



In the

Supreme Court of the United States

CITY OF KENOSHA, WISCONSIN,
et al.,

Appellants,

v.

PETER G. BRUNO, et al.,

Appellees.

No. 72-658

Washington, D. C.
April 18, 1973

Pages 1 thru 50

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Washington, D. C.
Wednesday, April 18, 1973

The above-entitled matter came on for argument
at 11:57 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LeROY L. DALTON, Assistant Attorney General of
Wisconsin, 114 East, State Capitol, Madison,
Wisconsin 53702; for the Appellants.

JAMES A. WALRATH, Esq., 222 East Mason Street,
Milwaukee, Wisconsin; for the Appellees Sleepy's
Inc., Kauzrich, and Wiginton.

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James A. Walrath, Esq. On behalf of the Appellees	26

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will call for argument next in Kenosha against Bruno. One counsel has not yet appeared, and we will take that up immediately following lunch. But we will take the case up and hear argument.

[Whereupon, at 11:58 o'clock a.m., the luncheon recess was taken.]

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AFTERNOON SESSION - 1:00 o'clock

MR. CHIEF JUSTICE BURGER: Mr. Dalton, you may proceed whenever you are ready.

ORAL ARGUMENT OF LEROY L. DALTON, ESQ.

ON BEHALF OF THE APPELLANTS

MR. DALTON: Mr. Chief Justice, and may it please the Court:

This is an appeal from a three-judge district court in the Eastern District of Wisconsin. This case involves the liquor licenses of three bars in the City of Racine and six bars in the City of Kenosha.

Kenosha is a city of about 70,000 on the border of Wisconsin and Illinois, just north of Chicago. Racine is a city of about 90,000, 95,000, just a few miles north of Kenosha.

This appeal is from a judgment holding that the Wisconsin statutes which permit legislative hearings in liquor license renewals and original grantings are in violation of the due process clause.

The court said that insofar as those statutes permit the denial of renewal of licenses, the granting of licenses, without a judicial type hearing, the statutes violate the Fourteenth Amendment.

The judgment is so broad against these two cities that when the licensing year, which is approaching arrives,

these cities are enjoined from denying any renewals. A motion is pending before the three-judge court to modify that but is unacted upon.

I would like to take the Court back through our liquor licensing regulations in Wisconsin. We have what may be compared to the old town meeting type of legislation. Since the Twenty-First Amendment, we permit what we call local option. That means that each of the over 7,000 local municipalities in Wisconsin has the authority to grant or not to grant licenses for the sale of beer or intoxicating liquor or both. This is a legislative grant to these municipalities, and at the present time about 150 municipalities do not permit the total package. There are some that permit beer, and there are some that permit beer--of course, the majority permit beer and liquor--but there are some that permit neither.

These cities, towns, and villages are the ultimate authority in our state to determine whether or not beer and intoxicating liquor will be served within their borders.

Q The option is exercised by the voters?

MR. DALTON: Either the voters or the governing body.

Q I thought that the basic option was exercised by the voters, but then that the governing body decided who and when to license.

MR. DALTON: The governing body can refuse to issue any licenses under our law.

Q It can. But then--

MR. DALTON: But there can be a referendum initiated by the voters to put the issue up to election as to whether or not there shall be. If there is sale, it can be taken away. If there is not, by referendum it can be granted by the voters. But then it is up to the--

Q There has to be a referendum petition, does there?

MR. DALTON: Yes. Then it is up to a governing body each year to decide which licenses will be issued.

Q Right.

MR. DALTON: There is another--

Q Under Wisconsin statutes could they have a program of, say, each person gets a license for one year and just rotate it? Would that be lawful under your structure?

MR. DALTON: Our statute provides that the license runs for one year, from July 1st to the succeeding June 30th.

Q Can it be canceled meanwhile for some kind of conduct?

MR. DALTON: It can be revoked. But then there has to be what amounts to an adjudicatory type hearing.

There is a special statute applying to revocation of a license or suspending of it during the period of its life.

Q And that is determined by what agency?

MR. DALTON: The licensing body.

Q Which is the local governing council or something, is it?

MR. DALTON: Yes.

Q And it has to give an adjudicatory hearing before revocation?

MR. DALTON: Yes.

Q And is there judicial review?

MR. DALTON: There is by certiorari.

Q Of a revocation?

MR. DALTON: Yes. We just went through one of those in the town of Madison which surrounds the City of Madison where we had another nude bar. And before they anybody could go into a state court for certiorari, they went into the federal court, and the federal court enjoined the town from revoking.

Q That was a revocation?

MR. DALTON: Yes.

Q And a federal court enjoined it?

MR. DALTON: Yes.

These annual licenses must be applied for by April 15th each year. The statute sets out a procedure that

each of the municipalities must follow as to time. They must begin to act on the licenses May 15th, and they must make final determination by June 15th. This gives a leeway of at least two weeks between the time of the final determination by the municipality and the succeeding licensing year. During this period of time, the aggrieved parties, of course, can avail themselves of one of two court proceedings in the state.

No liquor license can be issued in Wisconsin unless the applicant has first obtained a beer license. The beer license, if it is denied, if the application is denied, can be reviewed by a procedure in any court of record in the county. This is an original action brought by the applicant to test the revocation or denial of a license in the county court or circuit court.

Q Is that a review de novo or a trial de novo?

