STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF MCLEAN

JULIE CROWE,	)	
	)	
Plaintiff,	)	**Case No. 12 MR 45**
	)	
v.	)	**Judge Foley**
	)	
CITY OF BLOOMINGTON, a municipal corporation,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S RESPONSE IN OPPOSITION
TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Introduction

Plaintiff Julie Crowe's lawsuit seeks to vindicate her constitutional right to earn a living without being subjection to an arbitrary and irrational licensing law, known in Bloomington as a certificate of convenience ("COC"), the purpose of which is to protect existing vehicle-for-hire ("VFH") licensees from competition. The ordinance challenged here, Section 1002E of Chapter 40, Article X, of the Bloomington City Code (also referred to as the "COC"), makes Plaintiff's right to earn a living dependent on whether the City (through its City Manager) "finds that further vehicle for hire service in the City of Bloomington is desirable and in the public interest, and that the applicant is fit, willing and able personally and financially to perform such public transportation and conform to the provisions of this Ordinance and the rules promulgated by the City Manager." In making that determination, the ordinance requires the City to solicit input from would-be competitors and accords the City Manager unfettered discretion to define and enforce the term "desirable and in the public interest."

Defendant move for summary judgment claiming that: (1) the City has the right to regulate vehicles for hire ("VFHs"); (2) the certificate-of-convenience ("COC") provision in the City's VFH ordinance is not vague because it should be "construed" along with other provisions of the ordinance; (3) Plaintiff Julie Crowe was not owed any procedural due process, but, even if she was, it was minimal and she never requested it; and (4) the City's denial of Crowe's VFH application was not against the manifest weight of the evidence. As set forth below, Plaintiff respectfully submits that Defendant failed to show that the undisputed material facts entitle it to summary judgment as a matter of law. Therefore, Plaintiff requests that this Court deny the City's motion and enter judgment in favor of Plaintiff.

Standard of Review

Summary judgment is warranted where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Welton v. Ambrose*, 351 Ill. App. 3d 627, 633 (4th Dist. 2004). A defendant moving for summary judgment bears the initial burden of production and may meet this burden only by "(1) affirmatively demonstrating that it must prevail on an element of the cause of action or (2) demonstrating that the plaintiff cannot produce evidence necessary to support the plaintiff's cause of action." *Id.* at 633-34. Only if the defendant meets this standard does the burden shift to plaintiff to present a factual basis that would entitle plaintiff to a favorable judgment. *Id.* at 634.

Argument

I. The COC provision is not rationally related to any public health, safety or welfare purpose.

The City spends a great deal of its Motion citing to cases and presenting arguments that stand for the proposition that the City has the right to regulate the use of its streets, and specifically taxis and VFHs, in order to protect the public's health, safety and welfare under its

police power. (Def.'s Mot. 4-7.) As a threshold matter, it should be clear that this case is not about *whether* the City has the power to impose regulations that are rationally related to the public's health, safety or welfare. Instead, this case is about whether one provision of the City's VFH Ordinance – § 40-1002E, the COC – is rationally related to such purposes. Plaintiff submits that it is not.

A. The COC's legislative history shows its anti-competitive purpose

The COC's legislative history shows that its purpose was to "ensure the[] economic survival" of VFH companies existing at the time the COC was enacted. (Plf.'s Exh. 7, Schmidt Dep. Exh. 2.) Specifically, it shows that VFH companies approached City staff, stated their opinion that the VFH market was approaching the "saturation point," and requested the COC requirement "to better ensure their economic survival." (*Id.*) The legislative history is devoid of any evidence that the COC was needed for the public's health, safety or welfare. (*See id.*) In fact, the legislative history shows that taxi companies acknowledged that the operation of VFHs did not have "an overall negative impact on their businesses," and "[t]he volume of many persons seeking to enter and leave the downtown Thursday and Friday would overwhelm the taxi companies if they were required to transport all of those persons." (*Id.*) According to the legislative history, the market was not saturated at the point the ordinance was enacted (*id.*), nor is there evidence of saturation of the market to date (although it is entirely clear what "saturation" means in any event). (Plf.'s Exh. 7, Adkins Dep. 155:18-156:1-8; 157:1-11.)

