COURT OF APPEALS DECISION DATED AND FILED

August 18, 2011

A. John Voelker
Acting 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. 2010AP956

Cir. Ct. No. 2010CV1922

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STOJAN CORALIC, D/B/A THE BREW HOUSE,

PLAINTIFF-RESPONDENT,

V.

CITY OF MILWAUKEE, MILWAUKEE CITY COMMON COUNCIL AND MILWAUKEE CITY COMMON COUNCIL LICENSES COMMITTEE,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Reversed*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 LUNDSTEN, P.J. The City of Milwaukee Common Council voted to revoke the tavern license of The Brew House based on evidence that its

operation was associated with shootings, fights, and other incidents detrimental to the surrounding community. The owner of The Brew House, Stojan Coralic, sought review in the circuit court. Coralic argued that the Common Council violated his right to an impartial decision maker and, also, violated his rights because of a flawed fact-finding process. The circuit court agreed and, accordingly, vacated the Council's decision and remanded for a new hearing. The City appeals. Because we conclude that Coralic fails to show that his rights were violated, we reverse the circuit court's decision vacating the revocation.

Background

¶2 The Brew House, located in Milwaukee in a district represented by Alderman Tony Zielinski, had been operating under a Class B tavern license. In January 2010, Zielinski filed a complaint with the Milwaukee Common Council Licenses Committee, seeking revocation of The Brew House's license. The complaint alleged, "based upon personal knowledge and communication with constituents, Milwaukee police officers and city officials": "That the Brew House tavern is the scene of chronic dangerous, violent, and nuisance activity such as shootings, possession of controlled substances, and fights among patrons from the tavern. The Brew House tavern has had a substantial adverse effect upon the surrounding neighborhood due to the shootings and fights associated [with] the tavern."

¶3 On January 19, 2010, the Licenses Committee held a hearing on the revocation. The owner of The Brew House, Stojan Coralic, appeared. Evidence was presented both for and against revocation. Alderman Zielinski participated as "the complainant," but recused himself from participating as a Committee member and from voting on the revocation recommendation. Based on a police report,

neighborhood testimony, and testimony from a police captain, the Committee voted to recommend revocation of The Brew House's license. A city attorney, who had attended the hearing, then prepared findings of fact and conclusions of law.

¶4 The Licenses Committee report was submitted to the full Common Council. At a February 9, 2010, hearing, each Council member acknowledged having read the Committee report. Because all members of the Licenses Committee are also Council members, it is also true that all Committee members read the report. After all Council members verified that they had read the report, the Council voted unanimously to approve the revocation recommendation. Alderman Zielinski participated in that vote.

¶5 Coralic sought review of the Council's decision in the circuit court. Among other things, he argued that the Council's decision was invalid because Zielinski should not have been allowed to vote at the full Council stage and because the record fails to demonstrate that the findings of fact in the Licenses Committee report are actually findings of the Committee. The circuit court agreed with Coralic in both respects and, accordingly, vacated the revocation and remanded for a new hearing. The City appeals. We include additional facts as needed below.

Discussion

¶6 The tavern license proceedings here are governed by statute and Milwaukee ordinances. *See* WIS. STAT. ch. 125 (alcohol beverage license requirements and procedures); WIS. STAT. § 125.10(1) ("Any municipality may enact regulations incorporating any part of this chapter and may prescribe additional regulations for the sale of alcohol beverages, not in conflict with this

chapter.").[1] WISCONSIN STAT. § 125.12(2) provides that a municipality may revoke a license for a number of reasons, including that the licensee "has violated [chapter 125] or municipal regulations adopted under s. 125.10" or "keeps or maintains a disorderly or riotous, indecent or improper house." WIS. STAT. § 125.12(2)(ag)1. and 2. Section 125.12(2)(d) allows for judicial review of municipal decisions on licenses.

