

1 STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY  
2 BRANCH 39  
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4 Ghaleb Ibrahim et al

5 Plaintiff,

Case No. 11-CV-15178

6 vs.

7 City of Milwaukee,

8 Defendant.

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9 Motion Hearing

10 April 16, 2013

11 Before THE HONORABLE JANE CARROLL,

12 Circuit Judge presiding in Branch 39

13 Milwaukee County Courthouse Room 206,

14 Milwaukee, Wisconsin.

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15 APPEARANCES:

16  
17 ATTORNEY ANTHONY B. SANDERS, Institute for Justice  
18 Minnesota Chapter on behalf of Plaintiffs.

19 ATTORNEY KATELYNN MCBRIDE, Institute for Justice  
20 Minnesota Chapter on behalf of the Plaintiffs.

21 ASSISTANT CITY ATTORNEY ADAM B. STEPHENS, City of  
22 Milwaukee Office of the City Attorney, on behalf of the  
23 Defendant.  
24  
25

1 the same standard the US Supreme Court applies  
2 in federal equal protection claims, and that's  
3 why we have this -- this five-part test that is  
4 completely alien to the US Supreme Court.

5 THE COURT: Okay. I want to review a  
6 few of the cases based on your arguments and  
7 give my court reporter a break, so we'll take  
8 about 15 or 20 minutes, and I'll have a ruling  
9 for you.

10 (Off the record.)

11 THE COURT: We are back on the  
12 record. All right. This is an action for  
13 declaratory judgment filed by the Plaintiffs.  
14 Both parties have filed competing motions for  
15 summary judgment. I'll just briefly state the  
16 legal standards governing declaratory judgment  
17 and summary judgment.

18 Declaratory judgment is an action  
19 brought under Wisconsin Statute 806.04, the  
20 purpose of which is to settle and to afford a  
21 party relief from uncertainty and insecurity  
22 with respect to rights, status and other legal  
23 relations.

24 A trial court can exercise discretion  
25 to entertain and decide an election for

1 declaratory judgment when there is a  
2 justifiable controversy and the court can  
3 determine parties' legal rights with respect to  
4 a particular statute or ordinance, instrument,  
5 contract, or franchise.

6 In terms of the summary judgment  
7 standard, both parties have moved for summary  
8 judgment under 802.08(2) of the Wisconsin  
9 Statutes. The purpose of that statute is to  
10 determine whether a dispute can be resolved  
11 short of a trial.

12 If the complaint states a claim and  
13 the pleadings show the existence of factual  
14 issues, the court examines the moving party's  
15 affidavits or other evidence to determine  
16 whether that party has made a *prima facie* case  
17 for summary judgment.

18 Summary judgment is appropriate when  
19 there are no genuine issues of material fact  
20 and the moving party is entitled to judgment as  
21 a matter of law.

22 In the context of a summary judgment  
23 motion, all inferences to be drawn from the  
24 underlying facts contained in the moving  
25 party's material are viewed in the light most

1 favorable to the party opposing the motion.  
2 Doubts as to the existence of a genuine issue  
3 of material fact are resolved against the  
4 moving party. And the court takes evidentiary  
5 facts in the record as true, if not  
6 contradicted by opposing proof.

7 Doubts as to the existence of a  
8 genuine issue of material fact are resolved  
9 against the party moving for summary judgment.  
10 Inferences drawn from those facts are viewed in  
11 the light most favorable to the party opposing.

12 Here both parties have moved for  
13 summary judgment, and it's the equivalent of a  
14 stipulation of facts permitting the trial court  
15 to decide the case on the legal issue. And  
16 that is, in fact, the issue that is before the  
17 Court. There are no disputed facts. The  
18 plaintiff has supplied affidavits of the  
19 Plaintiffs and much of, if not all of, the  
20 legislative record surrounding the ordinance at  
21 issue here.

22 The salient facts that are not in  
23 dispute is that the City passed an ordinance in  
24 December of 1991, which became effective on  
25 January 1st of 1992. That ordinance provided

1 that there would be no new taxicab permits  
2 issued by the City after January 1st of 1992,  
3 with two exceptions: One is if a current permit  
4 holder changed the form of their business; the  
5 second if a current permit holder transferred  
6 their permit to another person.

