

**BEFORE THE
INDIANA ALCOHOL AND TOBACCO COMMISSION**

IN THE MATTER OF)	
THE PERMIT OF)	
)	
THE MANCAVE NITECLUB LLC)	PERMIT NO. RR45-32669
3201 E DUNES HIGHWAY)	
GARY, INDIANA 46402)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

The Mancave Niteclub, LLC, 3201 E Dunes Highway, Gary, Indiana, 46402, permit number RR45-32669 (Applicant), is the applicant for a new permit to sell beer and wine, in a retail location, located in an incorporated area to be issued by the Alcohol and Tobacco Commission (ATC). The application was assigned to the Alcoholic Beverage Board of Lake County (Local Board). The Applicant's matter was heard on October 4, 2016, where it was denied by a vote of 4-0, based on the lack of community desire and possible negative impact on the community. On October 18, 2016, the Commission adopted the findings of the Local Board and denied the permit. The Applicant filed a timely motion for an appeal hearing regarding the Commission's denial, which was granted.

The matter was set for hearing on March 1, 2017, and that time, witnesses were sworn, evidence was heard, and the matter was taken under advisement. The Hearing Officer also took judicial notice of the entire contents of the file related to this cause. Having been duly advised of the facts and law at issue, the Hearing Officer now submits these Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. EVIDENCE BEFORE THE LOCAL BOARD

- A. The following individuals testified before the Local Board in favor of the Applicant in this cause:

1. Donald Schilz, owner of Applicant;
2. Terry Roos, manager for Applicant; and
3. Joseph Svetanoff, attorney for Applicant.

B. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:

1. Affidavit of Compliance Regarding Notice Posting (Exhibit A);
2. Property Tax Clearance Schedule – Form 1 (Exhibit B);
3. County Verification of Business Location (Exhibit C);
4. Certificate of Organization and Articles of Incorporation for Applicant (Exhibit D);
5. Restaurant and Retail Food License (city of Gary), Registered Retail Merchant Certificate (IN Department of Revenue), General Business License (city of Gary), Amusement/Entertainment Annual Operating Permit (State Fire Marshal), Inspection sign-off by the Gary Fire Department, and Building/Plumbing/HVAC Inspections (city of Gary) (Exhibit E);
6. Aerial picture of premises and surrounding area (Exhibit F);
7. Floorplan of Applicant (Exhibit G);
8. Interior of Applicant premises (Exhibit H); and
9. Petition in favor of operating the operation of Applicant (approximately 18 signatures).

C. The following individuals appeared before the Local Board against the Applicant in this cause:

1. Jessica Renslow, resident of Gary, IN;
2. Susan Rutsen, resident of Gary, IN;
3. Mark Kurowski, resident of Munster, IN;
4. Jane Callies, resident of Gary, IN
5. George Rogge, president of the Miller Business Association (MBA).

D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:

1. None.

III. EVIDENCE BEFORE THE COMMISSION

A. The following individuals appeared before the Commission in favor of the Applicant in this cause:

1. Donald Schilz, owner of Applicant;
2. Terry Roos, manager for Applicant; and
3. D. Eric Neff, attorney for Applicant.

- B. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:
1. Letter dated March 17, 2017 to Gary city attorney Gregory Thomas stating that Applicant is withdrawing any special use permit request for this location. (Exhibit A).
- C. The following individuals appeared before the Commission against the Applicant in this cause:
1. George Rogge, President of Miller Business Association;
 2. Jane Callies, resident of Gary;
 3. Susan Rutsen, community leader;
- D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:
1. Settlement Agreement and Release between Applicant and City of Gary, dated May 21, 2016 (Exhibit 1);
 2. Gary ordinance Article III, Section 10-51 (Sexually Oriented Businesses) (Exhibit 2); and
 3. Office of Public Access Counselor, formal complaint stated October 11, 2016.

IV. FINDINGS OF FACT

1. The Mancave Niteclub, LLC, 3201 E Dunes Highway, Gary, Indiana, 46402, permit number RR45-32669 (Applicant), is the applicant for a new permit to sell beer and wine, in a restaurant located in an incorporated area to be issued by the Alcohol and Tobacco Commission (ATC File).
2. There are 54 Beer and Wine retail permits on quota for the city of Gary, with 50 presently available. (ATC File).
3. The Applicant meets the qualifications to hold a permit pursuant to Ind. Code §§ 7.1-3-4-2. (Local Board Hearing; ATC Hearing).

4. Applicant has received the necessary business permits to operate within the city of Gary. (Local Board Hearing).

5. Applicant invested close to \$50,000 to improve the site, including an interior remodel. (Local Board Hearing).

6. Applicant has/will install 16 cameras on the premises and has stated the owner will have a personal hand in the operations and supervision of the business. (Local Board Hearing, ATC Hearing).

7. Applicant's location is in an area zoned for commercial use and not in a residential area. (Local Board Hearing, ATC Hearing).

8. Applicant intends to operate the premises as a nightclub/bar that serves food and alcohol with a dance floor as well as providing entertainment games such as video games, darts, air hockey, etc. (Local Board Hearing, ATC Hearing).

9. Applicant will operate the premises in a "cabaret style" of which there are other nightclubs operating as such two to three miles east of the proposed location. (ATC Hearing).

10. The city of Gary defines an Adult Cabaret, in relevant part, as a nightclub which regularly features persons who appear semi-nude, live performances which are characterized by the exposure of specified anatomical areas or specified sexual activities. (ATC Hearing).