¶7 Coralic sought review in the circuit court, asserting a basis in WIS. STAT. § 125.12(2)(d) and further asserting that review under that provision is conducted by applying certiorari review. On appeal, the parties do not discuss why certiorari review (either common law or statutory) applies, given the language of § 125.12(2)(d).[2] In the absence of a dispute on this topic, we will assume they

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[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] WISCONSIN STAT. § 125.12(2)(d) states:

> (d) *Judicial review.* The action of any municipal governing body in granting or failing to grant, suspending or revoking any license, or the failure of any municipal governing body to revoke or suspend any license for good cause, may be reviewed by the circuit court for the county in which the application for the license was issued, upon application by any applicant, licensee or resident of the municipality. The procedure on review shall be the same as in civil actions instituted in the circuit court. The person desiring review shall file pleadings, which shall be served on the municipal governing body in the manner provided in ch. 801 for service in civil actions and a copy of the pleadings shall be served on the applicant or licensee. The municipal governing body, applicant or licensee shall have 20 days to file an answer to the complaint. Following filing of the answer, the matter shall be deemed at issue and hearing may be had within 5 days, upon due notice served upon the opposing party. The hearing shall be before the court without a jury. Subpoenas for witnesses may be issued and their attendance compelled. The decision of the court shall be filed within 10 days after the hearing and a copy of the decision

(continued)

are correct that certiorari review is appropriate. As we explained in ***State ex rel. Bruskewitz v. City of Madison***, 2001 WI App 233, 248 Wis. 2d 297, 635 N.W.2d 797:

> On certiorari review, we are 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.

Id., ¶11. The challenger of a municipality's decision bears the burden on review. *See* ***Ottman v. Town of Primrose***, 2011 WI 18, ¶50, 332 Wis. 2d 3, 796 N.W.2d 411 ("[o]n certiorari review, the petitioner bears the burden to overcome the presumption of correctness" that applies to a municipality's decision). We review the Common Council's decision, not the decision of the circuit court. ***Bruskewitz***, 248 Wis. 2d 297, ¶11. The issues in this appeal concern the second standard, whether the Council "acted according to law."

¶8 Because our review of the Common Council's decision is *de novo*, and because Coralic has the burden, we frame the issues in terms of Coralic's arguments.

A. Impartial Decision Maker

¶9 Coralic argues that his constitutional right to an impartial decision maker was violated when Alderman Zielinski participated in the Council vote. As we explain, Coralic fails to squarely address the pertinent circumstances and, accordingly, we reject his argument.

> shall be transmitted to each of the parties. The decision shall be binding unless it is appealed to the court of appeals.

¶10 We begin by providing additional background information.

¶11 As permitted by statute, Alderman Zielinski filed a complaint seeking revocation of The Brew House's license. *See* WIS. STAT. § 125.12(2)(ag) (any resident of a municipality may file a sworn written complaint seeking revocation or suspension). The matter proceeded to a fact-finding hearing before the Licenses Committee, a committee on which Zielinski was a member. Zielinski recused himself from participating as a Committee member and from voting on the revocation recommendation. Instead, he participated in the hearing as an advocate for revocation and was referred to as the "complainant." In that capacity, Zielinski, in Coralic's words, "presented the case in favor of revocation" in that he "was permitted to make … closing remarks in support of his revocation complaint, and also presided over the presentation of witnesses in support of revocation of the License."

¶12 After the hearing, the Committee voted to recommend revocation. A Licenses Committee report containing this recommendation and findings of fact and conclusions of law was submitted to the full Council. The Council voted to approve the Committee recommendation and, although this action required only a majority vote of those alderpersons present, the vote was unanimous with "15 ayes, 0 nos." *See* CITY OF MILWAUKEE, WIS., CODE OF ORDINANCES § 90-12-5-d-2 (2009). Alderman Zielinski participated in this vote, but otherwise remained silent at the Council proceeding.

¶13 It is Coralic's argument that, given Zielinski's role before the Committee, Zielinski's participation in the Council vote violated Coralic's right to an impartial decision maker.

