COURT OF APPEALS
DECISION
DATED AND FILED

September 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2335 **Cir. Ct. No. 2011CV10533**

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

POP PROMOTIONS, LLC, D/B/A TEXTURE,

PETITIONER-RESPONDENT,

V.

CITY OF MILWAUKEE AND RONALD D. LEONHARDT, CITY CLERK,

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Reversed*.

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

¶1 BLANCHARD, J. Pop Promotions, LLC, which operates a nightclub called Texture, applied to the City of Milwaukee to renew its Class B Tavern and Tavern Amusement licenses for the term July 26, 2011, to July 25, 2012. After holding two hearings, the Licenses Committee of the Milwaukee

Common Council recommended to the Common Council as a whole that it deny the applications for renewal. The Common Council unanimously adopted this recommendation. On review, the circuit court concluded that the Common Council's decision could not be sustained and ordered the City to issue the licenses, through what the court characterized as a writ of mandamus. The City appeals that order. For the following reasons, we reverse the order.

BACKGROUND

¶2 As discussed below, there are three issues on appeal.[1] Each focuses on aspects of two hearings held by the Common Council Licenses Committee. Therefore, we recite basic facts regarding the committee hearings phase of the proceedings, then provide additional facts in the discussion below as necessary. We refer to Pop Promotions by the name of the nightclub it operates, Texture.

The Notice

¶3 After Texture applied, as required by the City of Milwaukee, for annual renewal of its licenses, the City Clerk scheduled the matter for a hearing before the Licenses Committee. More specifically, the Clerk issued a notice ("the notice"), dated June 11, 2011, addressed to the agent for Texture, requesting attendance at a meeting scheduled for June 21, 2011, at a particular time in a designated room in Milwaukee City Hall. Attached to the notice were police

[1] As explained more fully below in footnote 2, we do not reach a fourth potential issue, namely, whether the reviewing court could issue an order directing the City to renew Texture's permit based on the extraordinary remedy of mandamus. We do not reach this fourth issue in light of our conclusion, based on the record, that Texture fails to carry its burden of overcoming the presumption of correctness that applies to the City's decision under the standard of review that we discuss in ¶12 and footnote 2 of this opinion.

reports alleging activities at or near Texture: (1) a report of the Milwaukee Police Department entitled "License Investigation Unit—Criminal Record/Ordinance Violation/Incidents Synopsis" ("the synopsis"); (2) five separate reports of the Milwaukee Police Department, each entitled "Report of Incidents Involving Licensed Persons Or Premises ("the premises reports").

¶4 Referring to the synopsis and the premises reports, the notice stated, in part, as follows:

> There is a possibility that your application may be denied for one or more of the following reasons: failure of the applicant to meet the statutory and municipal license qualifications; pending charges against or the conviction of any felony, misdemeanor, municipal offense or other offense, the circumstances of which substantially related to the circumstances of the particular licensed activity, on behalf of the licensee, his or her employes, or patrons (if the licensee is a corporation or licensed limited partnership, the conviction of the corporate agent, officers, directors, members or any shareholder holding 20% or more of the corporation's total or voting stock, or proxies for that amount of stock, of any of the offenses enumerated in s. 125.12(2)(ag), Wis. Stats., as amended); the appropriateness of tavern location and premises; neighborhood problems due to management or location; failure of the licensee to operate the premise[s] in accordance with the floor plan and plan of operation submitted pursuant to s. 90-5-1-c of the Milwaukee Code of Ordinances; and any factors which reasonably relate to the public health, safety and welfare. See attached police report and/or written correspondence regarding this application. Please be advised the public will be able to provide information to the committee in person. The committee will receive and consider evidence regarding the above mentioned criteria.
>
> ….
>
> Failure to appear at this meeting may result in denial of your license…. Limited Liability applicants must appear only by the agent designated on the application or by an attorney….

> You will be given an opportunity to speak on behalf of the application and to respond and challenge any charges or reasons given for the denial. No petitions can be accepted by the committee, unless the people who signed the petition are present at the committee hearing and willing to testify. You may present witnesses under oath and you may also confront and cross-examine opposing witnesses under oath.

¶5 In bold at the bottom of the notice, Texture was advised, "**If you have questions regarding this notice please contact the License Division at (414) 286-2238.**"

First Committee Hearing

¶6 At around the time and on the date reflected on the notice, the chair of the Licenses Committee turned to the Texture applications. Texture appeared and was represented by legal counsel. The Chair called a "contested hearing," which by City ordinance generally limits presentations and argument by each side to thirty minutes but allows for extensions as appropriate, as discussed further below. The hearing was extensive, lasting approximately three hours. The committee heard from six persons: Juli Kaufmann, who resides near Texture; a police lieutenant and a police officer; a person who operates a spiritual center next to Texture; the agent for Texture; and a person who recorded video footage in the area of Texture, on behalf of Texture, to present to the committee.

