

**IN THE COURT OF APPEALS OF IOWA**

No. 0-802 / 10-0424  
Filed February 23, 2011

**CRAIG MALIN, City Administrator, and  
CITY OF DAVENPORT,**  
Plaintiffs,

**vs.**

**IOWA DISTRICT COURT FOR  
SCOTT COUNTY,**  
Defendant.

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Certiorari to the Iowa District Court for Scott County, Marlita A. Greve,  
Judge.

The City asserts the ruling granting a temporary injunction to Evernew was  
illegal and should be reversed. **WRIT SUSTAINED.**

Thomas D. Warner of City Hall, Davenport, for plaintiffs.

John T. Flynn of Brubaker, Flynn & Darland, P.C., Davenport, and Michael  
J. Meloy of Koos & Meloy, Bettendorf, for defendant.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

**VOGEL, J.**

Craig Malin, City Administrator of Davenport, and the City of Davenport (City) were granted certiorari review from a district court ruling which granted a temporary injunction to Evernew Concept L.L.C. The City asks us to declare the district court's ruling of November 30, 2009 to be illegal and void. We agree. Writ sustained.

**I. Background Facts and Proceedings**

Evernew is a company owned by Nadeem Mazhar. In July 2009, Evernew applied for a Class C beer permit for its store, "Beer Mart." The permit Evernew applied for allowed customers to purchase beer and wine on a carry-out only basis. The Davenport police and fire departments as well as the City's building division all approved the license application. Davenport municipal code required obtaining a special use permit from the city's zoning board of adjustment, after determining the proposed business's impact on the surrounding area. Under section 17.48.020(B)(b)(3) of the municipal code, grocery stores, pharmacies, and restaurants were exempt from this requirement. At a September 2, 2009 meeting of the zoning board of adjustment, Evernew stated the business would be operated along the same lines as its previous owner, which was not a grocery store; Evernew was granted a one-year special use permit.

On September 22, City Administrator Craig Malin sent a letter to Evernew "administratively rejecting" the application for a Class C beer permit, stating that this type of permit was "not allowed in the North Brady URTE corridor. Davenport Municipal Code § 5.10.105(F) allows only Class C Liquor Licenses (typical bar or restaurant license) in this area." On October 21, 2009, Evernew

sent a letter to Malin demanding its application be placed on the agenda for the next city council meeting. When that was not done, Evernew filed a petition in district court, as later amended, for writ of certiorari, declaratory judgment, writ of mandamus, and request for a temporary and permanent injunction. The City filed a motion to dismiss Evernew's petition and application for temporary injunction on November 19, arguing among other things, Evernew never submitted a valid application. Evernew's November 23 filed affidavit stated its intentions to operate the establishment so that more than fifty percent of its sales were from the sale of food and food products. On November 30, the district court ruled on Evernew's petition, finding that Evernew established it was likely to succeed on the merits of its claim because its "uncontroverted affidavit provides evidence to the Court that its intent to operate a grocery store on these premises more likely than not qualifies it for a carryout beer and wine permit under Iowa Code §123.129." In the same ruling, the court granted the temporary injunction "enjoining [the City] from refusing to submit Plaintiff's wine and beer application to the city council for approval or denial pursuant to Iowa Code Chapter 123." It did not specifically rule on the petition for writ of certiorari, petition for declaratory judgment, or petition for writ of mandamus.

On January 25, 2010, following another hearing, the district court denied the City's motion to dismiss. The City's motion to reconsider the temporary injunction was denied on March 1. The City then filed a petition for writ of certiorari with the Iowa Supreme Court on March 15, along with a request for a stay of the district court proceedings, claiming the district court acted illegally in

granting the temporary injunction.<sup>1</sup> On March 16, a temporary stay was granted, and on April 1, Evernew's motion to dismiss the petition for writ of certiorari was denied and the petition was granted. This order was affirmed on May 18 by a three justice panel. On August 31, 2010, the supreme court granted a stay order filed by Evernew, which at its expiration allowed the one-year special sentence to be stayed "until thirty days after the issuance of procedendo in this certiorari action."

## II. Standard of Review

"Certiorari is an action at law to test the legality of an action taken by a court or tribunal acting in a judicial or quasi-judicial capacity." *Petersen v. Harrison County Bd. of Supervisors*, 580 N.W.2d 790, 793 (Iowa 1998). "A writ of certiorari shall only be granted . . . where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded proper jurisdiction or otherwise acted illegally." Iowa R. Civ. P. 1.1401. In an original certiorari proceeding, our review is for errors at law. *State Pub. Defender v. Iowa Dist. Ct. for Black Hawk County*, 633 N.W.2d 280, 281–82 (Iowa 2001). "An illegality is established if the board has not acted in accordance with a statute; if its decision was not supported by substantial evidence; or if its actions were unreasonable, arbitrary, or capricious." *Perkins v. Bd. of Supervisors of Madison County*, 636 N.W.2d 58, 64 (Iowa 2001) (citation omitted).

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<sup>1</sup> Evernew asserted the writ of certiorari filed by City was not timely, as it was not filed until March 15, 2010, more than thirty days after the November 30, 2009 district court ruling granting the temporary injunction. "The petition [for writ of certiorari] must be filed within 30 days from the time the tribunal, board or officer exceeded its jurisdiction or otherwise acted illegally." Iowa R. Civ. P. 1.1402(3) (emphasis added). However, as the motion to reconsider was decided March 1, and certiorari was filed March 15, it was timely filed.

We first acknowledge the authority of the City, not the City Administrator to approve or reject an entity's application for a liquor license.

*The local authority shall either approve or disapprove the issuance of a liquor control license, retail wine permit, or retail beer permit, shall endorse its approval or disapproval on the application and shall forward the application with the necessary fee and bond, if required, to the division. There is no limit upon the number of liquor control licenses, retail wine permits, or retail beer permits which may be approved for issuance by local authorities.*

Iowa Code § 123.32(2) (2009) (emphasis added).

We agree with the district court's finding that the local authority in this case is the city council. Davenport City Code § 5.10.170 ("Action by council: Action taken by the city council shall be so endorsed on the application and thereafter the application, fee and bond, if required, shall be forwarded to the division for such further action as is provided by law.").

The City cites no authority which would give the City Administrator the power to reject an application for a liquor license. Moreover, Iowa Code section 364.6 states, "A city shall substantially comply with a procedure established by a state law for exercising a city power. If a procedure is not established by state law, a city may determine its own procedure for exercising the power."

Therefore, we agree with the district court. The power to approve or reject an application for a liquor license lies with the city council, and that is the body that will ultimately review Evernew's application.

In its petition for certiorari, the City argues the district court's ruling went too far by "enjoining Defendants from refusing to submit Plaintiff's wine and beer application to the City Council for approval or denial." We agree that the district court went beyond merely finding Malin's actions illegal, and erred in going one

step further by the granting of injunctive relief. See *Lewis Invs., Inc. v City of Iowa City*, 703 N.W.2d 180, 186 (Iowa 2005) (suggesting temporary injunctions may be issued as an auxiliary remedy, but only to preserve the status quo). Having found that Malin's actions were without authority, the district court should have simply issued a writ of certiorari as sought by Evernew. See *Frank Hardie Adver., Inc. v. City of Dubuque Zoning Bd. of Adjustment*, 501 N.W.2d 521, 523 (Iowa 1993) ("Certiorari is available where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have acted in excess of jurisdiction or illegally.").

We therefore sustain the City's writ of certiorari before us.

**WRIT SUSTAINED.**