B. The Ordinance's privileges and exemptions benefit and protect existing businesses

Additionally, the City's intent to protect existing licensees at the expense of companies wishing to enter the VFH market, such as Crowe, is replete in a series of special privileges and exemptions the Ordinance accords existing companies, including:

- A grandfather provision that automatically grants VFHs in service before November 4, 2010, COCs for all of their existing vehicles. Code § 1002A;[1]

- A special privilege provision that entitles VFHs in service before November 4, 2010, to replace any VFH in service with a vehicle of up to 50% more capacity without obtaining a COC and thus without having to show that such additional seat capacity would be desirable and in the public interest. *Id.*; Plf.'s Exh. 8, Adkins Dep. 166:17-23;

- Specific rights to receive notice from the City of any new COC application. Code, § 1002(a);

- Specific rights to file evidence with the City Manager in support of or opposition to the issuance of a COC. § 1002(b);

- The specific right to file a motion to continue or postpone an applicant's COC public hearing. § 1002(c); and

- Regular meetings between Deputy City Manager Barbara Adkins and existing COC holders that are closed to the public regarding the regulation of taxis and VFHs in Bloomington (Adkins Dep. 232:21-234:21, 236:4-237:20).

C. Illinois law forbids laws enacted for a protectionist purpose

Under the Illinois Constitution, the City "cannot invoke the police power on the pretense of protecting the public interest, where the actual objective . . . is an arbitrary interference with private business, or where the legislation imposes unnecessary or unreasonable restrictions upon lawful occupations." *Figura v. Cummins*, 4 Ill. 2d 48, 49 (1954). The City may not invoke its police power "to serve a purely private purpose," *Koos v. Saunders*, 349 Ill. 442, 449 (1932), or to bestow "special and exclusive favors" on a particular group, *People v. Brown*, 407 Ill. 565, 584 (1950); *see also Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) ("Courts have

[1] The City argues that grandfathering is not "new" or "unusual," citing *Capitol Taxicab Co. v. Cermak*, 60 F.2d 608 (N.D. Ill. 1932). But although grandfathering may not be inherently unconstitutional, here, combined with the exclusion of new competitors and a lack of any health or safety justification, it confirms that the COC requirement was designed only to serve the economic interests established businesses, not to objectively determine an amount of VFH service that optimally serves consumers.

repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose.").

"The mere fact that the [government] has invoked the police power to restrict or prohibit a particular trade is not conclusive that the power was lawfully exercised, and it is the province of the court[s] to determine that issue." *Id.* at 49. "[I]n determining that question the courts will disregard mere forms and interfere for the protection of rights injuriously affected by arbitrary and unreasonable action." *Koos*, 349 Ill. at 447 (1932). For a restriction on individual rights to stand, it must be apparent that preservation of the public's health, safety or welfare was the end the City "*actually intended* and that there is some connection between the provision of the law and such purpose." *Metropolitan Trust Co. v. Jones*, 384 Ill. 248, 255 (1943) (emphasis added).

In its Motion, the City relies on several cases that examine the constitutionality of taxicab regulations under the rational basis test. (Def.'s Mot. 4-6.) Those cases, however, do not stand for the proposition that any regulation is *per se* permissible when a city regulates the use of its streets. They are fact-specific cases where the courts examined regulations and made a determination as to whether they were rationally related to a proper purpose. None of the cases are dispositive of the ordinance at issue in this case. For example, in *City of Chicago v. Vokes*, the Court upheld a regulation requiring taxicab companies to maintain their principal place of business in Chicago. 28 Ill. 2d 475, 480-81 (1963). The court upheld the regulation because it facilitated the investigation, inspection and supervision of those companies for purpose of protecting the public's health, safety and welfare. *Id.* In another case the City cites, *City of Decatur v. Chasteen*, the Court upheld challenged regulations because they ensured uniform charges through the use of taximeters, which the Court held served the public welfare. 19 Ill. 2d 204, 211-12 (1960).