¶14 The parties argue about whether, as a threshold matter, it is correct to characterize the Council vote as a quasi-judicial or quasi-legislative act. More specifically, the parties seemingly agree that the Committee hearing was quasi-judicial, but part ways on the characterization of the Council vote. We need not resolve this dispute because we would reject Coralic's arguments regardless how the Council proceedings are characterized.[3]

¶15 We also note that portions of Coralic's argument might be taken as asserting that the mere fact that Alderman Zielinski filed the revocation complaint would require Zielinski's recusal at the Council vote. Coralic, however, provides no legal support for this view. Moreover, a case he cites elsewhere in his briefing supports a contrary view. Specifically, ***State ex rel. DeLuca v. Common Council of Franklin***, 72 Wis. 2d 672, 242 N.W.2d 689 (1976), addressed a comparable situation and explained that "the mere fact that [the decision maker] had stated under oath [in a verified petition] … that there were grounds to remove [the objector] did not disqualify [the decision maker] from subsequently sitting as an impartial adjudicator" on that same matter. *See* ***id.*** at 675-76, 690. Coralic does not suggest, much less explain why, some other rule would apply here. Thus, we are not persuaded that Zielinski's filing of the revocation complaint here disqualified Zielinski from voting on the matter as a Council member.

¶16 We now turn to Coralic's main argument. Coralic contends that Alderman Zielinski's role as an advocate at the Licenses Committee fact-finding hearing disqualified Zielinski from subsequently voting as a Council member on

[3] This disagreement aside, both parties seem to assume that some degree of due process applies to the revocation. For purposes of this opinion, we will likewise assume that this is correct.

the revocation. We do not, however, consider Coralic's argument on a blank slate. Rather, in ***DeLuca***, the supreme court explained that a person objecting to a decision maker's impartiality has a "heavy burden" and must overcome the presumption that the decision maker, "as a responsible … officeholder and entrusted with great public responsibility, would adhere to his oath and reach a final decision only on [a proper] basis." *See* ***id.*** at 684, 690. To overcome this presumption, Coralic must point to "special facts and circumstances to demonstrate that the risk of unfairness was intolerably high." *See* ***id.*** at 691-92.

¶17 Coralic's impartial-decision-maker argument relies on two cases, but, as we explain, he fails to connect these cases to the specific circumstances here. This omission is fatal to Coralic's argument because, as we have just explained, he bears a substantial burden on this issue and must specify why the circumstances here justify disregarding the presumption of impartiality.

¶18 Coralic relies on ***Marris v. City of Cedarburg***, 176 Wis. 2d 14, 498 N.W.2d 842 (1993). In that case, which addressed a zoning board decision, the board chairperson had made previous statements that the landowner's legal position was a "'loophole' in need of 'closing'" and that the board members and the city attorney should try to "'get her [the landowner] on the Leona Helmsley rule.'" ***Id.*** at 27. The chairperson, having made these statements, participated in both a subsequent board hearing on the matter and the decision based on that hearing. *See* ***id.*** at 22-23, 26, 31.

¶19 Addressing these facts, the ***Marris*** court first noted that "a board member's opinions on land use … *should not necessarily* disqualify the member from hearing a zoning matter" because such decision makers are "selected from the local area" and "can be expected to have opinions about local zoning issues."

Id. at 26 (emphasis added). The court nonetheless concluded that recusal was required largely based on the unique circumstance that the chairperson stated a desire to "'get her [Marris].'" *See* ***id.*** at 29-31. The court concluded that this strong statement revealed an impermissibly high risk of bias because "[i]mpartial decision-makers do not 'get' the parties before them." *See* ***id.*** at 30-31.

¶20 Coralic's argument relying on ***Marris*** is brief and lacks necessary detail. He simply asserts that ***Marris*** should guide the result here because Alderman Zielinski's "complaint and prosecution against Brew House were undoubtedly stronger in tone and aggressiveness than anything experienced by Marris." Coralic, however, does not specify what was equivalent to, much less "stronger" than, the chairperson's statements in ***Marris***. That is, Coralic does not point to any specific statements made by Zielinski here, much less a statement equivalent to the "get her" statement in ***Marris***. Neither does Coralic specifically explain how Zielinski was otherwise out to "get" him in the sense discussed in ***Marris***. So far as the record reveals, Zielinski was acting in response to constituent concerns that appeared to meet the criteria for revocation. Coralic does not adequately explain why ***Marris*** should guide the result in these circumstances. Accordingly, we have no reason to suppose that Zielinski's Council vote was based on anything other than these facts as applied to the relevant revocation criteria.

