

In The Matter Of:
*Alcohol License Review Committee vs
Revocation Hearing for Visions Night Club*

ORIGINAL

*Transcript of Proceedings
September 24, 2019*

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ALCOHOL LICENSE REVIEW COMMITTEE
Revocation Hearing for
VISIONS NIGHT CLUB

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Transcript of Proceedings:

Madison, Wisconsin
September 24, 2019

Reported by: Paula Wondra

1 TRANSCRIPT OF PROCEEDINGS, taken before Paula
2 Wondra, a Notary Public in and for the State of
3 Wisconsin, at the Madison Municipal Building, 215
4 Martin Luther King Jr. Boulevard, City of Madison,
5 County of Dane, and State of Wisconsin, on the 24th
6 day of September, 2019, commencing at 5:32 p.m.

7

8 A P P E A R A N C E S

9 Jeff Olson, Jeff Olson's paralegal, City Attorney
10 Jennifer Zilavy, Amy Westra, Deputy City Clerk,
11 Michael Donnelly, ALD. Skidmore, Attorney Roger Allen
12 for ALRC

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1 (Attached to the original transcript and copies
provided to all counsel)

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(Original transcript filed with Mr. Allen and copies
provided to all counsel)

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1 MR. DONNELLY: This meeting will
2 please come to order. Mr. Clerk, will you
3 please call the roll.

4 DEPUTY CITY CLERK: Donnelly?

5 MR. DONNELLY: Present.

6 DEPUTY CITY CLERK: Skidmore?

7 MR. SKIDMORE: Here.

8 DEPUTY CITY CLERK: Westra?

9 MS. WESTRA: Here.

10 DEPUTY CITY CLERK: We have a
11 quorum.

12 MR. DONNELLY: Thank you,
13 Mr. Clerk. First item, which is not on the
14 agenda, is selecting a chair for this
15 meeting. Do I hear a motion?

16 MS. WESTRA: I nominate Michael
17 Donnelly.

18 ALD. SKIDMORE: Second.

19 MR. DONNELLY: Any discussion?
20 Hearing none, all in favor, signify by saying
21 aye.

22 (All respond aye.)

23 MR. DONNELLY: Ayes have it.

24 Are there any disclosures or recusals
25 under the City's Ethics Code? Hearing none,

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1 please take notice that when considering the
2 following item, the ALRC may go into closed
3 session from time to time pursuant to
4 Sections 19.85, (1) (a), (1) (b), and 1 (g) of
5 the Wisconsin Statutes, which read in
6 relevant parts:

7 A, deliberating concerning a case which
8 was the subject of any judicial or
9 quasi-judicial trial or hearing from the
10 governmental body.

11 B, considering licensing or discipline
12 of any person licensed by the ALRC or the
13 investigation of charges against such person
14 and the taking of formal action on such
15 matter.

16 G, conferring with legal counsel for the
17 ALRC who is rendering oral or written advice
18 concerning the strategy to be adopted by the
19 body with respect to litigation in which it
20 is or is likely to become involved.

21 Further, take notice that if the ALRC
22 goes into closed session, it may return to
23 open session immediately without giving the
24 12 hours' notice under Section 19.85(2) of
25 Wisconsin Statutes.

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1 Before we get started, Assistant City
2 Attorney Allen, will you give everybody in
3 the room an idea of what's going on?

4 MR. ALLEN: Thank you. The first
5 order of business tonight is maybe to discuss
6 the burden of proof here. The -- excuse me.
7 The case law is a little confusing on this
8 because it talks about substantial evidence
9 being the standard. Actually, that's a
10 standard upon appellate review or trial court
11 review upon certiorari.

12 The standard that the ALRC has always
13 imposed in these cases is just a
14 preponderance of the evidence. That means
15 it's more likely than not that the violations
16 occurred. The burden of proof to prove the
17 violations is on the City of Madison, and it
18 remains on the City at all times.

19 Tonight, the way we'll proceed is in
20 disposing of motions filed by the licensee
21 first, and on these motions, the licensee
22 does bear the burden of proof or of
23 persuasion, rather, and the ALRC will then
24 afford the city attorney an opportunity to
25 argue against the motions, I presume. Some

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1 of these motions, there may be some level of
2 agreement. I don't know.

3 And then the licensee's attorney will
4 have one last crack at the bat, if you will.
5 Or crack the bottle is more accurate. And
6 then the ALRC may go into closed session.
7 It's entirely up to them. I have not talked
8 to them to consult with me. I most certainly
9 hope they consult with the legal counsel in
10 closing of motions, but that's entirely up to
11 them.

12 To do so, they'll have to have a motion
13 to state the same grounds that Mr. Donnelly
14 previously stated and the reported vote on
15 that. After the motions are decided and
16 disposed upon, the committee will reconvene
17 in open session and announce its decision.
18 At that point, assuming that the entire case
19 has not been disposed of, as some of these
20 motions argue it should be, if there is
21 anything to try, the City will be first to
22 present its case. Mr. Donnelly.

23 MR. DONNELLY: Thank you, Assistant
24 City Attorney Allen. What order should we
25 take those motions?

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1 MR. ALLEN: I would argue that you
2 let Mr. Jeff Scott Olson -- Attorney Jeff
3 Scott Olson decide whichever order he prefers
4 to recite them in.

5 MR. DONNELLY: Works for me. Go
6 ahead with your motions.

7 MR. OLSON: Mr. Allen, are we going
8 to handle these motions one at a time?

9 MR. ALLEN: Yes.

10 MR. OLSON: Okay.

11 MR. ALLEN: Well, is that the way
12 you prefer to do it?

13 MR. OLSON: That would be the way I
14 prefer to do it.

15 MR. ALLEN: All right. And then
16 you would have Ms. Zilavy respond to
17 whichever motion you argue first, or are you
18 going to argue a motion, then argue another
19 motion?

20 MR. OLSON: No. I would -- I would
21 say let's do one motion at a time, complete
22 the arguments on it, move on to the next one.

23 MR. ALLEN: All right.

24 MR. OLSON: We have made a motion
25 to permit witnesses who are employed as

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1 exotic dancers to testify in such a manner
2 that only their stage names will be displayed
3 on the public record. We filed a great deal
4 of authority in support of that motion from
5 courts that have rules similarly recognizing
6 the real physical danger to women who are
7 employed as exotic dancers if members of the
8 general public who may become sexually
9 obsessed with them can find their home
10 addresses and contact information on the
11 public record.

12 And we have filed affidavits from
13 dancers who indicate their very real privacy
14 and physical safety concerns associated with
15 wanting to testify under only their stage
16 names. We don't think it hurts anybody's
17 ability to prove their case.

18 MS. ZILAVY: Can I just interrupt
19 for a second just because we have so many
20 motions? But I do not object to this
21 particular motion.

22 MR. OLSON: Oh.

23 MS. ZILAVY: So I am fine with
24 disclosing the names of the dancers in camera
25 and --

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1 MR. ALLEN: The one problem I have
2 that maybe the two of you can work out, since
3 you're in agreement upon allowing them to
4 testify with pseudonyms, is I don't see a
5 closed meeting exception that would allow us
6 swearing a witness in in closed session.

7 So I'm fine because when a person takes
8 the oath, they aren't asked to give their
9 name at the moment they take the oath. It's
10 usually one party asks during the questioning
11 to state your name on the record, is usually
12 the way it goes.

13 So as long as the two of you can work
14 out something whereby you get all the
15 information you need to effectively
16 cross-examine the witness, we can proceed.
17 But we can't go in camera, or closed session
18 would be the more accurate term, to swear the
19 witness in and have the witness state their
20 name.

21 Even if we were, the name would still be
22 on the record and would be available at some
23 point down the road to the general public.
24 Once the purpose for going into closed
25 session is over, the documents, the records

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1 may be available to the public.

2 MR. OLSON: Well, I'm sure we can
3 agree that on the public record, the dancers
4 will simply be asked, what is your stage
5 name.

6 MS. ZILAVY: As long as you provide
7 me with their identifying information --

8 MR. OLSON: We're happy to do that.

9 MS. ZILAVY: -- at the end.

10 MR. ALLEN: Very good. That's the
11 way we like to see this go.

12 MR. DONNELLY: Is there any action
13 they need to take since they're in agreement?

14 MR. ALLEN: No.

15 MR. DONNELLY: What's your next
16 one?

17 MR. SKIDMORE: I have a question if
18 I may ask. Just for the record, is the
19 award-winning cable TV system going to be
20 videotaping this or displaying it through
21 feed so our image is going to be displayed?

22 MR. ALLEN: I don't know, but more
23 than likely. But I didn't see that as an
24 objection by Mr. Jeff Scott Olson or by the
25 City to have the images of the dancers.

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1 MR. SKIDMORE: I'm bringing that up
2 because not everybody knows that our cable
3 regularly video streams some meetings, and it
4 might be this one. That's why I ask if
5 that's an issue.

6 MR. OLSON: No, it's not. As long
7 as they can testify under their stage names,
8 it's not.

9 MR. DONNELLY: Thank you.
10 Mr. Olson.

11 MR. OLSON: We have filed two
12 motions regarding the timeliness of the
13 allegation. One is called motion to dismiss
14 allegations that precede the 2019 license
15 renewal based on considerations of
16 fundamental fairness and double jeopardy, the
17 idea behind this motion being that in
18 connection with the 2019 license renewal,
19 some of the grounds upon which the complaint
20 urges revocation of the license now were
21 considered in discussions before the ALRC and
22 the city council, and particular conditions
23 were imposed on the license in response to
24 those concerns.

25 And there is such a thing as

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1 administrative double jeopardy, and it is our
2 view that it would be a violation of due
3 process to do the imposition of conditions as
4 a sanction in connection with the renewal of
5 the license and then to impose additional
6 punishment by way of revocation for the same
7 offenses in a separate revocation proceeding.

8 And so we ask that matters that precede
9 the July 1st, 2019, renewal of the license be
10 excluded from these proceedings on that
11 ground.

12 MR. DONNELLY: City attorney?

13 MS. ZILAVY: And the position I am
14 in in terms of this complaint is not an
15 unusual one for a city. The timeline for
16 renewing a license is very tight, and the
17 application -- the renewal applications are
18 due to the clerk by April 15th, and the
19 common council asked to hold on renewal at
20 its meeting before June 15th of each year.
21 So that's the time frame within which I have
22 to put in the case.

23 I had started reviewing police reports
24 back in I think January, and some things came
25 to my attention that caused me to go further

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1 back in police reports, and there was no
2 way -- no physical way that I was going to be
3 able to get a complaint together prior to the
4 renewal period.

5 And I had stated that -- I believe I had
6 stated that to the ALRC that my intent was to
7 file a revocation after it was renewed
8 because I could not do -- I couldn't file a
9 renewal within that time period. And I --
10 the conditions on the license are not
11 sanctions. They're conditions for helping to
12 create a safer environment at an
13 establishment. I don't see them as
14 sanctions.

15 And it's also possible that at the end
16 of the hearing, you won't revoke the license.
17 So argument that the sanctions and then the
18 revocation would be double jeopardy is
19 presuming that at the end of this, you would
20 revoke the license. And I don't see any way
21 that it is double jeopardy.

22 MR. DONNELLY: Is this the
23 opportunity to rebut?

24 MR. ALLEN: Yes.

25 MR. OLSON: We're not finding fault

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1 with the City Attorney's office, and we don't
2 doubt Ms. Zilavy's narrative of the
3 difficulties of her -- and the timing of her
4 workload, but it is a due process
5 consideration to consider the same misconduct
6 in two distinct proceedings and take action
7 regarding that misconduct in two different
8 ways in two different proceedings, and that's
9 the constitutional basis of our motion.

10 It doesn't have anything to do with
11 anybody doing anything wrong in the City
12 Attorney's office. But what they could do in
13 the future to avoid this constitutional
14 problem would be they could caution the
15 counsel not to take action on allegations
16 concerning which there is a contemplated
17 revocation proceeding coming down the line.
18 That would avoid the double jeopardy problem.
19 Thank you.

20 MR. DONNELLY: Go ahead.

21 MR. ALLEN: Thank you, Mr. Chair.
22 One question I have for you, Counsel, is your
23 advice of the City Attorney's office. What
24 happens if a license is up for renewal and
25 the prosecutor for the ALRC is in that

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1 position but the counsel by statute has to
2 act by a certain date or the license is not
3 renewed? We need to be arguing -- here
4 arguing tonight that your client was denied
5 due process for that action?

6 MR. OLSON: The City would be in a
7 stronger position if it simply renewed the
8 license and noted that it was doing so
9 without considering the allegations of
10 misconduct that it contemplates making part
11 of a subsequent revocation proceeding because
12 then you wouldn't have the same allegations
13 being the basis for governmental action
14 against the licensee on two separate
15 occasions.

16 MR. ALLEN: So not only aware of
17 administrative double jeopardy in the context
18 of labor law, and your brief/motion cites
19 heavily to those cases, are you aware of any
20 administrative body of law or body of
21 administrative law where such double
22 jeopardy, administrative double jeopardy, as
23 you've called it, has been a determinate
24 factor in the case?

25 MR. OLSON: Outside the labor

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1 context, we're not at this time. But we have
2 looked hard to find some constitutional
3 reason why the result would be different, and
4 we can't find one. We think the constitution
5 would require the result to be the same.

6 MR. ALLEN: Well, I'm glad I didn't
7 miss that case law either. So my question
8 for you then is, aren't you really arguing
9 that the City by renewing that license should
10 be equitably stopped from enforcing the
11 ordinances or charging these violations?

12 MR. OLSON: No. We don't have to
13 go to a bare renewal at this point, and we
14 don't have to answer the question of whether
15 a bare renewal has some estoppel effect on
16 the City because we have a renewal with
17 conditions that are expressly based on some
18 of the most significant conduct upon which
19 revocation is now sought.

20 So we have two successive City actions
21 to -- taken against the licensee on the same
22 conduct on two separate occasions. That's
23 not the next harder case, which is what if
24 you just renew the license and expressly
25 reserve any action based on that allegation

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1 of misconduct.

2 MR. ALLEN: Okay. But aren't these
3 two separate acts, imposing conditions and
4 renewing the license?

5 MR. OLSON: They were part of the
6 same motion and part of the same council
7 action as I recall.

8 MR. ALLEN: When those conditions
9 were imposed on your client, was there any
10 complaint filed for nonrenewal of your
11 client's license?