The City also cites to *Yellow Cab v. City of Chicago*, 396 Ill. 388 (1947), for its "observation" that the City of Chicago could reduce the number of taxicabs in the past based on profit issues of existing licensees. (Def.'s Mot. 6.) However, while the Court upheld a limit on the number of taxi licenses in *Yellow Cab*, its decision was based on fact-specific circumstances that are not similar to the facts in Bloomington. Specifically, in *Yellow Cab*, the court upheld the city's reduction in the number of licensed taxis to address a health and safety issues, namely "strikes and other violence on the city streets" resulting from the Great Depression's effect on Chicago's taxi industry. 396 Ill. at 391, 400.

The City also relies on cases that examine the state's power to restrict entry into public utilities markets under a "limited monopoly" theory. (Def.'s Mot. 3-4.) However, VFHs are not deemed public utilities as defined under the Illinois Public Utilities Act, 220 ILCS 5/3-105[2], and are therefore not governed by that Act's regulations, which subject public utilities to unique reciprocal rights and responsibilities. Unlike VFHs, public utilities are *compelled* to provide service and do so "adequate[ly]" to all customers in the territory over which it has been granted a monopoly. *See Gulf Transport v. Illinois Commerce Comm'n*, 402 Ill. 11, 19 (1948); *Amalgamated Trust & Sav. Bank*, 98 Ill. App. 3d 254, 260-61 (1st Dist. 1981). That is, in exchange for regulations that protect public utilities from competition, utilities have a reciprocal *obligation* to *actually provide* the service for which they have been given a certificate of convenience. *Will County Water Co. v. Village of Shorewood*, 117 Ill. App. 3d 187, 190 (3d Dist. 1983); *see also* 220 ILCS 5/8-508 (prohibiting public utility from abandoning or discontinuing

[2] Public utilities generally include providers of heat, cold, power, electricity, water and light, disposal of sewage and transport of oil or gas by pipeline.

service without Commerce Commission's approval).[3] The state also controls their rates – and thereby *limits* their profits – based on detailed considerations of the utility's capacity, costs and output. *See* 220 ILCS 5/9-101 *et seq.*

II. The Ordinance is vague and arbitrary and grants the City Manager unfettered discretion.

The City's Motion wholly fails to raise any undisputed material facts that establish, let alone address Plaintiff's claim that the COC provision is unconstitutionally vague and arbitrary and accords the City Manager unfettered discretion. Instead, the City seemingly concedes that it is vague by sidestepping it altogether, and then claiming the "ordinance must be construed as a whole." (Def.'s Mot. 11.) Specifically, the City cites to provisions of the Ordinance regarding information COC applicants must submit (*e.g.*, the financial status and experience of the applicant, the color scheme of the vehicle(s), "any facts which the applicant believes tend to prove that public convenience would be benefitted by the granting of a certificate," criminal background checks, and evidence and testimony presented at the applicant's public hearing).

But looking at the ordinance's other provisions does nothing to define the term "desirable and in the public interest" so that people of "ordinary intelligence" would not have to "guess at [its] meaning" (*see City of Wheaton v. Sandberg*, 215 Ill. App. 3d 220, 227 (2d Dist. 1991)), or how it is sufficient to advise the ordinary person of his or her rights are under the ordinance or how he or she would be affected by its operation as due process requires. *McDougall v. Lueder*, 389 Ill. 141, 154 (1945); *see also Polyvend, Inc. v Puckorius*, 77 Ill. 2d 287, 299 (1979) (law

[3] In contrast, Bloomington's VFH COC holders are under no duty to actually operate their VFHs. In fact, it is undisputed some COC holders do *not* operate all of their licensed VFHs. (Adkins Dep. Exh. 9 (hereinafter "Hrg. Tr.") 12:14-19; Plf.'s Exh. 9, Halliday Dep. 52:8-53:15) and that the City does not know on any given day (1) whether existing VFH COC holders actually operate their vehicles, or (2) if they do operate them, how much service they provide. (Adkins Dep. 188:21-189:1, 191:1-9.)

grants overly broad discretion where factors officials are to apply are vague and lack "sufficient standards" to guide exercise of discretion).

