STATE OF WISCONSIN
CIRCUIT COURT BR. 11
WAUKESHA COUNTY

CITY NEWS & NOVELTY, INC.,

Plaintiff,

-vs-

CITY OF WAUKESHA,

Defendant.

CASE NO. 96-CV-1427

DECISION

(Filed Apr. 2, 1997)

Plaintiff, City News & Novelty, seeks certiorari review of defendants', City of Waukesha and City of Waukesha Administrative Review Board, decisions not to renew their license to operate an adult oriented establishment at 245 West Main Street in the city of Waukesha. Plaintiff contends that the action of the defendant in failing to renew plaintiff's license was unlawful because the licensing ordinance is unconstitutional and represents unconstitutional restraint; plaintiff contends that it was denied due process with respect to notice and an impartial tribunal; further the plaintiff contends that the record is inadequate as a matter of law to support the findings of the Administrative Review Board.

Review on certiorari is limited to whether, (1) the board kept within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive, unreasonable and represented its will and not its judgment; and (4) the evidence was such that it might reasonably make the

order or determination in question. *Coleman v. Percy,* 96 Wis. 2d 58, 588 (1990). On review courts should be "hesitant to interfere with the administrative determinations and accord the decision of the board [of appeals] a presumption of correctness and validity." *Snyder v. Waukesha Zoning Board,* 74 Wis. 2d 468, 476 (1976). Further on certiorari this court may not disturb the Board's findings if they are sustained by any reasonable view of the evidence nor substitute its discretion for that of the Board.

Plaintiff contends that the Waukesha Licensing Ordinance Section 8.195 under which the City Administrative Review Board acted is facially unconstitutional. Ordinarily, certiorari is confined to a review of the decisions of an administrative agency. Common councils and boards of review are not empowered to declare legislation unconstitutional. Such bodies can determine whether constitutional elements of due process have been accorded applicants. *Kmiec v. Town of Spider Lake* 60 Wis. 2d 640, 645 (1973). Some cases hold that declaratory judgment is the vehicle for a test of constitutionality. The court after research concludes that the case of *Omernick v. Department of Natural Resources,* 100 Wis. 2d 234 (1981) sets the procedural policy for Wisconsin:

> We believe *Cobb* reflects a fundamental policy that parties to an administrative proceeding must raise known issues and objections and that all efforts should be directed toward developing a record that is as complete as possible in order to facilitate subsequent judicial review of the record under Section 227.20 Stats. That policy, applicable in this case as it was in *Cobb,* requires that those constitutional issues be raised even

> though the administrative agency is without power to decide them. p. 248.

Plaintiff did not specifically address the constitutional issues in the hearings before the Administrative Review Board; however in January of 1996, in a "request for a review" of the determination of the Common Council, the specific constitutional infirmities of 8.195 alleged by the plaintiff were listed. In a footnote, the plaintiff noted that it was reserving the "right to raise issues pertaining to the constitutionality of Section 8.195 in state or federal court in an appropriate action at an appropriate time." The brief supporting the request concludes with a paragraph that contains the following language: "In particular, the omission of any constitutional arguments is not intended as a waiver of said arguments because the applicant understands that the Council does not have jurisdiction to declare any portion of the City's ordinances unconstitutional. The applicant intends to raise the constitutional issues in a appropriate forum." From this record, the court concludes that the plaintiff has raised specifically the constitutional issues and under the *Omernick* case the court has jurisdiction to decide them. Contrary to defendant counsel's belief, plaintiff is not attacking Wisconsin Statute Chapter 68.

The first issue concerns the plaintiff's assertion that no explicit standards for renewal of licenses are contained in the defendant's ordinance. The plaintiff contends that the Board was acting against the law in utilizing the standards for granting of a new license under Section 8.195 (4). Plaintiff argues the holdings in these cases support their position: *Renton v. Play Time,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed. 19, (1986); *City of Lakewood*

v. Plain Dealer Publishing Company, 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed. 771, (1988); and *Wolff v. City of Monticello*, 803 F.Sup. 1568 (Minnesota, 1992).

Defendant argues that plaintiff's counsel conceded the propriety of utilizing the standards under 8.195 (4) because plaintiff's counsel submitted findings of fact and conclusions of law to the administrative review board adopting same as the standards for renewal. The court does not find this argument of the defendant to be persuasive.

