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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1758**

Brooklyn Center Service Center, Inc.,
Relator,

vs.

City of New Hope,
Respondent.

**Filed July 27, 2010
Affirmed
Willis, Judge***

City of New Hope
Resolution No. 2009-97

Scott W. Swanson, Swanson Law Firm, PLLC, St. Paul, Minnesota (for relator)

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Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Stauber, Judge; and Willis,
Judge.

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

WILLIS, Judge

Relator brings this certiorari appeal challenging the New Hope city council's denial of an application for an off-sale liquor license. Because we conclude that the city acted within its broad discretion in denying the application and its decision is supported by substantial evidence and is not arbitrary and capricious, we affirm.

FACTS

In March 2009, Randy Rau, the owner of relator Brooklyn Center Service Center, Inc., applied to respondent City of New Hope for an off-sale liquor license. The city had recently amended its code to increase the number of available off-sale liquor licenses from seven to eight because of a potential tenant in the city's Midland Center who would need a license. Rau was the first to apply for the newly available license.

Rau already operated three businesses at his site: a gasoline station, a convenience store at which he also sold fishing bait, and a car wash. After applying for the liquor license, Rau submitted to the city's planning commission a proposed plan that would reconfigure the building on the property by turning approximately 59% of the area occupied by the convenience store into a liquor store. Rau commented in his submission that due to the state of the economy and the popularity of paying for fuel at the pumps, a large convenience store was unnecessary.

On June 2, 2009, the planning commission approved Rau's building proposal, subject to his ability to obtain a liquor license. On June 22, 2009, the city council held a public hearing to consider Rau's off-sale liquor-license application and proposed building

plan. Rau's application and building proposal were presented as separate items, and the liquor-license application was considered first. When the license application was presented, Councilmember Stauner stated his opposition, noting that the city had twice increased the number of off-sale licenses with the expectation of a Midland Center tenant applying for a license and both times other persons had applied. Stauner also voiced his concern regarding having a liquor store and a convenience store in the same building. The city council approved Rau's liquor-license application, with only Stauner voting no.

The city council next considered the planning commission's approval of relator's proposed building plan. The city's director of community development discussed the plan and commented that the zoning ordinance did not require Rau to add parking spaces. Two attempts to approve the building plan failed. Councilmembers then began raising their concerns with the overall concept. Councilmembers Stauner and Elder were concerned about the configuration of the space and parking availability at the location. Specifically, Stauner was worried about inadequate parking and the fact that an increased number of customers would have to walk through the gasoline pumps in order to reach the proposed liquor store. He also expressed concerns regarding the likelihood that customers would park in front of the store "to rush and get their six-pack and head out" because of the unavailability of an adequate number of parking spaces. Elder expressed similar concerns with the available parking. Elder was also concerned by the fact that all customers would have to walk past the liquor store to get to the convenience store.

The city attorney told the city council that while it had broad discretion in regulating the sale of liquor, once a license became available, the council could not

designate that license for a particular location or a particular person. He also explained that if the city council did not think Rau's location was appropriate for a liquor license, the council had the authority to deny the license on reconsideration. Mayor Hemken then moved to reconsider Rau's liquor-license application, and after some discussion, the application was tabled for a work session at the next council meeting. Rau expressed disappointment with the reconsideration, and Elder responded that other councilmembers had raised issues that he and possibly others had not thought of before the initial motion to approve the liquor-license application was presented.

On July 20, 2009, the city council held a work session, at which the city attorney told the council that it had broad authority in considering Rau's application and was not required to grant the liquor license simply because Rau met the minimum standards. He then summarized the city council's concerns: public safety; potential for overuse; possible public opposition to the liquor store; Rau's failed compliance checks related to his tobacco license and the 3.2 beer license that he formerly held; parking; and the fact that the city already had issued seven off-sale liquor licenses.

Mayor Hemken said that she thought that the city council had made a mistake by increasing the number of available licenses from seven to eight, given the size of the city. Elder noted that since the previous meeting, he had received 14 comments on the proposed liquor store and 11 of those were opposed to the proposal because they did not want another liquor store in the city. Stauner again stated that he was unwilling to support the license because of public-policy considerations associated with a liquor store and a gas station on the same premises, safety risks involving traffic and pedestrians, and

the fact that he did not think that Rau would manage the store properly. He also remarked that the increase in licenses was for the purpose of targeting redevelopment in a troubled area of the city, but in hindsight, he thought that six off-sale liquor licenses were sufficient for the city's needs. Councilmember Hoffe agreed that eight licenses were too many for the city's size. Councilmember Lammle explained to Rau that he initially thought that the city council was required to approve Rau's application because he met the minimum requirements for a liquor license. He further stated that it was only after this mistaken assumption was corrected that the city council voted to reconsider Rau's application.

