

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 3, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-0227

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

AMERICAN WORLD, INC.,

Plaintiff-Appellant,

v.

CITY OF WISCONSIN DELLS,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Columbia County: RICHARD L. REHM, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

DEININGER, J. American World, Inc. appeals from a judgment upholding the City of Wisconsin Dells' denial of its application for a "Class B" liquor license, claiming that the City's action was arbitrary and capricious. Because we find the record demonstrates a proper exercise of discretion in denying the license, we affirm.

BACKGROUND

Section 125.51(4), STATS., places a quota on the number of "Class B" licenses a municipality may issue.¹ The City of Wisconsin Dells' quota of "Class B" licenses is fourteen, all of which are presently issued. As part of the 1995-1997 state budget bill, 1995 Wis. Act 27, the legislature enacted the following provision:

Section 4123m. 125.51(4)(u) of the statutes is created to read:

(4)(u)1. Notwithstanding the quota of a municipality, its governing body may issue a license to a corporation that holds a Class "B" license, a "Class C" license and a "Class A" license since January 1, 1992, if the licenses are issued by that governing body.

2. No license may be issued under subd. 1. after September 1, 1995, or 30 days after the effective date of this subdivision [July 29, 1995], whichever is later, but a license issued under subd. 1. on or before September 1, 1995, or on or before 30 days after the effective date of this subdivision [July 29, 1995], whichever is later, may be renewed.

American World is a Wisconsin corporation which operates a one-hundred-sixty room motel and recreational complex in the City of Wisconsin Dells (City). The complex includes a restaurant and lounge, as well as a liquor store. American World has held the three licenses cited in § 125.51(4)(u)1.,

¹ A "Class B" license authorizes the retail sale of intoxicating liquor, by the glass and not in the original container, for consumption on the premises. It also permits the sale of wine in the original container for off-premises consumption. Section 125.51(3)(a), STATS. The "Class B" license quota is generally based on population, but also involves a "grandfather" provision for the number of licenses issued as of August 27, 1939. Section 125.51(4)(b)(2), STATS.

STATS., since January 1, 1992, and was thus eligible for a "Class B" license from the City of Wisconsin Dells under the newly enacted quota exception.²

American World applied for a "Class B" license on July 31, 1995, and paid all appropriate fees. On August 14, 1995, the City's license committee held a public meeting on the application. Richard Makowski, a principal shareholder and president of American World, spoke in favor of the application. Speaking against the application were three persons who operate taverns in the City, as well as at least one other person who owns "several businesses" in the City. Also present was the state representative for the area who explained the legislative history of the new quota exception. He indicated that Mr. Makowski had been working "through the State Legislature" for approximately six years to obtain a quota exception that would allow him to obtain a "Class B" license from the City.

Attached to and incorporated by reference in the minutes of the license committee meeting is a summary of the comments made by citizens and committee members who were present at the meeting. This summary was prepared by the city attorney and assistant city attorney, both of whom were present at the meeting. The summary of comments is as follows:

Comments Favoring Issuance of the License

The license should be allowed pursuant to the spirit of competition. The strong will survive and the weak will fall.

The City of Wisconsin Dells needs more licenses to draw more business into the area.

² The licenses presently held by American World authorize retail sale of intoxicating liquor (including wine) in original containers for off-premises consumption ("Class A," § 125.51(2), STATS.); retail sale of wine by the glass or in an opened original container for on-premises consumption ("Class C," § 125.51(3m)); and retail sale of fermented malt beverages for on or off-premises consumption (Class "B," § 125.26(1), STATS.). Thus, American World could sell packaged liquor, beer and wine for off-premises consumption and it could serve beer and wine to its restaurant and lounge customers. Without a "Class B" license under § 125.51(3), STATS., however, it could not serve intoxicating liquor by the glass for on-premises consumption.

The license quota is too limiting. This special legislation will allow another license despite the quota.

Comments Opposing Issuance of the License

All liquor licenses should be processed in the same manner. This special legislation suggests that the state can override the City's power to regulate licensing.

This special legislation is for the benefit of only one individual and as such, prohibits others from equal access to the same benefit.

There is a sufficient number of liquor licenses already in Wisconsin Dells.

This person should go through the same expense that others have had to go through in obtaining a license.

To allow such a license would be setting a bad precedent for others - that an individual who cannot get what they want locally can attempt to get what they want by going through the state.

No one on the Wisconsin Dells Council was consulted regarding the matter to obtain input from the Mayor, the City Council and City Community Members.

The location does not promote the downtown area of Wisconsin Dells.

Issuance of the license for this particular location is of no benefit to the overall development of Wisconsin Dells.

The license committee voted 3-0, with one abstention, to recommend to the city council that American World's application be denied.

On August 21, 1995, the city council considered the license application as a part of its regular meeting agenda. Although Mr. Makowski was present, apparently neither he nor anyone else spoke in favor of or against

the application. After a brief discussion, the city council voted 3-1, with two members abstaining, to accept the license committee's recommendation that American World's application be denied. On August 22, 1995, the city clerk sent Mr. Makowski a letter informing him of the denial of American World's license application. The letter stated the action was "based upon the following articulated reasons and factors":

- *State [i]nterference with a matter of unique local concern.
- *Lack of consultation by the State with the municipality.
- *Concern with regard to the location of the proposed licensed premises.
- *The effect of this license on other licensees.

In addition to stipulating that American World was eligible for a "Class B" license under the newly enacted quota exception, the parties also stipulated that the corporation, its principals and agents met all other requirements of § 125.04, STATS., for the issuance of a "Class B" license.