Defendant next observes that the language of 8.195 was analyzed in *Suburban Video v. City of Delafield*, 64 F.Sup. 585, (E.D. Wis., 1988). The Delafield ordinance has the same language with respect to "renewal" and other strictures as the Waukesha ordinance. This court finds that the constitutionality is not only presumed but confirmed by precedent. Defendant further argues that a reading of the entire ordinance reveals that the granting of new licenses, suspensions, revocations and renewals is dictated by the same standards: i.e., the presence or absence of violations of the sections of the ordinance. In a reply brief, plaintiff notes the denotations of "issue" and "renew" are quite separate. The court finds that in Section 8.195(4) the word "issuance" (a nominalization) only appears in the heading. The headings (STANDARDS FOR ISSUANCE OF LICENSE, FEES, RENEWAL OF LICENSE OR PERMIT, REVOCATION OF LICENSE) and the numerical enumeration are matters of style and indexing. The headings and enumerations are not operative parts of the legislation. When Section 8.195(4) is read in conjunction with 8.195(10) (b) the language demonstrates that the standards for obtaining a license apply.

The *City of Lakewood* case is distinguishable because the ordinance in question contained no standards. *Wolff* is also inapplicable because the format and language of the ordinance in that case was quite different from the Waukesha city ordinance. Therefore the court concludes that the ordinance is explicitly with respect to the standards to be applied when an applicant seeks renewal and the Administrative Review Board did not act unlawfully.

Plaintiff next asserts that the language of the ordinance permits unbridled discretion because Section 8.195(4) (d) (2) is vague. The plaintiff argues that the words "shall have been found" is not defined and is open to subjective decision making. The plaintiff contends that the language can't survive a vagueness challenge. The concern here is heightened because of the ordinance requirement to renew annually. *City of Lakewood, supra,* 760. The court finds that Judge Evans reviewed the same language with approval in *Suburban Video v. The City of Delafield;* also the plaintiff has cited no case stating that use of the word "found" is improper. The court notes that the forms of the verb "to find" are part and parcel of legal procedure. "To find" is to make a determination of fact; it's the act of an adjudicator after investigation or hearing. The cases cited by plaintiff all concern criminal statutes and involve whether the prohibited conduct is stated clear enough. *State v. Courtney,* 74 Wis. 2d 705, (1976); *State v. Tronca,* 84 Wis. 2d 88, (1977); *State v. Pompanz,* 112 Wis. 2d 166, (1983).

Plaintiff does not attack the nature of the conduct which "if found" constitute a violation of the ordinance. This court finds that the past perfect subjunctive "shall have been found to have violated" sets limits on the

municipal body rather than granting unbridled discretion. The Common council can only act when facts or evidence of a violation exist. The action is then subject to review under the substantial evidence test. The language is not vague.

The next two constitutional challenges can be combined: the challenges in regard to time limits; and for failure to preserve the status quo throughout the review process. The court agrees with the plaintiff that the review in this area must be confined to the statutory language and not the chronology of plaintiff's own renewal process. Because an applicant may choose to waive a time limit or because the Council did not upset the status quo are not relevant.

The importance of time limits is clear:

> The core policy underlying *Freedman* is that the license for a first amendment protected business must be issued within a reasonable period of time, because undo [sic] delay results in the unconstitutionality suppression of protected speech. *FW/PBS, Inc., v. Dallas*, 493 U.S. 215, 224, 110 S.Ct., 603.

The court does not find that 8.195(7) (c) – filing by police department, and (7) (d) – inspection by the building inspector create the capability to delay the decision on the grant or denial of a license. The sections do not change the 21-day time period after receiving an application for a license. In *FW/PBS v. Dallas*, the license was conditioned on an inspection by "health and fire departments and building officials" for compliance with other ordinances. No time limit was set for the inspections. In

the case at hand, the grant or denial is not conditioned on inspection and compliance.

Plaintiff next argues that, consistent with *Redner v. Dean*, 29 F. 3d, 1495, (11th Cir. 1994), the ordinance is defective because there is no time limit on the Common Council to decide after the public hearing specified in 8.195(3) (d).

> (d) Whenever an application is denied, the city clerk shall advise the applicant in writing of the reasons for such action. If the applicant requests a hearing within ten days of receipt of notice of denial, a public hearing shall be held within ten days thereafter before the council or its designated committee as here in after provided.