12 MR. OLSON: I don't think there
13 was.

14 MR. ALLEN: Ms. Zilavy, was there?

15 MS. ZILAVY: No.

16 MR. ALLEN: Thank you. Counsel,
17 are you aware of any body of case law that
18 equates conditions on a license with punitive
19 action or discipline?

20 MR. OLSON: Well, I'm not aware of
21 any body of case law that equates revocation
22 of a license with punitive action or
23 discipline. Either they're both being done
24 ostensibly to protect the public from a
25 licensee with a propensity to conduct itself

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1 in a dangerous fashion. So the answer to
2 your direct question is no, I'm not. But I
3 don't think that makes a difference.

4 MR. ALLEN: Ms. Zilavy, conditions
5 on a license affect the way a licensee can do
6 their business, restricts the way they can do
7 their business, why isn't that punitive?

8 MS. ZILAVY: Well, I would -- I
9 would liken this -- well, not liken, but
10 let's say a chief of police security plan is
11 imposed on the business in the course of the
12 licensing year and the business operates
13 under the chief security plan. And then
14 incidents keep happening at the
15 establishment, and it becomes clear that the
16 chief security plan is not taking care of the
17 issue that the City thought it would, so then
18 the City files for an action, be it
19 suspension, revocation, whatever.

20 And in terms of whether a condition is
21 punitive, in this case in particular, it
22 doesn't -- I don't think it necessarily
23 restricts how they do their business. It's a
24 safety issue for the City. And the -- I
25 wasn't at that meeting, so I don't know

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1 exactly what was discussed, but the -- there
2 wasn't a hearing on the -- any of the
3 allegations that are contained in the
4 complaint. There wasn't evidence presented
5 in -- in a witness-type hearing at that
6 meeting.

7 MR. ALLEN: So is it your position
8 that their license was never in jeopardy at
9 the time the conditions were agreed to?

10 MS. ZILAVY: Well, it wasn't
11 because there was no nonrenewal action filed.
12 And I had stated that -- that basically the
13 City had to renew their license because of
14 the timing and that I would be filing a
15 revocation at a later date.

16 MR. DONNELLY: I have nothing. So
17 how do we proceed?

18 MR. ALLEN: Will the ruling on this
19 motion, Mr. Olson, potentially affect your
20 arguments on the other motions or your
21 position on the other motions?

22 MR. OLSON: It might eliminate the
23 need for the other motion, but it wouldn't
24 affect the nature of my arguments.

25 MR. ALLEN: Okay. It's really your

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1 call as a committee whether you want to hear
2 all of the motions and then decide them or if
3 you would like to seek any legal advice or
4 just rule on the motion. And if you receive
5 legal advice, I have to point out the statute
6 says you may go into closed session to
7 receive that advice, but it does not compel
8 you to go into -- that's why -- if you go
9 into closed session, you have to have a roll
10 call on a motion.

11 MR. DONNELLY: I'll ask my fellow
12 committee members. Does anyone feel the need
13 to go into closed session to receive advice
14 on this topic?

15 MR. SKIDMORE: I'm sensing that
16 that might be a good idea, but I'm also not
17 real anxious to drag this on to 3:00 or 3:30
18 in the morning. And I'm wondering, how many
19 motions will we be going through just in
20 terms of timing?

21 MR. ALLEN: There's five of them,
22 are there not, Counsel?

23 MR. OLSON: Yes. So there's three
24 more after the one we're talking about.

25 MR. DONNELLY: So I feel quite

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1 comfortable discussing this in open session.
2 Do you think that's a bad idea?

3 MR. ALLEN: I do think that's a bad
4 idea because there are all sorts of questions
5 that people want to ask legal counsel, and
6 sometimes they're not formulated as well as
7 they could be, and you could find yourself
8 trying the court probably continuing for a
9 misstatement. Also, I can be much more
10 candid, frank, and direct with you in closed
11 session than I may be in open session.

12 MR. DONNELLY: Amy, what's your
13 pleasure?

14 MS. WESTRA: My preference would be
15 to go through all of the motions and then go
16 into closed session.

17 MR. SKIDMORE: I'd be more
18 comfortable with that unless that's not
19 protocol for the committee.

20 MR. ALLEN: That's fine.

21 MR. DONNELLY: All right.

22 Mr. Olson, you can present your next motion.

23 MR. OLSON: Oh. Excuse me?

24 MR. ALLEN: They would like you to
25 go ahead and argue the next motion.

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1 MR. OLSON: All right. The next
2 motion also goes to the timeliness of the
3 proceedings. It is called motion to limit
4 allegations to those that occurred within one
5 single license year as is required by
6 principles of equity.

7 In this case, we're just asking that the
8 committee limit the considerations for
9 alleged grounds for revocation to the
10 2018-2019 license year from July 1st, 2018,
11 to June 30th, 2019, because the complaint
12 goes back so far. It goes back to 2012.

13 And we've introduced in our motion a
14 discussion of the law of equitable estoppel
15 and laches that both talk about a party
16 storing up its allegations until they're so
17 old that they're very difficult to defend
18 against, and it's prejudicial to the party
19 having to try to defend against those
20 allegations.

21 And we've introduced the affidavit of my
22 paralegal who is here with me, Caitlin Polari
23 [phonetic], about her efforts to try to
24 contact a number of important witnesses to
25 some of these very early allegations that

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1 have not been successful because of the
2 passage of time.

3 So we believe that we are prejudiced in
4 being asked to defend against allegations
5 going back to 2012, and we would ask the
6 committee to limit the scope of these
7 proceedings to the 2018-2019 license year for
8 purposes of fairness.

9 MR. DONNELLY: Assistant City
10 Attorney Zilavy.

11 MS. ZILAVY: And I would argue that
12 in terms of due process, in these types of
13 hearings, due process is notice and an
14 opportunity to be heard, an opportunity to
15 cross-examine witnesses, and that is
16 available to Visions at this hearing.

17 There's reference in the motion to
18 knowing or should have known. And just in
19 the course of my reading reports to see
20 whether there was anything that would warrant
21 a revocation action, as I started reading the
22 reports, I saw things that were disturbing to
23 me.

24 In the course of my review, I received
25 an e-mail from an individual who was a victim

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1 of an incident at the club, and she reported
2 it to the police and the police investigated
3 it. And based on what she told me, I
4 wondered whether similar incidents had taken
5 place, so that caused me to go back further
6 in years and get reports and review
7 incidents.

8 And I came upon incidents that I had
9 never been aware of that were of great
10 concern to me given the nature of the
11 incident. Some of them were very violent,
12 some of them were sexual assaults, some were
13 reflection on the management of the club.

14 And as I reviewed the reports, I saw a
15 pattern, and I thought it was important to go
16 back so that that pattern would be evident
17 because one of the -- one of the other things
18 that I noticed was that -- that in the
19 pattern is that there's a pattern of Visions
20 not calling the police. So things don't get
21 reported in a timely fashion and probably
22 some things, none at all.

23 But that is why I went as far back as
24 2012, because of information that came to my
25 attention, and I felt like I had a duty to

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1 flesh that out. And as I said, a pattern
2 emerged, and I felt like it was important for
3 that information to be brought to the
4 committee. And as I said, I have witnesses
5 that Visions would be able to cross-examine,
6 and I think that solves the due process
7 issue.

8 MR. DONNELLY: All right.

9 Mr. Olson?

10 MR. OLSON: I think that that is
11 just the sort of thing that the doctrine of
12 laches protects a party from having to defend
13 against is a person in a prosecutorial
14 position looking at a case and deciding as
15 they look through it that, man, this case
16 would be even stronger if I went back and
17 added stuff from additional years from the
18 past. And going back farther and farther
19 into the past, every year back you go, those
20 incidents become much -- more and more
21 impossible for the party defending those
22 allegations to investigate.

23 It's not just cross-examining the
24 prosecution witnesses that is important for a
25 party defending against these allegations.

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1 It's being able to investigate them
2 independently, develop one's own independent
3 witnesses, interview those people who are
4 identified as potential witnesses in the
5 police reports, not just the ones that
6 prosecution seeks to call, but all of them.
7 And interviewing, finding and interviewing,
8 that is denied when you wait seven years.
9 Thank you.

10 MR. DONNELLY: Assistant City
11 Attorney Allen, do you have any questions or
12 comments?

13 MR. ALLEN: Thank you for
14 anticipating my need to flesh this out a
15 little bit. I don't know whether you're
16 properly referred to as Attorney Scott Olson
17 or just Attorney Olson.

18 MR. OLSON: Just Olson. Scott's
19 just my middle name.

20 MR. ALLEN: All right. Well,
21 Attorney Olson, are you aware of the case law
22 that says equitable estoppel and laches don't
23 apply to municipalities enforcing ordinances
24 enacted under the police power?

25 MR. OLSON: I am aware of law in

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1 that area, but I think at some point, it
2 becomes a constitutional issue of due process
3 that is analyzed through the same principles
4 as laches in particular.

5 MR. ALLEN: I guess what troubles
6 me is there's a case out there, City of
7 Milwaukee versus Leavitt, 31 Wis. 2d 72,
8 1966, and for any lawsuit out there you just
9 said that's an old case, cases don't have
10 shelf lives. It's still a good law. It's
11 not overruled.

12 But in that case, occupancy permits have
13 been an issue for the building since 1947,
14 and somewhere in the early '60s, the City of
15 Milwaukee realized it had been doing so in
16 error and essentially evicted the people from
17 a building.

18 The court upheld that, and it very
19 clearly stated that, "While municipal and
20 other governments are not" -- I'm quoting the
21 page here -- "wholly immune from application
22 of the doctrine of equitable estoppel," as
23 you've argued, "this Court is firmly
24 committed to the principle that estoppel will
25 not lie against a municipality so as to bar

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1 it from enforcing an ordinance enacted
2 pursuant to the police power. Thus,
3 erroneous acts of municipal officers do not
4 afford a basis to stop the municipality from
5 enforcing its ordinances enacted pursuant to
6 the police power."

7 So I guess my question for you is, why
8 isn't this enforcement of an ordinance
9 enacted under the police power of the City,
10 and why can't it then under this case law,
11 and there are several cases that hold this
12 principle to be applied to the police power
13 that equitable estoppel won't apply, what's
14 different here?

15 MR. OLSON: That was an ongoing
16 violation. It was -- the ordinance in
17 question had not been enforced mistakenly for
18 a number of years, but it was -- the
19 violation was still in place at the time the
20 City decided to enforce it, and it was being
21 put into a position of either having to count
22 as an ongoing violation of its black letter
23 ordinance or proceed -- be allowed to proceed
24 despite its earlier contrary apparent
25 approval or condonation of the use in

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1 question.

2 In this case, we're not talking about an
3 ongoing violation of a black letter ordinance
4 that, for example, prohibits the use as a
5 zoning classification where Visions is.
6 We're talking about building up a case of
7 little pieces of past evidence of wrongdoing
8 that all either add up or don't add up to a
9 revocation decision. And that's a different
10 thing.

11 The City doesn't have to condone an
12 ongoing violation in order to decide that
13 it's not fair to require the licensee to
14 defend against five-, six-, seven-year-old
15 allegations.

16 MR. ALLEN: Ms. Zilavy, certainly
17 one of the concerns under due process is a
18 fairness to the opponents, to the defendant.
19 And here, there's an affidavit showing
20 difficulty getting ahold of certain witnesses
21 that would testify to the meat of the matter,
22 some of the older violations. Why wouldn't
23 laches apply in this case?

24 MS. ZILAVY: Because they -- the
25 witnesses that I am calling are the police

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1 officers who've responded to the incidents,
2 and they are here subject to a thorough
3 cross-examination, and I would submit that
4 this is not like a court of law. This is not
5 a prosecution on a specific charge where --
6 where both sides present evidence to -- you
7 know, I present evidence to get a conviction
8 on the charge, and they provide evidence to
9 find their party not guilty. But this is a
10 different animal from a court trial.

11 MR. ALLEN: And then we'll get to
12 that in a moment here, the other motions here
13 shortly. What about -- I'll throw this out
14 for both of you. There's a statute
15 893.93(2)(b), imposes a two-year statute of
16 limitations on ordinance prosecutions.

17 Since you've got the burden of proof,
18 Attorney Zilavy, I'll ask you first. Why
19 wouldn't that be an applicable statute here
20 or something that the ALRC should draw upon
21 in deciding this motion?

22 MS. ZILAVY: Again, because I'm not
23 charging a specific ordinance violation
24 that -- where there's going to be a
25 conviction in a court of law. I think that's

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1 different from this administrative action,
2 and the -- the ordinance that the disorderly
3 falls within, the allegation is that Visions
4 is a disorderly house. All of the counts in
5 the complaint are in support of that
6 allegation.

7 MR. ALLEN: Isn't that allegation
8 an allegation that they violated the
9 ordinances by keeping the riders on?

10 MS. ZILAVY: Right. Right. But it
11 doesn't require proof of each individual
12 count in the same way that is if each
13 individual count would be charged against
14 them, if that makes any sense. So if it were
15 being charged as a count in municipal court,
16 for example, any of the paragraphs in the
17 complaint, I would have to prove the elements
18 of that offense.

19 And with the disorderly house -- I don't
20 know if I'm articulating this very well, the
21 -- the substance that makes up the disorderly
22 house, as I said, I have the witnesses
23 available for cross-examination.

24 And in the liquor licensing context,
25 what is required for the revocation hearing

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1 is due process, and the due process is notice
2 and being heard and cross-examining and
3 having a transcript of the proceeding if you
4 so desire. But I believe the elements of due
5 process are met because of the nature of this
6 action. If it were a court action, I would
7 agree with that.

8 MR. ALLEN: Attorney Olson, why
9 shouldn't she have at least the two years
10 provided by the statute for ordinance
11 prosecutions? I mean, you've argued that she
12 should have nothing beyond a year.

13 MR. OLSON: Well, I think that's a
14 judgment call for the ALRC, and it would be
15 difficult to argue against a two-year statute
16 in the statute of limitations ordinance
17 prosecution for the following reasons:
18 Statute of limitations represents a judgment
19 by the legislature on balancing the interest
20 of the government in being able to prosecute
21 violations of its laws and not be foreclosed
22 from prosecuting them just because they
23 haven't found out about them very quickly.