¶21 Coralic also relies on ***DeLuca***, 72 Wis. 2d 672. In ***DeLuca***, an alderperson filed a petition for removal of a city clerk for cause and, in that petition, asserted that the allegations against the clerk were "'true of his own knowledge.'" *See* ***id.*** at 675-76, 677, 681 (emphasis deleted). In addition, it appeared that the alderperson "conducted an *ex parte* investigation" into the matter. ***Id.*** at 682. The alderperson subsequently presided over a fact-finding

hearing conducted by the common council and participated in the common council removal vote based on that hearing. *See* ***id.*** at 675-77, 681-82. The supreme court upheld the common council's decision, reasoning that these facts were insufficient to show that the alderperson was "so 'psychologically wedded'" to his complaint or was "the prosecutor of the case" in ways that created an intolerably high risk of bias. *See* ***id.*** at 690-92. In reaching this conclusion, the court highlighted the presumption of impartiality and the lack of a showing of "special facts and circumstances" by the city clerk. *See* ***id.***

¶22 As can be seen, ***DeLuca***'s result of upholding the council decision does not support Coralic's position here. Coralic nonetheless asserts that ***DeLuca*** supports reversal based on a statement made by the court in the course of rejecting the argument of partiality. That statement was a general observation regarding when, in theory, a decision maker might be found not to be impartial: "the combination of bringing the charges and being an adjudicator could result in an intolerably high risk of unfairness if it could be said that this essentially converts the charge bringer into the role of prosecutor." *See* ***id.*** at 688. Based on this concept from ***DeLuca***, Coralic contends that Alderman Zielinski's recusal *from the Council vote* was required because Zielinski acted like a "prosecutor" *at the prior Committee hearing*.

¶23 Here, assuming that Zielinski was a "prosecutor" within the meaning of the ***DeLuca*** discussion, Coralic's argument falls short. The reason, once again, is a lack of necessary development. Coralic's premise is that his rights were violated at *the Council vote*, but he does not point to any behavior or statements specific to *the Council vote proceeding* to support his argument. Rather, underlying Coralic's argument is the proposition that Zielinski's conduct at the Committee hearing had an equal effect on the Committee vote and the Council

vote. It follows, according to Coralic, that Zielinski was required to recuse himself from both. The problem for Coralic is that he does not support this proposition. If Coralic believes that this is too obvious to merit an explanation, he is mistaken, especially given that he bears the burden.

¶24 So far as the record and arguments reveal, the Council vote presents different circumstances than the Committee decision. An obvious example is that, at the Council vote, the primary fact finding is already accomplished and there is already a recommended course of action. Related to this, Coralic effectively ignores the basic fact that this was a two-stage process. For example, Coralic essentially concedes that it was proper for the Committee members who made the recommendation to subsequently vote on that recommendation. Implicit in this concession is the proposition that the Committee members are presumed to vote impartially at the second stage, regardless of their view at the first stage.

¶25 In sum, Coralic has not overcome the presumption that Alderman Zielinski, presumed to be "a responsible … officeholder," did not "adhere to his oath and reach a final decision only on [a proper] basis." *See* ***DeLuca***, 72 Wis. 2d at 690.

B. Committee Report's Findings Of Fact

¶26 Coralic also contends that we should reverse the Council's decision because it is based on an invalid Committee report produced by a city attorney. We are not persuaded.

¶27 By statute, the Licenses Committee report must contain the Committee's findings of fact, conclusions of law, and recommended Council action. *See* WIS. STAT. § 125.12(2)(b)3. The full Council then considers the

Committee report when voting on the matter. *See **id.*** ("If the city council, after considering the committee's report and any arguments presented by the complainant or the licensee [regarding the report], finds the complaint to be true, … the license shall be suspended or revoked ….").

¶28 Here, with a city attorney present, the Committee heard evidence. After taking evidence, a Committee member moved for a vote on a recommendation of revocation and that motion identified, in general terms, the hearing evidence that supported the revocation.[4] The motion carried. Following established practice, the city attorney then drafted the Committee's findings of fact based on the evidence identified by the motion. Later, the Council members—including the Council members who were Licenses Committee members—read the report before a Council vote was taken on the recommendation.

