, 38 Wis. 2d 518, 525, 157 N.W.2d 568 (1968). "An arbitrary or capricious decision is one which is either so unreasonable as to be without a rational basis or the result of an unconsidered, willful and irrational choice of conduct." ***Town of Pleasant Prairie v. Johnson***, 34 Wis. 2d 8, 12, 148 N.W.2d 27 (1967) (citing ***Olson v. Rothwell***, 28 Wis. 2d 233, 239, 137 N.W.2d 86 (1965)).

A. Procedures Governing Renewal of Class B License

¶20 Heinemeier contends that the City failed to fully comply with the rules and procedures governing the renewal of a Class B license provided in state laws and city ordinances. We disagree.

¶21 The sale of alcohol beverages without a valid license is prohibited. *See* WIS. STAT. § 125.04(1), (2). Only municipal governing bodies have the authority to issue and Class B licenses for retail sale of intoxicating liquors. *See* WIS. STAT. § 125.51(1).[9] After a license has been granted, under WIS. STAT.

[9] WISCONSIN STAT. § 125.51(1)(a) provides as relevant: "Every municipal governing body may grant and issue 'Class A' and 'Class B' licenses for retail sales of intoxicating liquor … from premises within the municipality to persons entitled to a license under this chapter as the issuing municipal governing body deems proper.…"

§ 125.12[10] the municipality may revoke, suspend, and refuse to issue or renew a license. Section 90-11-7 of the Milwaukee Code of Ordinances (MCO) sets forth the municipal counterpart to § 125.12.[11]

¶22 WISCONSIN STAT. § 125.12(3) addresses refusal of a municipality to renew a license and provides:

> A municipality issuing licenses under this chapter may refuse to renew a license for the causes provided in sub. (2)(ag).[12] Prior to the time for the renewal of the license,

[10] WISCONSIN STAT. § 125.12(1) provides in part:

> (a) Except as provided in this subsection, any municipality or the department may revoke, suspend or refuse to renew any license or permit under this chapter, as provided in this section.
>
> (b)1. In this paragraph, "violation" means a violation of s. 125.07(1)(a), or a local ordinance that strictly conforms to s. 125.07(1)(a).
>
> 2. No violation may be considered under this section or s. 125.04(5)(a)1. unless the licensee or permittee has committed another violation within one year preceding the violation. If a licensee or permittee has committed 2 or more violations within one year, all violations committed within one year of a previous violation may be considered under this section or s. 125.04(5)(a)1.

[11] The Milwaukee Code of Ordinances has since been amended, and in the current version, the relevant section is 90-11-2.

[12] WISCONSIN STAT. § 125.12(2)(ag) provides in part:

> *Complaint.* Any resident of a municipality issuing licenses under this chapter may file a sworn written complaint with the clerk of the municipality alleging one or more of the following about a person holding a license issued under this chapter by the municipality:
>
> 1. The person has violated this chapter or municipal regulations adopted under s. 125.10.
>
> 2. The person keeps or maintains a disorderly or riotous, indecent or improper house.

(continued)

> the municipal governing body or a duly authorized committee of a city council shall notify the licensee in writing of the municipality's intention not to renew the license and provide the licensee with an opportunity for a hearing. The notice shall state the reasons for the intended action. The hearing shall be conducted as provided in sub. (2)(b) and judicial review shall be as provided in sub. (2)(d). If the hearing is held before a committee of a city council, the committee shall make a report and recommendation as provided under sub. (2)(b)3. and the city council shall follow the procedure specified under that subdivision in making its determination.

(Footnote added.) Milwaukee County Ordinance § 90-11-7-2 reads in relevant part:

> **2.** PROCEDURE FOR NONRENEWAL. a. Notice. a-1. The utilities and licenses committee of the common council shall be responsible for holding hearings regarding the non-renewal of license. If there is a possibility that the committee will not renew a license, a motion should be entertained to hold the application in committee and instruct the city clerk to forward proper notice to the applicant, unless such proper notice has already been sent, in which case the hearing shall proceed.
>
> a-2. Prior to the date set for the hearing, the city clerk's office shall forward notice to the applicant which shall contain:
>
> a-2-a. The date, time and place of the hearing.
>
> a-2-b. A statement of the common council's intention not to renew the license or suspend the license in the event any objections to renewal are found to be true.
>
> a-2-c. A statement of the reasons for non-renewal.
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> a-2-d. A statement that an opportunity will be given to respond to and challenge such reasons for non-renewal

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> 3. The person has sold or given away alcohol beverages to known habitual drunkards.
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> 4. The person does not possess the qualifications required under this chapter to hold the license.