24 And balancing that right against the
25 right of citizens and businesses not to have

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1 to defend old allegations because witnesses
2 move away, documents are destroyed or
3 disappear. Other evidence that might be
4 relevant to defend a case becomes less
5 available with the passage of time.
6 Computers get changed over. And all of those
7 things make it more challenging to defend
8 older allegations.

9 So in this case, the legislature made a
10 judgment that for ordinance violations, we're
11 going to cut it off at two years. That's
12 your statute of limitations for ordinance
13 violation prosecution. That's where we
14 strike the balance between allowing the
15 government to prosecute violations within a
16 reasonably long period of time and allowing
17 people not to have to defend against very old
18 allegations.

19 And that's for ordinance violation
20 prosecutions where if you're convicted,
21 you're going to have to pay a monetary
22 forfeiture, and usually not a large one.

23 We're talking here about the liquor
24 license revocation, which is the death
25 penalty for a liquor license business. And

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1 so it's equally important for the same
2 considerations of fairness that we've argued
3 here in the due process analysis to protect
4 the business against having to defend against
5 old allegations. How old? If you want to
6 look at the statute of limitations, I think
7 that would be a rational choice.

8 MR. ALLEN: Do you agree, though,
9 that any act, regardless of when it occurred,
10 could be used to impeach a witness?

11 MR. OLSON: Well, probably.
12 Certain -- certainly if we were in a court of
13 law, that would be true with respect to some
14 things. There would be no time limitation on
15 that.

16 MR. ALLEN: Okay. Ms. Zilavy,
17 why -- as I understand it, we do sort of a
18 Texas two-step in these proceedings. We have
19 a finding if there were violations if
20 violations were proven. Then we have a
21 subsequent argument or hearing on what the
22 appropriate discipline would be, right?

23 MS. ZILAVY: Correct.

24 MR. ALLEN: Why wouldn't it be
25 appropriate to use some of these older events

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1 in that portion of these proceedings?

2 MS. ZILAVY: Well, it wouldn't be
3 inappropriate.

4 MR. ALLEN: Okay. That's all I
5 need. I don't have anything further.

6 MR. DONNELLY: All right.
7 Mr. Olson, you may go over your next motion,
8 please.

9 MR. OLSON: We have filed a motion
10 to disqualify the members of the subcommittee
11 who volunteered to serve as decision-makers,
12 and we filed that because we believe it's a
13 flawed mechanism of getting to an impartial
14 panel because who is likely to volunteer for
15 such an assignment that has, other than skin
16 [phonetic] work, actually observed might
17 require having to stay up to the wee hours of
18 the morning.

19 It seems to the average person through
20 common sense that people likely to volunteer
21 for such a job would be people that have an
22 agenda wanting to achieve some specific thing
23 by the action of the subcommittee for which
24 they're volunteering. It just looks to have
25 the appearance of other than an impartial

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1 decision-making body.

2 And we have cited authority on the
3 importance of the decision-making body that
4 not only is impartial but appears to be
5 impartial to the general public, and we think
6 that's an important consideration.

7 We think that the matter ought to go
8 back to the ALRC for the selection of a
9 subcommittee in some other fashion. Nothing
10 personal against any of the committee
11 members, but that's our constitutional
12 position. Thank you.

13 MR. DONNELLY: Assistant City
14 Attorney Zilavy.

15 MS. ZILAVY: I would argue there
16 has to be an actual showing or some kind of
17 evidence of one of the subcommittee members
18 not being impartial or evidence to show that
19 there's a question of them being fair. And I
20 would submit that -- that the method that
21 he's proposing could have negative
22 implications because if it would go back to
23 the ALRC and the chair would say, all right,
24 you, you, and you are going to be at the
25 subcommittee, I mean, by way of his argument,

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1 that might cause a subcommittee member to
2 hold some resentment for being appointed to
3 the committee where they know they're going
4 to have to stay up until maybe 3:00 in the
5 morning.

6 So I think that's -- it goes both ways
7 with that argument. But I think that at --
8 for a bottom line, there has to be some kind
9 of evidence at the outset that a member has
10 shown that they will not be fair and/or
11 impartial.

12 MR. DONNELLY: Mr. Olson?

13 MR. OLSON: We think the evidence
14 is the fact of volunteering. Thank you.

15 MR. DONNELLY: Assistant City
16 Attorney Allen.

17 MR. ALLEN: Thank you. I'll be
18 real brief. Attorney Olson, isn't it true
19 that everyone who is on any City body or
20 appointed by the common council mayor has in
21 some way volunteered to be on that body?

22 MR. OLSON: Volunteering to be on
23 the body is different from volunteering to be
24 on a specific tribunal to conduct a trial
25 like hearing and determine guilt or

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1 innocence.

2 MR. ALLEN: That's a very good way
3 of avoiding the question I have asked. But I
4 take it that by avoiding the question that
5 was asked, the answer is yes.

6 MR. OLSON: I mean, did they
7 volunteer? Yes. They had -- we don't have
8 involuntary servitude as far as I know.

9 MR. ALLEN: I won't touch that. I
10 guess my trouble is the entire motion is that
11 if you look at Marris versus City of
12 Cedarburg, 176 Wis. 2d 14, 1993 case, in that
13 case, they were addressing bias of a
14 committee member of a planning commission,
15 actually, of the City of Cedarburg who had
16 made multiple statements about a property
17 owner and the condition of the property the
18 owner kept that property in and still sat on
19 that board when a matter involving that
20 property owner came before it.

21 And there, the Court said, well, that
22 was evidence of bias and prejudice, and that
23 person should not have participated. But the
24 Court did say that there has to be evidence
25 of bias or prejudice or an impermissibly high

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1 risk of bias or prejudice.

2 And I want to be clear, your sole
3 argument here is that by volunteering to be
4 on this tribunal, that, to you, creates that
5 impermissibly high risk of bias?

6 MR. OLSON: It is.

7 MR. ALLEN: And there's no other
8 evidence and there's no affidavits supporting
9 this motion?

10 MR. OLSON: That's correct.

11 MR. ALLEN: All right. Thank you.

12 MR. DONNELLY: All right.

13 Mr. Olson, may we hear your next motion,
14 please?

15 MR. OLSON: We have made a motion
16 to exclude any evidence other than eyewitness
17 testimony and to exclude or redact
18 allegations from the complaint that are based
19 strictly on hearsay evidence.

20 And the basis for that motion is the
21 case law that we cite in it in which we
22 establish first that licensee has the right
23 to due process of law in a constitutional
24 sense in connection with a revocation
25 proceeding like this. And then we establish

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1 that the elements of due process, although
2 flexible, include the right to confront and
3 cross-examine the witnesses against you.

4 And that just doesn't mean cross-examine
5 somebody who talked to the person on the
6 scene that saw and heard the alleged
7 misconduct. It means cross-examining the
8 person who claims to have seen and heard the
9 alleged misconduct. Thank you.

10 MR. DONNELLY: Assistant City
11 Attorney Zilavy.

12 MS. ZILAVY: This is an
13 administrative hearing, and the case law does
14 say the Rules of Evidence do not apply in
15 these administrative hearings. Hearsay is
16 admissible. The primary prohibition is that
17 the City's entire case could not be based on
18 hearsay. I have to present corroborating
19 evidence to the allegations that are set
20 forth.

21 In Questions v. City of Milwaukee 336
22 Wis. 2d 654, in that case, the City came
23 forward with a synopsis from the police
24 department of various police issues that
25 occurred in relation to this establishment,

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1 and there were also witnesses who testified.

2 The licensee objected to the police
3 report synopsis stating that it consisted of
4 uncorroborated hearsay that was controverted
5 by in-person testimony. The Court disagreed
6 with that. The Court referenced that the
7 statutes only prohibit the admission of
8 hearsay from proceedings in the courts of the
9 State of Wisconsin, that common council and
10 its licenses committees are not courts and
11 therefore are not bound by statutory Rules of
12 Evidence; and as such, the Court ruled that
13 the synopsis was properly admitted.

14 The Court went on to say, as I said,
15 that you can't base your entire case on
16 hearsay, you have to have corroborating
17 evidence. And in this case, yes, there is
18 hearsay, but I have witnesses to corroborate
19 all the evidence that would be presented.
20 And again, Attorney Olson has the opportunity
21 to cross-examine on those issues as well.

22 MR. DONNELLY: Mr. Olson?

23 MR. OLSON: From our examination of
24 the complaint, it appears that many of the
25 allegations are based simply on the reports

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1 of police officers who talked to the actual
2 witnesses at the scene and reported what they
3 said. Those are the ones that we've
4 identified in our moving paper. I think --
5 we are not basing our motion on some argument
6 that the Rules of Evidence that are
7 applicable to courts apply here. We know
8 they don't.

9 But we do believe that the elements of
10 due process include the right to confront and
11 cross-examine the eyewitnesses and ear
12 witnesses who support the allegations. Thank
13 you.

14 MR. DONNELLY: Assistant City
15 Attorney Allen.

16 MR. ALLEN: Quick question for you,
17 Attorney Zilavy. The case that you
18 referenced somewhat obliquely, would that be
19 Questions versus City of Milwaukee,
20 336 Wis. 2d 654, if you know?

21 MS. ZILAVY: Yeah.

22 MR. ALLEN: Okay.

23 MS. ZILAVY: Yes.

24 MR. ALLEN: Attorney Olson, I've
25 had the benefit of being a circuit court

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1 judge reading complaints where a police
2 officer is alleging on information and belief
3 that the reports of other police officers
4 completed during the regular course of
5 business were true and accurate, and they
6 form the basis of criminal charges.

7 This is not a criminal case, as
8 everybody agrees. Ms. Zilavy filed a sworn
9 complaint, which is what the statute
10 requires. What authority do you have to say
11 that the complaint cannot have hearsay within
12 its four corners?

13 MR. OLSON: Oh, none. And we are
14 not suggesting that there is any such
15 authority. It simply appeared to us from the
16 complaint that it was likely that the only
17 evidence presented in support of the
18 allegations we identified was going to be
19 hearsay evidence from police officers, no
20 direct evidence from actual eyewitnesses.

21 And now, if we're wrong about that,
22 we're wrong about that. But we think we're
23 right, and we think that, in those instances
24 where the only testimony is secondhand,
25 reports of police officers, the elements of

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1 due process say that we're then denied our
2 constitutional right to confront the actual
3 eyewitnesses against us.

4 MR. ALLEN: Why isn't that an issue
5 of proof rather than a charging issue?

6 MR. OLSON: Well, you're right. In
7 the end, it is a --

8 MR. ALLEN: Can I hear that again?
9 I don't hear that often.

10 MR. OLSON: You're right. In the
11 end, it's an issue of whether the evidence in
12 support of a given allegation stands up to
13 the test of was the licensee given the right
14 to confront and cross-examine the witnesses
15 supporting that allegation. And that
16 analysis could be conducted at the end of a
17 long hearing. But if it's possible to
18 identify allegations where the only
19 supporting evidence is hearsay, it'd be
20 awfully convenient for this body to exclude
21 them from the proof early on.

22 MR. ALLEN: As a personal note,
23 I've never known the ALRC to take the easy
24 road. That's all I have, Mr. Chair.

25 MR. DONNELLY: Thank you, Assistant

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1 City Attorney Allen. Mr. Olson, next motion.

2 MR. OLSON: My last motion, we
3 learned in an informal discussion with
4 Ms. Zilavy that the practice of the
5 subcommittee may include permitting citizens
6 to make unsworn comments regarding their
7 opinions on how these proceedings should come
8 out. Not testifying to facts, not testifying
9 at all.

10 We object to that. This is a due
11 process proceeding intended to permit them,
12 an impartial hearing body, to find the facts
13 based on sworn testimony and admissible
14 evidence, not opinions of citizens. Thank
15 you.

16 MR. ALLEN: I can flesh that out a
17 little bit more for you. There is a City
18 ordinance which requires every meeting of the
19 public body to allow for public comment. I
20 specifically instructed the body that those
21 unsworn comments cannot be considered in
22 deciding the case.

23 MS. ZILAVY: I was just going to
24 say he mischaracterized what I said. I
25 talked to one of his I believe paralegals,

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1 and she asked if I had any idea how things
2 were going to go tonight, and I said, well, I
3 don't, but I'm guessing they will take up the
4 motions first. At the last hearing I had,
5 there were citizens who testified. And I
6 said, there was 20 -- I think there were 20
7 some of them, and some of them were sworn in
8 and testified. Others spoke in the public
9 comments portion of the meeting. And I don't
10 know if there will be any tonight.

11 And that's what I said. I didn't
12 represent anything in terms of what citizens
13 would want and that they -- what they would
14 be talking about.

15 MR. ALLEN: I should also say that
16 the ALRC has allowed counsel for licensees to
17 effectively cross-examine such witnesses.
18 Whether or not -- I should say members of the
19 public to be more correct -- to allow the
20 licensees' attorney to question them whether
21 or not they're testifying or whether they
22 just make a public comment in a public
23 meeting.

24 MR. DONNELLY: Mr. Olson?

25 MR. OLSON: If that's -- Ms. Zilavy

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1 was a participant in that conversation, I was
2 not. I did my best to recount what I was
3 told by my staff member, but I stand
4 corrected certainly if I didn't get it
5 exactly right. But our consideration is
6 somewhat ameliorated by the instruction from
7 the City Attorney's office to disregard any
8 unsworn comments. It's unfortunate they have
9 to be permitted if that's the case.

10 MR. ALLEN: And just for the
11 record, I will give that body the instruction
12 now that should you have any people who come
13 forward and wish to speak under the public
14 comments portion of the meeting that that is
15 not to play any factor in your decision of
16 this license revocation motion.

17 MR. DONNELLY: Understood. So does
18 that amelioration extend to withdrawing this
19 motion?

20 MR. OLSON: I'm not going to
21 withdraw the motion because I think that the
22 city ordinance is unconstitutional if it
23 requires a body trying to hold a fair and
24 impartial hearing to listen to unsworn
25 comments from citizens just to come in and

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1 say anything they want.

2 MR. DONNELLY: All right. Do you
3 have any further motions? Oh, sorry.
4 Assistant City Attorney, anything else?

5 MR. ALLEN: No.

6 MR. DONNELLY: Do you have any
7 further motions, Mr. Olson?

8 MR. OLSON: We don't have a further
9 motion, but I do have one word of explanation
10 to offer.

11 MR. ALLEN: If I could interject.
12 I just thought of a solution here for you.
13 This is the beginning of a public hearing,
14 which, because of the open meetings law, we
15 have to publish a notice on agenda for each
16 subsequent part of this hearing.