MR. DALTON: A trial de novo.

Q Not just a review on any record?

MR. DALTON: No, it is a trial de novo. And there are limits set by the Wisconsin statute as to when the court must act so that any aggrieved parties can have a prompt determination of the issues.

The other type of court review is by certiorari. And our supreme court has without any question set out the procedures that are to be followed in that type of

proceeding.

Q That is discretionary with writ or is that--

MR. DALTON: The writ of certiorari is discretionary.

Q And in what court does that go?

MR. DALTON: That is in the circuit court. That is the court of general jurisdiction in the state.

There is another feature of Wisconsin law--

Q That is a review, is it not? That is not a de novo.

MR. DALTON: That is a review, including all constitutional questions--

Q There is no record, is there?

MR. DALTON: Yes, the notes that are made go to court, review.

Q There is no transcript.

MR. DALTON: There is no transcript of testimony, no verbatim transcript. But if there is a denial, of course the statute requires a statement of the reasons for denial be made in the record. And all of the notes of the licensing body in the case of a city council that are subsequently printed, part of the record in this case, would go to the circuit court for review.

Q Does there have to be some reason for failure to renew a license?

MR. DALTON: The reasons should be stated, according to our statute, whenever renewal is refused.

Q That is on renewal.

MR. DALTON: But not for original application.

Q On original application they just deny it?

MR. DALTON: Yes.

Q But on renewal there has to be a determination of some kind of conduct?

MR. DALTON: Yes. And our supreme court has indicated that that is to facilitate certiorari, so that the court can determine whether or not any action taken was arbitrary and capricious.

Q So, it is different then in an original application?

MR. DALTON: Yes, Your Honor.

Q But that is the first time he finds out what the board acted on?

MR. DALTON: No, he would find out at the time. These are all public hearings, public meetings.

Q These minutes, et cetera, that you say are kept for the certiorari hearing, does he see those before the certiorari hearing?

MR. DALTON: He may, yes. They are public records.

Q They are printed, available?

MR. DALTON: They would, I imagine, be available. I am not sure how fast these are printed. But there would be some record in the clerk's office.

Q But that is after the hearing.

MR. DALTON: That is after the city council has acted.

Q What does the applicant have before the city council acts?

MR. DALTON: He files an application each year. He files an application with the city council and by our law he must pay for having that printed in a local paper. The burden is always on the applicant to carry forward his request to the governing body to license him for a one-year period. On renewal, it is the same as original--

Q Maybe I am hearing the word "Hearing" wrong. Does he get a hearing?

MR. DALTON: Well, this is a difficult term. Hearing. I think it depends on what situation you are in. We have run up repeatedly in the federal court system where--

Q Do you know what notice means?

MR. DALTON: Yes.

Q Does he get a notice?

MR. DALTON: A notice of what, Your Honor?

Q Of why there is a possibility that it will

not be renewed.

MR. DALTON: He understands each year when he applies that there will be hearings on all licenses that the application has been filed for on the 15th of April. He knows--he should know--that each one of these boards and committees will have to act upon these licenses between May 15th and June 15th.

The notice I think that you are talking about is when the licensing body is going to hear these requests for licensing.

Q His request.

MR. DALTON: Well, all of them. They usually set license matters for hearing on a certain date, and there are requirements within the city law that they hold license hearings on specific dates. And that notice is posted on the city council bulletin board. It is printed in the newspaper.

Q And does he know whether or not there is going to be opposition?

MR. DALTON: Not necessarily.

Q You mean not at all?

MR. DALTON: Very possible.

Q Do people testify against him?

MR. DALTON: Well, they testify, yes, if they want to.

Q Under oath?

MR. DALTON: No. Unless he asks and makes a motion--the city council is an administration body. It acts in a legislative capacity. It acts in a quasi-judicial capacity. Sometimes it acts in an administrative capacity. It has the power to do many things. But the liquor licensing function is not what we consider to be a contested matter. The man comes in and applies, and he has the burden of convincing that licensing body that he should have a license for the succeeding year. He has the burden from the beginning of convincing that legislative body--and I want to emphasize that at that point the city council is not sitting as a quasi-judicial body. It is sitting as a legislative body. It has been delegated the authority by the state legislative body--

Q So, the only hearing he gets is in the court?

MR. DALTON: The practice, Your Honor, the hearing that is granted is a legislative type hearing, the same as would be--

Q The only non-legislative hearing he gets is in the court?

MR. DALTON: If he asks for it. But I am not ruling out that if he asked for a fact-finding hearing before the board that he would not be entitled to it.

Q What provision of the law gives him that right?

MR. DALTON: There is no provision in the law.

Q I did not think so.

MR. DALTON: But the city council may sit as a fact-finding body.

Q Your state supreme court has ruled that he is not entitled to it on a renewal proceeding?

MR. DALTON: They have held that a legislative hearing--

Q --is enough.

MR. DALTON: --comports with due process.

Q Yes, they have held that. So, he is not entitled to that fact-finding hearing or a trial type hearing?

MR. DALTON: Right, Your Honor.

Q Let us assume he is not renewed. Then he goes to court over it. You say he has a trial de novo?

MR. DALTON: Yes, in the county court.

Q And meanwhile nothing happens to him? Is his license suspended or may he go on selling while he gets review?

MR. DALTON: That depends upon the court order. If he can convince the court that he should continue during the litigation, the court could--the same as the lower court

did here--grant a temporary restraining order.