> and to present witnesses under oath and to confront and cross-examine opposing witnesses under oath.
>
> a-2-e. A statement that the applicant may be represented by an attorney of the applicant's choice at the applicant's expense, if the applicant so wishes.

¶23 Here, on January 7, 2005, following the issuance of the police report, the Licenses Committee issued a notice stating that Heinemeier's renewal application would be considered by the Licenses Committee on January 18, 2005. The same day, the city clerk sent a notification to Heinemeier, addressed to the address he had provided on the renewal application, informing him of the time and place of the hearing, that he could be represented by an attorney, that he was personally requested to attend the hearing, and that, due to the information contained in the police report, a copy of which was enclosed, and neighborhood objections, there was "a possibility that [his] application may be denied." The notification also informed Heinemeier that "[f]ailure to appear at the meeting may result in the denial of [his] application." This satisfies MCO § 90-11-7-1-a-2.

¶24 Heinemeier contends, however, that he was still not given proper notice of the renewal hearing because "the time between the hearing date and the mailing of the notice [was] unreasonably short," and disagrees that the problem could have been avoided had he notified the City of his new address.[13] We

[13] Heinemeier did not raise the issue of adequacy of notice before the Common Council, and in fact stated, with respect to changing his address and his consequent nonappearance before the Licenses Committee: "I know it's my fault and my responsibility." He did, however, explain that he did not attend the hearing before the Licenses Committee because his mail was forwarded and did not get the notice until after the hearing, but he did not mention any alleged armed standoff as being the reason for his sudden move. In addition, Heinemeier's complaint, filed with the trial court following the Common Council's adoption of the Licenses Committee's decision, does not make any mention of inadequate notice as a basis for a cause of action. At the hearing on the City's motion for summary judgment, Heinemeier's counsel did nevertheless orally mention the issue of adequate notice, and we therefore address it.

disagree. It is true that the statute does not provide a specific time within which notice must be given to a renewal applicant, and we agree with Heinemeier that a reasonable conclusion is that "reasonable" notice must be given. We disagree, however, that the eleven days from January 7, 2005, until January 18, 2005, was insufficient. Even disregarding the two weekends during that period, there were still seven business days from the day the notice was sent until the date of the hearing. This was adequate notice.

¶25 Heinemeier also makes a related argument alleging that the notice did not comply with MCO § 90-11-7-a-2-b, which states that the notice is to contain a "statement of the common council's intention not to renew the license or suspend the license in the event any objections to renewal are found to be true."[14] Heinemeier argues as follows:

> The notice of the city clerk did not say anything of the council's intention not to renew, it merely said that there is a possibility that your license may be denied … (emphasis added). That difference is legally significant, although the trial court found that saying that "it is the common council's intention not to renew your license" is equivalent to saying, "there is a possibility that your license may not be renewed[."]
>
> The notice also says that failure to appear at this meeting may result in denial of you application. Appellant suggests that the word "may" is not legally equivalent to the word "will," although the trial court found that it was. To the Committee on Utility and Licenses the two words apparently have the same meaning.

(Underlining and omission in brief; alteration added.) This argument is not convincing. The statute and the ordinance both make it clear that the hearing was

[14] Heinemeier erroneously cites the current version of the Milwaukee Code of Ordinances and for that reason refers to § 90-11-2 even though the correct section at the time in question was § 90-11-7.

to be held in order to determine whether to renew or not to renew the license. The word "intention" does not imply that the Licenses Committee was supposed to have made up its mind prior to the hearing regarding whether to renew the license. In so asserting, Heinemeier ignores the actual language of § 90-11-7-a-2-b, which reads, "statement of the common council's intention not to renew the license or suspend the license *in the event any objections to renewal are found to be true*" (emphasis added). The ordinance directs that *if* the allegations are true, *then* the committee will not renew the license. The second half of the sentence clearly qualifies the first, which means that it is merely another way to say that there a possibility that the license may not be renewed.