17 But it is ultimately one hearing. There
18 will be one transcript and one decision, and
19 if the licensee appeals, there will be one
20 appeal action. Therefore, my interpretation
21 of the ordinance is that since there was --
22 this is a first, the opportunity for a public
23 comment is closed and we have no public
24 comment tonight; therefore, there's nothing
25 for you to be concerned about.

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1 MR. OLSON: One more comment. I
2 received an e-mail from my counterpart,
3 Ms. Zilavy -- is it Zilavy or --

4 MS. ZILAVY: Zilavy. Thank you.

5 MR. OLSON: -- this afternoon about
6 a social interaction I had with Captain
7 Ackeret on the golf course, and suggesting
8 that there might have been something improper
9 about that. I just want to say that that
10 occurred by chance. Captain Ackeret joined
11 the twosome of which I was a member at
12 Monona. I didn't remember who he was until
13 the 9th hole.

14 And it occurred after the renewal
15 decision and before the complaint had been
16 filed, so there was nothing pending between
17 my client and the City at that time. And
18 I -- our conversation was limited after I
19 recognized him to introducing myself and him
20 introducing himself and remembering that
21 we've been at the same meeting together, the
22 ALRC meeting, in which the subject of
23 Visions' liquor license renewal came up and
24 Captain Ackeret had been required to leave
25 the meeting by a scheduling conflict before

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1 the actual Vision consideration occurred.

2 I think that was the sum and substance
3 of our conversation. But I don't think
4 there's any cause for a concern of any
5 misconduct or attempt to exert improper
6 influence on my part or Captain Ackeret's
7 part.

8 MR. DONNELLY: Noted. So Amy,
9 what's your pleasure?

10 MS. WESTRA: I would like to move
11 to closed session.

12 MR. DONNELLY: Do I hear a motion?

13 MR. SKIDMORE: I think we have
14 to --

15 MR. ALLEN: You actually have to
16 read the grounds for going into closed
17 session.

18 MS. WESTRA: Yep. So closed
19 session G, conferring with legal counsel for
20 the ALRC who is rendering oral or written
21 advice concerning strategy to be adopted by
22 the body with respect to litigation in which
23 it is or likely become involved.

24 MR. SKIDMORE: Second.

25 MR. DONNELLY: I hear a motion and

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1 a second. Is this a motion to go into closed
2 session for a discussion? City Attorney
3 Allen?

4 MR. ALLEN: That's a very good
5 question.

6 MR. DONNELLY: I just wanted to --
7 Mr. Clerk, will you call roll call, please.

8 DEPUTY CITY CLERK: Donnelly.

9 MR. DONNELLY: (No audible
10 response.)

11 DEPUTY CITY CLERK: Skidmore.

12 MR. SKIDMORE: Aye.

13 DEPUTY CITY CLERK: Westra.

14 MS. WESTRA: Aye.

15 DEPUTY CITY CLERK: The motion
16 passes.

17 MR. DONNELLY: Thank you very much.
18 Will everyone please clear the room.

19 (Recess.)

20 MR. DONNELLY: All right. I now
21 call this session reconvened -- or reconvene
22 the session of the ALRC committee.

23 DEPUTY CITY CLERK: Donnelly.

24 MR. DONNELLY: Present.

25 DEPUTY CITY CLERK: Skidmore.

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1 MR. SKIDMORE: Here.

2 DEPUTY CITY CLERK: Westra.

3 MS. WESTRA: Here.

4 DEPUTY CITY CLERK: Mr. Chair, we
5 have a quorum.

6 MR. DONNELLY: Thank you, Mr.
7 Clerk. We have considered all of the
8 motions. Assistant City Attorney Allen is
9 our counsel, and he will relay our rulings.

10 MR. ALLEN: Thank you. (Inaudible)
11 performed this role for many years for the
12 Madison Police and Fire Commission. I hope
13 they do them justice in recounting your
14 positions on the motions. I always found him
15 to be quite straight to the point and quite
16 accurate.

17 The motion to use pseudonyms consistent
18 with the agreement of the parties is granted.
19 Attorney Zilavy, if you feel you are
20 shortchanged in getting the information you
21 need to properly research the licensee's
22 witnesses, please feel free to bring an
23 appropriate motion before the body.

24 The second motion, the motion to
25 dismiss, if you will, for double jeopardy

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1 reasons is denied or dismissed. The
2 committee wanted me to note that conditions
3 are not disciplined and, in fact, this
4 license was never in jeopardy at the time the
5 conditions were imposed. And conditions are
6 often imposed on brand-new licenses where the
7 applicant has no history and there's no basis
8 for imposed discipline on the licensee.

9 The third motion regarding laches or
10 timeliness, a motion to dismiss on that basis
11 or to limit the charges to a one-year
12 lookback, if you will, is denied in part and
13 granted in part.

14 The committee grants the motion to the
15 extent that it will bar any charges for the
16 purposes of imposing discipline, the factual
17 allegations that are older than two years
18 from the date of the complaint. Such conduct
19 may still be used to impeach witnesses or at
20 the discipline phase of these proceedings.

21 We would ask that the city attorney
22 complete an amended complaint that shows only
23 those charges within the two-year lookback
24 period. We'd also ask that the licensee
25 waive any argument about service of process

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1 with regards to the amended complaint.

2 MR. OLSON: We'll accept service
3 informally at my office.

4 MR. ALLEN: Thank you. The motion
5 to strike the panel is dismissed, the only
6 basis being that was asserted that was
7 volunteering created an impermissibly high
8 risk of bias. The committee rejects that
9 argument.

10 The motion to exclude hearsay is neither
11 dismissed. We would note that the city
12 attorney has complied with the requirements
13 that this proceeding be initiated with a
14 sworn complaint. It was a sworn complaint.
15 And if the charges are based entirely on
16 hearsay, that would be a matter of proof on
17 the matter of charging.

18 Count number -- or challenge number six,
19 if you will, or motion number six relating to
20 the citizens and public comment is dismissed
21 or denied. I will instruct, as I have in the
22 past and as jurors are instructed similarly,
23 to disregard the relevant or certain
24 testimony.

25 I will be instructing the panel that

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1 they cannot rely on any unsworn testimony.
2 Additionally, should such persons show up to
3 speak, the licensee and/or his attorney will
4 be provided the opportunity to question such
5 persons as well. But the committee cannot
6 and will not base any decision on anything
7 but sworn testimony presented during the
8 hearing portion of these meetings.

9 MR. DONNELLY: Thank you, Assistant
10 City Attorney Allen. Regarding motion three,
11 for the convenience of us here, it would be
12 charge B [phonetic], items 2 through 48 that
13 will not be considered, which conveniently is
14 pages 5 through 45 in their entirety of the
15 complaint. So if you tear that out, what's
16 left is what we would consider tonight.

17 All right. So item one, revocation
18 action against commission. Assistant City
19 Attorney Zilavy.

20 MS. ZILAVY: Can you give me a
21 second, please. Because in terms of who I
22 have for witnesses and everything, I need --

23 MR. ALLEN: Do you want a brief
24 recess?

25 MS. ZILAVY: Well, I know for sure

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1 my first witness falls within the time frame,
2 so we could do him and then we can recess
3 after that. Is that okay?

4 MR. DONNELLY: Okay. Go ahead.

5 MS. ZILAVY: Do you want to do
6 appearances and all of that stuff?

7 MR. ALLEN: We should just have
8 them state their name for the record and what
9 we call in the legal business appearances.

10 MS. ZILAVY: Oh, you know what? I
11 take that back because I've got like 12
12 officers across the hall and some who are on
13 double time, so...

14 MR. DONNELLY: How long do you
15 need?

16 MS. ZILAVY: Like five minutes,
17 maybe. I'll try and be super quick.

18 MR. DONNELLY: Do I hear a motion?

19 MS. WESTRA: Move to recess for
20 five minutes.

21 MR. SKIDMORE: Second.

22 MR. DONNELLY: All right. All in
23 favor of recessing until 7:20, say aye.

24 MS. WESTRA: Aye.

25 MR. SKIDMORE: Aye.

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1 MR. DONNELLY: The ayes have it.

2 (Recess.)

3 MR. DONNELLY: So we'll reconvene
4 the session of the committee of Alcohol
5 License Review Committee. Mr. Clerk, would
6 you please call the roll.

7 DEPUTY CITY CLERK: Donnelly.

8 MR. DONNELLY: Present.

9 DEPUTY CITY CLERK: Skidmore.

10 MR. SKIDMORE: Here.

11 DEPUTY CITY CLERK: Westra.

12 MS. WESTRA: Here.

13 DEPUTY CITY CLERK: Mr. Chair, we
14 have a quorum.

15 MR. DONNELLY: Thank you very much.
16 We'd request that both of the attorneys at
17 some point present the list of all of their
18 witnesses to the court reporter for spelling
19 purposes. Assistant City Attorney Zilavy.

20 MS. ZILAVY: Did we call the case?

21 MR. ALLEN: No. You have to. Do
22 you want me to do that?

23 MR. DONNELLY: Yes, please.

24 MR. ALLEN: Okay. We're going to
25 call the case of City of Madison versus

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1 Visions. This is a revocation action for the
2 ALRC. Can we have you state your appearance
3 starting with the City.

4 MS. ZILAVY: The City appears by
5 Assistant City Attorney Jennifer Zilavy,
6 Z-I-L-A-V-Y, and sitting with me is Captain
7 Brian Ackeret from the North Police District.
8 And that's A-C-K-E-R-E-T.

9 MR. ACKERET: Correct.

10 MR. OLSON: Licensee appears by its
11 registered agent, David Brown, and by counsel
12 in person of Attorney Jeff Scott Olson.
13 Seated with me at counsel table is my
14 paralegal, Katie Polari.

15 MR. DONNELLY: All right.

16 MR. ALLEN: Ms. Zilavy, could you
17 please call your first witness.

18 MS. ZILAVY: Sure. The City calls
19 Kyle Bunnow.

20 KYLE BUNNOW,
21 called as a witness, being first duly
22 sworn, testified on oath, as follows:

23 DIRECT EXAMINATION

24 BY MS. ZILAVY:

25 Q Please state your name and spell it for the

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1 record.

2 A Kyle Bunnow, K-Y-L-E, B-U-N-N-O-W.

3 Q And you are with the City of Madison building
4 inspection department, correct?

5 A That is correct.

6 Q What is your current position?

7 A I am the plan review and inspection supervisor
8 with the City.

9 Q How long have you been in that position?

10 A Permanently since April of 2019.

11 Q What was your position prior to that?

12 A I was the minimum housing inspection supervisor
13 with the City of Madison building inspection
14 division.

15 Q How long were you in that position?

16 A July of 2012.

17 Q Can you explain -- excuse me -- to the committee
18 what your duties are in your current position and
19 your position as the minimum housing building
20 inspector?

21 A Sure. So in my current position as the plan
22 review and inspection supervisor, I oversee staff
23 that handles all plan review for our building
24 permits that the City of Madison issues, as well
25 as inspectors in the building, electrical, HVAC,

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1 and plumbing trades for permitted work within the
2 City, effectively all new construction from the
3 permitting process all the way through completion
4 and then final occupancy.

5 Prior to that as the minimum housing
6 inspection supervisor, I was responsible for
7 overseeing inspectors that inspected finished
8 buildings to ensure that they were being
9 maintained in accordance with the minimum
10 standards of the (inaudible) effectively handling
11 buildings that have completed construction but now
12 fall under the realm of needing general
13 maintenance.

14 Q Are you familiar with Visions?

15 A Yes, I am.

16 Q How so?

17 (Knocking on the door.)

18 MR. DONNELLY: You can continue.

19 THE WITNESS: I'm familiar with
20 Visions as an establishment that's been in
21 Madison for a long time. I never visited the
22 establishment outside of work. I was there
23 in December of 2018 at the request of the
24 City Attorney's office and the police
25 department to review the interior conditions

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1 to ensure that the conditions met the
2 permitted and expected conditions.

3 BY MS. ZILAVY:

4 Q So you were there in December on December 13th,
5 2018, correct?

6 A That's correct. I believe it was the 14th.

7 Q Oh, the 14th? And did you perform an inspection
8 of Visions at that time?

9 A Yes, I did.

10 Q Can you detail for the committee what your
11 inspection involved and what your observations
12 were?

13 A So during my time at the site, I reviewed the
14 interior to assess what was constructed within the
15 building to look for signs of obvious unpermitted
16 work or other potential dangerous situations
17 related to building operations.

18 During my time there, I observed a couple of
19 things that led me to believe that some
20 unpermitted work had been completed. Compared
21 against previously -- previously investigated
22 standards, I determined that the computers there
23 were private viewing booths that had been
24 installed.

25 Q So let me stop you for a second. Did you -- in

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1 preparation for your visit, did you look at
2 something in building inspection before?

3 A Yes. So prior to inspecting, it's routine to
4 review a case file relative to a property. The
5 City maintains documents relative to permits,
6 inspections, or other actions that had been taken
7 at the property relevant to building inspection.

8 And in order to be well-informed, it's
9 routine for staff or supervisors to review that in
10 advance of looking at a site to have a baseline
11 expectation of what you will find, what should be
12 there as well as to help give guidance as to if
13 you see something that is potentially out of line,
14 not in the history of the file, that that may be a
15 sign that something has occurred.

16 Q And so prior to going to Visions on December 14th,
17 you had looked at the file and --

18 A That's correct.

19 Q So back to your testimony, you were testifying
20 that in conjunction with what you would review
21 prior to your visit, you had observed some things.
22 And continue.

23 A That's correct. So during my inspection, I viewed
24 some things that were inconsistent with the
25 history of case file property. Specifically on

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1 the first floor, there were private viewing booths
2 that appeared to have been installed, which I
3 found no record of ever having reached final
4 approval.

5 In the basement, I found rooms that appeared
6 to have been constructed that separated the
7 basement area into storage. There were also some
8 other areas in the basement that had been
9 separated that were consistent with what I would
10 call (inaudible), which would have been dressing
11 rooms, a small lounge area for staff. What I did
12 not have record of was separations relative to
13 liquor storage and other general storage that I
14 found in the basement.