Q And this gentleman is not out of business yet?

MR. DALTON: There are nine of these and, Your Honor, I must say that I understand that three of them are out of business. But they have been protected by the federal court for almost two and a half years by different orders allowing them to continue nude dancing and the selling of alcohol.

Q Anyway, if he went to a judicial review, there would have to be some finding of some kind of conduct disentitling him to renewal in order to sustain the refusal? I understood a while ago that on renewal, as distinguished from original application, that there must be some finding of some conduct disentitling him to renewal by a court in order to sustain the decisions--

MR. DALTON: When he starts his court action, he must make allegations that he has some legal right that is being violated.

Q All right.

MR. DALTON: And one of those I was suggesting is that the licensing body had come to a wrong conclusion as to some facts.

Q Right, right.

MR. DALTON: Yes. So, he could have a factual determination by the court--

Q By the court.

MR. DALTON: And then that could be applied to the denial of the renewal and his legal rights would be protected.

Q But in order to affirm the refusal to renew, the court is going to have to find or is going to have to agree with the city council with respect to this alleged conduct.

MR. DALTON: If you are talking about the 66.054, our supreme court has not yet interpreted the breadth of that provision. Apparently no one has ever really carried a case under that statute all the way through. They usually use the certiorari provision. And there our supreme court has said that they are limited to a review of arbitrary, capricious action.

Q In that connection, Mr. Dalton, I am looking at the record here, page 44. I do not know which of the cases--there seems to be three of them. And there appears there a report of the Committee on License and Welfare with a recitation in five paragraphs of the reasons why the license was not renewed. And then that is followed by a later report which speaks of alleged violence and threats of violence and shooting between the management of the Pussycat and whatever the other one is. This goes up on certiorari to your circuit court. Is that the record which

is reviewed that we are looking at--

MR. DALTON: Whatever notes are in the--

Q Let us suppose this would be all that there is.

MR. DALTON: That was the report of the committee. The committee reports to the council and then the council acts, based upon--

Q You mean on certiorari it is a review on a record? I thought it was de novo.

MR. DALTON: No, it is not de novo on certiorari.

Q You cannot call any witnesses then?

MR. DALTON: No.

Q And it is discretionary whether or not the circuit court will give even that review, is it?

MR. DALTON: Yes, I think certiorari is the discretionary writ which--

Q How then does the applicant seeking a renewal get any fact determination? I thought you suggested to Mr. Justice White that if his allegations set up a fact issue, he could get a fact determination in certiorari in circuit court, can he?

MR. DALTON: No.

Q He cannot?

MR. DALTON: I am sorry. I misled you. Section 66.054 applies to the beer license. You cannot have a

liquor license unless you first have a beer license. This statute, which has not been really interpreted by the Wisconsin Supreme Court as to its breadth, says that if the council revokes or does not grant a license for a good cause, then a regular court proceeding may be had to determine whether or not there was good cause.

Q What do you mean by a regular court proceeding?

MR. DALTON: A de novo trial.

Q A de novo trial, a judicial trial?

MR. DALTON: Yes.

Q With witnesses and fact-findings all the rest?

MR. DALTON: Yes.

Q Where does the alternative of certiorari come in?

MR. DALTON: That is the applicant's choice as to whether he wants to move by this route or by certiorari.

Q Can he move this way--

MR. DALTON: Excuse me. If he has factual issues which he wishes determined--let us take, for instance, in this case, let us say that an applicant said, "Well, you told me that I was permitting nude dancing and you would not renew my license because of that, and I was not permitting nude dancing." And he wants a factual

determination of that. I suggest that he can either ask the council to--and this is not required under the statute and our supreme court has not said it was necessary. But I am saying that he could ask the council for a hearing on that point and could ask to bring in his own court reporter and to have testimony taken. The council is perfectly capable under rules of administrative law of setting itself up to determine--

Q He does not have to do that and so he does not do it. Then what may he do?

MR. DALTON: Then he may choose one of these two judicial routes.

Q The only one in which he gets a fact-finding, as I understand it, is if he follows the de novo route.

MR. DALTON: Right. That is right.

Q If he follows the cert route, he does not get a fact-finding.

MR. DALTON: There is one exception. The certiorari court could weigh evidence and determine whether or not there is substantial evidence in the record.

Q Wait a minute. You mean take testimony?

MR. DALTON: No. They could refer back to the administrative body.

Q Oh, I see. Where is this provision that you are talking about where he would get an actual judicial

trial?

MR. DALTON: It is on page 4 of our brief, Section 66.054.

Q Is that as of right?

MR. DALTON: The action of any city council, yes.

Q Let us say a man comes up for renewal. He is turned down, the council alleging that he has done and finding that he has done A and B. He has then a right, a legal right, to go to court and have a de novo hearing if he chooses the right procedure?

MR. DALTON: Yes.

Q And meanwhile--

MR. DALTON: But that is only on the beer license, which is a necessary step to get a liquor license.

Q What was not renewed here?

MR. DALTON: Both.

Q For the same reason?

MR. DALTON: Yes. A combination license.

Q May you have a renewal of the beer license and yet be denied a renewal of the liquor license?

MR. DALTON: Yes.

Q When the council fails to renew after the end of one year, to distinguish it from a revocation, when they fail to renew they must give a statement of reasons; is that correct?

