

STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL & TOBACCO COMMISSION

IN THE MATTER OF)	
THE PERMIT OF:)	
)	
SCOTTY DOG HOUSE, INC.)	PERMIT NO. RR84-00292
D/B/A DAWG HOUSE PUB)	
HAROLD ROSS, PRESIDENT)	
2940 DEKALB STREET)	
NEW CHICAGO, INDIANA 46405)	
Applicant		

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Background of the Case

Scotty Dog House, Inc. d/b/a Dawg House Pub (“Applicant”) is an applicant for renewal of Alcohol and Tobacco Commission permit type 210. The Alcoholic Beverage Board of Vigo County (“Local Board”) held a hearing and voted 3-0 to deny the application for renewal. Applicant requested an appeal hearing before the Indiana Alcohol and Tobacco Commission (“Commission” or “ATC”). Applicant, by counsel Matthew E. Morgan of Barnes & Thornburg LLP, participated in an appeal hearing held before N. Davey Neal (“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 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 RR84-00292 (“Permit”).
2. On November 3, 2010, Applicant submitted an application to the Commission for the purpose of renewing its Permit.

3. On December 7, 2010, Applicant's Permit was placed into escrow pursuant to IND. CODE § 7.1-3-1-3.5.
4. On August 15, 2011, the Local Board concluded its investigation and the three members of the Local Board who were present at the August 15th hearing voted to deny the Applicant's application for renewal of its Permit.
5. On August 18, 2011, the Applicant filed a letter with the Commission objecting to the Local Board's recommendation and the Applicant requested an appeal hearing before the Commission.
6. On December 19, 2011, N. Davey Neal, Executive Secretary of the Commission, (the "Hearing Judge") heard the Applicant's appeal of the Local Board's recommendation to deny renewal.

III. Evidence Before the Local Board

1. The following individuals testified before the Local Board on August 15, 2011 in favor of the Applicant:
 - a. The Applicant, through its President Harold Ross, responded to questions from the Local Board.
2. The following evidence was introduced and admitted before the Local Board in favor of the Applicant:
 - a. None.
3. The following individuals testified before the Local Board on August 15, 2011 against the Applicant:
 - a. None. There were no sworn remonstrators.
4. The following evidence was introduced and admitted before the Local Board against the Applicant:
 - a. The Local Board reviewed Indiana State Excise Police ("ISEP") records which were not formally marked as exhibits, but are deemed as such and are considered a part of the Commission's record in this matter.

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 December 19, 2011 in favor of the Applicant:
 - a. The Applicant, through its President Harold Ross, responded to questions from the Hearing Judge.
 - b. Applicant was represented by legal counsel Matthew E. Morgan, Barnes & Thornburg LLP.
3. The following evidence was introduced and admitted before the Hearing Judge in favor of the Applicant:
 - a. Exhibit A: A redacted version of a memo written by ISEP Officer Brian Stewart to the attention of the Commission’s paralegal Kim Chew dated August 31, 2011 (RE: Summary of Reasons for Recommendation of Denial re: Application for Renewal for Scotty Dog House, Inc (RR84-00292)).
4. The following individuals testified at the Appeal Hearing on December 19, 2011 against the Applicant:
 - a. None. There were no sworn remonstrators.
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 RR84-00292. (ATC File)
2. Harold Ross is the President of Scotty Dog House, Inc. (ATC File)
3. On October 29, 2009, the Applicant was cited by ISEP upon probable cause that Applicant furnished an alcoholic beverage to a minor in violation of IND. CODE § 7.1-5-7-8 and that Applicant allowed a minor to be in a prohibited place in violation of IND. CODE § 7.1-5-7-10(B) (the “October 29th Citations”). (ATC File)

4. On January 8, 2010, the State of Indiana, by and through a duly appointed Prosecutor of the Commission, provided a settlement offer to the Applicant in regards to the October 29th Citations. (ATC File)
5. On January 21, 2010, Applicant accepted the settlement offer in regards to the October 29th Citations in which Applicant admitted to the violations and paid a \$500.00 fine. (ATC File)
6. On January 22, 2010, the Applicant was cited by ISEP upon probable cause that Applicant purchased beer and liquor from an entity that was not entitled to sell alcohol to Applicant in violation of IND. CODE § 7.1-3-4-6 and IND. CODE § 7.1-3-9-9, respectively. Applicant was also cited by ISEP upon probable cause that Applicant was unprepared to exhibit employee permit records upon request of the ISEP in violation of 905 IND. ADMIN. CODE 1-12.1-2. Lastly, Applicant was cited by ISEP upon probable cause that the licensed premises had become a public nuisance in violation of 905 IND. ADMIN. CODE 1-27-2 (Collectively, the "January 22nd Citations".) (ATC File)
7. On June 6, 2010, the Applicant was cited by ISEP upon probable cause that Applicant sold alcoholic beverages during a portion of the day at a price that was reduced from the established price that the Applicant charged during the remainder of that day in violation of IND. CODE § 7.1-5-10-20 (the "June 6th Citations".) (ATC File)
8. On July 2, 2010, the Applicant was cited by ISEP upon probable cause that Applicant discriminated between purchasers by granting a price discount which was not available to all purchasers at the same time in violation of IND. CODE § 7.1-5-5-7. Applicant was also cited by ISEP upon probable cause that Applicant was improperly advertising type II gambling games in violation of 905 IND. ADMIN. CODE 1-53-9 (Collectively, the "July 2nd Citations".) (ATC File)
9. On July 29, 2010, the Applicant was cited by ISEP upon probable cause that Applicant was operating under an expired permit in violation of IND. CODE § 7.1-3-1-3. Applicant was also cited by ISEP upon probable cause that Applicant was unprepared to exhibit employee permit records upon ISEP request in violation of IND. CODE § 7.1-5-6-3 and 905 IND. ADMIN. CODE 1-12.1-2. Lastly, Applicant was cited by ISEP upon probable cause that Applicant was unable to provide minimum menu requirements in violation of IND. ADMIN. CODE 1-20-1 (Collectively, the "July 29th Citations".) (ATC File)