¶7 The committee heard argument from counsel for Texture and discussed details regarding the case, during which one member of the committee moved for non-renewal, based on what he saw as a record of "basically, noise and fights." The committee voted 3-2 in favor of that motion, recommending non-renewal to the Common Council.

¶8 In a report dated June 21, 2011, the committee issued its findings of fact and conclusions of law. The findings of fact described fights and excessive noise at Texture on specified occasions.

Second Committee Hearing

¶9 The matter was reopened for a second hearing by the committee on July 7, 2011, after Texture asserted that the committee should consider additional evidence. Texture called a Texture bouncer and two police officers, including one of the officers who had testified at the first hearing. The second hearing lasted at least thirty minutes, at the close of which counsel for Texture asked the committee to reconsider its prior decision and renew the licenses.

¶10 The committee rejected this request and again voted 3-2 for non-renewal. In a report dated July 11, 2011, the committee issued findings of fact and conclusions of law consistent with its new vote and with its prior report.

Common Council and Circuit Court Decisions

¶11 Texture did not appear before the Common Council, where the second report and recommendation of the committee was adopted on a 15-0 vote. Texture sought review in the circuit court. The court concluded that the notice was "not sufficient to apprise" Texture of the committee's intent and the nature of the objection to renewal, that Texture "was not given a full and fair opportunity to be heard on the matter of its license renewal," and that the decision not to renew "was not based on substantial evidence." For these reasons, the court ordered that the City issue the licenses.

DISCUSSION

I. Standard of Review

¶12 The parties agree that our review is of the Common Council's decision, not the decision of 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. As the party challenging the Common Council's decision, Texture bears the burden on review. *See* ***Ottman v. Town of Primrose***, 2011 WI 18, ¶50, 332 Wis. 2d 3, 796 N.W.2d 411 ("the petitioner bears the burden to overcome the presumption of correctness" that applies to a municipality's decision). The parties further agree that our review of the Common Council's action is limited to the standards ordinarily associated with certiorari review, namely whether: "(1) the governmental body's decision was within its jurisdiction, (2) the body acted according to law, (3) the decision was arbitrary or oppressive, and (4) the evidence of record substantiates its decision." *See* ***Bruskewitz***, 248 Wis. 2d 297, ¶11.[2]

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[2] It appears from the record, and in particular from the circuit court's order, that the court not only reviewed the Common Council's non-renewal action pursuant to the judicial review provisions in WIS. STAT. § 125.12 (2009-10) but also ordered the Common Council to issue a permit "through a writ of mandamus." As referenced above in footnote 1, the parties dispute whether, even if the Common Council committed error, the court has mandamus authority to order the Common Council to renew the licenses. The City argues that the court lacks such authority and may only "affirm, reverse, or remand the matter to the city for further proceedings consistent with the court's instruction." Because we conclude that Texture fails to show any Common Council error, we need not address whether the circuit court has mandamus authority to order the Common Council to issue a permit. Even assuming without deciding that the court has such authority, it would not have been properly exercised here given Texture's failure on appeal to demonstrate error based on the record.

We also note that, in a recent opinion recommended for publication, this court concluded that WIS. STAT. § 125.12 "contemplates a de novo [judicial] review," not certiorari review. *See* ***Nowell v. City of Wausau***, No. 2011AP1045, slip op. ¶¶1, 13 (WI App Aug. 21, 2012). Even assuming this opinion will become binding law through publication and even if we were to issue this opinion after ***Nowell*** became binding, it would not change the result here for the following (continued)

II. Notice; Time to Present Case

¶13 Texture argues that the notice failed to provide Texture with adequate notice that the hearing would be a "contested hearing" or that the committee would, on any basis, limit the time periods within which the parties could present evidence and argument, and as a consequence "[Texture] was not given a full opportunity or sufficient time to be heard." For the following reasons, we conclude that Texture's notice argument is not persuasive.