MR. DALTON: That is right, Your Honor.

Q And it is on that statement of reasons that a court of general jurisdiction decides whether to grant review by certiorari?

MR. DALTON: Right. That is right, Your Honor. And then it is tested by arbitrary, capricious action.

Q Where is the statement of reasons in these cases?

MR. DALTON: The statement of reasons was just referred to by Justice Brennan.

Q Where do we find them here in the appendix?

MR. DALTON: [No response]

Q You mean the Committee on License and Welfare? That does not necessarily mean you have a statement of reasons. It says the report of the committee.

MR. DALTON: That was the committee report.

Q You keep saying that you have to have a statement of reasons. Is that correct, what you said?

MR. DALTON: Yes.

Q Where is that in this case, "a statement of reasons"?

MR. DALTON: A statement of reasons was adopted by the council because these bars had nude dancing--

Q Where is that in the record?

MR. DALTON: [No response]

Q Tell us the page. Where do we find it in here?

MR. DALTON: These were stipulations of fact that were entered--

Q Where do we find the stipulation then?

MR. DALTON: On page 28 of the appendix, the stipulation of facts which relate to all of the issues involved in the case.

Q Is the statement of reasons in the stipulation of facts?

MR. DALTON: Yes, Your Honor. On page 32, No. 26. "That such dancers perform both in costume and in the nude."

Q You keep saying statement of reasons. You know what stipulation of facts--is that statement of reasons? Statement of reasons, as I understood you, was a piece of paper that the council wrote up as statement of reasons for denying John Jones renewal of his license. Am I correct there is no such instrument?

MR. DALTON: Other than the report of the committee.

Q Then there is no such instrument as a statement of reasons?

MR. DALTON: They adopted the committee report.

Q Oh. Then when you say statement of reasons,

you mean the committee report?

MR. DALTON: Yes, Your Honor.

Q Under the law the committee itself could have acted without reference to the council, as I read the statute, and that is one of the complaints of your brothers on the other side. They did not even know which body was going to act, whether it was going to be the committee or the council as a whole.

MR. DALTON: The council as a whole has to make the final determination.

Q That is not what the law seems to say. It says all town or village boards and common councils or the duly authorized committees of such councils, and so on.

MR. DALTON: In these cases they were all referred to the city council.

Q They were in fact in these cases--

MR. DALTON: They were in fact referred to the city council, and they adopted the reports of the committee.

The committee reports are in fact the basis for the legislative action: The reasons why the legislative body decided that they would resolve not to have nude dancing within their municipalities.

It is true that this record does not specifically set out that resolution. And I think that that is not a

federal constitutional question. That is a question of state law as to whether or not the city councils in these cases actually followed the state law when they adopted the resolution that they would not license nude bars within their community.

To give you a little bit more background on what happened, the two cities when faced during the 1970 license year with nude dancing in several bars and after receiving over 2,000 petitions in the City of Kenosha and upward of 25,000 in the City of Racine, the councils in both cities passed ordinances which regulated costumes in cabarets. This required the dancers to cover the sexual organs.

Both cities were enjoined by the federal district court in December of 1970. From that point until the next licensing year in 1971, the cities, both these cities, were faced with a dilemma of how to control nude dancing in the bars in those cities. The test of obscenity was difficult. The county prosecutor prosecutes the criminal laws--

Q Do you have to spend much time on that in view of the holding in the ruling? Is this not basically a procedural problem now?

MR. DALTON: Yes. The rule we think solves that, and I want to point out that after the rule the district court released the injunction that had permitted the nude dancing to take place in these two cities.

But while this injunction was in effect, the cities decided that they would not relicense these bars, and they sat as a legislative body in doing this. They did not sit and adjudicate each one of these cases. They decided that they would not permit nude dancing in their cities and in each city the bars were treated as a group. And they made a policy statement, and I agree that the committee report here probably does not satisfy the Wisconsin statute in regard to the reasons why the denials were made. But that is not a federal constitutional question.

Q I submit to you that at the bottom of your page 32 that you referred to us, paragraph No. 26, and on the opposite page, the bottom of page 33, paragraph 32, both ascribe that indirectly as reasons for not granting the renewal in the committee reports. And if the committee reports were adopted by the legislative body, that would be a quite adequate statement of reasons to satisfy me as to why they had failed to renew.

MR. DALTON: Well--

Q The committee report itself is on page 34 and 35?

MR. DALTON: Yes. But my point is the underlying reasons for the legislative resolution--the legislative resolution is why these licenses were denied. They all were featuring nude dancing. Both these communities had decided

that they would not permit nude dancing anymore, and the reasons why they would not permit nude dancing were the items set out in the committee report.

Q Mr. Dalton, under Wisconsin law would the common council of Racine or Kenosha be permitted to deny renewal of the license simply on the ground that they felt they had too many places in Kenosha or Racine selling hard liquor without giving any more reason than that?

MR. DALTON: Our supreme court has so held. We have the power to do away with all bars. Each municipality can decide from one year to the next. They can wipe out every bar within the municipality by proper legislative action.

Q Or by not issuing licenses?

MR. DALTON: Yes.

Q Just by not renewing the licenses?

MR. DALTON: Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: Your time is up now, Mr. Dalton.

Mr. Walrath.

