

# 18081

STATE OF WISCONSIN

BEFORE THE ALCOHOL  
LICENSE REVIEW COMMITTEE  
OF THE CITY OF MADISON

DANE COUNTY

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CITY OF MADISON  
210 Martin Luther King Jr. Blvd. #401  
Madison WI 53703

Complainant,

v

**NONRENEWAL**  
OF CLASS "B" COMBINATION  
ALCOHOL BEVERAGE LICENSE

THE GRID, LLC.  
Robert Sieger, Agent  
73 White Oaks Lane  
Madison, WI 53711

Respondent.

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### Synopsis

The complaint in this case, filed by Assistant City Attorney Jennifer Zilavy alleges that the Respondent, Grid LLC, has not used its retail alcohol license since November 3, 2008. Under Sec. 38.10(1)(f), Madison General Ordinances, the license may be revoked, suspended or nonrenewed, when the license has not been used for at least 15 days. Following the public hearing held on May 19, 2010, the voting members of the Alcohol License Review Committee (hereinafter "ALRC"), deliberated in closed session and determined that the evidence showed that the license has not been used for at least 15 days, but decided not to take any action against the license at this time. As stated in this decision, the ALRC determined that it would be willing to reconsider this matter at the August 18, 2010, ALRC meeting, or at a time thereafter, if this issue is again brought before the ALRC. This document constitutes the Findings of Fact and Conclusions of Law in the above captioned case.

### Statutory Framework

Madison General Ordinances, Sec. 38.10(1)(f), sets forth the grounds and the procedure for taking action on unused licenses:

- (f) Unused Licenses. Notwithstanding Sec. 38.10, MGO, the City may revoke, suspend or refuse to renew a license authorized under this Chapter that has not been issued, a license whose usage has been discontinued for at least fifteen (15) days or where the licensee does not own or lease a premises from which business may be conducted, pursuant to the procedures in Wis. Stat. § 125.12. Prior to the time for renewal of the license, the City Clerk on behalf of the Alcohol License Review Committee, shall notify the licensee in writing of the City's intention not

to renew the license and the Alcohol License Review Committee shall provide the licensee with the opportunity for a hearing. The notice shall state the reasons for the intended action. The Alcohol License Review Committee shall be authorized to issue the notice under this subsection. The hearing shall be conducted as provided in Wis. Stat. § 125.12(2)(b), and judicial review shall be as provided in Wis. Stat. § 125.12(2)(d). The hearing shall be held before the Alcohol License Review Committee and the Committee shall make a report and recommendation as provided in Wis. Stat. § 125.12(2)(b)3, and the Common Council shall follow the procedure specified under that subdivision in making its determination.

This subdivision (f) is similar to Sec. 125.12 (3), of Wisconsin Statutes, which relates to nonrenewal of a license, except that it also includes the nonuse of a license as grounds for nonrenewal of a license. Chapter 125 of Wisconsin Statutes does not state that the nonuse of a license is grounds for nonrenewal, suspension or revocation. However, the Wisconsin League of Municipalities has issued an opinion, Intoxicating Liquors #858 (1986), that a continuation of business requirement may be adopted by a municipality under Sec 125.10 (1), Wis Stats. Pursuant to that authority, the City of Madison has adopted the continuation of business requirement that will be applied in this case.

The City has the burden of proof in this matter and must prove charges in the complaint to be true by a preponderance of the evidence, under Sec. 38.10(1)(b)2. This Sec. 38.10(1)(b)2, MGO, also provides that the rules of evidence shall be those provided in Chapter 227, Wisconsin Statutes. Under Sec 227.45, Wis. Stats, the ALRC is “not bound by common law or statutory rules of evidence.” and the ALRC “shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony.” Sec 227.45(1), Wis. Stats.

### **Procedural Background**

This matter comes before us on a Complaint, with one alleged violation of Madison General Ordinances, and is made by Madison Assistant City Attorney Jennifer Zilavy. It was filed with the Madison City Clerk and the Respondent was notified in writing by the City Clerk of the City’s intent to not renew the license. There has been no allegation that the Respondent did not receive proper notice of the proposed action, and the agent of the Respondent appeared at the April and May regular meetings of the ALRC. Assistant City Attorney Zilavy appeared on behalf of the Complaint, City of Madison and the agent of the licensee, Robert Sieger, appeared on behalf of the Respondent. Each party was permitted to call witnesses and to cross examine the witnesses of the other. Attorney Zilavy called one witness, Madison City Clerk Maribeth Witzel-Behl, and Mr. Sieger testified on behalf of the Respondent. Three documents were admitted into the record as Exhibits and they are attached to this decision. No request was made by a party for a court reporter to record a transcript of the proceeding. A videotape was made of the public proceeding, which will be available to be streamed through the City’s website.

The complaint pleads for the Common Council of the City of Madison to cancel the license. Under the Ordinance the City may revoke, suspend or refuse to renew an unused

license. We choose to interpret the complaint, which specifically cites Sec. 38.10(1)(f), Madison General Ordinances, as a pleading to refuse to renew the license.

The ALRC recognizes that final Common Council action is necessary in this matter and that this decision is not final until acted upon by that body. The ALRC has conducted this hearing and issued this decision pursuant to its authority, under Chapter 125, Wisconsin Statutes, and Chapter 38 of Madison General Ordinances, as a duly authorized committee of the Common Council.