In fact, the ordinance accord Adkins' such unfettered discretion that disregards the term "desirable" when reviewing a COC application because "it's either going to be desirable or undesirable " and things "undesirable" is a "negative." (Adkins Dep. 54:3-22). Further, she simply makes up her own definition of the term "public interest" because there is no definition in the ordinance. (Adkins Dep. 176:11-179:2.). The City concedes that it has no written objective criteria by which Adkins determines whether additional VFH service is 'desirable' or 'in the public interest'" and no written objective criteria by which a VFH applicant can determine what he or she must do to demonstrate that new a VFH service is 'desirable' or 'in the public interest. (Plf.'s Exh. 10, Defs.' Resp. Req. Admit, 22-23.)

Lacking definition or objective criteria, Adkins defines "in the public interest" as meaning whether there is a "need" for additional VFHs, and then calculates the need by looking to the number of seats currently licensed, the time by which the downtown is cleared on weekends, and the potential negative impact on existing VFH companies. (Adkins Dep. Tr. at 177:5-178:16.) The City never explains how the information solicited in Section 1002B or any other part of the Ordinance makes the terms "desirable" or "public interest" as used in Section 1002E any less vague or arbitrary, or how they constrain the City Manager's discretion. The City Manager's determination is purely arbitrary and acknowledges neither guidance nor restraint." *Yick Wo*, 118 U.S. at 366-67. Section 1002E is therefore unconstitutionally void for vagueness. As such the City's Motion should be denied.[4] *See also* Plaintiff's Motion for Summary Judgment, pp. 10-17 and 20, "The Ordinance's COC provision is unconstitutionally vague and

[4] *See also* Plaintiff's Motion for Summary Judgment, pp. 10-17 and 20, regarding Section 1002E and void for vagueness grounds, which is incorporated herein by reference.

arbitrary and thus violates Plaintiff's right to due process of law," which is incorporated herein by reference.

III. The City violated Crowe's right to procedural due process.

Count I of Crowe's alleges that the City infringed her right to procedural due process by: (1) denying her the opportunity to cross-examine witnesses, present rebuttal evidence, and consider and evaluate the evidence and testimony against her; (2) presenting evidence to the City Council that was not in the record or Adkins' findings; and (3) providing the City Council with an incomplete record. (Verif. Compl. ¶¶ 48-58.) In its motion, the City does not dispute that it denied Crowe procedural due process, and also admits that it has no policies, procedures, rules or regulations providing for procedural due process (Adkins Dep. 43:15-20, 44:2-6). Instead, the City claims that it did not owe Crowe any procedural due process, or if it did, she waived it. (Def.'s Mot. 6-10.)

A. Crowe was entitled to due process at her public hearing and appeal hearing.

It is well-established in Illinois law that "an administrative proceeding is governed by the fundamental principles and requirements of due process of law." *Abrahamson v. Ill. Dep't of Professional Regulation*, 153 Ill. 2d 76, 92 (1992). Due process is required where, as here, an administrative hearing could prevent someone from practicing his or her occupation. *See, e.g., id.* (medical license applicant entitled to due process before denial for lack of "good moral character and judgment"); *Willner v. Cmte. on Character & Fitness*, 373 U.S. 96, 105 (1963) (bar applicant entitled to due process before denial for lack of character and fitness); *Freitag v. Carter*, 489 F.2d 1377, 1382 (7th Cir. 1973) (chauffer's license applicant entitled to due process before denial). Although due process is a "flexible" concept, the government must always provide "certain minimal guarantees" at administrative hearings, including, among others, the

right to cross-examine witnesses and the right to a reasonable opportunity to inspect evidence so that the applicant can "test, explain, or refute" it. *Balmoral Racing Club, Inc. v. Illinois Racing Bd.*, 151 Ill. 2d 367, 408-10 (1992). In *Balmoral*, for example, the Court held that an applicant for a racing license was denied due process where it only learned of adverse evidence when its "hearing was almost half over," was only "given a one-hour lunch break in which to examine this information," and was given only a short time in the hearing to respond. The Court found that this was "tantamount to providing no opportunity to examine this evidence or respond to it at all." *Id.*