The city council held a meeting on July 27, 2009, to formally consider Rau's application. The council made findings of fact and conclusions of law, and passed a resolution denying the liquor license on the grounds that:

1. The Property is inherently unsuitable for an "Off-Sale" liquor store,
2. [T]he establishment of a liquor store at the Property would be an unacceptable overuse of the Property,
3. The City has a sufficient number of liquor stores within the City or in close proximity to the City to meet the public need for off-sale liquor sales,
4. There is a public policy and public safety concern against allowing the sale of gasoline and hard liquor/strong beer from the same facility or property,
5. [Rau] has a past record of failing compliance checks for the illegal sale of tobacco and 3.2 beer that causes this Council concern regarding the ability of [Rau] to sell hard liquor/strong beer.

This certiorari appeal follows.

DECISION

City councils are vested with broad discretion in their consideration of liquor-license applications. *Country Liquors, Inc. v. City Council*, 264 N.W.2d 821, 824 (Minn. 1978). This broad discretion reflects a “concern for the abuse which could result from the dispensation of liquor.” *Bird v. State, Dep’t of Pub. Safety*, 375 N.W.2d 36, 43 (Minn. App. 1985). When an applicant meets the minimum criteria for obtaining a license, “the council must consider the application, but is by no means divested of its legislative authority and responsibility to pass upon the merits of the application.” *Country Liquors*, 264 N.W.2d at 824. This court’s review of a city council’s decision regarding a liquor-license application is narrow in scope and should be cautiously exercised. *Id.* The burden is on Rau to demonstrate the arbitrary nature of the council’s decision. *See id.*

1. The city council’s reconsideration of Rau’s liquor-license application does not demonstrate that its decision was arbitrary or capricious.

Rau argues that the arbitrary nature of the city council’s decision is evidenced by the fact that they granted and then, upon reconsideration, denied his application. We are not persuaded that the city council’s reconsideration of Rau’s application shows that its decision was arbitrary. A decision is arbitrary and capricious when it represents the council’s will and not its judgment. *In re Hutchinson*, 440 N.W.2d 171, 177 (Minn. App. 1989), *review denied* (Minn. Aug. 9, 1989). The record reflects that at least one councilmember initially thought that he was required to grant Rau’s application because Rau met minimum requirements for a liquor license. But when the building plan was up

for discussion, almost all of the councilmembers voiced opposition to the plan or the idea of another liquor store in the city. Once the city attorney clarified the scope of the council's authority in considering Rau's application, a motion to reconsider was passed. Relator cites no authority for the proposition that a city council is precluded from reconsidering a license application, and we conclude that the city council did not act arbitrarily simply because it voted to reconsider and then deny Rau's application after being shown the proposed building plan and engaging in additional discussion.

2. The city council's denial of Rau's liquor-license application was not pretextual.

Rau contends that the council would have granted his liquor-license application had he been a Midland Center tenant and that this demonstrates that the city council's decision is pretextual. But the record shows that the city council focused specifically on Rau's application and proposed building plan when making its determination. And the evidence shows that while some councilmembers acknowledged that the reason for authorizing an eighth license was to accommodate a potential Midland Center tenant, the fact that Rau is not located in the center was not a reason the council relied on to deny his application. Indeed, the hearing testimony shows that the city council was unhappy with the number of available licenses in general. We find nothing to suggest that the city council denied Rau's application because he is not a Midland Center tenant. We therefore conclude that the city council's decision was not pretextual.

3. The city council’s denial of Rau’s liquor-license application is supported by substantial evidence and is therefore not arbitrary and capricious.

Rau argues that the council’s grounds for denying his off-sale liquor-license application are not supported by substantial evidence and are therefore arbitrary and capricious. Rau further asserts that the absence of substantial evidence supports his argument regarding the allegedly pretextual nature of the city council’s decision; as we already determined this argument to be without merit, we will not readdress it. This court may modify or reverse a city council’s decision if it is not supported by substantial evidence in view of the entire record as submitted. *In re On-Sale Liquor License, Class B*, 763 N.W.2d 359, 365 (Minn. App. 2009). Substantial evidence has been held to mean “(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

A. Property Inherently Unsuitable

The council’s first ground for denying Rau’s application was that the property is “inherently unsuitable for an ‘Off-Sale’ liquor store.” The council reasoned that the configuration and location of parking spaces in relation to the existing convenience store was not suitable for the addition of a liquor store. The director of community development testified that there is no available parking in the front of the store. Instead, there are seven spaces for parking located near the gasoline-pump islands. The remaining parking is further from the building and is part of a shared parking arrangement with a

nearby shopping center. A photograph of the property introduced at the hearing shows that customers of the liquor store would have to walk through the gasoline-pump area in order to reach the proposed liquor store from available parking. There was no proposal to add parking spaces or a pedestrian walkway from the available parking to the front of the store. The configuration of the store and the location of the parking areas support the council's determination that the property is inherently unsuitable for a liquor store.