7 The record is unclear as to the  
8 number of cabs that were in existence in 1992.  
9 The number that has been referred to are in the  
10 record are 368 or 354. Based on this statutory  
11 scheme, the number of permits can only go down  
12 by attrition. It cannot go up. And the number  
13 of permits, how that would play out in the  
14 future, was obviously not known to City in  
15 December of 1991, but it was clear that the  
16 number of permits could go down; it could not  
17 go up.

18 Currently, there are 321 permits  
19 issued by City, so the number has decreased  
20 somewhat. The result is that the permits have  
21 a significant value. And, as I will discuss in  
22 a minute, that was an intended result by the  
23 City. It's clear that the City intended that  
24 the permits have value on the open market, and  
25 permit holders were free to sell the permits,

1 and purchasers were free to solicit permits  
2 from then-existing permit holders.

3 The current -- the value of a permit,  
4 according to Mr. Ibrahim, I-B-R-A-H-I-M's  
5 affidavit in 1996, four years after the  
6 enactment of the ordinance, was \$30,000. And  
7 the current market value, according to several  
8 of the affidavits submitted by the Plaintiffs  
9 is \$150,000 per permit.

10 Permit holders, as part of their  
11 business, rent their cabs to licensed taxicab  
12 drivers, and since 1992 the rents have  
13 increased. In 1992 the rents were \$150 for a  
14 twelve-hour shift. Now they are in the  
15 vicinity of \$375 to \$400 per twelve-hour shift.  
16 Drivers who are renting cabs from a permit  
17 holder working six days, twelve hours a day are  
18 netting \$300 to \$400 weekly less the -- and  
19 that's after taking out rent and gas.

20 The Plaintiffs have challenged this  
21 ordinance and its resulting economic hardships  
22 on people seeking permits under both the equal  
23 protection clause and the substantive due  
24 process clause of the Wisconsin Constitution,  
25 which is found in Section I, Article I of the

1 Wisconsin Constitution, and states that all  
2 people are born equally free and independent,  
3 and have certain inherent rights; among these  
4 are life, liberty and the pursuit of happiness;  
5 to secure these rights, governments are  
6 instituted, deriving their just powers from the  
7 consent of the governed.

8 The equal protection clause -- a  
9 challenge to the equal protection clause  
10 requires the challenger to show that the  
11 statute unconstitutionally treats members of a  
12 similarly situated class differently. Where  
13 the statutory classification does not involve a  
14 suspect class or a fundamental interest, which  
15 is the case here, the court will sustain the  
16 classification if there exists any rational  
17 basis to support it.

18 The party challenging the ordinance  
19 bears the frequently insurmountable task of  
20 demonstrating beyond a reasonable doubt that  
21 the ordinance possesses no rational basis to  
22 any legitimate municipal objective.

23 Courts -- the test is not whether the  
24 ordinance is unwise; it is an objective  
25 determination as to whether or not the

1 ordinance in question is rationally related to  
2 the public health, safety, morals or general  
3 welfare.

4 The equal protection analysis  
5 involves three specific steps. The first is  
6 whether the legislature created a distinct  
7 classification of citizens in passing the  
8 legislation at issue; second is if it did  
9 create a distinct classification, whether the  
10 legislation treats the class significantly  
11 differently from others similarly situated; and  
12 three, if it does treat the class significantly  
13 differently, whether a rational basis exists  
14 for the different treatment. And that's where  
15 our five-part test comes in.

16 First of all, this particular  
17 legislation does create a classification of  
18 citizens, two distinct classifications of  
19 citizens, one being permit holders, the other  
20 being non-permit holders. The legislation does  
21 treat the classes significantly different from  
22 others similarly situated. Those with permits  
23 have an asset that is valuable on the open  
24 market, and those that don't have a permit do  
25 not have that asset.



1                   The next portion of the analysis goes  
2                   to the rational basis, and this was really  
3                   where this -- this case comes down to is  
4                   whether or not a rational basis exists for the  
5                   significantly different treatment and the five  
6                   bases.

7                   The first is that the classification  
8                   must be based on a substantial distinction  
9                   which makes one class really different from  
10                  another class, and it can't simply be because  
11                  there are two -- because the legislation in  
12                  question created the classes. The only real  
13                  difference between these two classes here seems  
14                  to be whether or not the individual held a  
15                  piece of paper that was a permit that was  
16                  issued prior to January 1 of 1992.