The City, however, suggests that it owed Crowe no due process at all, arguing that "[a]n analogy may be made to the sale of alcoholic liquor," where "denial of a new license is not subject to due process," citing *Las Fuentes, Inc. v. City of Chicago*, 209 Ill. App. 3d 766 (1st Dist. 1991). (Def.'s Mot. 7.) However, *Las Fuentes* dealt only with the right to serve liquor at a particular location, not the right of an individual to practice a business or occupation. In relying on *Las Fuentes*, the City entirely ignores the line of cases cited above that requires procedural due process in administrative proceedings that affect an applicant's right to practice a business or occupation.

The City also argues that "due process is flexible," apparently claiming that if it owed Crowe due process at all, it was a *reduced* level of procedural due process that does not include the rights to cross-examination, rebuttal and an opportunity to consider and evaluate evidence. In support of this argument, the City relies on *Webb v. Lustig*, 298 Ill. App. 3d 695, 702 (4th Dist. 1998). (Def.'s Mot. 7-8.) *Webb*, however, was not a licensing case and only held that due process did not require discovery, confrontation and cross-examination at the *investigatory* stage of employment discrimination proceedings before the Illinois Department of Human Rights. In fact,

Webb explicitly recognized that a party in "judicial or quasi-judicial proceedings" has greater due process rights, including but not limited to the rights to "discovery, confrontation, [and] cross examination." 298 Ill. App. 3d at 703. *Webb* thus *supports* Plaintiff's claim because the City's VFH public hearing and City Council appeal hearing were "judicial or quasi-judicial proceedings." *See Department of Finance v. Gandolfi*, 375 Ill. 237, 240 (1940) ("An administrative officer empowered to issue and revoke licenses to engage in a business or profession necessarily exercises quasi judicial powers in determining whether a license should be issued or revoked . . . ."). Thus, under *Webb* and the line of cases that actually addresses licensing, the City denied Plaintiff procedural due process to which she was entitled when it denied her cross-examination, rebuttal, and the opportunity to consider and evaluate the evidence against her. *See, e.g., Abrahamson*, 153 Ill. 2d at 92; *Balmoral*, 151 Ill. 2d at 408-10.

The City also argues that, if Crowe did have procedural due process rights to cross-examination and rebuttal, she waived them by failing to assert them at her public hearing. (Def.'s Mot. 8-9.) But it is simply disingenuous for the City to claim that Plaintiff waived her rights to invoke procedural rules that the City concedes do not exist. (*See* Adkins. Dep. 43:15-20, 44:2-6). The Illinois Supreme Court addressed this very issue in *People ex rel. Klaeren v. Village of Lisle*, holding that because "formal objections go hand in hand with formal proceedings," parties do not waive their right to object to lack of cross-examination in administrative proceedings not governed by procedural rules. 202 Ill. 2d 164, 178 (2002).

It is also disingenuous for the City to argue that Plaintiff waived her right to object to a lack of cross-examination when, in fact, it has not afforded those rights at any other VFH hearings. *See id.* (no waiver of cross-examination at administrative hearing where request would have been futile). For example, in a hearing on a VFH application by Double Trouble Shuttle,

Adkins denied the applicant's request to respond to statements made by VFH owners who opposed the application. (*See* Plf.'s Exh. 11, Gooderham Dep. 237:12-24, Exh. 17 at 17:4-10.)

In short, the City argues that even though it did not have procedural rules, Crowe was required to invoke them anyway, and even though the City never allows applicants to respond to adverse evidence, Crowe was required to ask anyway. The law, however, does not place this burden on citizens, and the City therefore cannot excuse its failure to provide due process by blaming Crowe.