15 Q And what exactly does that mean?

16 A So from a building inspection perspective, one of
17 the things that's important is that when floor
18 plans are altered or changed, we have record of
19 what's done. The reason we want that to be
20 well-documented is because any time somebody
21 demises a space, separates it off, or creates
22 rooms, they're changing the patterns of the access
23 to the building or changing potential uses for the
24 building.

25 For example, in the event of a fire, an

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1 individual needs to be able to quickly find the
2 exits to be able to get out safely. Those are
3 things that we inspect for. Those are things that
4 we review when somebody submits plans to us.

5 So it's always important from a building
6 inspection perspective that if we find spaces that
7 have been created without permits or approval,
8 that an individual go through that process and
9 either confirm or alter the space to ensure that
10 things like exiting, other safety-type concerns
11 are met.

12 Q Did you observe anything besides the booths and
13 the downstairs areas you mentioned?

14 A With regards to building code violations, nothing
15 that stood out as an immediate hazard, though you
16 could have classified some general maintenance
17 having been needed on the building, broken window,
18 some other small items, things that didn't
19 necessarily fall within the scope of what I was
20 looking for but you would just notice walking
21 through the building kind of with a sharp eye.

22 Q What did you do after your inspection?

23 A So after the inspection, we issued a notice to the
24 owner of Visions, as well as copied Visions on
25 that notice for their own notification, directing

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1 them to obtain permits for the work that had been
2 completed or to remove the unpermitted work.

3 Q And when did you issue that notice?

4 A The notice was issued out formally January 14th,
5 2019.

6 Q Had a notice for those items been issued at any
7 prior time prior to January 14th, 2019?

8 A The case file showed instances of private viewing
9 booths having been installed on the property and
10 the property owner having been directed to obtain
11 permits for the work. What the file is
12 inconsistent on is if that case had reached its
13 successful conclusion. In my opinion, it appeared
14 that the notice that the City had issued I believe
15 in approximately 2004 was not appropriately
16 followed up on by city staff and was never fully
17 completed by the property owner.

18 MS. ZILAVY: Can I get this marked
19 as an exhibit, please? It was issued on
20 9/3/04.

21 MR. ALLEN: Attorney Zilavy, do you
22 have a copy for the record and for opposing
23 counsel?

24 MS. ZILAVY: Yes.

25 MR. OLSON: Oh. Will this be

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1 Exhibit A or Exhibit 1?

2 MR. ALLEN: It's a decision for the
3 clerk, but my recommendation to the clerk is
4 to do it numerically because it gets awfully
5 confusing when you do run out of letters.

6 DEPUTY CITY CLERK: We'll go with
7 Exhibit 1.

8 (Exhibit No. 1 marked for identification.)

9 MS. ZILAVY: Once that's been
10 marked, can you please pass that over to
11 Mr. Bunnow?

12 BY MS. ZILAVY:

13 Q Showing you what's marked as Exhibit 1. Do you
14 recognize that document?

15 A Yes, I do.

16 Q What is it?

17 A This is an official notice issued by the City of
18 Madison building inspection division.

19 Q And when was it issued?

20 A It was issued on September the 3rd, 2004.

21 Q And was that the notice that you were referring to
22 in terms of history on the file?

23 A Yes, it is.

24 Q Thank you.

25 MS. ZILAVY: Can I get this marked

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1 as Exhibit 2, please?

2 (Exhibit No. 2 marked for identification.)

3 BY MS. ZILAVY:

4 Q Showing you what's marked as Exhibit 2. Can you
5 identify that document?

6 A Yes. This is the official notice from building
7 inspection that was issued to the property owner
8 in reference to the inspection that I completed on
9 December 14th.

10 Q So that's the notice that you issued?

11 A That's correct.

12 Q Okay.

13 A Actually to clarify, it was issued by staff at my
14 direction --

15 Q Okay.

16 A -- based on my observations.

17 MS. ZILAVY: Can I get this marked
18 as Exhibit 3, please?

19 (Exhibit No. 3 marked for identification.)

20 BY MS. ZILAVY:

21 Q Showing you what's marked as Exhibit 3. Can you
22 identify that document?

23 A Yes. This is a photograph that I took the day of
24 our inspection that showed the interior conditions
25 of the first floor and the private viewing booths

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1 that had been installed.

2 Q Can you describe more specifically where the
3 booths are located that are referenced in your
4 inspection notice?

5 A Sure. So the booths are lined up against the rear
6 wall of the property as long as you view it from
7 East Washington Avenue. So if you're standing at
8 the front entrance of the property looking into
9 the building, that would be located on the right
10 rear side just adjacent to the public stage.

11 Q And then looking at the photo, what else on those
12 booths would help the committee identify where the
13 booths are?

14 A So on the booths, there are silhouettes of dancers
15 and the saloon-style doors, which are white, are
16 also marked as VIP in the upper right-hand
17 corners.

18 Q The notice that you issued on January 14th, 2019,
19 has that been complied with?

20 A Not as of this time.

21 Q What needs to be done for that notice to be
22 complied with?

23 A So building inspection has received plans for the
24 work that was completed, and those plans have been
25 reviewed and approved according to the building

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1 code. The property owner does need to pay the
2 inspection fee to obtain a permit, although that's
3 merely a formality. And then they do need to call
4 for inspections so that it can be formally
5 inspected to ensure that the methodology that was
6 used complies with the building code. That's
7 going to be primarily related to the work that was
8 done in the basement.

9 Q And then do you -- who notifies you when and if a
10 license holder has come before the ALRC for
11 permission to make those changes?

12 A That is a good question. Typically, we would
13 receive a notification from the ALRC is my
14 understanding if there are questions about
15 permitted work that has been done. We simply
16 evaluate relative to the building code and to the
17 approved permitted plans. We don't necessarily
18 take into consideration any restrictions that the
19 ALRC would impose, although the ALRC could take
20 actions a property owner has taken, although it
21 being done appropriately and permitted as to be
22 potentially a violation of other standards or
23 assertions that the ALRC imposed.

24 Q So if -- if a license holder could come to you
25 with plans for changing their interior premise and

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1 you would grant the permit and allow them to do
2 that work without knowing the ALRC's position on
3 it, is that what you're saying?

4 A It is possible that that would occur. If the
5 plans that were submitted to us met the building
6 code, we review and approve based on that. We
7 don't have a mechanism for notifying additional
8 restrictions beyond the building code that the
9 ALRC may have imposed upon the building.

10 When we are aware of a liquor license that's
11 in place, we do look to ensure that the individual
12 who's making these changes notifies the ALRC to
13 ensure that it complies with any restrictions of
14 their liquor license. For example, capacity is
15 something that comes up relatively frequently. A
16 person may look to expand their space so that they
17 can expand their capacity. The ALRC may have
18 restrictions relative to their capacity that
19 render the increase in property size moot. That
20 doesn't mean that we would not allow them to
21 pursue that.

22 Q Did you have any conversations with any Visions
23 owners or managers regarding ALRC approval for the
24 changes that you observed at Visions?

25 A Yes, I did.

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1 Q Who did you speak with?

2 A Dave Brown.

3 Q And what was the nature of the conversation?

4 A The nature was that the changes that were going to
5 be proposed for the work that had been completed
6 to the property would need to be reviewed relative
7 to the ALRC, that the installation of private
8 viewing booths is something that needed to be
9 brought to their attention and something that they
10 would need to weigh in on as far as whether or not
11 it impacted their liquor license.

12 Q And since the notice was not complied with,
13 they're currently in violation, correct?

14 A That is correct.

15 MS. ZILAVY: Nothing further.

16 CROSS-EXAMINATION

17 BY MR. OLSON:

18 Q Mr. Bunnow, was your inspection in January of 2018
19 triggered by the shooting that occurred a few days
20 earlier?

21 A The inspection was completed in December of '18,
22 and it was triggered at the request of the City
23 Attorney's office. They asked for us to
24 inspect -- to accompany them with police to
25 inspect, so we went at their request. The impetus

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1 for their request would have to come from the City
2 Attorney's office.

3 Q Did they tell you why they were requesting it
4 then?

5 A Yes. They wanted us to inspect for the conditions
6 on the interior of the property to ensure that it
7 met what we expected from a building perspective.

8 Q Why then?

9 A You'd have to ask the City Attorney's office why
10 they asked for us to accompany them.

11 Q When you went out there, did you know there had
12 been a shooting a few days earlier?

13 A I was aware of that, yes.

14 Q Did you talk about that amongst yourselves when
15 you went out there with the representatives of the
16 City Attorney's office and the police department
17 and yourself from the building inspection
18 department all at the same time?

19 A I don't recall that I specifically discussed the
20 shooting. I discussed that we were out there
21 relative to problems that the police department
22 had had. I don't know that it was a single
23 specific event that said, you are here because of
24 this. It was more in the terms of this is an
25 ongoing -- we're having problems out here, we need

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1 to evaluate this space because we're having
2 consistent, regular problems here.

3 Q What was the -- is the content of the 2004 notice
4 in terms of building code corrections that are
5 needed the same as the one you issued?

6 A It is partly the same as the one we issued. In
7 2004, it referenced only the private booths that
8 had been installed. It did not reference
9 unpermitted work in the basement, which was also
10 included in the most recent notice.

11 Q And you said that there was some anomaly with
12 respect to your office's handling of that 2004
13 notice, correct?

14 A That is correct.

15 Q Specifically, ordinarily, if a notice like that is
16 issued, you'd expect to see some resolution of it
17 in the file?

18 A Absolutely.

19 Q Do you know whether there were any informal
20 communications between your office and Visions to
21 the effect that Visions didn't really need a
22 permit for those booths because the walls didn't
23 go all the way to the ceilings and the doors
24 didn't go either all the way to the floor or all
25 the way to the ceilings?

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1 A I'm not aware of that, no.

2 Q Is that a possibility?

3 A It is a possibility.

4 Q Is there some work that can be done by a landlord
5 that doesn't require a building permit?

6 A Yes.

7 Q And would those booths be -- would it be possible
8 to construct booths that were so small in terms of
9 their height or their ability to close them off
10 that it wouldn't require a building permit? What
11 if they were just hanging curtains, for example,
12 instead of solid walls?

13 A Yeah, so now you're starting to get into the
14 routine issues that we face with building
15 inspection relative to when is the permit needed
16 or not needed. From our determination, it was the
17 permanent nature of the installation that was made
18 that demised the space.

19 So if you're talking about something like
20 hanging a curtain, that would not be a permanent
21 installation. It's not a true demising of the
22 space. It's not a true creation of new space.
23 It's when somebody takes an action to put in place
24 what is commonly accepted as a permanent division,
25 like a door or a wall or, in this case, the

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1 saloon-style doors that were mounted to poles that
2 were mounted to the floor and to the ceiling that
3 triggered our determination that a building permit
4 was warranted and appropriate.

5 Q Would that judgment be affected by a wall that was
6 so short you could walk up and look over it?

7 A No. And the reason is because it would impact
8 potentially the path of travel for an individual
9 with a disability. When we're talking about
10 demising spaces, we're also talking about creating
11 differences in path of travel to egress.

12 MR. OLSON: Now, I have an exhibit,
13 and I'll give a copy to you, I'll give a copy
14 for you to pass down. And who else wants a
15 copy? I've got a lot of them. Any committee
16 members? Why don't we just send this down
17 there, and he's going to get the original
18 marked one. This is going to be Exhibit 4.
19 Will you hand me one of those?

20 (Exhibit No. 4 marked for identification.)

21 BY MR. OLSON:

22 Q Mr. Bunnow, you have in front of you what's been
23 marked for identification as Exhibit 4, do you
24 not?

25 A Yes, I do.

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1 Q And that appears to be an exchange of e-mails
2 between Dave Brown and yourself?

3 A That is correct.

4 Q In the first e-mail at the bottom of the page, the
5 first page, Dave Brown writes you on June 12,
6 2019, and says, "Could you please e-mail me the
7 plans that you have for us so far. How do I go
8 about setting up a meeting with the ALRC? If you
9 need to call me, please do so at 608-698-5209.
10 Thanks for the help. David."

11 Did I read that correctly?

12 A Yes, you did.

13 Q And then you did respond to that, did you not?

14 A Yes, I did.

15 Q And you said on the same day, "Here are the plans
16 that were reviewed and approved. You should
17 contact the City Attorney's office and ask to
18 speak with Jennifer Zilavy regarding the ALRC
19 agenda. Thank you."

20 Did I read that correctly?

21 A Yes, you did.

22 Q And do you know whether the pages that are
23 attached hereto are what was attached to this
24 e-mail when you sent it to Mr. Brown?

25 A I believe that they are.

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1 Q And do the plans that were reviewed and approved
2 encompass all of the work that was the subject of
3 the original December notice?

4 A Yes, they do.

5 Q And in your e-mail, you did not say anything to
6 Mr. Brown about his -- that he still needed to pay
7 a fee, correct?

8 A That is correct.

9 Q And you did not say anything to him about needing
10 to call for a reinspection, correct?

11 A On this e-mail exchange, no, I did not.

12 MR. OLSON: No further questions.

13 MS. ZILAVY: I have no followup.

14 MR. DONNELLY: Okay. Is this
15 witness dismissed?

16 MS. ZILAVY: I would like to move
17 City Exhibits 1, 2, and 3 into evidence.

18 MR. OLSON: We have no objection,
19 and we'll move Exhibit 4 as well.

20 MS. ZILAVY: No objection.

21 MR. DONNELLY: Excellent.

22 MS. ZILAVY: Mr. Chair, if any of
23 the committee members have questions, you
24 should clarify.

25 MR. DONNELLY: Committee?

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1 MR. SKIDMORE: No, no questions.

2 MR. DONNELLY: So next witness?

3 MS. ZILAVY: Pardon me?

4 MR. DONNELLY: If you have your
5 next witness.

6 MS. ZILAVY: You're excused.

7 THE WITNESS: All right. Thank you
8 very much.

9 MR. ALLEN: Can we release the
10 witness from the subpoena?

11 MR. OLSON: Yes.

12 MS. ZILAVY: Mm-hmm.

13 THE WITNESS: Thank you.

14 MS. ZILAVY: And for the
15 committee's information, I had Jason Lee
16 [phonetic] from the Department of Revenue
17 subpoenaed to testify tonight. He is within
18 the realm of counts that I can present on,
19 and he e-mailed me Sunday morning telling me
20 that his mother had passed away on Saturday
21 and he's off today. So I don't have him here
22 today, and that is why.