¶29 Coralic's argument is directed at the statutory requirement that the report contain the Committee's findings of fact. Coralic does not appear to take issue with the fact that the Committee report was prepared by a city attorney. Rather, he contends that the report does not contain the full and genuine fact finding by the Committee because the Committee members did not review the report and approve it prior to the report's submission to the full Council.

¶30 Our recent decision in ***Questions, Inc. v. City of Milwaukee***, No. 2010AP707, unpublished slip op. (WI App July 19, 2011), addressed substantially the same argument and rejected it. Although we are not bound by ***Questions, Inc.***,

[4] The motion was for revocation "based upon the police report, based upon neighborhood testimony, [and based upon] testimony provided by the captain of the local police district."

we follow its reasoning here. In ***Questions, Inc.***, we also addressed a report prepared by the Milwaukee City Attorney's Office for the Common Council's Licenses Committee. In that case, we addressed Coralic's concern as follows:

> In other words, on the record before the Common Council, all members of the Licenses Committee acknowledged reading the Findings of Fact and Conclusions of Law drafted by the City Attorney's Office and no member of the Committee spoke up to say that they did not approve of the document as drafted. Each committee member's acknowledgement of receipt and failure to object is sufficient to demonstrate that the document accurately represented the Committee's findings and recommendations. Questions points to no statute or ordinance stating that more needed to be done to secure the committee members' approval.

Id., ¶31.

¶31 Here, as in ***Questions, Inc.***, each Council/Committee member acknowledged having read the report and none spoke up to say that he or she did not approve of the document as drafted. Accordingly, we reject Coralic's premise that the findings were not the Committee's findings. Coralic couches his argument in due process terms, but he points to no specific due process requirement for something more, given what we have just discussed.

¶32 In an attempt to bolster his argument, Coralic points to the testimony taken by the circuit court of Alderman Bohl, a Committee member. However, in light of our analysis in ***Questions, Inc.***, which we adopt here, we fail to see why Bohl's testimony matters. By adopting the reasoning of ***Questions, Inc.***, we have concluded that we may assume that Committee members adopt the findings in a report prepared by a city attorney when, at the subsequent Council meeting, they acknowledge having read that report and do not object to it. Coralic points to nothing in Bohl's testimony that undercuts that reasoning. And, our own review

of Bohl's testimony reveals no suggestion that he does not agree with the findings in the report.

¶33 Moreover, we do not agree with Coralic's characterization of Alderman Bohl's testimony. Coralic asserts that Bohl's testimony showed that, in Coralic's words, the Committee report "left out critically important information" considered by the Committee. The apparent suggestion here is that Bohl did not agree with the findings in the report. Coralic's assertion, however, depends on an incomplete reading of Bohl's testimony.

¶34 It is true that, at one point, Alderman Bohl appeared to state that, as a general matter, he may at times cast his Council vote based on facts outside the Committee report's findings. However, even taken in isolation, this statement does not indicate disagreement with the Committee report's findings in this case. Rather, it is merely an acknowledgment of what is common sense—that Bohl's knowledge of the hearing evidence may be greater than that of Council members who are not on the Licenses Committee. Further, taken in context, Bohl's comments were not an assertion that he considers *different* categories of evidence not accounted for in the report's findings. Rather, his comments were that his participation in the fact-finding proceeding means that his understanding of the items contained in the findings is more "substantial" than a Council member who did not participate. Once again, this is common sense and it does not support a conclusion by this court that the report did not contain the findings of the Committee as a whole.[5]

[5] We do not address additional arguments by Coralic that assume he has persuaded us that the Committee report does not contain the findings of the Committee. For example, Coralic relies on ***Lamar Central Outdoor, Inc. v. Board of Zoning Appeals of Milwaukee***, 2005 WI 117,

(continued)

Conclusion

¶35 For the reasons discussed, we reverse the circuit court's decision vacating the Common Council's license revocation.

By the Court.—Order reversed.

Not recommended for publication in the official reports.

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284 Wis. 2d 1, 700 N.W.2d 87, but his accompanying argument assumes that the Committee report's findings were not the Committee's findings. In addition, Coralic cites circuit court testimony from another Council member, but does not explain how this testimony adds anything of substance.