B. On appeal, Adkins came up with new reasons to deny Crowe's application that were not contained in Adkins' findings letter

It is undisputed that the City presented into evidence grounds for upholding the denial of Crowe's COC application to City Council that were not part of the original findings denying Crowe a COC. Specifically, Adkins authored a memorandum to the City Council recommending that it affirm her decision, which was signed by the Mayor, in which she alleged that Crowe's "cash flow limited [her ability to perform]," and that "establishing a new [VFH] company is not in the public interest" because it would "saturate the market," which is not only new, but contradicted by her own sworn testimony. (Adkins Exh. 5 at 605; Defs.' Resps. Req. Admit 3, 4, 12; Plf.s Exh. 7, Adkins Dep. 155:18-156:1-8; 157:1-11; *see also* Adkins Dep. Exh. 4.).

Presenting this purported evidence, which were not part of the original findings, violated the ordinance. Section 1002E requires Adkins to state each and every basis for the denial in the findings letters and, as Adkin herself testified, this is required so that applicants have notice of the bases of her decisions so they can appeal if necessary. (Adkins Dep. 101:9-21.) At the same time, Adkins admits that she asked the City Council to uphold her decision based on claims that were not presented at Crowe's public hearing and that were part of the findings letter Adkins sent Crowe denying her COC application. (Adkins Dep. 253:3-254:11.)

Not only were these not bases for the denial of the COC, the City gave Crowe no notice that it presented City Council with this purported evidence or that City Council would consider it in deliberating on her appeal. (Defs.' Resps. Req. Admit 3, 4, 12.) The City does not dispute that it offered new evidence to City Council (not included in the findings letter) and to which Crowe was not given an opportunity to be heard, instead, the City embarks on a confusing discussion about ex parte hearings, claiming that "[i]t is not constitutionally required for a hearing officer to conduct an ex parte hearing with an applicant for a government license prior to issuing a decision on an application for such license." (Def.'s Mot. 9.) But this discussion wholly misses the point. Simply put, it was improper for Adkins to present City Council with new bases to support her original decision to deny Plaintiff's application when this evidence was neither addressed at the public hearing nor a basis for Adkins rejecting the application. The City's presentation of new grounds for denying Crowe's application deprived Crowe of her right to notice and an opportunity to respond and, as such, deprived her of procedural due process. *See Balmoral*, 151 Ill. 2d 408-09.

C. The City denied Crowe procedural due process by giving the City Council an incomplete record.

In addition to presenting City Council with grounds for denying Crowe's application that were not in the public hearing record or the findings letter, it also *omitted* material evidence from the record that *was* presented in support of Crowe's application. Specifically, the City omitted letters that Crowe submitted in support of her application, a petition signed by downtown bar owners supporting Crowe's application, and Crowe's financial statement, and it failed to provide the City Council with a recording or transcript of Crowe's public hearing. (Verif. Compl. ¶ 57; Plf.'s Exh. 12, Covert Dep. 61:14-20, 63:19-64:14, 67:3-24; Gooderham Dep. Exh. 16.) The City does not deny that it failed to provide the City Council with a complete record on appeal, nor

does it dispute that procedural due process required the City Council to receive a complete record on appeal. *See Abrahamson*, 153 Ill. 2d at 95-96 (administrative decision-makers need not be present when evidence is taken so long as they review the record of proceedings).

Instead, the City seemingly argues – without citing the record or any law whatsoever – that it made up for this omitted evidence when City Council "waived its rules and permitted Plaintiff to make new arguments before the City Council at the time of her appeal." (Def.'s Mot. 10.) Even if that were sufficient to satisfy the requirements of due process, which it is not, the City did not allow Crowe to present new evidence at her appeal hearing; it merely allowed her to state reasons why it should grant her a COC. (Adkins Dep. Exh. 5 at 607-08.) Accordingly, the City has failed to show that it is entitled to summary judgment on this facet of Crowe's procedural due process claim.