17                  The classification adopted needs to  
18                  be germane to the purpose of the law. The City  
19                  has put forth two bases for this law. One is  
20                  that the council clearly, and it's clear from  
21                  the legislative record, that it did not want to  
22                  continue to have the adequacy hearings every  
23                  October 15th.

24                  Alderman Nardelli, who was the  
25                  proponent of the law, specifically said, "We

1 want to get out of the permit business. We  
2 want to let taxicabs self regulate. We don't  
3 want to have to have these hearings once a  
4 year."

5 The fact that the City does not want  
6 to hold yearly hearings is not a legitimate  
7 purpose that -- that promotes public good,  
8 morals or welfare in any respect. There's  
9 nothing to indicate that it was a significant  
10 drain on city resources. It's a one-day-a-year  
11 process, and I don't see how the public good is  
12 promoted by the City simply abdicating its role  
13 as issuing permits to the private market.

14 What is striking in the record is --  
15 phone off, please.

16 What is striking in the record is the  
17 understanding by the Council that what they  
18 were doing in 1991 was creating this asset,  
19 this private asset, people who had permits on  
20 January 1st of 1992 now had something that is  
21 of significant value in the market, and that  
22 value has increased today to \$150,000. If you  
23 were somebody who held that permit on  
24 January 1st of 1992, the City in essence gave  
25 to those permit holders this very significant

1           asset that none of the other members of the  
2           class have the ability to get from the City.  
3           So that is, in my view, where the problems come  
4           in with this law.

5                         But that -- but I did review the  
6           entire legislative history that was provided.  
7           And one of -- in the transcript, which is  
8           Exhibit 6, one of the proponents of this cap  
9           and this system, and this is not simply a cap,  
10          and that's where the cases that were cited by  
11          the City where there's a difference.

12                        This isn't a cap because it's a  
13          decreasing amount of unknown quantity. It's a  
14          cap that's diminishing in size over time, and  
15          it's also the City's taking its obligation or  
16          its duty that it had previously undertaken to  
17          provide the permits for the taxicabs and  
18          instead having the private market regulate that  
19          and the City simply have no -- no say in that.

20                        One of the individuals who testified  
21          in favor of this law testified as follows, and  
22          this is a taxi driver, or a taxi permit holder:

23                                 "I have no way of building a business  
24          that I can leave to my estate or that I can  
25          sell to another individual. Other drivers are

1           reluctant to let go of the business simply  
2           because they have nothing to show for it. They  
3           want to retire. They want to go south or  
4           whatever. They really have nothing to sell.  
5           By creating this cap and by creating the  
6           ability to transfer taxes [sic] between  
7           individuals, you give these people a way out.  
8           You give them individual a way in the premarket  
9           place of creating a business that's worth  
10          something. We're now able to legitimate -- to  
11          be legitimate business people in the banking  
12          community, in the financing community, and so  
13          forth.

14                       ALDERMAN NARDELLI: That gives you  
15          assets and equity.

16                       UNIDENTIFIED SPEAKER: It gives you  
17          equity. It gives you assets. It gives you  
18          something that you can use as collateral  
19          against a loan other than just a pure vehicle.  
20          By giving us the ability to say we have a  
21          business, I can improve my business. I can try  
22          to make it as good as possible to enhance its  
23          value in case I do not -- in case I do want to  
24          leave the business and sell to another  
25          operator."

1                   There is also evidence in the record  
2                   from -- and this is found at tab five in the  
3                   memorandum from the Legislative Reference  
4                   Bureau that discusses and is a memo to the  
5                   Common Council to Alderman Nardelli and  
6                   Alderman Krajniak, K-R-A-J-N-I-A-K, that talked  
7                   about this medallion system that the City was  
8                   contemplating, and told the City that the fact  
9                   that medallions can be bought and sold as items  
10                  of property is favored by taxicab operators  
11                  because their efforts to build and maintain a  
12                  business will be worth something in the event  
13                  they die or want to leave the taxicab business.

14                  So the fact that the City was well  
15                  aware that it was providing an asset to the  
16                  permit holders that would be of great value on  
17                  the open market is very clear from this  
18                  legislative history, and that's what they chose  
19                  to do. And the question is whether this Court  
20                  should substitute its decision making for that  
21                  decision to provide that asset to the current  
22                  market holders -- or to the current permit  
23                  holders.

24                  Because it's an asset -- if became on  
25                  January 1st of 1992, that permit became an

1           asset that had value that was not present prior  
2           to January 1st of 1992, and it was an asset  
3           that has continued to increase in value to its  
4           current level of \$150,000.