10. On November 3, 2010, the Applicant submitted a handwritten letter to the Commission requesting that its Permit be placed into escrow due to economic hardship. (ATC File; Appeal Hearing)
11. On November 23, 2010, the State of Indiana, by and through a duly appointed Prosecutor of the Commission, provided a settlement offer to the Applicant in regards to the January 22nd Citations, the June 6th Citations, the July 2nd Citations, and the July 29th Citations (collectively, the “2010 Citations”). The settlement offer stated:

“This permit must be placed into escrow, within 14 days of this offer. Failure to do this may result in fines and/or penalties. The business is closed and currently in foreclosure. All Charges are dismissed.”
- Additionally, the “Total Offer” entry only stated one word, “Dismissed.” (ATC File)
12. On December 7, 2010, the Commission approved Applicant’s request to place its Permit into escrow pursuant to IND. CODE § 7.1-3-1-3.5. (ATC File)
13. On December 16, 2010 Applicant signed the settlement offer of November 23, 2010. (ATC File)
14. Applicant through its President and legal counsel testified that it was the Applicant’s understanding, at the time of settlement offer, that the dismissal was without prejudice since the Commission reserved the right to pursue fines or penalties against Applicant if certain conditions subsequent were not satisfied (i.e., proper placement of permit into escrow). (Appeal Hearing)
15. On August 15, 2011, the Local Board conducted an investigatory hearing and the three members of the Local Board who were present at the hearing voted to deny the Applicant’s application for renewal of its Permit which was being held in escrow. (ATC File)
16. On August 31, 2011, ISEP Officer Brian Stewart, who is a voting member of the Local Board, drafted a memorandum (the “Local Board Memo”) to Commission paralegal Kim Chew outlining the “summary reasons for recommendation of denial.” (ATC File)

17. The Local Board Memo stated in its conclusion that the vote to deny renewal “was based on the belief that the premises has become the scene of acts or conduct prohibited by I.C. 7.1.” (ATC File)
18. 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; (4) the permittee has ceased to possess any of the qualifications, including alteration or cessation of the particular business or type of business then engaged in, which qualifies him to hold that particular type of permit; or (5) the applicant has not fully disclosed the true facts in respect of the location of the permit premises for which the permit is applied. 905 IND. ADMIN. CODE 1-27-1, 2, and 3.

9. In determining a 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 Applicant contends the Local Board's decision not to renew the Permit was based on alleged violations of Indiana law and, therefore, was (a) in excess of its authority because the Commission acted, previous to the Local Board's hearings, to dismiss all criminal and civil charges against Applicant; (b) contrary to well defined constitutional principles regarding a presumption of innocence in matters not finally adjudicated by an authoritative body; and (c) contrary to required procedures associated with the adjudication of citations by ISEP. (Appeal Hearing)
11. Where an issue involves a charge of moral turpitude, the presumption of innocence obtains in civil as well as in criminal cases; hence when in a civil action a party is charged with a crime, the evidence should be sufficient to overcome the presumption of innocence. *Spurlin v. State*, 20 Ind. App. 342 (Ind. Ct. App. 1898).
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 function of a local board is that of a recommending body. The Commission itself is the ultimate decision maker; it is required to follow the recommendation of the local board only when a majority of the members of the local board vote to deny the application for a permit. In all other instances the Commission can act with or without the approval of the local board. *Indiana Alcoholic Beverage Com. v. State*, 269 Ind. 48, 58 (Ind. 1978).

14. While the Applicant's qualifications and fitness to hold an alcohol permit are legitimately in question, the due process provided Applicant is equally in question. Without any documented testimony in opposition to the Applicant, dismissed charges cannot solely validate a Local Board's decision given the constitutional presumption of innocence. Substantial evidence, given the totality of the record and proceedings, must form the basis for the Commission's decision. *Indiana Alcoholic Beverage Comm. v. River Road Lounge*, 590 N.E. 2d 656, 659 (Ind. App. 1992).
15. The initial findings of the Local Board were without observance or procedure required by law. IND. CODE § 7.1-3-19-11
16. The Commission, at its discretion, however, may allow the Applicant to place the denied Permit into escrow and allow a reasonable time for the Applicant to sell the Permit to a bona fide purchaser for value in an arms length transaction subject to the approval of the Commission. 905 IND. ADMIN. CODE 1-36-2(c).

Therefore, it is ORDERED, ADJUDGED AND DECREED that the recommendation of the Local Board to deny this renewal application must be REVERSED.

It is, however, further ORDERED, ADJUDGED AND DECREED that the Permit shall be RENEWED and placed in ESCROW for the exclusive and limited purpose to allow for the sale of the Permit to a bona fide purchaser for value in an arms length transaction subject to the approval of the Commission.

It is, further, ORDERED, ADJUDGED AND DECREED that the Permit shall remain in ESCROW for a period of one year from the date of approval of these findings. The Applicant shall provide a written progress report on a date six months from the date of approval of these findings. The ESCROW period shall not extend beyond one year without the written consent of the Commission.

It is, finally, ORDERED, ADJUDGED and DECREED that the appeal of the Applicant is GRANTED, and the renewal of permit for the limited use by Applicant as stated above is hereby GRANTED.

Dated: March 22, 2012

N. Davey Neal
Hearing Judge