

STATE OF INDIANA
BEFORE THE ALCOHOL & TOBACCO COMMISSION

IN THE MATTER OF)
THE PERMIT OF:)
)
JEFFREY PHIPPS) **PERMIT NO. RR18-08317**
d/b/a BYGONES'S BAR & GRILL)
2108 N WALNUT)
MUNCIE, IN 47303)
Applicant

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Background of the Case

Bygone's Bar & Grill ("Applicant") is an applicant for renewal of Alcohol and Tobacco Commission permit type 210. The Alcoholic Beverage Board of Delaware County ("Local Board") held a hearing and voted 4-0 to recommend denial of the application for renewal. Applicant requested an appeal hearing before the Alcohol and Tobacco Commission ("Commission" or "ATC".) Applicant, by counsel Michael Alexander participated in an appeal hearing held before Douglas M. Kowalski ("Hearing Judge".) The Hearing Judge, having read the typed transcripts and documents from the Local Board hearing, the evidence and testimony submitted during the Local Board hearing and the contents of the entire file, as well as having taken judicial notice of the same, as well as the codes and standards adopted by the State of Indiana, now tenders Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. Procedural History

1. Applicant is the holder of an Alcohol and Tobacco Commission permit type 210, numbered RR18-08317 ("Permit").
2. On September 27, 2011, Applicant submitted an application to the Commission for the purpose of renewing its Permit.
3. On December 1, 2011, the Local Board took testimony and continued the hearing to January 5, 2012, for further investigation.

4. On January 5, 2012, the Local Board, with three members present, took additional testimony and reset the hearing for February 1, 2012, for all four local board members to vote on the application.
5. On February 1, 2012, the Local Board voted 4-0 to recommend denial of the application for renewal.
6. On February 21, 2012, the Commission voted 3-0 to adopt the recommendation of the Local Board to deny the application for renewal.
7. On October 25, 2012, the Hearing Judge heard the Applicant's appeal of the Commission's denial of the application for renewal.

III. Evidence Before the Local Board

1. The following individuals testified before the Local Board in favor of the Applicant:
 - a. Michael Adams, manager of Applicant
 - b. Bruce McClaren, permit processor for Applicant
 - c. Jeffrey Phipps, Applicant
2. The following evidence was introduced and admitted before the Local Board in favor of the Applicant:
 - a. Unsigned letter from permittee to neighbors.
 - b. Petition from permittee with one hundred signatures (only eight provided contact information)
3. The following individuals testified before the Local Board:
 - a. Linda and Rod Case, live directly across the street from Applicant.
 - b. Linda Gregory, Muncie City Councilwoman.
 - c. Sue Schlagel, neighbor of Applicant.
 - d. Carolyn Lopez, neighbor of Applicant.
 - e. Jeff Arnold, Delaware County Prosecutor.
 - f. Sgt. Joe Krejsa, Muncie Police Department.
 - g. Lt. Al Williams, Muncie Police Department.
 - h. Terry Troxell, Food Safety Director for Delaware County Health Department.
 - i. Mike Blanch, concerned citizen.

4. The following evidence was introduced and admitted before the Local Board against the Applicant:
 - a. Indiana State Excise Police (ISEP) report from March 4, 2011.
 - b. ISEP report from August 13, 2011.
 - c. Photo of marquee at the premise.
 - d. Two pages of notes from Mrs. Linda Case.
 - e. Muncie Police dispatch report for 2108 N Walnut Street.
 - f. Petition against permit with twenty-eight signatures (twenty-seven with contact information)
 - g. List of questions about Bygones.
 - h. Twenty-four pages of police reports.
 - i. Muncie Police incident log.
 - j. Delaware County Health Department complaint
 - k. Delaware County Health Department complaint
 - l. Letter from unnamed concerned citizen.
 - m. Muncie Police incident log.
 - n. Muncie Fire Department report
 - o. Muncie Police incident log.

IV. Evidence Before the Commission

1. The contents of the entire Commission file regarding the Permit ("ATC File").
2. The following individuals testified at the Appeal Hearing on October 25, 2012, in favor of the Applicant:
 - a. Micahel J. Alexander, Attorney for Applicant.
 - b. Bruce McClaren, permit processor for Applicant.
3. The following evidence was introduced and admitted before the Hearing Judge in favor of the Applicant:
 - a. Exhibit A: Three photos of the permit location.
4. The following individuals testified at the Appeal Hearing on October 25, 2012, against the Applicant:

- a. Linda and Rod Case, live directly across the street from Applicant.
 - b. Darcie Brooks, lives less than a block from Applicant.
5. The following evidence was introduced and admitted before the Hearing Judge against the Applicant:
- a. None.

V. Findings of Fact

1. Applicant is the holder of an Alcohol and Tobacco Commission permit type 210, numbered RR18-08317. (ATC File)
2. Applicant filed a Manager's Questionnaire March 11, 2011, to add Michael Adams as manager. (ATC File)
3. Applicant had vacated the business in July 2010, prior to the Manager's Questionnaire. (Local Board)
4. Phipps has never met Adams despite the Manager's Questionnaire. (Local Board)
5. Phipps purchased the permit on contract from John Neal. (Local Board)
6. John Neal has not applied for transfer of the permit to his name. (ATC File)
7. Michael Adams testified he was buying the permit on contract. (Local Board)
8. Phipps testified the only agreement he has with Adams is the Manager's Questionnaire.
9. Adams operated the business for an unknown duration of time without a food permit and in violation of the Department of Health. (Local Board)
10. On March 4, 2011, a violation was issued for not having a Manager's Questionnaire on file, record of employee permits, and minimum food requirements. (ATC File)
11. On August 13, 2011, Muncie Police Department was called to the premise on a noise complaint. Upon entering, Excise Officer Brandon Thomas saw approximately four hundred people. Most of the people were holding and consuming alcohol after hours. (Local Board Exhibit 2)