This subsection must be read, with respect to procedures and time limits, in conjunction with Section 2.11 which adopts Chapter 68 of the Wisconsin Statutes.

> 8.195(11) ADMINISTRATIVE REVIEW PROCEDURE. The City ordinances and State Law shall govern the administrative procedure and review regarding the granting, denial, renewal, nonrenewal, revocation or suspension of a license.

The ordinance and the statute establish a licensing scheme which does not allow "unbridled discretion in the hands of government official or agency."

Reference to the provisions of Chapter 68 negates the arguments of the plaintiff. The city clerk notifies the applicant in writing whether the application is granted or denied, 8.195 (3). This is a determination according to 68.01. At this point, the applicant can ask for a public hearing which must be held within ten days. 8.195 (3);

and/or the applicant may proceed under 68.08, a request for review. The review has time limit of 15 days pursuant to 68.09. The applicant has other options under 68.10 which has time limits for review and decision. (68.11 and 68.12).

In the same case at hand plaintiff chose to file a request under 68.08 immediately after the Common Council made the initial determination to deny the license renewal. The applicant does not bear any burden; the applicant merely chooses which facet of review to pursue and the City must follow the prescribed time limits. The court finds this licensing scheme comports with the holding in *FW/PBS, Inc., v. Dallas*; there is not part of the licensing scheme that allows indefinite postponement of the issuance or renewal of the license.

Plaintiff raises the question of preserving the status quo. None of the cases cited deal with status quo for renewals. The city did not address this issue in their brief. Again the fact that the Council did not halt the plaintiff's operation during the renewal and review process is not dispositive of the challenge.

Time limits and status quo go hand in hand. The most instructive case is *T.K.'s Video, Inc., v. Denton County Texas*, 24 F. 3d 705 (5th Circuit 1994):

> Nor is this unduly restrictive, given the availability of expeditious judicial review. A rejected license applicant has 30 days to seek judicial relief before the order of the director of public works becomes final.
>
> This does not answer the further question of how much of the total licensing process must be

> complete within the specified brief period, specifically whether the brief period includes completion of judicial review. Despite contrary suggestions in Justice Brennan's opinion in *FW/PBS, Inc.*, and some uncertainty in the language of Justice O'Connor's opinion in the same case we read the supreme court to insist that the state must offer a fair opportunity to complete the administrative process an access to the courts within a brief period. A brief period within which all judicial's avenues are exhausted would be an oxymoron.
>
> *T.K.* objects that the order does not provide automatic and prompt judicial review or an automatic stay of an order denying a license. As we explained the order provides that filing a notice of appeal to the state district court of Denton County stays an administrative decision revoking or suspending a license so the focus of T.K.s intentions is on the absence of stay of an order denying a license. *FB/PBS* [sic] requires only a prompt judicial hearing, a standard that the order meets by giving an unsuccessful license applicant 30 days to appeal to a district court in Denton County "on a trial de novo basis." The availability of expeditious judicial review obviates the need for automatic stay. Citation omitted page 709.

The court concludes that the license renewal scheme of 8.195 obviates the need for an automatic stay. The application must be filed at least 60 days before the license terminates; the applicant must be notified within 20 days of the grant or denial; review by ordinance or chapter 68 can be completed within 10 to 15 days. A hearing on the appeal under 68.10 must be heard within

15 days and a determination made within 20 days of the completion of the hearing under 68.12. The scheme provides that most of the review process can be completed prior to the expiration of the one year term of the license.

On the question of whether the ordinance on its face provides for prompt judicial review, the court has read the cases and arguments presented by both counsel. The court concludes that the ordinance in Section 8.195(11) provides access to prompt judicial review under Wisconsin Statute Chapter 68. Section 68.001 provides as follows:

> 68.001. Legislative purpose. The purpose of this chapter is to afford a constitutionally sufficient, fair and orderly administrative procedure and review in connection with determinations by municipal authorities which involve constitutionally protected rights of specific persons which are entitled to due process protection under the 14th amendment to the U.S. Constitution.

In particular, the judicial review by certiorari can be accessed under 68.10(1) (b) as well as after the decision by the Administrative Review Board. Under the circumstances, this court finds the ruling in *Graff v. City of Chicago*, 9 F.3d 1309, (7th Cir., 1993) supports the court's conclusion.