¶26 Likewise, to insinuate that the nonrenewal shows that the Committee saw the word "may" as meaning "will," is absurd. The Licenses Committee warned Heinemeier that nonappearance "may" result in nonrenewal and at the hearing concluded that nonrenewal was proper, but nothing indicates that the Licenses Committee had made up its mind before the hearing that, if Heinemeier failed to appear, his license "will" not be renewed. The use of the word "may," coupled with the eventual nonrenewal of the license, in no way amounts to inadequate notice.

¶27 Heinemeier nevertheless submits that the proper procedures were still not followed because he should have been sent a warning letter. He argues:

> Municipal ordinance 90-11-[1-]c-1 states that if the chief of police files a written report, etc., and if all of the following are true, (ordinances 90-11-[1-]c-1-a through 90-11-[1-]c-2-e), which state in part,
>
> > "… the city clerk shall, in lieu of forwarding the application to the licensing committee for a hearing under par. B, refer the application to the common council for approval and issue a warning letter to the applicant whenever.…"

> In this case, a written report was filed, and all of the statements in ordnances 90-11-[1-]c-1-a through 90-11-[11-]c-2-e, were true. The application, however, was not forwarded to the common council for a warning letter to applicant as prescribed by the ordinance.

(Alterations added; underlining omitted; omissions in brief.)

¶28 The provision Heinemeier cites, obligating the city clerk to issue a warning letter instead of referring the application to the Common Council, was not in effect at the time his renewal application was handled and did not come into effect until October 14, 2005, approximately eight months after Heinemeier's case. *See* Common Council File No. 050071. The ordinance is therefore irrelevant for purposes of this appeal. Still, even if the provision had been in effect, it would not apply because Heinemeier overlooks the part of the ordinance that provides that a warning letter will be issued in lieu of a hearing only if the only basis for nonrenewal is a police report, but requires that a hearing be held if there are neighborhood complaints.[15] Thus, due to the citizen complaint from Tammy Banks, a hearing would still have been necessary.

¶29 Next, addressing the hearing before the Licenses Committee, WIS. STAT. § 125.12(2)(b) sets forth the proper procedure:

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[15] The amended MCO § 90-11-1-c-1 reads as relevant:

> If the chief of police files a written report … which could form the basis for nonrenewal of the application, *and if no written objection has been filed* under par. b, the city clerk shall, in lieu of forwarding the application to the licensing committee for a hearing under par. b, refer the application to the common council for approval and issue a warning letter to the applicant …

(Emphasis added.)

> (b) *Procedure on hearing.* 1. If the licensee does not appear as required by the [notice], the allegations of the complaint shall be taken as true and if the municipal governing body or the committee finds the allegations sufficient, the license shall be revoked. The clerk shall give notice of the revocation to the person whose license is revoked.
>
> ….
>
> 3. If the hearing is held before a committee of a city council, the committee shall submit a report to the city council, including findings of fact, conclusions of law and a recommendation as to what action, if any, the city council should take with respect to the license. The committee shall provide the complainant and the licensee with a copy of the report. Either the complainant or the licensee may file an objection to the report and shall have the opportunity to present arguments supporting the objection to the city council. The city council shall determine whether the arguments shall be presented orally or in writing or both.…

Milwaukee County Ordinance § 90-11-7-2 similarly provides:

> b. Hearing. b-1. At the committee hearing, the chairman shall open the hearing by stating that a notice was sent, and shall read the notice into the record unless the applicant admits notice. The chairman shall advise the applicant that he or she has an option to proceed with a hearing, represented by counsel, with all testimony under oath, or he or she can make a statement.
>
> ….
>
> c. Recommendation. c-1. The recommendation of the committee regarding the applicant must be based on evidence presented at the hearing. Probative evidence concerning non-renewal may include evidence of:
>
> c-1-a. Failure of the applicant to meet the statutory and municipal license requirements.
>
> c-1-b. Pending charges against or the conviction of any felony, misdemeanor, municipal offense or other offense, the circumstances of which substantially relate to the circumstances of the particular licensed activity, on behalf of the licensee, his or her employers, or patrons.