5                        So in looking at whether or not that  
6           was a rational use of the City's police power,  
7           the City did articulate two reasons; the first  
8           being that they didn't want to have these  
9           adequacy hearings once a year, as in October.  
10          The City talks about that in terms of the  
11          City's resources, being good stewards of the  
12          City's time and resources and money and having  
13          -- taking that piece of business away from the  
14          City so they can get on to more important  
15          things.

16                       However, in this entire legislative  
17          history, there is no discussion of resources.  
18          There is a discussion about how the City or the  
19          aldermen in question here don't want to have  
20          these hearings. But again, it's hard to see  
21          how the City's abdicating or not wanting to do  
22          hearings once a year promotes any public good  
23          or welfare, and that is not a legitimate  
24          purpose.

25                       The second purpose that has been

1 identified by the City is that this system  
2 increases professionalism and provides an  
3 incentive for permit holders to invest in their  
4 business and to improve their business.

5 The City can't simply articulate a  
6 reason without its ability to show that this is  
7 -- that it does that, that this cap and this  
8 system of making these permits available on the  
9 private market does something to create  
10 additional professionalism in the market.

11 The permits have value when they come  
12 to be sold. Whether or not it accomplishes the  
13 goal of permit holders investing and improving  
14 their business is questionable. It essentially  
15 cuts off competing businesses from entering the  
16 field.

17 It's under the system where the City  
18 issued a permit and they were not available  
19 under the private market, it's unclear why a  
20 permit holder in that situation would not be  
21 just as motivated to improve their business and  
22 to run their cab in a -- their cab company in a  
23 professional way. The City states it, but  
24 doesn't really convince me that this law was  
25 intended to do that or had that effect.

1                   The-- What this looks a lot like is  
2                   protecting the property interests of the permit  
3                   holders as of January 1st of 1992, which has  
4                   clearly been found to be not a legitimate  
5                   government purpose, in the *Wisconsin Wine and*  
6                   *Spirit Institute vs. Ley, L-E-Y*, case filed in  
7                   1987, by the court of appeals. That was a case  
8                   that prohibited the intoxicating liquor  
9                   wholesaler from also holding a retail license  
10                  and *vice versa*.

11                  The court found that there was no  
12                  rational basis for this and said specifically,  
13                  "We reject the proposition that purely economic  
14                  reasons justify a perpetual exception from  
15                  police power regulation."

16                  There was also a grandfather clause  
17                  in the issue in that case which established two  
18                  separate classes of liquor wholesalers, the  
19                  only distinguishing feature being that in one  
20                  instance the retailers had also wholesale  
21                  licenses on October 3rd, 1963, and the other  
22                  did not.

23                  The Court held, "We cannot conclude  
24                  that these two classes are so far different  
25                  from one another as to reasonably suggest the



1           propriety of substantially different  
2           legislation."

3                         Also the Metropolitan Life Insurance  
4           Company case, which was a US Supreme Court case  
5           from 1984 that addressed an Alabama statute,  
6           that statute put different rates on domestic  
7           and foreign corporations. The Court indicated  
8           that purely economic considerations were not a  
9           legitimate government interest and not a  
10          legitimate use of police power.

11                        And, finally, the Craig Miles case,  
12          C-R-A-I-G, M-I-L-E-S, from the Sixth Circuit  
13          indicated that courts have repeatedly  
14          recognized that protecting a discrete interest  
15          group from economic competition is not a  
16          legitimate government purpose, where simple  
17          economic protectionism is affected by state  
18          legislation a virtually per se rule of  
19          invalidity has been erected.

20                        In that case, at issue there was a  
21          law which limited the sale of caskets to  
22          licensed funeral directors. The court found  
23          that that was purely economic protectionism and  
24          not an appropriate government interest.

25                        So in terms of the equal protection

1 analysis and the rational-basis test, this  
2 ordinance does not pass the test. It fails  
3 under the first consideration. The  
4 classification is not based on substantial  
5 distinctions which make one class really  
6 different from one another. The classification  
7 adopted is not germane to the stated purposes  
8 of the law. It fails (3). It is based upon  
9 existing circumstances only that existed in  
10 January of -- or December of 1991.

11 And the -- in terms of the fourth  
12 factor, to what class the law may apply, it  
13 applies equally to each member of the class, it  
14 does do that.