¶14 The City's position is that notice of the possibility of a "contested hearing" is sufficiently provided by Milwaukee Code of Ordinances § 90-11-2, which addresses "Procedure for Non-Renewal." Section 90-11-2-b-2-h sets forth a detailed but flexible approach to time management at the hearings referenced in the notice that Texture received:

> If the chair should at any time determine that a hearing is or will be contested, the chair will announce that a time limit of 30 minutes shall be provided opponents of the license renewal and a time limit of 30 minutes for the applicant and supporters of the license renewal. This time will be extended for relevant questioning by licensing committee members. If upon expiration of 30 minutes for opponents or 30 minutes for the applicant and proponents the chair should determine, subject to the approval or objection of the committee, that a full and fair hearing of relevant issues requires an extension of time to protect the

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reasons. Texture has not asserted that de novo review should apply or indicated that it ever sought de novo review in the circuit court. To the contrary, Texture sought and received certiorari review. And, as indicated above, Texture asserts on appeal that a reviewing court is limited to applying the standards ordinarily associated with certiorari review. Accordingly, we are not faced with an argument that the circuit court failed to provide the type of review that the petitioner sought. Under these circumstances, Texture has forfeited any argument that de novo review applies.

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

> interests of the public and the applicant, a reasonable extension of time may be granted. Individuals opposing the proposed license and members of the public supporting the proposed license may be limited to not more than 2 minutes testimony each, or a greater or lesser amount if the chair determines that a different time limit is appropriate to the fair and efficient conduct of the hearing. The applicant shall have the privilege of using any portion of applicant's 30 minutes for presentation and testimony. At any time, the chair may overrule or prohibit redundant testimony or argument found unnecessary to substantiate or corroborate testimony and argument previously presented.

¶15 We agree with the City. Texture gives us no reason to conclude that the notice it received had to explain all the procedures that are explained in the ordinance, or in particular to explain the potential for limitations on time for presentations. Litigants routinely must consult statutes or rules separate from a hearing notice in order to determine what procedures will or may apply at the hearing. Moreover, we observe that here, the notice made reference to an ordinance section in the same chapter as the applicable rule quoted above. Looking at the wording and elements included in the notice, we fail to see how the notice could reasonably be read to have misled Texture into believing that the procedures set forth in the ordinance would *not* apply. Texture does not provide any persuasive reason why the notice and ordinance failed to give Texture adequate notice that the chair might call a "contested hearing," thus potentially limiting the time of proceedings. For all of these reasons, Texture's bald assertion that it had "no reason to believe" that the hearing might be limited to a "contested hearing" is unavailing.

¶16 If Texture means to argue that there is some defect related to the fact that the ordinance gives significant discretion to the committee chair to control the timing limitations described in the ordinance, this argument is insufficiently developed. Texture does not explain or provide authority explaining why we

should conclude that the discretionary nature of the time limitations created a due process problem or, more specifically, a notice problem.

¶17 Texture cites two cases as providing substantive support for its argument, but fails to explain how any proposition in either case shows that the notice Texture received was deficient, much less that it amounted to, as Texture now argues, "no notice whatsoever." *See* ***City News & Novelty, Inc. v. City of Waukesha***, 231 Wis. 2d 93, 104, 125, 604 N.W.2d 870 (Ct. App. 1999) (property interest in renewal of operating license warrants the minimal safeguards of procedural due process, which include providing notice of the charges upon which the license denial was based and giving an opportunity to challenge the charges); ***Bracegirdle v. Department of Regulation & Licensing***, 159 Wis. 2d 402, 417, 464 N.W.2d 111 (Ct. App. 1990) ("[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him [or her], notice and an opportunity to be heard are essential").

¶18 If Texture means to argue that, regardless of notice, limitations on its time to present evidence and argument amounted to a due process violation, that argument, too, is insufficiently developed and supported. Rarely are hearings in tribunals unlimited in time or scope. Given the flexible approach set forth in the ordinance quoted above, including the ability of the committee to give applicants *more* than the standard amount of time to present their cases—as in fact occurred here—the ordinance might reasonably be viewed as a due process enhancement, not a due process limitation.

¶19 Finally, Texture fails to point to evidence in the record that, at any time during the two hearings, totaling four hours in length, Texture lodged an objection or made an offer of proof related to an asserted lack of notice. In fact,

the record appears to reflect the opposite. At the first hearing, legal counsel for Texture took time to banter with committee members, indicated his assent to time management by the chair and took advantage of flexibility permitted by the chair,[3] and completed his closing remarks without suggesting that the record was deficient due to a lack of time to advocate for or present evidence in favor of renewal. Similarly, at the second hearing, legal counsel appears to have been given all the time he thought he needed, and ended his remarks by thanking the chair for allowing him "leeway." We acknowledge that, in its written objections to the committee's findings of fact and conclusions of law, Texture cited the thirty-minute default time limitation in the ordinance as being "inappropriate and a violation of Texture's rights." However, Texture did not, in those written objections, allege that Texture was not aware of this limitation in advance of the first hearing, nor did Texture allege that it was in fact prevented from presenting any particular evidence to the committee.