> c-1-c. The appropriateness of tavern location and premises.
>
> c-1-d. Neighborhood problems due to management or location.
>
> c-1-e. Any other factor or factors which reasonably relate to the public health, safety and welfare.
>
> c-2. The committee may make a recommendation immediately following the hearing or at a later date. The committee may recommend that the license be renewed or not renewed. In addition, if the committee determines that circumstances warrant it, the committee may recommend that the license be renewed conditioned upon a suspension of the license for a defined period of time.… Following the hearing the committee shall submit a report to the common council, including findings of fact, conclusions of law and a recommendation as to what action, if any, the council should take. The committee shall provide the complainant and applicant with a copy of the report. The applicant may file a written objection to the report and shall have the opportunity to present arguments in writing supporting the objection to the common council. The objection must be filed with the city clerk at least 2 days prior to the date set for hearing by the common council.

¶30 The hearing before the Licenses Committee took place as scheduled on January 18, 2005, but Heinemeier, as noted, did not attend. It was first established that the notification had been sent to Heinemeier on January 7, 2005, and that it had not been returned, satisfying MCO § 90-11-7-2-b. The police report was made part of the record. Two citizen witnesses, the mother, Tammy Banks, and aunt, Nina Banks Jackson, of a former patron of Terry Lee's testified, explaining that their son/nephew had been shot inside Terry Lee's on April 25, 2003. The Licenses Committee ultimately voted to deny the application based on the contents of the police report and the nonappearance of Heinemeier. Following the hearing, the Licenses Committee issued a report setting forth Findings of Fact and Conclusions of Law and a recommendation that Heinemeier's license not be renewed. These proceedings satisfy WIS. STAT. § 125.12(2)(b)3 and MCO

§ 90-11-7-2-c-1. Next, a copy of the report and a notification that the Common Council would hold a hearing on February 1, 2005, and that he could file a written objection to the Licenses Committee's recommendation or present an oral argument to the Common Council at the hearing, were sent to Heinemeier's new address, which he had provided the same day the report was issued. These actions satisfy § 125.2(2)(b)3 and MCO § 90-1-7-c-2. On January 25, 2005, Heinemeier filed a written request to present an oral argument in accordance with § 125.12(2)(b)3 and MCO § 90-11-7-c-2.[16]

¶31 Next, WIS. STAT. § 125.12(2)(b)3 and 4 set forth the procedures for the hearing before the Common Council:

> 3. …. If the city council, after considering the committee's report and any arguments presented by the complainant or the licensee, finds the complaint to be true, or if there is no objection to a report recommending suspension or revocation, the license shall be suspended or revoked as provided under subd. 2.
>
> 4. The municipal clerk shall give notice of each suspension or revocation to the person whose license is suspended or revoked.

¶32 Similarly, Milwaukee County Ordinance § 90-11-7-2-d provides:

> d. Council Action. d-1. The applicant shall be given 5 days' notice of the date set for hearing by the full common council.

[16] In this reply brief, Heinemeier asserts that it was also error for the Licenses Committee to rely on the cumulative police report "because the 2003 events were out of the jurisdiction of the committee, according to the chairman as reported in the transcript." This is Heinemeier's first suggestion that the Licenses Committee improperly relied on the entire police report in the findings of fact. He never raised such an argument before the Common Council or in his pleadings before the trial court, and we therefore do not address it. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980) (appellate courts generally do not review issues raised for the fist time on appeal).

> d-2. At the meeting of the common council, the chairman, in his or her discretion, may allow oral argument by an applicant or complainant who has presented written objection to the recommendations of the utilities and licenses committee. The city attorney shall also be permitted a statement. Oral argument shall not exceed five minutes on behalf of any party.

¶33 The hearing before the Common Council took place on February 1, 2005, as scheduled, and Heinemeier attended and made a statement. He explained to the Common Council that he did not appear before the Licenses Committee because his mail was forwarded and he did not get the notice until after the hearing, but he did not explain why his mail was being forwarded or why he had failed to provide the City with an updated address. To the contrary, he stated: "I know it's my fault and my responsibility." He discussed one underage drinking incident, one fight and one shooting, and said in essence that although the incidents recounted in the police report are serious, it is hard to stop them before they happen and that the underage drinking incident was an isolated incident. He did not explain the remaining incidents in the police report, nor did he dispute any of them. He stated that he would be willing to close early for an extended period if necessary. Heinemeier specifically did not request that the matter be remanded to the Licenses Committee for another hearing. Heinemeier's oral statement to the Common Council was proper and in accordance with the procedure expressed in WIS. STAT. § 125.12(2)(b) and MCO § 90-11-7-2-b-2.