23 MR. OLSON: Mr. Allen, I'm sorry,
24 is it the committee's practice to rule on the
25 admission of exhibits as they are moved, and

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1 was there a ruling on those exhibits?

2 MR. ALLEN: That's a very good
3 question. I would recommend to the committee
4 that they rule on whether you're admitting
5 the exhibits or not, and then Mr. -- Attorney
6 Olson be given the opportunity to object
7 before you rule.

8 MR. DONNELLY: Okay. Is that
9 something where we have a motion or the chair
10 takes action?

11 MR. ALLEN: The chair can actually
12 decide that.

13 MR. DONNELLY: Okay. And you have
14 no objection to any of the evidence so far?

15 MR. OLSON: We don't. And she has
16 moved for the admission of her exhibits, and
17 I moved for the admission of No. 4. I don't
18 think there's any objection to anything.

19 MR. DONNELLY: Okay. We accept
20 items -- or evidence items 1 through 4.

21 (Exhibit Nos. 1-4 admitted.)

22 MR. ALLEN: What would happen is if
23 your ruling -- if either of the other two
24 members thought your ruling was in error
25 [phonetic], they could challenge it with a

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1 motion.

2 MR. DONNELLY: Noted. I invite you
3 to do the same.

4 MS. ZILAVY: The City calls Officer
5 Dan Frei.

6 (Recess.)

7 MR. DONNELLY: All right. Can you
8 state your name for the record, please?

9 THE WITNESS: I'm sorry?

10 MR. DONNELLY: Can you state your
11 name for the record, please?

12 OFFICER FREI: Officer Dan Frei,
13 F-R-E-I.

14 DAN FREI,
15 called as a witness, being first duly
16 sworn, testified on oath, as follows:

17 DIRECT EXAMINATION

18 BY MS. ZILAVY:

19 Q You are a police officer with the City of Madison
20 Police Department, correct?

21 A Correct.

22 Q How long have you been employed in that capacity?

23 A Twenty-four years.

24 Q What district do you work in?

25 A North.

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- 1 Q How long have you worked in the North Police
2 District?
- 3 A Nineteen years.
- 4 Q What shift do you work?
- 5 A We call it 5th detail, so 10:00 p.m. to 6:00 a.m.
- 6 Q And how long have you worked that shift?
- 7 A My entire career.
- 8 Q So I take it you're familiar with Visions?
- 9 A Yes.
- 10 Q How are you familiar with Visions?
- 11 A From having gotten calls there over the years.
- 12 Q Do you recall going to Visions on September 6th,
13 2018, at approximately 12:33 a.m.?
- 14 A Yes.
- 15 Q And do you recall the nature of the dispatch?
- 16 A That a person had been knocked unconscious in the
17 bar after a fight.
- 18 Q And you went to Visions?
- 19 A Correct.
- 20 Q What did you do when you arrived?
- 21 A I went in, along with other officers, I ended up
22 speaking to one of the employees, a dancer, who
23 did not want to be identified, and took her
24 witness statement as to what happened.
- 25 Q Do you know why she didn't want to be identified?

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1 A She was fearful. The suspects in this case were
2 members of a biker gang or a club, and she was
3 fearful of retribution from them.

4 Q But she did go ahead and give you a statement?

5 A Yes.

6 Q What did she tell you?

7 A She told me that a male and a female were in the
8 bar. The male was playing, I guess, a video game
9 where you can punch a punching bag and it measures
10 the force of the punch. While he was doing that,
11 one of the bikers had come up to him and tried to
12 play the game and there was a little bit of a
13 verbal disagreement between the two of them about
14 the biker needing to give away his turn or put up
15 money. While the -- the witness stated that while
16 those two, the male and the biker, were kind of
17 discussing this, another biker had come up from
18 behind him and grabbed the male from behind in a
19 bear hug, and then the main suspect had punched
20 the victim. And then they took him to the ground,
21 and all the bikers, there were six total, started
22 kicking him until he was unconscious.

23 MR. OLSON: I just want to make one
24 objection, and I'd like to reach an
25 understanding. I don't want to clutter up

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1 the record with continuing objections to
2 hearsay. We made our position clear on that
3 with our motion. I would just like to show a
4 continuing objection to the admission of any
5 hearsay testimony that's not going to be
6 corroborated by direct eyewitness testimony.
7 Would that be acceptable?

8 MR. DONNELLY: Acceptable that he
9 says it?

10 MR. ALLEN: Note he's got a
11 continuing objection to hearsay.

12 MR. DONNELLY: That's fine.

13 MR. OLSON: Thank you.

14 BY MS. ZILAVY:

15 Q At the time that you entered Visions, did you
16 observe the victim?

17 A Yes.

18 Q And where was the victim at that time?

19 A He was still back over in the corner by where this
20 machine was. So if you go in the bar, you -- if
21 you were to go straight in the bar, you kind of
22 almost would run into the front corner of the bar,
23 so you'd have to just sort of walk around that and
24 to the right, and then straight back there's a --
25 this video game.

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1 Q And was -- was he on the floor at that point?

2 A At that point, he was standing. He was being
3 attended to, and then fire and rescue came in and
4 attended to him.

5 Q Did you observe any injuries on him when he was
6 standing there?

7 A Yeah. I didn't observe him at any -- for any
8 length of time, but he did have some facial
9 injuries, like puffiness and redness.

10 Q So the female who is a dancer at Visions is who
11 was giving you this information, correct?

12 A Correct.

13 Q And did she give you any information as to who,
14 what she described as bikers, were? Were they
15 customers? Were they employees?

16 A They were customers, correct.

17 Q Did she indicate whether they were regulars?

18 A She said she had seen them in there before. She
19 couldn't really say how often.

20 Q And how did she know they were bikers?

21 A They were all wearing what would commonly be
22 referred to as colors of the biker gang at a biker
23 club, or some biker clubs called them cuts. So
24 they're vests essentially that have patches on the
25 back and say what the gang or the club is.

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1 Q Did the dancer that you spoke with, did she
2 identify any one person in particular who went
3 after the victim?

4 A She said that the main person who had kind of
5 started the whole confrontation was a male black.
6 He was wearing a red vest. She took that --
7 because all the other vests were black in color,
8 which is more typical what you see for most biker
9 clubs or gangs, so she took that red to be a
10 delineation that he was the leader.

11 Q Did she know the victim, did the dancer know the
12 victim?

13 A She didn't seem to, no.

14 Q And who was the victim identified as, if you
15 recall?

16 A Roberto Gonzalez.

17 Q Did the dancer say whether he was a regular patron
18 of the club?

19 A I don't recall asking her that.

20 Q At the time that you arrived at Visions, were the
21 bikers still present?

22 A No. They left.

23 Q Do you know how soon in proximity to when you
24 arrived that they had left?

25 A I don't exactly. I would imagine it would have

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1 not been more than like five or ten minutes. We
2 were dispatched to -- this was sort of -- it was
3 being described as if it was still happening. So
4 it would have been reasonably soon.

5 Q And did the dancer say anything to you in terms of
6 how long the bikers were assaulting the victim?

7 A Based on her description, it would have probably
8 been no more than maybe four to five minutes from
9 the point of the initial confrontation to the
10 point of them actually battering him and then
11 leaving, but she didn't give a specific time.

12 Q And did she indicate why they stopped, if she
13 observed anything that indicated why they stopped?

14 A I think it was her belief that it became known
15 that the police were being called and that was
16 what caused them to leave.

17 Q Did the dancer call the police, do you know?

18 A I don't believe she did, no.

19 Q Do you know who called the police?

20 A I don't, no.

21 Q Were you aware of the motorcycle gang being
22 identified at any point?

23 A I was eventually told by other officers that other
24 patrons or employees of the bar said that they
25 were called the 4 Horsemen Motorcycle Club.

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1 Q Had you ever heard of that club before?

2 A I heard of them a little bit and researched them a
3 little bit, just trying to actually see if I can
4 identify them -- any of them. And I saw that
5 there's a national club of this name, but there's
6 also a Facebook site of one of the local
7 affiliated Madison one.

8 Q And how do you know that the victim was
9 unconscious?

10 A Just based on statements of the dancer. It was
11 conveyed from other officers that he was described
12 as being unconscious.

13 Q Did she -- can you be more specific in terms of
14 what the dancer conveyed to you in terms of his
15 condition once he was on the ground?

16 A She just said that he was knocked out, so I took
17 that to be what most people would take that as,
18 unconscious, not responding, not talking,
19 appearing to be asleep almost.

20 Q Do you have any recollection as to how many
21 patrons were in Visions at the time you arrived?

22 A It would probably be somewhere in the area of
23 maybe 10 to 15, including the dancers and
24 employees.

25 Q Did you speak with any other Visions employees

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1 other than that dancer?

2 A I didn't, no. I think I actually might have. I
3 think there was a female bartender who was working
4 that night, and I had asked if Dave Brown was
5 there, just to try to get video, and she said Dave
6 was not.

7 Q Do you know whether the victim left on his own
8 accord, or did he -- was he transported by fire?

9 A If I refer to my report, I might know. I believe
10 he went to the hospital, but I don't recall
11 whether he was taken by fire and rescue or if the
12 female transported him. My report doesn't say.

13 MS. ZILAVY: I have nothing further
14 at this time.

15 CROSS-EXAMINATION

16 BY MR. OLSON:

17 Q You couldn't identify the individual perpetrators
18 upon your initial visit to Visions, I take it?

19 A Correct.

20 Q But there was video of that incident available,
21 and it was given to police in due course?

22 A I'm not aware of that. I assume that there was
23 video, because typically there is on the side of
24 the bar, but I don't know that for a fact. I
25 didn't do any followup.

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1 Q You're not aware of the actions of any of the
2 other officers in connection with this case?

3 A I know that other officers interviewed other
4 people, but I don't know specifically what they
5 did or what they learned.

6 Q There's a gang specialist, for example, named
7 Terrence Loos. Does Madison have an increasing
8 problem with gang presence?

9 A Yeah, I would say they do.

10 Q And this motorcycle club was classified as a gang
11 by the police department?

12 A I'm not aware of that. I'm not -- I guess it's
13 not my specialty to say whether we classify or
14 don't classify.

15 Q Initially, the victim was interviewed by you about
16 whether he wanted to press charges, correct?

17 A I did not interview him, no.

18 Q You did not?

19 A No. I just interviewed the dancer.

20 Q Do you know whether any charges were ever brought
21 against anybody arising out of this incident?

22 A I don't know.

23 Q You did not identify any citable offenses
24 committed by Visions in connection with this
25 incident, I take it?

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1 A Correct.

2 Q And this incident happened very quickly, did it
3 not?

4 A Yeah. Based on the description, it reasonably
5 quickly happened, yeah.

6 Q And there isn't anything in your report about any
7 wrongdoing by any Visions staff that contributed
8 to this injury to this customer, correct?

9 A Correct.

10 Q As far as you could tell from the witness you
11 talked to, it was an unfair fight started by
12 members of a motorcycle gang over access to the
13 boxing game at Visions, correct?

14 A The only thing that the witness said different
15 than how you characterized it right there was that
16 there was an off-duty employee there that tried to
17 verbally kind of separate the parties beforehand.
18 So I don't know -- I didn't have any direct
19 information about what went on, what the employees
20 did or did not do to try to stop this
21 confrontation as people saw it developing.

22 Q So the only thing you knew about anybody
23 associated with Visions and the beginning of this
24 altercation was that there was an off-duty
25 employee from Visions who tried to prevent it,

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1 correct?

2 A Correct.

3 MR. OLSON: Thank you. No further
4 questions.

5 MR. DONNELLY: Okay. Committee
6 members? Thank you.

7 THE WITNESS: Thank you.

8 MR. ALLEN: Can he be released from
9 his subpoena, though?

10 MS. ZILAVY: Yes.

11 MR. ALLEN: Does he know that?

12 MS. ZILAVY: I think he does, yeah.

13 (Recess.)

14 MR. DONNELLY: Swear him in,
15 please.

16 KYLE TOBERMAN,
17 called as a witness, being first duly
18 sworn, testified on oath, as follows:

19 MR. DONNELLY: Can you state your
20 name for the record, please.

21 THE WITNESS: Kyle, K-Y-L-E. Last
22 name is Toberman, T-O-B-E-R-M-A-N.

23 MR. DONNELLY: Thank you.
24 Assistant City Attorney Zilavy.

25

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1 DIRECT EXAMINATION

2 BY MS. ZILAVY:

3 Q Do you recall being dispatched to Visions on
4 June 2nd, 2019, at approximately 1:48 a.m.?

5 A I do.

6 Q And do you recall the nature of the dispatch?

7 A If it's the one I'm thinking of correctly, it was
8 originally a medical issue. Members of the
9 Madison Fire Department were dispatched.

10 Q And did you go to Visions?

11 A I did.

12 Q What did you see upon arrival?

13 A It was -- there were several individuals outside
14 in the parking lot. They were members of the
15 staff and civilians. I can't recall if fire was
16 on scene quite yet or not. But when I started
17 speaking with staff there, they advised there was
18 an individual lying on his back, reported that he
19 was not breathing in the parking lot.

20 Members of the fire -- Madison Fire started
21 attending to that individual. And during that
22 time, I spoke with a staff member who said that he
23 believed it could have been some type of opiate
24 overdose, which led to him no longer breathing,
25 being conscious at that point.

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1 Q But he was in the parking lot?

2 A At that point, he was.

3 Q Had he been in the bar earlier?

4 A According to staff, yes.

5 Q And what -- do you recall who the staff was you
6 spoke with?

7 A His first name was Matt. I don't recall full name
8 at this point.

9 Q And what did he tell you in terms of this
10 individual?

11 A He said that individual along with another
12 acquaintance had come into the establishment
13 earlier in the night. He made the comment to me
14 that something didn't seem right about this guy,
15 that there's been some type of issue or couldn't
16 really pinpoint why.

17 At some point while they were inside, the
18 patron had fallen over on the stool after --
19 shortly after ordering a beer. I believe there
20 was an off-duty nurse inside the establishment at
21 that time who started attending to him. Staff
22 actually assisted that person, the patient, from
23 the bar to the outside parking lot area at which
24 time they noticed he was not breathing or
25 conscious at that point.

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1 Q So he was unconscious, and then they brought him
2 outside?