Following the denial of the license application by the city council, American World filed this action requesting the court to direct the City to issue a "Class B" license to American World. The trial court determined that the action was a proceeding under § 125.12(2)(d), STATS., for judicial review of the City's "failing to grant" a "Class B" license. The court concluded that the City's determination was not arbitrary or capricious; that it was a conscious and reasoned decision; that the actions of the City were not wilful, irrational or unconsidered; and that the City did not abuse its discretion. American World appeals from the judgment denying its requested relief.³

ANALYSIS

³ The court also concluded it had the authority to grant the relief requested by plaintiff and that § 125.51(4)(u), STATS., is constitutional. Neither issue is raised on this appeal. Further, the parties stipulated that the City did not commit any "technical procedural error[s]," such as open meetings law violations or insufficiencies of notice. While American World notes in its brief that no tape recordings of either the license committee or city council meetings were made available to the court, it did not allege in the trial court or on this appeal any procedural deficiencies in the proceedings conducted by the City of Wisconsin Dells.

It is well settled law in Wisconsin that a nominally qualified applicant does not have a "right" to the issuance of a liquor license from a municipality. *Marquette Sav. & Loan Ass'n v. Village of Twin Lakes*, 38 Wis.2d 310, 315, 156 N.W.2d 425, 427-28 (1968). Rather, the decision to grant or deny a liquor license is committed to the sound discretion of the municipal governing body. *Rawn v. City of Superior*, 242 Wis. 632, 636-637, 9 N.W. 87, 89 (1943).

A reviewing court may not substitute its judgment for the properly exercised discretion of the governing body. *State ex rel. Ruffalo v. Common Council*, 38 Wis.2d 518, 525, 157 N.W.2d 568, 571 (1968). We review de novo the City's decision under the same standard as the trial court. See *Norton v. Town of Sevastopol*, 108 Wis.2d 595, 598, 323 N.W.2d 148, 150 (Ct. App. 1982). The denial of a liquor license application may only be set aside if the municipality acted arbitrarily and capriciously. *Id.*; *State ex rel. Higgins v. City of Racine*, 220 Wis. 107, 111-112, 264 N.W. 490, 492 (1936).

In determining whether the City of Wisconsin Dells acted arbitrarily and capriciously, the court must determine whether the action "is unreasonable or does not have a rational basis." *Olson v. Rothwell*, 28 Wis.2d 233, 239, 137 N.W.2d 86, 89 (1965). "Arbitrary action is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the 'winnowing and sifting' process." *Id.* This court has further explained the arbitrary and capricious standard in *J.F. Ahern Co. v. Wisconsin State Building Commission*, 114 Wis.2d 69, 96, 336 N.W.2d 679, 692 (Ct. App. 1983):

When applying the arbitrary and capricious standard, we determine whether the [municipality's] action had a rational basis, not whether the [municipality] acted on the basis of factual findings. Rational choices can be made in a process which considers opinions and predictions based on experience.

We conclude that the City of Wisconsin Dells did not act arbitrarily or capriciously in denying American World's application.

First, the record in this case establishes that the City employed a regular and proper procedure in reviewing American World's application. American World was afforded a legislative-type public hearing before the City's

license committee as well as public consideration and action on its request by the city council. See *Ruffalo*, 38 Wis.2d at 524, 157 N.W.2d at 571.

Second, we conclude that the City's actions were based on rational choices. The City provided American World with its reasons in writing for denying the application: "State interference with a matter of unique local concern; lack of consultation by the state with the municipality; concern with regard to the location of the proposed licensed premises; and the effect of this license on other licensees." The concerns regarding location and effect on other licensees are noted in the summary of public comments at the license committee meeting. These two reasons for denial are based on public input to the governing body, are not irrational, and are thus sufficient in and of themselves to substantiate the exercise of reasoned discretion.

American World, however, claims that the City's stated concerns regarding location and effect on other licensees were merely pretexts, while the remaining two reasons reflect the real, arbitrary and capricious basis for the decision: animus on the part of city officials toward the legislature for enacting the quota exception as part of the state budget bill. As noted above, there is a basis in the record for city concerns about location and effect on other licensees, and our inquiry need go no further. "[T]he motives which actuate municipal authorities in performing an act within the scope of their power will not be inquired into by the courts in the absence of fraud, corruption, or oppression." *State ex rel. Boroo v. Town Board*, 10 Wis.2d 153, 162, 102 N.W.2d 238, 243 (1960); see 2A E. MCQUILLIN, MUNICIPAL CORPORATIONS § 10.35 (3d ed. 1996).

Moreover, it appears that the governing body's distaste for the newly enacted quota exemption stems in large measure from its perceived unfairness. The minutes of the city council meeting reflect, for example, that one council member "stated ... his objection ... was that this State provision did not afford any other citizen equal access to this same benefit." Another member cited a letter received by the City from a state senator who was critical of the legislative enactment: "Such budget provisions circumvent the quota system for a liquor license permit and outrage people believing in fair play throughout Wisconsin." These comments reflect a rational consideration of local concerns and public sentiment. See *State ex rel. Smith v. City of Oak Creek*, 139 Wis.2d 788, 800-801, 407 N.W.2d 901, 906 (1987) (Section 125.51, STATS., and "the case law of our state ... provide ... that the ultimate question of whether to issue such a license to a particular applicant is a matter of local concern."); *Johnson v.*

Town Board, 239 Wis. 461, 462, 1 N.W.2d 796, 797 (1942) (upholding a town's denial of a license "for reasons wholly unconnected with [the applicant's] fitness merely because it considered that no licenses should be granted in view of the community sentiment.")

We do not hold that a governing body may arbitrarily refuse to grant a liquor license solely on the basis of political differences with the state legislature. But, where, as here, the governing body conducts a proper review of the application, considers public sentiment and local concerns, and has a rational basis for denial, the municipality's action may not be disturbed.

By the Court. – Judgment affirmed.

Recommended for publication in the official reports.