IV. The City's decision was against the weight of the evidence.

A. Crowe's financial statement and the opinions of VFH owners do not provide an evidentiary basis Adkins' decision.

The City claims Adkins' denial of Crowe's application was not against the manifest weight of the evidence by relying on (1) the financial statement Crowe submitted as part of her application; and (2) the opinions of VFH owners who opposed Crowe's application at her public hearing. (Def.'s Mot. 12-18.) The City, however, ignores the undisputed fact that Crowe's financial fitness was not a basis on which Adkins rejected her application; as set forth above, the only basis on which Adkins rejected Crowe's application was the alleged lack of "need" for additional VFH service. (Adkins Dep. 253:3-254:11, Exh. 4.) Accordingly, the financial statement is not record evidence that supports Adkins' decision.

The City points to the fact that Adkins received the opinions of existing VFH owners, whose demeanors she had the "opportunity to observe" and who statements she determined were

credible" (Def.'s Mot. 18), presumably to show Adkins' decision denying Crowe's application was not against the manifest weight of the evidence. However, the City makes this argument while admitting that these very VFH owners "obviously may have a bias against permitting additional competition" and some of whom Adkins has called "cutthroats" who will "say whatever they need to say to keep someone else from encroaching on their business." (Adkins Dep. 221:4-21, 224:6-10.)

The very cases the City cite for purposes of setting forth what the manifest weight of the evidence standard is, hold that reliance on discredited, refuted, uncorroborated testimony does not suffice to show that the manifest weight of the evidence supported an administrative decision. *See Kerr v. Police Bd. of the City of Chicago*, 59 Ill. 2d 140, 146 (1974) (decision relying on uncorroborated testimony against manifest weight of the evidence); *Basketfield v. Police Bd. of the City of Chicago*, 56 Ill. 2d 351, 359 (1974) (decision relying on "totally discredited" and "refuted" testimony against manifest weight of the evidence).

In this case, the statements on which Adkins relied were *not* "testimony" but were merely unsworn, unsupported, self-serving opinions. Indeed, Adkins did not even have the opportunity to "observe the demeanor" of Tami Quinn, because Quinn only submitted a letter opposing Crowe's application and did not appear in person. (Hrg. Tr. 1, 9:19-10:24.) The two opponents of Crowe's application who did attend her hearing offered no evidence that the market was "saturated" or that additional VFH service was not needed. One, Aaron Halliday, simply stated that he did not "think there was a need" and that he "rarely" received calls requesting a female driver. (*Id.* at 11:8-12:7.) The other, Robert Rotramel, only stated that he could not "run all of [his] equipment," that "there's going to be nowhere to park" downtown, that he employed a female driver part-time for part of the year, and that there were already "plenty of companies"

and "plenty of vehicles." (*Id.* at 12:14-13:8.) Rotramel did not state *why* he could not run his equipment or otherwise elaborate on his statements. As Adkins admits, Rotramel could have had any number of reasons for not running his equipment, including a need for repairs or a lack of available drivers. (Adkins Dep. 222:18-223:16.) In the absence of any supporting details or evidence, the unsworn, undocumented, extremely brief statements of Halliday and Rotramel are not evidence of anything other than their self-serving personal preferences, and they cannot suffice to support Adkins' denial of Crowe's application.

Of course, because Crowe's financial statement and VFH owners' opinions did not support Adkins' decision, they also did not support the City Council's decision to affirm Adkins' denial of Crowe's application. Moreover, even if the City Council could have properly reviewed the record *de novo* or considered new evidence,[5] it is undisputed that the City Council *never received* Crowe's financial statement or the information it contained because the City Manager chose to exclude it from the record. (*See* Covert Dep. 62:21-63:7; Plf.'s Exh. 12, Schmidt Dep. 28:19-23, 81:9-11.) Accordingly, the City Council only heard Adkins' wholly unsupported allegations – which she falsely represented as the basis for her decision – that Crowe lacked the "cash flow" and "financial wherewithal" to operate a VFH business. (*See* Plf.'s MSJ Exh. 1, Adkins Dep. Exh. 5 at 605-06.) On the other hand, the only facts the City Council received regarding Crowe's finances were *favorable* and came from Crowe herself, who told the Council that she had equity in her home, had no credit card debt and received a monthly annuity from the

[5] Because the Ordinance contains no standards, rules, regulations, policies or procedures to guide the City Council's appellate review, the nature of the Council's review is unclear. (*See* Code, § 40-1033; Adkins Dep. 44:2-9.) Indeed, the Council members themselves stated at Crowe's appeal hearing that *they* did not understand the nature of the proceeding. (*See* Plf.'s MSJ at 8.) In any event, as shown in Section III.B above, its consideration of new grounds and evidence without giving Crowe a sufficient opportunity to respond violated her right to procedural due process.