Plaintiff at the time of the Board hearing raised the due process issue concerning an impartial tribunal. Plaintiff specifically challenged Mayor Opel and Alderman Seidl because the two had "participated" in the Common Council meetings which passed a resolution denying plaintiff's renewal of the license. Counsel for the plaintiff argued that the Mayor and alderman were there:

> "The fact is he was there. The fact is he heard the debate. The fact is that he had this collegial association with the rest of the Common Council as did your Honor, the Mayor." (Transcript of April 12, 1996, page 14).

The members of the board responded to the challenge. The court finds that none of the cases cited by the plaintiff in this regard bear upon the situation presented. Upon review of the *DeLuca v. Common Council* decision at 72 Wis. 2d, 672 (1976), this court finds that plaintiff was not denied an impartial decision maker for the following reasons:

(1) Mayor Opel and Alderman Seidl were not reviewing their own decisions because they had not presented, argued, or voted on the Resolution in question.

(2) The Mayor was obliged by statute to conduct Common Council meetings as part of her duties and the city's rules of order; likewise, the alderman was obligated to attend the Council meetings.

(3) The Mayor and the alderman sit on the administrative review board pursuant to the city's ordinances; they are not volunteers.

(4) The Mayor as part of municipal procedure always signs, along with the clerk, any resolution of the Common Council. This activity is administrative in nature to provide authenticity to the document, not to pass on the merits of the legislation. This procedure is followed for resolutions and ordinances in most municipalities.

(5) Nothing in the record shows that the two individuals should be disqualified or precluded from the

administrative review board by prior conduct. There is no prohibition or disqualification in that the adjudicators heard the details of the Resolution (allegations) or the debate involving said Resolution.

(6) While the *DeLuca* case rejected a finding using hindsight, for completeness sake this court notes that Mayor Opel conducted the protracted and often contentious hearing in a fair and proper manner. She often deferred to and looked for guidance from the legal counsel for the board. Nothing in the questions or statements by either the Mayor or Alderman Seidl demonstrate partiality or a closed mind to the plaintiff's positions.

The plaintiff contends that the review board found that the plaintiff had committed a violation of the open booth provision on a totally different date than alleged in the Resolution. The Resolution of December 19, 1995, indicates that:

> WHEREAS on "November 30, 1994, December 1, 1994, and December 2, 1994, City News & Novelty, Inc., through its employees and/or agents violated the provisions of section 8.195(9) (b) (3) of the Waukesha Municipal Code by failing to have every booth, room, or cubicle totally open to a public lighted aisle so that permitting an unobstructed view of all times of anyone occupying same.
>
> WHEREAS each of the violations set forth above resulted in five convictions in municipal courts in the city of Waukesha during 1995 license year.

At the hearing, Marv Lemke, house inspector for the city, testified that his recollection was that on November 7, 1994, the booths had been improperly narrowed; that

on either November 9 or 10 he dropped off some literature with a Mr. Bishop at the establishment and observed that the booths were not in compliance. His testimony at the hearing further indicated he recalls dropping off some literature on November 28 and again observing the booths not in compliance. He further testified at the hearing that on November 30 his inspection of the establishment indicated the booths had been cut back as well as an observation on December 9 that the booths had been cut back. (April 2, 1996, transcript pages 280-282). Plaintiff further introduced Exhibits 24 and 25 which represent memos made Lemke on March 29, 1996, and 12-9-1994 respectively. The Board in its findings and conclusions found that the open booth violation had occurred on November 7, 1994, the date of Inspector Lemke's first visit (Section 16 B.1 page 8 and 9). Because City News and Novelty was given no notice that a violation was alleged to have occurred on November 7, 1995, and because the plaintiff never received the citation for a problem on November 7, notice of this violation was not given and constitutes unlawful action by the Board and an improper basis for denying renewal of license.

The court concludes that the plaintiff had been notified with sufficient and reasonable particularity regarding the times and dates of offenses sufficient to meet the accusations and prepare to defend against it for the following reasons:

(1) Plaintiff admits in their brief on page 27 that they had received citations for activities on November 30, 1994, and subsequent dates involving the booths and had been convicted in municipal court in 1995 based on testimony from Inspector Lemke.