3 A Correct.

4 Q Did they say why they brought him outside?

5 A They thought it could have been related to an
6 alcohol issue or, as it was relayed to me, it
7 could have been hot in the bar, lost
8 consciousness, as a result of that, they wanted to
9 get him to fresh air. I believe it was cooler on
10 that night, so that could have been a reason why.
11 But after further evaluation, they discovered that
12 that wasn't the chief complaint.

13 Q And you mentioned that they -- the employee Matt
14 who you spoke with thought there was something odd
15 about this individual when he first came into
16 Visions?

17 A Yeah, shortly after. Again, from the comments
18 that were made to me wasn't too positive I don't
19 believe as to why. It could have been mannerisms.
20 In fact, I believe he made a comment that he
21 actually went to the bathroom for a short time and
22 came out. But I think it was mostly related to
23 physical mannerisms, the way he was acting while
24 he was in the bar.

25 Q And at some point while you were present, did this

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1 individual regain consciousness?

2 A Yes.

3 Q Was that while he was outside in the parking lot?

4 A I believe so.

5 Q Was fire and rescue there at that time?

6 A They were.

7 Q Do you know what they -- what, if anything, they
8 did to him?

9 A I believe they had administered Narcan, which is a
10 form of naloxone, a counteracting agent for opioid
11 overdoses. It includes heroin, Fentanyl, hard
12 [phonetic] Fentanyl. I do not recall how much or
13 if it was intranasal or into the blood stream
14 itself. But I did recall somebody making that
15 comment while I was on scene.

16 Q And did the individual say anything else to you at
17 the time?

18 A The patient, you mean?

19 Q Yes.

20 A Not at that time. I spoke with him briefly at a
21 medical facility in the City of Madison. He told
22 me he was an over-the-road truck driver, that he
23 often receives a blood test, and he wasn't
24 comfortable with speaking to me about what he had
25 taken on the night. He did admit that he believed

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1 he did cocaine earlier but would never have used
2 any type of opiate, including heroin, if he knew
3 that's what it was.

4 Q And you are -- you do not know who called the
5 police, correct?

6 A I do not, no.

7 MS. ZILAVY: Nothing further.

8 CROSS-EXAMINATION

9 BY MR. OLSON:

10 Q Officer Toberman, you wanted to investigate
11 whether this incident of this gentleman falling
12 off his bar stool unconscious might have been
13 attributable to his use of opiates, correct?

14 A Could have been, yes.

15 Q So now, you asked people whether he had been
16 engaging in any drug transactions, correct?

17 A From what I recall, yes.

18 Q And the first person you talked to, an employee of
19 Visions that you knew through previous
20 professional contacts, known as Shane T.
21 Mcelmurry, responded to you that he had not
22 observed Duarte [phonetic], the guy that fell
23 down, speaking with anyone that would have led to
24 suspicion of drug transaction, correct?

25 A Correct.

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1 Q And Mcelmurry told you that minutes before he
2 contacted emergency services, Duarta was sitting
3 at the bar and had just ordered a beer when he
4 fell out of his chair onto the floor and went
5 unconscious, correct?

6 A Correct.

7 Q So Mcelmurry told you at least that he had called
8 emergency services, correct?

9 A I believe so.

10 Q Would you take that to mean that he called 911?

11 A Could have been, but again, I'm not positive at
12 this moment that he was the one that specifically
13 did.

14 Q And that's what you want the staff to do if they
15 have an incident like that is call 911, correct?

16 A In theory, yeah.

17 Q And Mcelmurry -- in your report, you wrote,
18 "Mcelmurry advised he and the other individuals
19 proceeded to carry Duarta out into the parking lot
20 believing he had just passed out to get him into
21 cooler air."

22 That was the only reason that was given to
23 you for taking him outside was to get him into
24 cooler air, was it not?

25 A Correct.

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1 Q Mcelmurry told you that he had never seen Duarte
2 using any illicit drugs, correct?

3 A Correct.

4 Q And he told you that he'd only been served a
5 couple of beers there at the bar at Visions,
6 correct?

7 A Yes.

8 Q And you found an almost full bottle of Budweiser
9 there at the bar at his place where he had been
10 sitting, correct?

11 A Correct.

12 Q And you looked at the area around where he had
13 been sitting as well as in the bathroom for any
14 illicit drugs or paraphernalia and found nothing,
15 correct?

16 A Correct.

17 Q And Mcelmurry told you that he didn't observe any
18 suspicious persons in the bar that might have been
19 engaged in drug use or transactions, correct?

20 A The only suspicious person he mentioned was the
21 patient in this one, correct.

22 Q Then you talked with Lobianco [phonetic], or
23 Duarte's coworker. They're truck drivers
24 together, Mr. Lobianco, correct?

25 A Yes, I did.

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1 Q And Lobianco told you that Duarte might have used
2 cocaine?

3 A Yes, he mentioned that to myself and another
4 officer that was currently interviewing him. I
5 started to take over at that point.

6 Q Before they got to Visions?

7 A Correct.

8 Q And you said when they got to Visions, they were
9 in different areas, and they each only had a
10 couple of drinks, correct?

11 A To his knowledge. He did mention again that he
12 had walked off from Duarte at some point, so it
13 wasn't positive 100 percent, but yes, from his
14 knowledge.

15 Q And Lobianco did not appear to be under the
16 influence of any drugs or alcohol when you talked
17 to him, correct?

18 A Alcohol.

19 Q He did?

20 A (Witness nods head.)

21 Q In your report, you wrote, "Lobianco did not
22 appear to be under the influence of any
23 intoxicants or illicit drugs during this time."

24 A I'm sorry, yes. I'm sorry. Duarte did; Lobianco
25 did not. My apologies.

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1 Q Duarta fell off a chair, correct?

2 A Correct.

3 Q Now, you went to the hospital to talk to Duarta
4 then after that, did you not?

5 A I did.

6 Q And Duarta told you that he didn't recall much
7 including what happened at Visions, correct?

8 A Correct.

9 Q You said he didn't want to incriminate himself,
10 talked about any cocaine use that night, but he
11 did use cocaine at other times, correct?

12 A He did make that comment, yes.

13 Q And he said he was afraid of using opiates and
14 didn't use them, correct?

15 A Correct.

16 Q You did not observe any track marks on his body,
17 and you looked at his pupils and saw that they did
18 not appear to be constricted, correct?

19 A Correct.

20 Q Go ahead.

21 A Okay. I will say that from my experience in law
22 enforcement that I don't know scientifically the
23 reason, but I can say that I have noticed
24 individuals at one point when they're unconscious,
25 potentially not breathing, and R.D. [phonetic] was

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1 given naloxone, that shortly after the fact that
2 their pupils will go from a very restricted point
3 to dilating. So it could have been beforehand. I
4 did not see when he was unconscious.

5 Q Understood. At any rate, you said in your report,
6 "Duarta also did not appear to be obviously under
7 the influence of any alcoholic intoxicants, which
8 led me to believe he was not potentially
9 overserved by Visions staff," correct?

10 A Correct.

11 Q And you didn't identify any wrongdoing by anybody
12 at Visions that had contributed to this incident,
13 correct?

14 A Correct.

15 MR. OLSON: Thank you. No further
16 questions.

17 MS. ZILAVY: Nothing further.

18 MR. DONNELLY: Nothing further at
19 all and nothing further on this count.

20 REDIRECT EXAMINATION

21 BY MS. ZILAVY:

22 Q Do you recall being dispatched to Visions on
23 December 9th, 2018, at approximately 1:44 a.m.?

24 A I do.

25 Q What was the nature of that dispatch?

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1 A Originally, if I recall, that while filling out
2 (inaudible) shots fired report -- multiple
3 reports, I believe, of shots fired at the
4 establishment and potential injuries to multiple
5 parties.

6 Q And you went to Visions?

7 A I did.

8 Q What did you do upon arrival?

9 A I, along with other members of my department,
10 slowly started making entry into the building
11 through the front door off the East Washington
12 Avenue side on the south end.

13 Q When you arrived, did you observe anything
14 outside?

15 A Yeah. There were members of the Dane County
16 Sheriff's Department. I believe they detained a
17 few individuals. I didn't contact them. They
18 weren't any concern at that point. In the parking
19 lot, there were people walking out of the
20 establishment yelling and screaming, making
21 comments about people being hurt inside. Nothing
22 really about who would have caused this to happen
23 or their whereabouts.

24 Some of the individuals were still standing
25 near the front door. There was beer glasses, I

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1 believe, scattered kind of in front of the door
2 and in the parking lot itself. So that's really
3 what I saw outside. I wasn't outside long at all
4 before we actually made it to the front door.

5 Q And what happened once you got inside?

6 A It's a double -- it's like a short hallway from
7 the front door to the second entry, like open
8 doorway. And then the horseshoe bar is actually
9 in front of that area itself. I recall seeing
10 barstools knocked over with what looks like blood
11 scattered on the floor, fresh blood, wet, a lot of
12 liquid. Smelled greatly like alcoholic beverages,
13 I will say.

14 People are still inside yelling. It was
15 starting to clear out by that point. There were
16 actually a couple of individuals still sitting at
17 the bar drinking at that point too. So we started
18 actually to order people out, patted down a few
19 subjects for protection for us because we did have
20 anybody in custody at that point or any identified
21 suspects in this incident.

22 Slowly started to make our way through.
23 Couple of individuals that I work -- my coworkers
24 went downstairs and I believe they attended to
25 another individual that had been moved there from

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1 an apparent gunshot wound in the basement. At
2 that point, somebody came from I guess a private
3 dance area, more of an east area of the facility
4 itself. He was assisted out by two acquaintances
5 before me kind of in the middle of the dance area
6 that --

7 Q So the -- you observed a male coming out?

8 A A male, and he was being walked by a male subject
9 and a female subject.

10 Q Did you identify this individual?

11 A Yes. Justin Madison [phonetic] was his name.

12 Q And this was the individual that was coming from
13 the --

14 A Private dance area.

15 Q And what did you notice about him other than he
16 had two people assisting him? Why were they
17 assisting him?

18 A He said he had been shot. I believe his right
19 leg, the lower leg area had fresh blood coming
20 from there, so they applied a tourniquet to that
21 area to make it stop bleeding.

22 Q Where -- did you observe the gunshot wound?

23 A On him physically you mean?

24 Q Yes.

25 A I believe on his lower leg area, on his right leg.

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1 Q His lower leg?

2 A I believe so.

3 Q Like below the knee?

4 A Yes. I thought it was the calf area. I didn't
5 actually physically completely pull his leg all
6 the way up other than seeing an entry point on him
7 with blood coming from that area towards the back
8 of his leg.

9 Q Was he wearing pants or shorts?

10 A I don't recall, but I believe pants.

11 Q But you could see an entry wound on him -- on his
12 leg; is that correct?

13 A It was either to -- from what I recall -- again,
14 it was dark. It was fast-paced. From what I
15 recall, it was either to a pants area, lower, or
16 his actual person itself. I want to say it was
17 his pants, from what I recall.

18 Q And you testified earlier that when you came in,
19 you saw stools tipped over and liquids on the
20 ground and blood. Was the blood on the ground or
21 on other things, and how did you know that it was
22 blood?

23 A Again, so I said I believe it was blood. It
24 resembled it, red liquid, solid. It was
25 towards -- if I'm standing in the second doorway

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1 in front of the bar, almost to the right in front
2 of me by the barstool area around the horseshoe
3 itself.

4 Q And back to the individual, did you say Madison
5 was his last name?

6 A Justin Madison I believe is his name.

7 Q Justin Madison. At the point that you saw him or
8 these two individuals, did you make contact with
9 him?

10 A I did.

11 Q And what was the nature of that contact?

12 A He had -- they had been further towards the back.
13 Myself and the other officer were ordering them to
14 come to us. He was clearly being helped. He had
15 his arms draped around each one of those persons
16 that was assisting him out. I could hear -- I
17 believe the female was yelling that he had been
18 shot, Mr. Madison had. And then he couldn't walk
19 any further, so at that point, I started attending
20 to him.

21 Q What do you mean when you say you started
22 attending to him?

23 A I applied a tourniquet to where I believed the
24 wound was on his leg and above it on the leg that
25 I believe was wounded.

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1 Q Was he saying anything to you at this point?

2 A I did speak with him very briefly. At that point,
3 our main concern again was potential loss of life.
4 The rest of the facility had not been tactically
5 cleared by officers. So I spoke very briefly with
6 him. He did not have a lot of information as to
7 what exactly happened other than he recalled
8 hearing a -- a fight, I believe he stated he heard
9 at least one gunshot, and then he recalled having
10 pain in his leg.

11 Q What did he say about a fight?

12 A That he -- I believe that he stated that he heard
13 an altercation going on while he was in the back
14 area away from most of the center and the bar area
15 itself.

16 Q So he himself was not involved in an altercation?

17 A To my knowledge, no, not at all.

18 Q And did he -- did he or the individuals who were
19 holding him up tell you about somebody else who
20 had been shot?

21 A I don't recall. I don't -- do you have a copy of
22 the report with you or the complaint itself?

23 MS. ZILAVY: I'm just going to have
24 him review his report.

25 MR. OLSON: Oh, go ahead.

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1 THE WITNESS: Thank you.

2 BY MS. ZILAVY:

3 Q Are you reviewing the report that you wrote?

4 A I am.

5 Q Do you recall when you wrote the report?

6 A Do I -- I'm sorry. Can you ask that one more
7 time?

8 Q Do you recall when you wrote the report?

9 A Early the next morning when I was away from the
10 scene itself. Okay. So that's what I wanted to
11 verify. So he had not made the statement. In my
12 report, I said that I was informed. That was via
13 radio communication, my officers that were
14 attending to that subject downstairs. To Mr.
15 Madison's knowledge, as well as the other two
16 people that he was with, they were not aware of
17 any other victims that were actually in the
18 facility itself.

19 Q So somebody on the radio told you that somebody
20 else was shot inside?

21 A Correct.

22 Q And can you give more information about that?

23 Like, where it was, the person?

24 A The lower level area, and then a potential gunshot
25 wound to the abdomen area on that person.

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- 1 Q And do you know whether that person was shot while
2 they were in the lower level, or did they go to
3 the lower level after they were shot?
- 4 A Went to the lower level afterwards.
- 5 Q Do you know where they were at the time they were
6 shot?
- 7 A You mean based on at that point or just in general
8 after the fact? I'm sorry.
- 9 Q At any point, were you aware of where they were
10 when they were shot?
- 11 A Yeah. I was made aware by other officers as well
12 as the person that I had spoken with later on
13 while on scene that that subject had been on the
14 main level near the bar itself when he was
15 actually shot by another party.
- 16 Q And do you know whether that person had been
17 involved in an altercation?
- 18 A Correct, yes.
- 19 Q They had been?
- 20 A Had been.
- 21 Q Did you end up speaking with that person?
- 22 A I did not.
- 23 Q Do you know that person's name?
- 24 A Not without looking. I'm sorry.
- 25 Q You can look at your report.