15 And number five, the characteristics  
16 of each class should be so far different from  
17 those of other classes as to reasonably suggest  
18 at least the propriety, having regard to the  
19 public good, of substantially different  
20 legislation. And the -- I did find, although  
21 it is -- can be distinguished, the Grand Bazaar  
22 Liquor case from 1982, a Supreme Court of  
23 Wisconsin case, the analysis of the grandfather  
24 clause, there to be similar to the issues  
25 before this court.

1                   That was also a declaratory judgment  
2                   action which challenged the Milwaukee ordinance  
3                   which established that in order to have a  
4                   liquor license, a Class A liquor license, a  
5                   store must have at least 50 percent of its  
6                   income from on-premises sale of intoxicants.  
7                   And then there was a grandfather clause which  
8                   provided that the current permit holders, or  
9                   license holders, could continue to operate.

10                   The court in that case found that the  
11                   classification did not accomplish the  
12                   articulated goals of the ordinance, and the  
13                   ordinance is an arbitrary and irrational  
14                   exercise of the City's police power and a  
15                   denial of equal protection. We note a glaring  
16                   absence in the record of any public health,  
17                   safety, moral or general welfare problem or  
18                   concern. We conclude that the ordinance is not  
19                   rationally related to the purpose of limiting  
20                   the number of liquor licenses.

21                   And that's what this Court is holding  
22                   in this case as well, is that this law with the  
23                   diminishing cap, or the receiving cap, and the  
24                   ability of license holders, or permit holders,  
25                   to transfer or sell their permits to another

1 person does not accomplish the stated goal of  
2 increasing of the professionalism of the  
3 industry, and there is nothing in this  
4 legislative record either that describes a  
5 problem with the professionalism of the  
6 industry that the City was attempting to  
7 address.

8 This-- The comments are more to the  
9 desire of the City to create a valuable asset  
10 for the current permit holders so that they  
11 could sell them and, as the one taxi driver  
12 indicated, retire comfortably to Florida,  
13 that's simply not a legitimate government  
14 purpose.

15 The Court in Bazaar Liquors also  
16 talked about the date of the grandfather clause  
17 which established two separate classes whose  
18 only distinguishing feature was whether they  
19 sold liquor before or after June 30th of 1977.  
20 The court said, "We cannot conclude that these  
21 two classes are so far different from one  
22 another as to reasonably suggest the propriety  
23 of substantially different legislation," and  
24 that is the case here.

25 The only difference between the

1 members of the two classes are whether or not  
2 they were permit holders on January 1st of  
3 1992. Those individuals have been handed a  
4 significant asset by the City of Milwaukee,  
5 which is now -- has a value of \$150,000. The  
6 other members of the class, those who did not  
7 have a permit in January 1st of 1992, are not  
8 able to obtain that incredible benefit from the  
9 City.

10 In terms of substantive due process,  
11 the standard is as follows: When a challenge  
12 to the exercise of police powers is directed at  
13 the legislative means employed, the issue is  
14 properly framed as one of substantive due  
15 process. It requires that the legislative  
16 means chosen have a rational relationship to  
17 the purpose or object of the enactment. If it  
18 has, and the object is a proper one, the  
19 exercise of police power is valid.

20 The issue is whether the ordinance is  
21 rationally related to the public health, safety  
22 or general welfare. To be reasonable, an  
23 ordinance must tend in some degree to  
24 accomplish the object for which the municipal  
25 corporation was created and the powers

1 conferred upon it.

2 The fundamental inquiry is not  
3 whether the challenged provisions in an  
4 ordinance are rationally related to the stated  
5 purpose of the ordinance, but whether the  
6 challenged provisions are rationally related to  
7 any legitimate municipal objective; the health,  
8 safety, and welfare of the residents of the  
9 City.

10 And for the reason that I discussed  
11 in the equal protection analysis, this law does  
12 interfere with the Plaintiff's right to obtain  
13 a permit from the City. There is no rational  
14 basis, and it also fails under substantive due  
15 process.

16 For those reasons, Plaintiff's motion  
17 for summary judgment on the declaratory  
18 judgment is granted, and the City's motion for  
19 summary judgment denied.

20 All right. Do you want prepare the  
21 order, Mr. Sanders?

22 MR. SANDERS: Yes, Your Honor.

23 THE COURT: Okay.

24 MR. SANDERS: I will -- just one  
25 question. We -- we ask for relief on