¶34 Schrimpf then addressed the Common Council and argued that it should decide the matter based on the Licenses Committee's recommendation for nonrenewal because it is supported by the evidence set forth in the findings of fact. Schrimpf's statement was proper and in accordance with MCO § 90-11-7-2-d-2. Alderman Donovan moved to refer the matter back to the Licenses Committee, but the Common Council, by a vote of fourteen to one, voted not to do so, and instead

voted to approve the recommendation of the Licenses Committee and adopted the Licenses Committee's findings of fact and conclusions of law.

¶35 The hearing before the Common Council was conducted in full compliance with the procedures set forth in WIS. STAT. § 125.12(2)(b)3 and MCO § 90-11-7-2-d. Significantly, the hearing before the Common Council was Heinemeier's opportunity to argue for a suspension or conditional renewal of his license rather than a nonrenewal, and most importantly, had Heinemeier felt that there was more he wanted to argue to the Licenses Committee that he did not have an opportunity to argue due to his nonappearance at the initial hearing, this was his chance to request another hearing before the Licenses Committee. Although Heinemeier mentioned that he would be willing to close early, he argued only that the license should be renewed and never asked that the case be remanded to the Licenses Committee where he could have made the argument he seeks to make now.[17] In light of Heinemeier's failure to dispute the Licenses Committee's findings of fact and failure to even request a remand, the Common Council's decision to adopt the Licenses Committee's report and accept the recommendation

[17] Heinemeier argues that the Common Council acted improperly in refusing to remand the matter the Licenses Committee for a cause hearing due to his nonappearance. He submits that the Common Council should have remanded the matter essentially because the Common Council did not fully consider the application, did not consider Heinemeier's reasons for failing to appear before the Licenses Committee, and erred in relying on the police report. According to Heinemeier, "[t]he council did act in an arbitrary, capricious or discriminatory manner against the plaintiff, since neither the committee on Utility and Licenses nor the Common Council stated any specifics for the denial." Heinemeier, however, never raised this issue when he appeared before the Common Council. In fact, although the possibility of a remand was raised by Alderman Donovan, Alderman Donovan's motion was defeated by a vote of fourteen to one. Heinemeier also failed to allege in his complaint that the Common Council acted improperly in refusing to remand the matter to the Licenses Committee. Because Heinemeier failed to request a remand at the Common Council and failed to allege any error vis-à-vis the Common Council's alleged failure to remand the matter in his complaint, we will not address the issue because it is raised for the first time on appeal. *See* ***Wirth***, 93 Wis. 2d at 443 (appellate courts generally do not review issues raised for the first time on appeal).

was precisely what § 125.12(2)(b)3 asks it to do and was not arbitrary, capricious or discriminatory. Indeed, Alderman Bohl's motion to remand the matter to the Licenses Committee shows that the possibility of a remand was discussed before a vote was taken, and further affirms that the decision was not arbitrary, capricious or discriminatory.

B. Sufficiency of Evidence

¶36 Having determined that the proper procedures were followed, we reach the evidentiary issue of whether there was adequate evidence to support the nonrenewal of Heinemeier's license.

¶37 The Licenses Committee's findings of fact and conclusions of law that were subsequently adopted by the Common Council were, as already noted, based on both the police report and testimony by Tammy Banks and Nina Banks Jackson. The Licenses Committee's report specifically stated that it found the police report and the testimony by Banks and Banks Jackson to be true, and on that basis, recommended nonrenewal on grounds that Heinemeier had failed to meet the requirements of MCO ch. 90 and WIS. STAT. § 125.12, determining in particular that the continued operation of Terry Lee's would be detrimental to the health, safety and welfare of the citizens of the City of Milwaukee.

¶38 The police report contained numerous incidents that show that the continued operation of Terry Lee's would be detrimental to health, safety and welfare. The police report contained three reports of sale of alcohol to underage

persons—April 19, 2003, March 31, 2004, and June 8, 2004.[18] The report also reveals that on March 8, 2003, police learned from a security guard that a fight broke out between four men, and when the security guard attempted to stop the fight, one of the men pulled out a gun and pointed it at one of the patrons, but fled when the security guard pulled that patron behind the bar. On April 25, 2003, police were called to Terry Lee's because of an alleged shooting, but while acknowledging that a fight had taken place, the bartender and the patrons denied hearing or witnessing a shooting. Later police learned that a shooting victim was at a local hospital and stated that he had been shot inside Terry Lee's. The police report also lists another incident later the same day of police arresting a man for carrying a concealed weapon at Terry Lee's.