Navy. (*Id.* at 609.) Thus, even if the City Council could have properly considered new evidence on appeal, it still would have had no evidentiary basis for denying Crowe's application based on her finances.

B. The undisputed facts establish that the application and public hearing record actually support granting Plaintiff a COC.

The record is otherwise devoid of any evidence to support the denial of Crowe's application. For example, it is undisputed that there is no evidence that Crowe or her vehicle would be unsafe, harm the public or contribute to street congestion. (Adkins Dep. 200:3-201:20.) The City's Motion makes passing reference to the number of licensed VFH seats (Def.'s Mot. 15, a factor Adkins purportedly considers in deciding whether to grant a COC (Adkins Dep. 177:12-14). The record, however, contains no competent evidence regarding the number of seats: No one with personal knowledge testified or provided other evidence in the record on the number of seats licensed in the City. Moreover, it is undisputed that the number of seats Adkins stated at Crowe's hearing, 910, was inaccurate. (*Id.* at 214:19-217:23.) The record also lacks evidence of how many licensed seats actually operate on any given night (*Id.* at 188:21-189:1), but it does contain undisputed evidence that not all vehicles are operated (Hrg. Tr. 12:14-19). Accordingly, the record lacks any evidence to show that the current number of seats sufficed to satisfy the public's need.

The City's Motion also makes passing reference to Adkins' "belief that the downtown was clear [on weekends] by 2:40-2:45 a.m." This cannot support denying Crowe's application, however, because it is undisputed that it would be better to have the downtown cleared of people as early as possible and that an additional VFH, such as Crowe's 15-passenger van, would help do so. (Adkins Dep. 158:9-159:8; 211:1-212:23.) Also, Crowe explained at her hearing that her van would benefit smaller groups seeking transportation early in the evening (Hrg. Tr. 6:1-6) –

so the time by which the downtown clears at night is irrelevant to whether Crowe's service earlier in the evening would serve the public interest.

Although there is no record evidence to support denying Crowe's application, there is undisputed record evidence that supports granting it. For example, it is undisputed that:

- "[I]t would be desirable to provide a female vehicle for hire service for female coeds who wish to utilize such a service" (Adkins Dep. 171:19-173:15) and Crowe would provide such a service (Hrg. Tr. 6:24-7:13);
- Another female VFH driver in Bloomington would contribute to diversity, be desirable and in the public interest and serve the interests of consumers (Adkins Dep. 173:16-174:17), and Crowe would be another female VFH driver (Hrg. Tr. 6:24-7:13);
- Crowe's petition from downtown bar owners supporting her application (*see* Adkins Exh. 1) is evidence that granting a COC would benefit the public convenience (Adkins Dep. 183:1-10).

Accordingly, as set forth more fully in Plaintiff's Motion for Summary Judgment, because the undisputed record evidence supports granting Crowe's application and shows that Adkins's decision was arbitrary, unreasonable and not based on evidence, the City's denial of Crowe's application was against the manifest weight of the evidence and should be reversed.

CONCLUSION

The City failed to show that it is entitled to judgment as a matter of law. For all the foregoing reasons, Plaintiff respectfully requests that the Court deny the City's Motion, grant Plaintiff's Motion for Summary Judgment and enter judgment in favor of Plaintiff and against Defendant.

DATED: MAY 6, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

On May 6, 2013, I served the foregoing Response in Opposition to Defendant's Motion for Summary Judgment sending a copy by electronic mail to Plaintiff's counsel, J. Todd Greenburg, at tgreenburg@cityblm.org.

Attorney for Plaintiff