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1 A Okay. So the person that had been shot that was
2 being attended to in the lower level was DaShawn
3 Robert [phonetic], and he had apparently been shot
4 by an individual named Cole Foster [phonetic].

5 Q And do you know where -- I'm sorry if you already
6 testified to that, but do you know where on his
7 body he was shot?

8 A I believe in his abdomen, lower abdomen area.

9 Q Did DaShawn Robert give you any information as to
10 what led up to the shooting?

11 A I didn't actually speak with Mr. Robert throughout
12 the entire investigation.

13 Q Did anybody give you information as to what led up
14 to the shooting?

15 A I spoke with an employee there. It was a main
16 witness that I had spoken with immediately after
17 everything was basically settled down.

18 Q Do you know who that person was?

19 A Yes, I do.

20 Q Who?

21 A Her name is Angelique [phonetic] Brown.

22 Q And what did she tell you?

23 A Angelique said that she had been working just
24 minutes beforehand. She had gone to sit down in a
25 chair near the bar itself. She began overhearing

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1 some type of altercation, argument coming from the
2 bar area. She turns and saw -- towards one of the
3 edges of the bar itself, she saw Mr. Robert,
4 Mr. Foster arguing. She knew that Mr. Robert was
5 a relative of -- she believed a relative of
6 another employee there, Miracle, I can't recall
7 her actual last name.

8 And you could see that the argument was
9 becoming increasingly more hostile. She had
10 observed the other employee, Miracle, approach
11 Mr. Robert at which time Ms. Brown actually went
12 to Miracle's location and pulled her away from
13 the --

14 Q Is Miracle a dancer, do you know?

15 A She is a dancer there, yes. I believe her first
16 name is Miracle. I don't know exactly her last
17 name. I can look, though. Miracle Wood. Sorry.

18 Q So she came over to where Mr. Robert and
19 Mr. Foster were arguing?

20 A Correct.

21 Q And then what happened?

22 A Angelique told me she had attended or persuaded
23 Miracle to leave the area just to get away. At
24 that point, she recalled overhearing gunshots
25 start coming up from the area where Mr. Foster was

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1 standing. And she said that -- Ms. Brown said
2 that she, Ms. Lloyd, and Mr. Robert all went
3 downstairs at which time they learned that
4 Mr. Robert had received a potential gunshot wound
5 to his abdomen area.

6 Q Did Ms. Brown say whether Miracle was the subject
7 of the argument between Mr. Robert and Mr. Foster?

8 A She wasn't exactly certain when I spoke with her
9 about what exactly caused the incident to
10 transpire, but that it had originally been between
11 Mr. Robert, Mr. Foster in the bar and that Miracle
12 had came up to try to pull Mr. Robert away.

13 Q Did Ms. Brown say whether she knew Mr. Foster?

14 A She told me a little bit later on after I
15 originally had contact with her that he was a
16 regular at the establishment. I believe that --
17 she didn't know his actual identity but physically
18 described him to me. I believe his name was Co.
19 She spelled it out as C-O. Co is actually his
20 first name. I believe he was a drug dealer and
21 potentially a member of a motorcycle gang.

22 Q And I'm sorry again if you testified to it, but
23 what is Ms. Brown's position at Visions? You said
24 she's an employee. What does she do?

25 A Entertainer, dancer.

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1 Q Did Ms. Brown give you any other information in
2 terms of what physically may have happened between
3 Mr. Robert and Mr. Foster?

4 A She had stated when she provided information to me
5 about what Mr. Foster's identity, what it might
6 possibly be and that he's a regular there, that
7 she had then started to recall overhearing Mr.
8 Foster yelling while grabbing his head near the
9 bar. She thought that she saw blood coming from
10 that area, and believed that she had seen Mr.
11 Robert possibly holding a knife in one of his
12 hands.

13 Q Are you aware of how many people were shot on this
14 night at Visions?

15 A I believe three confirmed, but I'm not positive,
16 with the stabbing to Mr. Foster as well.

17 Q Can I see your report?

18 A Absolutely. Sorry.

19 MS. ZILAVY: I have nothing
20 further.

21 CROSS-EXAMINATION

22 BY MR. OLSON:

23 Q Officer Toberman, the two Visions entertainers are
24 the only people associated with Visions that you
25 spoke to -- well, I guess you only spoke to

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- 1 Ms. Brown, correct?
- 2 A Correct.
- 3 Q And the only two Visions staff members that you
4 learned about their role in the course of events
5 was Ms. Brown and the dancer known as Miracle,
6 correct?
- 7 A Correct.
- 8 Q And did I understand you to say that Miracle was
9 related to Mr. Robert?
- 10 A According to Ms. Brown. I haven't been able to
11 confirm that, but she stated that she's a
12 potential relative of his.
- 13 Q And Ms. Brown told you that Miracle observed an
14 altercation beginning between Mr. Robert and
15 Mr. Foster and went to try to get Mr. Robert out
16 of it, correct?
- 17 A From what I was told, yeah.
- 18 Q And we don't fault Miracle for trying to do that,
19 do we?
- 20 A No.
- 21 Q And Ms. Brown had said that she went and tried to
22 talk Miracle into stepping back herself from this
23 potential altercation, correct?
- 24 A From what she told me, yes.
- 25 Q And we don't fault Ms. Brown for having done that,

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1 correct?

2 A No.

3 Q You don't have any reason to disbelieve the
4 accuracy of her account, do you?

5 A At this point, no, I do not. Or at that point, I
6 did not. I'm sorry.

7 Q And when the shooting started, Ms. Brown led
8 Miracle and Mr. Robert down the stairs into the
9 basement, correct?

10 A Correct.

11 Q And that was a good thing for her to do to get
12 them out of line of fire, was it not?

13 A I believe so.

14 Q And you made some observations about Ms. Brown's
15 condition and degree of cooperation with the
16 police, did you not?

17 A I did.

18 Q You said that she did not have delayed responses
19 to questions and had a consistent demeanor. What
20 you wrote down is indicators that she was not
21 intoxicated, correct?

22 A Yes. And I also wanted to -- if she was -- we
23 believed she was going to be a credible witness.
24 I did believe that because she wasn't showing any
25 type of behaviors (inaudible).

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1 Q As a matter of fact, you went on to write, "Brown
2 did not appear intoxicated and was extremely
3 coherent," correct?

4 A Correct.

5 Q And then you said, "Brown was cooperative during
6 my contact with her," correct?

7 A Correct.

8 Q And you said, "Brown did inform me that she would
9 be willing to speak with additional MPD officers
10 and would remain on scene," correct?

11 A Correct.

12 Q And that's what we want our witnesses to do,
13 correct?

14 A Yes.

15 Q We don't always get that kind of cooperation when
16 we're investigating a criminal offense, right?

17 A Not at all.

18 Q She gave you her contact information including her
19 real name, correct?

20 A She did.

21 Q And she informed you maybe something you already
22 knew but told you that you could probably get
23 video from the establishment's video cameras,
24 correct?

25 A She believed that they were functioning, yes. I

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1 never actually attempted, but yes, she made that
2 comment to me.

3 Q So all in all, you find no fault with Ms. Brown's
4 comportment either during the incident or
5 afterwards and -- related to the police, correct?

6 A No.

7 MR. OLSON: Thank you. No further
8 questions. Oh, wait, one.

9 BY MR. OLSON:

10 Q You didn't discover any fact during your
11 investigation that led you to believe that any
12 Visions employee or staff member had contributed
13 to the starting of this altercation, I take it?

14 A Not from my portion of the investigation.

15 MR. OLSON: Thanks. No further
16 questions.

17 MR. DONNELLY: Committee members,
18 any questions?

19 MR. SKIDMORE: I do. I'm not sure
20 how to quite phrase this. You talk a lot
21 about the dancers and such like that. Do you
22 notice any involvement from the security
23 staff that was there? Were there any?

24 THE WITNESS: From the shooting
25 itself?

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1 MR. SKIDMORE: Well, during the
2 incident, I mean, were security staff
3 scurrying around, trying to maintain order?
4 Did you see any?

5 THE WITNESS: Not from what I
6 recall. I remember getting to the scene.
7 Shane Mcelmurphy was actually -- when I --
8 through our first case that we went through,
9 I believe his name was -- I'm sorry, it was
10 Shane that I actually spoke with. I believe
11 he had been present. I saw that he -- they
12 were asking people to meet out in the parking
13 lot. But again, I wasn't entirely focused on
14 him at that point.

15 MR. SKIDMORE: Maybe you can't
16 answer this, but in terms of context, can you
17 say how many patrons were around versus staff
18 and what kind of staff? Was it, like,
19 bartenders and dancers, or were there
20 security staff or others? Just, like, who
21 from management was around to maintain order
22 versus who was in the crowd, you know, as a
23 guest?

24 THE WITNESS: I didn't attempt to
25 actually estimate how many patrons were

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1 there. I would say at least 20, at least 10
2 inside. There was at least one bartender I
3 believe behind the bar area still when we
4 first entered. And I recall the DJ being
5 there present afterwards or somebody that was
6 at least some kind of technical support with
7 the facility. And I recall seeing two
8 different security officers or members there.

9 MR. SKIDMORE: You said you saw two
10 or possibly two?

11 THE WITNESS: I believe at least
12 two.

13 MR. SKIDMORE: Okay. Thank you.

14 THE WITNESS: You're welcome.

15 MR. DONNELLY: Okay. Do you know
16 who called MPD?

17 THE WITNESS: I do not. I know
18 there was at least -- there was more than
19 one, I believe.

20 MR. DONNELLY: Do you know if
21 anyone employed at Visions called?

22 THE WITNESS: I don't. Again, I'm
23 sorry. I wasn't focused on that part at the
24 time.

25 MR. DONNELLY: Okay. Thank you.

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1 Do you have anything else?

2 MS. ZILAVY: He can be released.

3 THE WITNESS: I'm released? Thank
4 you.

5 MR. SKIDMORE: Thank you.

6 MR. DONNELLY: Next?

7 MS. ZILAVY: So I don't have any
8 more witnesses because I was not anticipating
9 the ruling on the motion earlier as it was.
10 And I had inadvertently released one that I
11 had for counts after 48. So...

12 MR. DONNELLY: Okay. Mr. Olson, do
13 you have any witnesses?

14 MS. ZILAVY: Well, I'm not --

15 MR. ALLEN: She's not done with her
16 case.

17 MR. DONNELLY: Oh, I'm sorry.
18 Okay. My apologies.

19 MR. ALLEN: Because I -- I know
20 Attorney Olson well enough to know that
21 there's a motion coming up at the close of
22 her case. So until their case is done, he
23 can't bring that motion, and depending upon
24 how you rule, they may not need witnesses.

25 MR. DONNELLY: I see.

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1 MR. ALLEN: So the only thing we
2 may be able to do is adjourn for the next
3 hearing in October.

4 MR. DONNELLY: Should we hear the
5 remainder of Assistant City Attorney Zilavy's
6 case?

7 MS. ZILAVY: I don't have witnesses
8 tonight.

9 MR. OLSON: And we don't have any
10 witnesses because Ms. Zilavy and I both
11 believe, and we discussed it, that her case
12 would take up a long time tonight and there
13 wouldn't be any possibility of calling
14 defense witnesses tonight.

15 MR. DONNELLY: I see. So what's
16 our next step?

17 MR. ALLEN: Well, if there's no
18 objection from the defense side, you would
19 adjourn until the next hearing date.

20 MR. DONNELLY: Okay. Any
21 objections?

22 MR. OLSON: I am tempted, but given
23 the death of the family of one of
24 Ms. Zilavy's principle witnesses, I guess I
25 can't object to allowing her to continue her

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1 case until October 29th, the next day on the
2 schedule.

3 MR. DONNELLY: All right. So what
4 action do we take?

5 MR. ALLEN: You would rule, as
6 chair, continue the case until the next
7 hearing date, and then hopefully one of the
8 other committee members will make a motion to
9 adjourn because we don't want to stay here
10 until the 29th.

11 MR. DONNELLY: That sounds like a
12 good idea. So then -- I'm sorry. I forgot
13 the verb.

14 MR. ALLEN: We're going to adjourn
15 until October 29th.

16 MR. DONNELLY: So we'll adjourn
17 this hearing until October 29th, and I will
18 entertain a motion to adjourn the meeting.

19 MS. WESTRA: I move to adjourn the
20 meeting.

21 MR. SKIDMORE: Second.

22 MR. DONNELLY: All in favor,
23 signify by saying aye.

24 MS. WESTRA: Aye.

25 MR. SKIDMORE: Aye.

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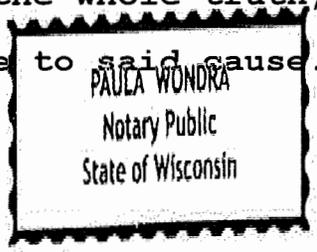
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MR. DONNELLY: Meeting adjourned at
8:48 p.m.

(Adjourned at 8:48 p.m.)

1 STATE OF WISCONSIN)
) SS
2 COUNTY OF DANE)
3

4 I, Paula Wondra, a Notary Public in and for the
5 State of Wisconsin, do hereby certify that the
6 foregoing proceedings was taken before me at the
7 Madison Municipal Building, 215 Martin Luther King
8 Jr. Boulevard, City of Madison, County of Dane, and
9 State of Wisconsin, on the 24th day of September,
10 2019; that it was taken in shorthand by me, a
11 competent court reporter and disinterested person,
12 approved by all parties in interest and thereafter
13 converted to typewriting using computer-aided
14 transcription; that said proceedings is a true record
15 of the deponents' testimony; that said witnesses
16 before examination were sworn by me to testify to the
17 truth, the whole truth, and nothing but the truth
18 relative to said cause.



Dated October 14th, 2019
Paula Wondra

21 _____
22 Notary Public
23 In and for the State of Wisconsin
24
25