12. Officer Thomas also detected the odor of burnt marijuana inside the permit premise. (Local Board Exhibit 2)
13. Neighbors complain that customers litter their yards and neighborhood upon leaving the bar.
14. Neighbors are regularly woken by sirens and lights of police cars called to the permit premise.
15. The police runs were for multiple instances of noise violations, fighting, and shots fired. (Local Board Exhibit 5, 8, 11)
16. Due to inadequate parking, the overflow takes over surrounding business' parking lots, as well as residential driveways. (Local Board)
17. Jeff Arnold, Delaware County Prosecutor, has been investigating and prosecuting violent crime for approximately thirty years. (Local Board)
18. In Arnold's opinion, the permit premise has become a stationary violent environment resulting in a predictably dangerous neighborhood that has become a drain on law enforcement. (Local Board)
19. Applicant wants nothing to do with the permit and wants it out of his name. (Local Board)
20. Applicant did not appear at the appeal hearing.
21. Michael Alexander appeared as applicant's counsel.
22. Alexander mentioned that he is also counsel for John Neal and Cheryl Eagan.
23. Alexander's sole argument at the appeal hearing was that to be considered a public nuisance criminal activity must take place inside of the permit premise. (Appeal Hearing)
24. Any Finding of Fact may be considered a Conclusion of Law, if the context so warrants.

VI. Conclusions of Law

1. The Commission has jurisdiction over this matter pursuant to IND. CODE § 7.1-1-2-2 and IND. CODE § 7.1-2-3-9.
2. Applicant properly submitted an application for renewal of its Permit in accordance with IND. CODE § 7.1-3-1-4.
3. The Commission is authorized to act upon proper application. IND. CODE § 7.1-3-1-4.
4. The Commission is required to follow the recommendation of the Local Board when the Local Board votes to deny an application by majority vote, unless the recommendation is arbitrary, capricious, contrary to a constitutional right, outside statutory jurisdiction, without observance of required procedures, or unsupported by substantial evidence. IND. CODE § 7.1-3-19-11.
5. The Hearing Judge may take judicial notice of the ATC File, including the transcript of proceedings and exhibits before the Local Board. 905 IND. ADMIN. CODE 1-36-7(a).
6. The Hearing Judge may consider as evidence all documents, codes, and standards that have been adopted by the State of Indiana. 905 IND. ADMIN. CODE 1-36-8(e).
7. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission, including a public hearing and a review of the record and documents in the ATC File. IND. CODE § 7.1-3-19-11(a); 905 IND. ADMIN. CODE 1-36-7(a).
8. A renewal application may be denied for one of the following reasons: (1) the permittee does not maintain a high and fine reputation, and is not of good moral character and good repute in the community; (2) the permittee has allowed the licensed premises to become a public nuisance, or the scene of acts or conduct which are prohibited by the criminal laws of Indiana or the United States; (3) the permittee violates or refuses to comply with a provision or a rule or regulation of the Commission. 905 IND. ADMIN. CODE 1-27-1, 2, and 3.
9. In determining an Applicant's eligibility to hold, renew, or continue to hold a permit, particularly where the applicant is of good moral character and of good repute, the Commission shall consider whether acts or conduct of the applicant or agents or employees constitutes action or conduct prohibited by the Indiana Penal Code or United States Code. 905 IND. ADMIN. CODE 1-27-1.
10. The Commission is not required to determine beyond a reasonable doubt that the act or conduct in issue would constitute an act or conduct prohibited by the Indiana

Penal Code. The Commission may refuse to grant or renew a permit for a violation of this regulation. 905 IND. ADMIN. CODE 1-27-3.

11. The Commission may investigate an application for such a permit in whatever manner it deems best and may grant or refuse the application "as it deems the public interest shall be served best." Ind. Code § 7.1-3-19-10
12. Substantial evidence is the standard to be applied by the Commission in review of the record of proceedings. Substantial evidence requires something more than a scintilla, and less than a preponderance of evidence; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Indiana Alcoholic Beverage Comm. v. River Road Lounge*, 590 N.E. 2d 656, 659 (Ind. App. 1992); see also *Roberts v. County of Allen*, 773 N.E.2d 850, 853 (Ind. App. 2002). Substantial evidence is more than speculation or conjecture. *Id.*
13. The LB found by showing of substantial evidence that the Permittee has allowed the permit premises to become a public nuisance in violation of 905 IAC 1-27-1, and has failed to maintain a high and fine reputation in the community in which it exists in violation of 905 IAC 1-27-2
14. At the appeal hearing, the Permittee failed to refute the finding of the LB that by substantial evidence it had been established that the permit premises has become a public nuisance and that the Permittee has failed to maintain a high and fine reputation.
15. The recommendation by the LB and the adoption of that recommendation by the ATC was not: 1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; 2) contrary to a constitutional right, power, privilege, or immunity; 3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; 4) without observance of procedure required by law; or 5) unsupported by substantial evidence. IC 7.1-3-19-11

THEREFORE IT IS CONSIDERED ORDERED AND ADJUDGED that the finding of the Delaware County Local Board that the renewal application of the Permittee shall be denied and the adoption of that recommendation by the Alcohol and Tobacco Commission is hereby upheld and the finding that this renewal should be denied is hereby affirmed.

Dated: June 11, 2013

Douglas M Kowalski
Hearing Judge