(2) The Resolution refers to the citations and the particular section involving the booths that the city was concerned about. The record indicates that Inspector Lemke has conversations about the booths with employees of City News & Novelty in November and December of 1994.

(3) These contacts referred to wooden panels observed affixed to the booths at the rear of plaintiff's store during November of 1994.

(4) The plaintiff has made no showing that he has been unable to respond or prevented from mounting a defense to the existence or nonexistence of wooden infringements on the sides of the booths.

Plaintiff cites evidence that was introduced at the administrative review hearing which were beyond the allegations set out in December 19, 1995, Resolution. These consist of the board hearing the testimony of Timothy Morgan regarding an incident on March 7, 1976, not referred to in the Resolution. Plaintiff also criticizes the receipt of the following exhibits: No. 33, a witness statement taken by Officer Conkle of Sonny Dietscher; No. 43, the record of conviction for Timothy Morgan for retail theft; Exhibit 35, a subpoena for a David Hull; Exhibit 36, a copy of the complaint of a 1990 lawsuit involving the plaintiff; Exhibit 37, the citation issued to a Jaimie Barr in April of 1994 for sale or displays of sexual materials to a minor. The court finds that the testimony of Timothy Morgan was objected to by plaintiff's counsel in a timely fashion as were the other exhibits listed above. With respect to Mr. Morgan and all of the exhibits listed, the decision of the board did not include any findings with

respect to the credibility of Mr. Hull or Mr. Morgan and did not make any findings with respect to the exhibits objected to by the plaintiff. The rulings of the Administrative Review Board indicate that they relief on the testimony of police officers and their observations concerning activities of minors and others at the plaintiff's store. The Board found that the testimony of the officers was unrefuted. Nowhere in the record does the court glean that the introduction of these exhibits and the testimony of Mr. Morgan were considered as a basis for denial and therefore the opportunity and elements of due process with respect to notice have not been violated. Indeed the Board kept within the allegations of which City News & Novelty had prior notice.

The plaintiff argues that the license should have been suspended rather than denied. The matter of whether to suspend rather than deny renewal is a matter within the discretion of the licensing authority. The court cannot substitute or exercise its own discretion on certiorari review. The number, nature and timing of the violations found by the Board gave a reasonable basis for the denial of the plaintiff's renewal application. Because there have been no recent violations, the Board could have ruled otherwise; they chose not to do so.

The last complaint of the plaintiff is that the evidence on which the nonrenewal was affirmed was inadequate as a matter of law. The court disagrees with plaintiff's analysis that the actions of patrons cannot be grounds for disqualification. Sections 8.195(9) (c), (10) (b) and (10) (f) apply to hold the operator responsible for activity observed by Officers Gibbs and De Jarlais at City News & Novelty. Plaintiff attacks the Board's "findings" with

respect to minors being present in the store. Because the plaintiff has not been convicted, even in municipal court, the evidence cannot serve as a basis for the denial of a license. The record is supported by substantial evidence that the minors were allowed to loiter around or frequent the store. The evidence for the finding of responsibility of the operator under 8.195(10) (c) and (b) comes from the line of testimony of four police officers. The Board's factual findings are supported by substantial and credible evidence in the record. This court concludes that the facts of record constitute violations of the ordinance as specified by the Board.

Plaintiff argues in his brief that the citations issued to Peggy Lindsley, employee, and Daniel Bishop, a director of City News & Novelty, are on appeal. Plaintiff later notes in a letter that the convictions have been vacated. The court on certiorari cannot add to the record or take new evidence except in unusual circumstances. This court concludes that the issuance of the citations revolve around police officers observing a patron who was a minor on December 24, 1994. There is not subjective discretion exercised by Officer Piagentini when he testifies to the fact a patron at the store was a minor; there is no subjective discretion exercised by the Board in finding the testimony credible.

The court concludes that the ordinance in question survives the constitutional challenges brought by the plaintiff; that plaintiff, was accorded due process with respect to the hearings before the Administrative Review Board; and finds that the evidence upon which the Review Board's findings are based represents relative and probative evidence. Such evidence that a fact-finder

could base conclusions that violations of the ordinance had occurred and that the Council was empowered to deny renewal of plaintiff's license. Accordingly the court affirms the decision of the Administrative Review Board for the City of Waukesha.

By the Court:

/s/ Robert G. Mawdsley
Robert G. Mawdsley
4/2/97