ORAL ARGUMENT OF JAMES A. WALRATH, ESQ.,

ON BEHALF OF THE APPELLEES

MR. WALRATH: Mr. Chief Justice--

MR. CHIEF JUSTICE BURGER: Will you be the only one speaking on behalf of the appellees here?

MR. WALRATH: Yes, Your Honor. May it please the Court:

I would like to begin by responding to some of the points that have arisen during the course of Mr. Dalton's argument.

First of all, the argument is made that these two municipalities have been enjoined under all circumstances from denying license renewals, that they have been foreclosed from in any way taking these licenses away from the individual appellees in this case.

I would submit that that is not a correct statement of the situation, and I would refer the Court specifically to page 55 of the appendix which contains a statement of the summary judgment order of the district court which indicates that the municipalities are free to act on the applications at such time that their actions are commensurate with the due process clause of the Fourteenth Amendment.

So, the municipalities are not foreclosed from considering these applications or denying them, should they follow the procedures which were outlined by the three-judge court below.

Q Could these applicants have gotten a trial type hearing in some court by some procedure after their renewal was denied by the city council?

MR. WALRATH: Our position is, Your Honor, that they could not, and that was the next point I wanted to raise. The procedures which must be followed--now, I have specific reference, first of all, to when a liquor license, as opposed to a beer license or malt beverage license, is not renewed--

Q Is your colleague essentially correct with respect to the beer license?

MR. WALRATH: I would submit that he is not, because a--

Q Well, you take it your own way then.

MR. WALRATH: Okay. First of all, Your Honor, as far as the liquor licenses are concerned, when a liquor license application is not renewed, the exclusive remedy, as I understand it under Wisconsin law, is by certiorari.

Q In which event no evidentiary hearing; all on records, reasons and notes?

MR. WALRATH: Yes, all on handwritten notes or typed notes by city clerks, whatever is there. In the present situation there was very little of any sort of record as far as what statements were made at the hearing.

Q That is not our question here, whether it was arbitrary or not.

MR. WALRATH: But there definitely is no entitlement to a trial de novo.

Q After certiorari the judge could not give a hearing?

MR. WALRATH: That is correct. On certiorari, the only thing that the reviewing court can do is look at the return which is filed with it by the municipality. That return would, in most instances, merely contain the notes from the clerk of the municipality, which would state under-- as required by state statute--the reasons why--

Q A statement of reasons?

MR. WALRATH: It would contain a statement of reasons, yes.

Q Would it specifically be what appears at page 44 to 46? Would that be a sample of a return?

No, this is not a return.

MR. WALRATH: That is right.

Q Is this what a return would look like?

MR. WALRATH: I would submit that the return could include that document, yes, if this document was in fact adopted by the city council as its reasons for denying the license.

Q And, in addition, then there would be what, notes, you said?

MR. WALRATH: Possible notes, if they had been taken.

Q But if the city council gives no reason at

all, is it automatically arbitrary to deny renewal?

MR. WALRATH: I would submit yes, under state law.

Q There must be a reason for denying renewal?

MR. WALRATH: Yes, by state statute.

Q So, arbitrariness of denying renewal simply turns on whether it states a reason or not?

MR. WALRATH: Our claim here, Your Honor, is more than that. We are claiming that the procedures were arbitrary because prior to the council's taking the action that they did, they did not grant each of the appellees a hearing--

Q I understand that.

MR. WALRATH: That is the other aspect of arbitrariness that we refer to.

Q But I would suppose there would be a different case if you had a right to a complete de novo hearing on review of the renewal where you could call witnesses, and the state would have to call its.

MR. WALRATH: Yes, no question about it.

Q Then you would not be here, would you? Or you would not have brought the action--

MR. WALRATH: We would have gone to state court.

Q You would have gone in state court.

MR. WALRATH: Yes.

Q And let me understand this clearly now. You

say that on the liquor license renewal the only route open to you in the way of judicial review is certiorari on the record below?

MR. WALRATH: Yes. That is correct.

Q What is the connection of the beer license to the liquor license? I thought Mr. Dalton told us you never get to a liquor license question until you have been granted a beer license.

MR. WALRATH: You cannot have a liquor license unless you have a beer license first.

Q What about these appellees?

MR. WALRATH: In each instance I do not believe there is an indication in the record as to whether in each instance their beer licenses were denied. I would have to rely on the representations of the state in that regard that they were.

Q And if they were, as I understand it, you might have gone into one of the county courts or the circuit court and got a de novo hearing?

MR. WALRATH: That is the argument of the state, Your Honor. But I would submit that that does not comport with a reading of the state statute which provides for procedures on beer licenses. Section 66.054, sub 14--

Q What page?

MR. WALRATH: Page 4 of the brief of the appellants.

That provision starting at the very bottom of page 4 mentions that the action of any city council in granting or the revocation of any license or the failure of said city council to revoke any license for good cause may be reviewed by any court of record.

Q Does not granting cover renewal? Granting, does that cover renewal or not?

MR. WALRATH: Our point, Your Honor, is that there is no express declaration in this statute to cover the situation where renewal is denied, that we are not in a revocation situation; we are in a denial of renewal situation, which is not covered by this statute.

Q Oh, I see. I see.

Q What you say basically is that 66.054 is more devoted to the outraged citizen who feels that a license has been improperly granted or has not been revoked when it should be?

MR. WALRATH: Yes. Or to the outraged tavern keeper who has gone through revocation procedures which are separate from what this case involves.