11. Applicant has withdrawn request from the city to operate under a special use permit for adult entertainment. (ATC Hearing Exhibit).

12. Applicant's location has been used as an adult entertainment club in the past by previous owners. (Local Board Hearing).

13. Remonstrators classify the proposed business model as a sexually oriented business and state that there are 23 secondary negative effects that can be caused by a sexually-oriented business. (ATC Hearing).

14. The Millers Business Association, via Mr. Rogge, stated that if this establishment were to be a sports bar, for example, they would not have any objections to the sale of alcohol in this location. (ATC Hearing).

15. Remonstrator states that a community survey was conducted to which 131 people responded, stating "Some people were very against The Man Cave Niteclub, LLC. Some people were neutral and some people for it."

16. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Ind. Code §7.1-1-2-2; §7.1-2-3-9.

2. The permit application was properly submitted pursuant to Ind. Code §7.1-3-1-4.

3. The Commission is authorized to act upon proper application. *Id.*

4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

5. 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

Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); see also Ind. Code § 4-21.5-3-27(d).

6. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).

7. In determining whether to renew a permit, the Commission may consider whether the applicant refuses to comply with the provisions and the rules and regulations of the Commission. *Ind. Code §7.1-3-23-5.*

8. In determining whether to award a permit a new application, the Commission shall investigate the need for such services at the proposed location and the desire of the neighborhood or community to receive such services. 905 IAC 1-24-4(a) and (b).

9. Where the choice for the product is slim or nil, that will usually show a need, which would shift the burden to remonstrators to show that there are alternatives, of that whether or not need exists, there is simply no desire for the product. *See John Malone Enterprises, Inc. v. Schaeffer, et al., Ind. App. (1996), 674 N.E.2d 599.*

10. "Need" means whether the services are available at the location or in some close geographical proximity. 905 IAC 1-27-4(a).

11. "Desire" means whether the individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).

12. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*

13. The Commission may reverse a local board's action in denying an application for a permit *only* if it finds that the local board's decision was (a) arbitrary, capricious, an abuse

of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; or (d) without observation of procedure required by law, or unsupported by substantial evidence. *Ind. Code §7.1-3-19-11.*

14. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

IV. RECOMMENDATION

A new or transfer of location permit can be denied for many reasons. For example, the proximity to a church or school, lack of high and fine reputation in the community, and the need and desire of the community for such services are all reasons listed in statute or rule. In the case of the above examples, the premises is not located within the 200-foot mark of the wall of a school or church and there is no evidence that the Applicant does not have a high and fine reputation in the community. The remonstrators explicitly states that their remonstrance is based on the lack of need and/or desire of the community to have such services.

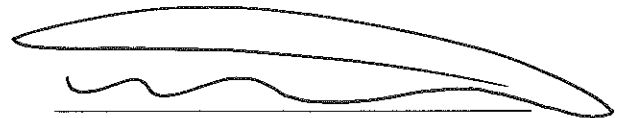
The remonstrators have stated that their sole concern with this establishment is the type of business the Applicant intends to run. Their concerns do not revolve around alcohol being served at the location – whether or not alcohol were to be served, the remonstrators would not want this business to operate under the proposed model in this location. In fact, it was stated by one remonstrator that if this were a “sports bar” there would be no issue.

It is well-established fact that alcoholic beverage permit holders are permitted by law to allow adult-oriented dancing on the licensed premises without obtaining prior authorization

from the Commission, subject to floor plan approval under 905 IAC 1-16.1-1.¹ Review of this decision, then is dependent upon whether or not the community desires this premises in terms of alcohol sales therein. In that there have been no remonstrators objecting to the sale of alcohol at this location, coupled with the fact that an equal, if not greater, number of people have signed Applicant's petition to allow them to operate, the Applicant is awarded his permit.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Lake County Local Board and the Commission to deny the application for the permit number RR45-32669, should be reversed and the application of the ManCave Niteclub, LLC, 3201 E Dunes Highway, Gary, Indiana, 46402, for a beer and wine retail permit, thus applied for herein, be APPROVED.

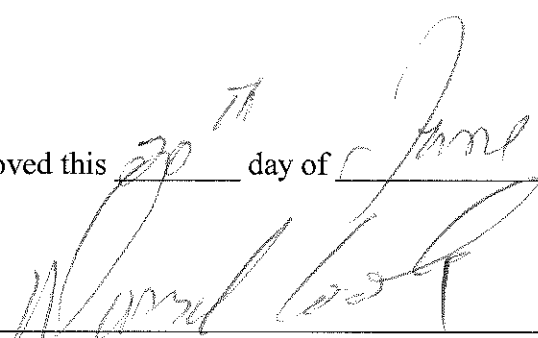
DATE: May 23, 2017



David Rothenberg, Hearing Officer

¹ See *Indiana Alcohol & Tobacco Commission vs. Ultimate Place, LLC*, 894 N.E.2d 1107 (Ind. App, 2008), unpublished, in which the Court considered a Commission denial of a transfer under the circumstances in which the owner converted the establishment into an adult-oriented club.


Approved this 20th day of June, 2017.



DAVID COOK, CHAIRMAN



DAVID COLEMAN, VICE CHAIRMAN



DALE GRUBB, COMMISSIONER

MARJORIE MAGINN, COMMISSIONER