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[3] The pertinent exchange between the chair and counsel reveals assent, not objection:

> CHAIRMAN BOHL: At this time, what I'm going to do is, I will call forward the witness who is here to testify in opposition to the license.
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> Mr. Halbrooks, what I will do is provide you and your client an opportunity to address the police reports after we've heard from the individual who is here in opposition. So that will not be part of the 30 minutes; however, I will provide you that opportunity all at one time.
>
> MR. HALBROOKS: Okay, that's fine.

Similarly, in a statement that is representative of what we find throughout the record, counsel for Texture concluded his questioning of a witness at the second hearing with, "Okay. That's all I got."

¶20 In sum, the developed aspect of Texture's due process argument involving the right to adequate pre-hearing notice is not supported by the record or legal authority.

III. Opportunity to Testify

¶21 Texture argues that the committee "failed to permit all members of the public with an opportunity to testify" to the committee, and that this contravened the statement in the notice that "the public will be able to provide information to the committee in person." Texture refers us to statements made at the judicial review hearing by four persons to the effect that they did not have the "opportunity" to testify or to testify fully. However, even assuming without deciding that the record could properly be supplemented in this manner, none of these statements describe any action of the chair or any member of the committee that limited or prevented the testimony of any of these persons. For example, a neighbor to Texture merely testified at the judicial review hearing that he was present at the first committee hearing and wanted to testify but was not recognized by the chair. This neighbor admitted on cross-examination that he was not sworn as a witness and never approached the committee or its staff with a request to speak. Texture's argument is without merit.

IV. Substantial Evidence to Support Non-renewal

¶22 Texture argues that the City's decision to deny renewal was "arbitrary and capricious" because two primary sources of information relied upon by the committee should have been given no weight: neighborhood resident and witness Juli Kaufmann was "simply not credible," and the "accuracy" of the synopsis was "disputed." However, these arguments misconstrue our standards of review in considering the record. *See* ***Madison Gas & Elec. Co. v. PSC***, 109

Wis. 2d 127, 133, 325 N.W.2d 339 (1982) ("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 agency.'") (quoting ***Sanitary Transfer & Landfill, Inc. v. DNR***, 85 Wis. 2d 1, 14, 270 N.W.2d 144 (1978)); *see also* ***State ex rel. Harris v. Annuity & Pension Bd.***, 87 Wis. 2d 646, 659, 275 N.W.2d 668 (1979) (reviewing court must defer to the trier-of-fact's determinations weighing the evidence and assessing the credibility of witnesses).

¶23 As to Kaufmann, Texture now presents us with a cross-examination-style critique of her testimony, but this goes to the weight of the evidence, a determination that was for the Council or the committee, not for this court. At least one member of the committee, in appearing to expressly credit at least parts of Kaufmann's testimony stated the view that aspects of her cross-examination by counsel for Texture had been "reprehensible." Similarly, as to the synopsis, Texture attempts to cast a negative light on some aspects of the allegations, but even then concedes that some of the allegations are merely "incompletely reported," as opposed to being either wholly false or supportive of renewal.

¶24 Support for a conclusion that the Common Council, in following the committee majority's recommendation, relied on a reasonable view of the evidence can be found in statements of a committee member who, despite the fact that she voted in the minority (against the motion for nonrenewal) summarized evidence supporting the decision not to renew. She explained that she was "extremely disappointed" in Texture regarding its responses to fighting and noise, and also said in part:

> Here today, we heard not that certain fights didn't occur, but that it lasted only 7 minutes instead of 20 minutes; not

> that the police didn't have to come and services be used, but that your security helped them; and not that crowds weren't out there, but the crowds were actually your security. There are those who would think that the necessity for 16 security guards is a bit excessive, and if it gets that bad, maybe—why should a place be open at all? I'm not saying that's what I think, I'm just saying a reasonable person can think that.

¶25 In sum, Texture at most raises questions about whether a different reasonable decision could have been reached, but it falls far short of demonstrating that the Council's decision here was arbitrary or not substantiated by evidence of record.

CONCLUSION

¶26 For these reasons, we conclude that each of the three grounds raised as a basis to affirm the circuit court's order is without merit, and accordingly we reverse the order.

By the Court.—Order reversed.

Not recommended for publication in the official reports.