¶39 The report discusses an incident on May 11, 2003, of police responding to an alleged bomb threat at another tavern owned by Heinemeier that turned out to be a disgruntled patron who was refused service because he was intoxicated. On August 18, 2004, a fight was reported at Terry Lee's, and upon arrival, police found blood stains on the floor and were told by the bartender that a woman had struck another woman over the head with a pool stick. While on the premises, the officers noticed that amusement machines, a pool table, a juke box and a cigarette machine were not properly licensed. Heinemeier was issued five citations, but found guilty of one citation, while the remaining four were dismissed. Finally, the report also described a shooting on September 16, 2004,

[18] The bartender was found guilty of sale of alcohol to an underage person in at least two of the underage drinking incidents, but it is unclear from the report what happened in the third. Heinemeier was found guilty in one and was not cited for the other two. The findings of fact cites only the April 19, 2003 incident and the date (September 17, 2004) Heinemeier was found guilty of the June 8, 2004 incident.

where the bartender called police due to a fight, and while on the phone with the police, the officers heard gunshots. When the officers arrived, they discovered a victim with a gunshot wound to the chest. The injuries were not fatal. We agree that the police report is powerful evidence supporting the Licenses Committee's conclusion that the continued operation of Terry Lee's would be detrimental to the citizens of the City of Milwaukee. *See* MCO § 90-11-7-2-c-1 ("Probative evidence concerning non-renewal may include evidence of: … Any other factor or factors which reasonably relate to the public health, safety and welfare").

¶40 In addition to the police report, the Licenses Committee's report also referenced the testimony of Banks and Banks Jackson, related to the April 25, 2003 shooting at Terry Lee's, in which the victim was Banks's son and Banks Jackson's nephew.

¶41 Heinemeier points to Alderman Bohl's motion to deny his renewal application, and particularly Bohl's comment in response to Schrimpf's inquiry that the testimony provided by Tammy Banks and Nina Banks Jackson would not be included. Bohl stated: "That is correct. Mr. Schrimpf, I didn't want to include hearsay testimony, in addition to the fact that this is a 2003 incident. So it is not within the same licensed year. I don't want to create any more problems for you than I think you would want." The Licenses Committee thus made its decision to recommend nonrenewal without considering the testimony of Banks and Banks Jackson. Finding "J" in the Licensing Committee's findings of fact nonetheless contains a reference to Banks and Banks Jackson:

> J. The Committee heard testimony from one Tammy Banks and a Lena [sic] Banks Johnson [sic] who were related to the individual who was shot in the incident of September 16, 2004. Although the individual did not die from the incident, it is obvious that the continued operation

> of these premises will be detrimental to the health, safety and welfare of the citizens of the City of Milwaukee.

¶42 Heinemeier appears to argue that Banks's and Banks Jackson's testimonies were erroneously included in the report, and that, without their testimony, there was not enough evidence for the Committee to accept the Licenses Committee's recommendation of nonrenewal. We are not convinced. First, this is the first time Heinemeier raises this argument and we therefore need not address it. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980) (appellate courts generally do not review issues raised for the first time on appeal). Still, even without the testimonies, the police report contained the vast majority of the evidence against Heinemeier, which was more than adequate evidence for the Common Council to accept the recommendation. As noted, neither Heinemeier at the Common Council nor his counsel at the trial court denied or questioned the truth of the numerous incidents recounted in the police report.

¶43 There was thus ample evidence for the Licenses Committee to deny Heinemeier's renewal application, even without Banks's and Banks Jackson's testimony. Accordingly, we are satisfied that the Licenses Committee's recommendation of nonrenewal of Heinemeier's Class B license was not arbitrary, capricious or discriminatory, but a reasonable determination.

¶44 Finally, the City also argues that Terry Lee's failed to comply with WIS. STAT. § 893.80, and asks this court to affirm the dismissal of Heinemeier's complaint on that basis. Because we address the merits of Heinemeier's argument and decide them in the City's favor, we need not address the question of whether Heinemeier complied with § 893.80. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to decide non-dispositive issues). For the foregoing reasons, we affirm the trial court's grant of summary judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.