Q The provision that your colleague referred to on a de novo hearing on denial of a beer license renewal, that provision was not considered by the three-judge court, I understand.

MR. WALRATH: That is correct.

Q It did not consider that as a matter of Wisconsin law or in connection with its due process ruling?

MR. WALRATH: If my recollection of the lower court opinion is correct, it did not consider that remedy as a viable one for these individuals.

Q Well, it did not even consider it.

MR. WALRATH: I am not sure what the opinion on that point states, Your Honor.

Q Let us assume for the moment that each of these gentlemen had his beer license renewal refused and could have gone to court and had a de novo hearing as to whether the reasons alleged existed or not. Let us assume that were true. Would you be here or not?

MR. WALRATH: Then the question would be, If they did get a remedy in state court and they did get a beer license, then the next problem is that they still did not get their liquor licenses back and--

Q The liquor licenses depended on the existence of some reasons. And if it has been determined that those reasons did not exist--

MR. WALRATH: Then I would say as a matter of good faith they would have to provide them with the liquor license, yes.

Q That is right.

MR. WALRATH: But there is nothing in the

statutory procedure which would compel them to do that.

Q I was just curious to know whether the district court addressed itself to this matter at all.

MR. WALRATH: Not in the way that we have just gone through it.

Q Mr. Walrath, I appreciate you have hardly had a chance to get the first sentence out of the arguments you intended to make. So, I apologize for interrupting you again. But I have a basic question here, which is this. The Due Process Clause, of course, covers deprivations of life, liberty, or property and those alone. And obviously life is not involved here, and I wondered how you defined what, if any, liberty and/or property is involved.

MR. WALRATH: Your Honor, if I may, the situation is this, that the--first of all, we submit that both liberty and property interests under the definition of or the analysis provided in Board of Regents v. Roth, both of those concepts of liberty and property were involved in the situation. Both the liberty of these tavern keepers and the property of these tavern keepers was impaired by the decisions not to renew their liquor licenses.

Q These were one-year licenses--

MR. WALRATH: Yes.

Q --under their terms and under state law. That is what they were and that is all they could be.

MR. WALRATH: Yes.

Q Is that not correct? So, that is very much like--

MR. WALRATH: It is similar to Roth.

Q --like Mr. Roth's teaching contract, is it not?

MR. WALRATH: But there are some very significant differences from the Roth situation.

Q That is what I am interested in.

MR. WALRATH: The first significant difference is that in Roth the action taken with regard to Roth was not-- the reasons for not renewing Roth's teaching contract were never stated, were not required to be stated, and were never made public.

In other words, one of the significant factors in the Roth case, I would submit, is that Roth was never faced with a situation where the reasons for his non-renewing his contract were communicated to anyone. And if those reasons had been, one, reasons which alleged dishonesty on his part or immorality in his affairs and they had been communicated to the public, this Court said that his case quite clearly would have been a different one. And I would submit, Your Honor, that the situation is very analogous in our own case in that by statute--

Q The court indicated he would then have been

given an opportunity to clear his name if the charges were false.

MR. WALRATH: That is correct.

Q I did not understand there was any claim here that this kind of dancing did not go on in these bars.

MR. WALRATH: No, but that is not the central point. The municipalities did not say that they were denying the renewal of these licenses because of nude dancing. They said--now, I want to be very specific, first of all, and refer to the appropriate parts of the record. First of all, the municipality of Racine, you will note on pages 35 and 36 of the appendix, there are the reasons which the municipality of Racine or at least the license committee gave for recommending that their licenses not be renewed. Those statements make no reference whatsoever to nude dancing. They do attribute to the tavern keepers conduct or operations which foster an increase in prostitution, in venereal disease. They also attribute as reason (f)--they attribute instances of serving minors on the premises. They attribute matters of fights or altercations in violence on the premises. None of these reasons are correctly related or in any way stated by the municipalities to involve nude dancing.

As far as the municipality of Kenosha is concerned, the statement of reasons in that situation with regard to the

six Kenosha tavern keepers may be found on page 7 of our red covered brief. And, again, there is no clear--nowhere in this record is there simply an assertion by these municipalities that they are not renewing these licenses merely because they do not like nude dancing.

Q I am perplexed about this criminal complaint on page 69. How did that get in the record?

MR. WALRATH: On page 69 of the appendix, Your Honor?

Q Yes, sir.

MR. WALRATH: The document on that page and the following page, both of those documents were inserted into the record below as part of the affidavits on motions for summary judgment. Both of these complaints, I would stress, relate to matters which occurred long after or after any of these license renewal denials occurred. In other words, the facts that are stated in those complaints are not--and the filing of those complaints--are not relevant to the reasons--

Q How did they get in there? I still do not understand how they got in there.

MR. WALRATH: I think they were inserted as part of the documents that accompany the motion for summary judgment by the state.

Q Then we do have something in this record about nude dancing.

MR. WALRATH: There is definitely something in this record, yes.

Q This is the record in this case.

MR. WALRATH: The question is whether there was anything in the record before the licensing committee and the city council and whether they said specifically or only that the only reason they were denying these licenses is because of nude dancing.

Q You do not know whether this was before the city council or not.

MR. WALRATH: I am sorry, I did not hear.

Q Do you know whether these complaints were before the city council or not?