We recognize that the Respondent is a limited liability company and not an individual. We understand that the agent listed on the license, appeared for the limited liability company and that the agent, as an individual, is not the Respondent in this case. However, we recognize that the agent of an alcohol beverage licensee is legally responsible for the conduct of the business, that he would derive income from the business and that he represented the Respondent limited liability company in this hearing. The use of pronouns and references such as "Respondent's statements" are used in this decision for convenience and clarity of style, and is not intended to reflect that Robert Sieger himself is a Respondent.

In our deliberations we have thoroughly considered the record, including the three Exhibits; we have carefully weighed the credibility and demeanor of all witnesses, although it has not been practical to describe in detail how each element of our decision reflects such judgment.

To the extent that there are any motions or objections that remain pending, we have decided them implicitly by this decision.

## **Decision**

### **A. Findings of Fact**

Based on the testimony of both parties, we conclude that the Respondent establishment has been closed for more than 15 days. This is clearly the case, because the testimony of both sides at the hearing and because the Respondent's prior appearances before the ALRC requesting a change of licensed premise, show that the Respondent was in the process of tearing down the former Grid structure and was building a hotel in place of that structure. Clearly, the prior establishment had to close in order for such construction to take place. The Respondent submitted a letter to the Madison City Clerk which was received on November 24, 2008, which has been admitted as Exhibit 1, which states that the former business was closed, the building razed and that Mr. Sieger was seeking to change his licensed premise for the operation of a food and beverage facility in the hotel.

It is not clear from the record exactly when work was commenced on the hotel, but the razing of the prior establishment occurred prior to November 24, 2008, the

date of the receipt of Exhibit 1 by the City Clerk. The public record shows that the Madison Common Council approved the change in licensed premise for the establishment in August, 2009. The testimony indicated that major work stopped on the hotel project in late 2009, although the Respondent testified that work has continued on the property. Respondent indicated that completion of the project was hampered by financing issues, related to the general economy and regulations imposed upon community banks. Respondent testified that the project was "95%" complete.

There was testimony that, Mr. Sieger, the agent of the Respondent was either selling the property or an interest in a portion of the business. We do not believe that we need to reach a decision as to whether the business was for sale or whether additional investors were being sought in order to make our decision. It is clear however, that project has not been completed and that financing was a reason that the project has not been completed. No firm completion date was offered to the ALRC, although the Respondent indicated that project would be completed by late July or early August, 2010.

#### **Conclusions of Law**

We find that that the allegation that the subject license has not been used for more than 15 days is true and is contrary to Sec 38.10(1)(f), MGO. However, for the following facts and policy reasons we conclude that, in this case, that there is not sufficient cause to refuse to renew the license.

First, we note that it has been about 9 months since the approval of the change in premises for the license. This does not seem like an unreasonable period of time, and we note that the approval process for the change in the licensed premise also took several months prior to the Common Council action in August, 2009. A number of other licenses have also been renewed for longer periods of time which owners sought financing or construction progressed at a very slow rate and those licenses were not separated or subjected to the non renewal process. We are not aware of a policy reason why this license should be treated differently, particularly when the licensed premise was so recently changed.

We also see a policy argument that it is in the City's interest that the Grid hotel project should not sit vacant and that the project should be completed. The Committee recently recommended the temporary suspension of a 365 day limitation on the reuse of formerly licensed premises in the Downtown Alcohol License Density District, partly because of our recognition of the effect that the economy has had on renting vacant space in the downtown. We felt that that the proposed change in premise was an appropriate use of the subject property in 2009 and we do not see what is different today. Denying a license to the property will affect the ability of the project owner to obtain financing and finish the project.

One of the reasons for establishing the rule that an unused license may be nonrenewed is that there is a quota for Class B Combination licenses, and someone might hold an unused license when the City has approached its quota and prevent someone else from obtaining any license. At the present time, there are still licenses available under the quota, and no one has yet been denied a license because of the unavailability of a license. However, the City is quickly approaching the limit of its licenses under the quota, as well as the time when reserve licenses will be the only remaining available licenses.

The reality is that many projects with a retail alcohol license will not open or will be closed for more than 15 days, whether that happens because of construction, remodeling, or other reasons. We feel that we need to exercise discretion, with regard to due process, when we refuse to renew a license. We note that the licensee sent a letter (Exhibit 1) giving notice of its intentions to the City Clerk, as has apparently been done by other businesses with retail licenses.

We also support a general policy supporting appropriate business development, and we want to give this licensee a chance to complete his project. We considered establishing a "bright line" rule in this case, that the ALRC would henceforth refuse to renew any license that has been unused for a certain period of time. However, we chose not to do so at this time. We will continue to consider each case for nonrenewal on its own merits.

Nevertheless, we recognize that major work seems to have come to a halt on this project. The testimony of the Respondent indicates that he has had difficulties in finding the funds to complete this project. We are not willing to wait forever.

The licensee indicated that the project would be finished by late July or early August, 2010. We rely upon this representation in making our decision. We are willing to revisit this issue at that time. If the project is not completed by the time of our regular August meeting, we would seriously consider taking action at that time, or thereafter.

#### Order

1. The ALRC recommends the renewal of the license of the Respondent, for the current license year, commencing July 1, 2010.

By:

  
David Hart, Chair  
Alcohol License Review Committee

  
Date