Rau argues that because the police chief of New Hope stated in an e-mail that he did not see an excessive risk to pedestrians at this location, the city council's decision is not justified. Rau also cites statements of the city's director of community development that he did not think that parking or pedestrian traffic would be an issue. This court will not reevaluate the weight that the city council gives to comments or evidence presented at a hearing. *See Senior v. City of Edina*, 547 N.W.2d 411, 416 (Minn. App. 1996) (noting that this court does not retry facts or make credibility determinations on review). The city council was entitled to rely on their own observations and judgment based on the proposed building plan, and the council's decision suggests that they did not find the opinions of the police chief and the director of community development to be persuasive. The scope of our review is narrow and we will not independently weigh the comments and evidence presented to the council. Instead, our role is limited to determining whether there is substantial evidence to support the city council's denial.

We conclude that here there is substantial evidence in the record to support the council's determination that the property is inherently unsuitable for a liquor store.

B. Unacceptable Overuse

The city council also determined that adding a liquor store to the property would result in an unacceptable overuse of the property. Rau currently operates on the property a gas station, a car wash, and a convenience store at which he also sells fishing bait. As the city council noted, these businesses are motor-vehicle intensive. In addition to the parking concerns discussed above, the city council concluded that an additional business would generate more traffic on the property, leading to overuse of the space. The city council's finding that adding a liquor store to the businesses already being operated on Rau's property would result in an overuse of the property is supported by substantial evidence.

Rau contends that other, larger stores in the metropolitan area sell gasoline and liquor, or other goods and liquor. According to Rau, this fact demonstrates that the city council's determination that four businesses would be an overuse of the property is arbitrary and capricious. The fact that other cities may permit larger stores to sell liquor and other goods does not mean that there is not substantial evidence here supporting the council's decision. Rau introduced no evidence of any stores similarly situated to his in size or location that would show that the council's finding is not supported by substantial evidence. Therefore, this argument is without merit.

C. Sufficient Number of Liquor Stores to Meet Need

The city council further concluded that New Hope already has a sufficient number of liquor stores to meet the public need. Public comments about the proposal show that a number of city residents shared this view. There is no dispute that seven liquor stores

currently operate in the city and that there are two additional liquor stores in Plymouth close to Rau's property. Mayor Hemken commented at the work session that cities bigger than New Hope in the Twin Cities area, such as Richfield, have only about half the number of liquor stores that New Hope has. She also noted that the liquor stores currently operating in the city were "pretty quiet" and not very busy. We also note that at the same meeting at which the city council denied Rau's liquor-license application, it amended its ordinance to reduce the number of authorized off-sale liquor licenses from eight to seven.

We conclude that the record contains substantial support for the council's conclusion that the city currently has enough liquor stores to meet the public need.

D. Public Policy/Public Safety

The council also based its denial on public-policy and safety concerns associated with selling liquor at the same venue as gasoline. The council noted that it has "never permitted the sale of hard liquor/strong beer and gasoline from the same facility or Property in any commercially zoned district," and the director of community development commented that a liquor store/convenience store combination would be "one of the first in the Metro area." The council expressed its concern that "the sale of hard liquor mixed with the sale of gasoline from the same facility or property will promote drinking and driving abuses and other illegal activities." The city council was entitled to consider whether allowing a liquor store in that venue would be contrary to public policy. We note that the city has never allowed a liquor store to operate in the same venue as a gasoline station or a convenience store. This fact and the fact that a

number of councilmembers were of the opinion that the combination would be contrary to public policy and a threat to public safety are sufficient to sustain the council's determination.

E. History of Failing Compliance Checks

Finally, the city council cited Rau's record of failing compliance checks for the illegal sale of tobacco and 3.2 beer as a ground for denying his application. Rau failed four compliance checks during a ten-year period, a fact that he does not dispute. The city council had the authority to consider Rau's record for illegally selling 3.2 beer and tobacco in denying Rau's application for a liquor license. *See Godfather, Inc. v. City of Bloomington*, 375 N.W.2d 68, 71 (Minn. App. 1985), *review denied* (Minn. Dec. 13, 1985).

We conclude that the city council's decision to deny Rau's liquor-license application is supported by substantial evidence in view of the entire record. Rau has therefore failed to demonstrate that the council acted in an arbitrary and capricious manner or abused its broad discretion in regulating the sale of liquor in the city.

Affirmed.