MR. WALRATH: They could not have been, Your Honor, because they were--

Q Did you object to them being put in the record?

MR. WALRATH: No, I did not.

Q What?

MR. WALRATH: I did not. I just think they are irrelevant.

Q They are irrelevant on the question of nude dancing?

MR. WALRATH: No, they were irrelevant on the question of what was before the licensing committee and the

city council at the time it reached its decision.

One other point that came up on direct argument, the statement of reasons why the Kenosha municipality, why it denied the liquor licenses, those reasons that you find on page 7 of our brief were adopted at a city council meeting word for word. In other words, the license committee entered these findings and then made these findings a recommendation to the city council. The city council adopted them word for word with regard to each of the six applicants.

In other words, word for word there were no variations in the finding of fact. The same activities were ascribed to each of the applicants in a rather indiscriminant broad fashion.

Q Is that not the nature of the legislative licensing process sometimes? You take a category of people and say they are not going to be in or they will be in.

MR. WALRATH: Yes, Your Honor, I would submit that in a legislative type situation where you are--as in the LaRue instance, where you were dealing with legislative findings in enacting a resolution or an ordinance or a state statute, these kinds of statements are appropriate. But here we were dealing with a definite adjudicatory situation where the city council or the licensing committee itself was passing on--as required by statute--was passing on the question of whether these individuals were proper

individuals to have their licenses renewed. So, I think we are in an adjudicatory situation which requires more specific findings of fact.

Q Do you contend that in any way there was a commonlaw kind of a property right or expectancy to a renewal each year?

MR. WALRATH: Yes, Your Honor, and that is an argument we did not make sufficiently, I would submit, in our brief. That is the Perry v. Cinderman rationale that-- I would submit there was--there is clear evidence that there is an implied property interest in or claim to having your liquor license renewed from year to year.

First of all, I think it is implied by the very fact that the state statutes require that licenses can only be renewed if reasons--or not renewed, excuse me, can only be denied if there are reasons given by the municipality.

Secondly, the record also indicates that there were some 154 to 159, I believe, applications to renew licenses before the municipality, and in only six situations, the six appellees in this case, were those applications denied. So, there is more or less, I would submit, a commonlaw situation or an implied situation that licenses will be renewed unless cause is shown by the municipality.

Q The district court did not rely on that at all?

MR. WALRATH: No, it did not.

Q So, the district court rather relied on the court of appeals opinion in the Roth case, which was subsequently reversed here.

MR. WALRATH: Yes.

Q Correct?

MR. WALRATH: The three-judge court below did not have the benefit of Perry v. Cinderman or Roth--

Q It had the then benefit of--you had the then benefit of a case that was subsequently reversed, the Roth opinion in the court of appeals.

MR. WALRATH: Yes. But we think quite clearly, even in light of Roth, which does restrict concepts or at least define concepts of liberty and property more carefully, that quite clearly these individuals, their liberty and property interests, were affected.

Going back to the definition of liberty, under the Roth decision, I would submit it should also be borne in mind that because these individuals and the accusations against them consisted of allegations of criminal type conduct, immoral influence on minors and juveniles in the community, quite clearly this brings this case within the language of Roth that these are the types of allegations which affect a person's liberty.

And, more importantly, these are the types of

allegations which attribute bad moral character to the license holders. And, by state statute, once again the critical eligibility factor for getting a license is that you must be a person of good moral character.

I would submit that the allegations therefore, in effect, make these license holders ineligible for renewal or ineligible to hold a license anywhere else in the state of Wisconsin, because they have been branded as persons of bad or poor moral character. So, that is the other aspect of liberty which we submit has been affected.

Just because these tavern keepers, who run legitimate businesses as tavern keepers choose to have burlesque-type entertainment or topless or nude dancing on their premises does not necessarily imply that they in any way have permitted prostitution on their premises or that they have permitted minors on the premises and have imposed immoral influences on juveniles. And these were the allegations that were leveled against them and these are the allegations which, under Roth, they should have a right to answer and counter.

I hope the record is sufficiently clear on--

Q On the fact that this is true or on the question of whether this is a legitimate reason for non-renewal?

MR. WALRATH: I am sorry. I did not hear the

beginning of your question, Your Honor.

Q You say they are entitled to a hearing to determine the fact of whether these events took place or whether this is an adequate ground for non-renewal or both?

MR. WALRATH: The former, not the latter. They are entitled to a hearing to dispute or challenge these allegations. If the allegations of prostitution or immoral influence on youths had been established at the hearing, then I think quite clearly it is, under state statute, within the power of the municipalities to deny their application.

Q Mr. Walrath, as you probably know in Monroe v. Pape this Court said that Section 1983 did not apply to municipal corporations. What is the federal statutory basis for joining the City of Racine and the City of Kenosha in this action?

MR. WALRATH: They were joined because the lower court was able to distinguish the Monroe v. Pape language in that that was, if I recall correctly, a damage--a request for damages.

Q Here is what this Court said in Monroe v. Pape. "For we are of the opinion that Congress did not undertake to bring municipal corporations within the ambit of 1983."

MR. WALRATH: But if I am correct, Your Honor, I believe that was in the context of a damage suit against the City of Chicago, I believe.

Q I think that is correct. I would not read that language as being addressed particularly to damage suits.

MR. WALRATH: It is our position that it can be--

Q How do you distinguish?

MR. WALRATH: There are two cases out of the Seventh Circuit, Your Honor, that distinguish--

Q Not as a matter of Seventh Circuit precedent but as a matter of reason.

MR. WALRATH: Frankly, I am not familiar enough with the history of 1983 to be able to distinguish it at this time.

Q You do not need the reasons if you have the law on your side in the Seventh Circuit, do you?

MR. WALRATH: That is what we had. We had two cases--

Q Good.

Q When you responded previously to the question I put to you, I am not sure which case you were referring to. Turning to paragraph No. 26 on page 32 of the appendix, in the stipulation of facts they have stipulated the fact--the parties have stipulated a fact which, under the rule, would mean non-renewal of the license. Do you--

MR. WALRATH: I do not dispute that, except for the fact that the municipalities in this case did not say that they were denying the applications of that fact in

paragraph 26.

Q In paragraph 32, a page later, they say that the method of doing business includes that paragraph 26 reason. How do you get away from that?

MR. WALRATH: The statement at paragraph 32 is something that happened in federal court, and it is a statement that was not made at the time that the licenses were renewed or denied, excuse me, that the renewal applications were denied.

Q What was the purpose of paragraph 26 stipulation of it was not to bear on the decision to renew or not renew the license?

MR. WALRATH: I think the purpose of paragraph 26 was merely to get an agreed stipulation of fact that in fact we do not dispute the fact that nude dancing occurred on these premises. That is not a disputed fact. What is disputed is whether there was prostitution on the premises--

Q No, but do you dispute that that is a good enough reason not to renew the license? Do you challenge that after LaRue?

MR. WALRATH: At the time, yes, it was a disputed fact because--

Q At that time.

MR. WALRATH: Yes.

Q But since that time this Court decided the

LaRue case.

MR. WALRATH: That is correct.

Q After the LaRue case, is not paragraph 26 the end of the case in terms of whatever cases are covered by that stipulation?

MR. WALRATH: Whether or not the municipality has subsequently been proven to be right or wrong as to the basis for denying the applications, it still does not counter the problem that these individuals and the procedures that confronted them denied them due process initially.

Q What do you do with the top of page 34, that this is the reason for the denial?

MR. WALRATH: At the top of page 34?

Q First full sentence. "That the defendant City relied on such dance entertainment as one of the factors producing the effects enumerated in paragraphs (a) through (f) of said Resolution in denying of the license...."

MR. WALRATH: It relied but it did not specify-- first of all, it did not give any notice prior to going into any of these meetings or hearings, it did not give notice that that was what the charge was going to be.

Q But that is not what I am talking about. This admits that the reason that they denied it was because of nude dancing.

MR. WALRATH: No, I would beg to differ with you,

Your Honor.

Q What really is said if it does not say that?

MR. WALRATH: It says that the defendant city relied on such entertainment as one of the factors producing the effects.

Q That is right.

MR. WALRATH: What they specifically stated as the reason for denying the license applications was not the dance entertainment; it was the allegations of paragraphs (a) through (f).

Q But this is all in the same statement here. It is all a part of the same thing.

MR. WALRATH: What you are reading from is again the stipulation of facts--

Q That were in the federal district court.

MR. WALRATH: --in the federal district court.

Q And 34 and 35 is the findings of the committee adopted by the common council and one of the municipalities. And on page 7 of your red brief are the findings of the committee adopted by the common council of the other municipality.

MR. WALRATH: That is correct.

Q And they are quite separate from the stipulations in the district court.

MR. WALRATH: That is correct.

Q Am I right in thinking that the stipulations in the district court were not necessarily entered into by all the parties? You are just representing a fraction, I take it, of the parties that were actually in the district court.

MR. WALRATH: That is also correct. However, the stipulations were entered in every case, which is noted on the cover.

Q Oh, so there is no distinction then between what might affect your clients and people who have not--

MR. WALRATH: There is no crucial variation in the facts as far as what was stipulated to.

Q If this case goes back, all the city has to do is show that there is nude dancing there and that is against their policy and that is the end of the case, right?

MR. WALRATH: Yes.

Q So long as they can show--

Q So long as you have a hearing.

MR. WALRATH: So long as we have a hearing.

Q This is purely a due process claim.

MR. WALRATH: We are not challenging what happened in LaRue. We are just saying before you can deny us the right to continue our taverns, you have to give us a requisite hearing so that allegations beyond nude dancing, should they arise and should they be the basis for denying the licenses,

can be countered if they are in fact not true.

Q There was no due process issue in LaRue, was there?

MR. WALRATH: Not that I am aware of, Your Honor.

Q In your view of the due process question, if the case went back to the district court, would the stipulation paragraph No. 26 be sufficient if they put that and only that in evidence as the reason for non-renewal? If the city council gave notice, went through all of its processes, and then put this stipulation in evidence, would paragraph 26 be sufficient then, in your view, for the denial of the renewal?

MR. WALRATH: If that is the only allegation that the city raises, I think that would be an adequate basis for a non-renewal. Under LaRue the city admittedly does have an ordinance on the books which defines what type of dress is required on tavern premises.

I should add, however, that the city ordinance is not identical to the LaRue statute and in fact it is our position that the city ordinance is even broader and more restrictive than the LaRue statute. So that that would be an additional issue that might be raised at a hearing before the city council.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:02 o'clock p.m., the case was submitted.]

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