

**STATE OF INDIANA
BEFORE THE ALCOHOL AND TOBACCO COMMISSION**

IN THE MATTER OF)	
THE PERMIT OF)	PERMIT NO. RR12-12717
)	
F J L, INC.)	
d/b/a O'LENEHAN'S PUB)	

**PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. BACKGROUND OF THE CASE

FJL, Inc, d/b/a O'Lenehan's Pub ("Applicant") located at 2455 E Wabash St. Frankfort, Indiana 46041, permit number RR12-12717 is the applicant for a transfer of location ("Application for Transfer") of a type 210 Alcohol and Tobacco Commission ("Commission" or "ATC") permit to 7 North Jackson Street, Frankfort, Indiana 46041 ("Proposed Transfer Location"). The application was assigned to the Alcoholic Beverage Board of Clinton County ("Local Board"). The Local Board held a hearing on January 4, 2012, and at the conclusion of the hearing, voted unanimously to recommend denial of the Application for Transfer. The Commission adopted the Local Board's recommendation on January 17, 2012.

Applicant filed a timely Notice of Appeal and the matter was assigned to Commission Hearing Judge N. Davey Neal; however, the matter was actually heard by Vice Chairman Johnson ("Hearing Judge"). The matter was set for hearing ("ATC Hearing") on April 12, 2012, and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement. The Affidavit filed by Carol Montgomery on April 27, 2012, after the hearing held on April 12, 2012, and the Response filed by her to the Applicant's Motion to Strike, have been stricken and have not been considered by this Hearing Judge. The Hearing Judge, having reviewed the tape-recorded transcript of the Local Board hearing, the evidence submitted to the

Commission during the appeal hearing and the contents of the entire Commission file, now tenders his Proposed Findings of Fact and Conclusions of Law for recommendation to the members of the Commission.

II. EVIDENCE BEFORE THE LOCAL BOARD

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

1. Tyler Best, personal friend of Jonas Lenehan.
2. Blake Pullen, Owner of Clubhouse Barbershop, 10 N. Main St. Frankfort, Indiana.
3. F. Joe Lenehan, co-owner of Applicant, d/b/a Sportsbar/O’Lenehan’s Pub.
4. Jonas Lenehan, alleged co-owner of Applicant, d/b/a Sportsbar/O’Lenehan’s Pub.

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

None.

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

1. Carol Montgomery (“Montgomery”), Jack and Jill Children’s Shoppe, 5 North Jackson Street, Frankfort, Indiana.
2. Steve Frey, Landlord of 9 North Jackson Street, Frankfort, Indiana.
3. Cliff Knuckles, Frankfort, Indiana, a recovering alcoholic and concerned citizen.

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

1. Letter from Jill Snyder, DDS, Landlord of 2, 6 and 8 S. Main Street, 7 W. Clinton St., 1009 S. Jackson St. and 1051 S. Jackson St., Frankfort, Indiana.
2. Petition in opposition with over 200 signatures and addresses.

III. EVIDENCE BEFORE THE COMMISSION

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

1. Jonas Lenehan, (“Applicant’s Alleged Co-Owner”).

2. Jeff Danner, Frankfort Police Officer.

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

1. Petition in favor of applicant with 566 signatures.
2. Letter from Chris Pippenger, Gary Zink, and James Osbon, former mayor and former Frankfort Board of Works members.
3. Letter from Jeff and Tammy Danner.
4. Letter from Marshal Bell, Bell Machine, 1400 Magnolia Ave., Frankfort, Indiana.
5. Letter from Vicky Elliott, Center Township Trustee.
6. Letter from Joel Stiller, Winski Brothers, 751 W. Washington St., Frankfort, Indiana.
7. Letter from Tammy Menefee, Tropical Breeze, 3 N Jackson St., Frankfort, Indiana.
8. Letter from Sam Power, OD, 1608 E. Wabash, Frankfort, Indiana.
9. Letter from Azteca Tropical Night Club, 55 N. Jackson St., Frankfort, Indiana.
10. Letter from T L Meyers, 952 E. Walnut Street, Frankfort, Indiana.
11. Letter from Humberto Leon (“Proposed Transfer Location Landlord”), Landlord of 7 N. Jackson, Frankfort, Indiana.
12. Shannon and Heather Brown, Sprint, 58 W. Clinton St., Frankfort.
13. Eric McCullough, Former Deputy Chief of Police, Frankfort, Indiana.
14. Blake Pullen, Club House Barbershop, 10 N. Main St., Frankfort, Indiana.
15. Aerial Photograph marked with vacant buildings.
16. Photographs of run down structures located throughout Frankfort, Indiana.

C. The following individuals testified before the Commission against the Applicant in this cause:

1. Carol Montgomery (“Montgomery”), building owner and business owner of Jack and Jill Children’s Shoppe, 5 N Jackson St, Frankfort, Indiana (a neighboring property).
2. Chris McBarnes, Mayor, Frankfort, Indiana
3. Shan Sheridan, Executive Director of the Clinton County Chamber of Commerce
4. Marshal Smith, Clinton County Economic Advancement Foundation.
5. Steve Frey, Businessman and owner of 9 N Jackson St, Frankfort, Indiana.
6. Gary Weir, owner of Edward Jones Franchise, 1 N Jackson St, Frankfort, Indiana.
7. Jill Snyder DDS, owner of properties located at 2, 6 and 8 Main Street, Frankfort, 7 W Clinton St. and 1009 S Jackson St, and 1051 S Jackson St., Frankfort, Indiana.

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

1. Second Petition in opposition with over 300 signatures and addresses.
2. Letter from Partners in Progress, signed by all board members in opposition.
3. Letter from the Clinton County Chamber of Commerce in opposition.
4. Chronological Case Summary for 12D01-1001-FD-013, State v. Jonas Lenehan (Applicant's Alleged Co-Owner), showing a Class D Felony conviction for Operating While Intoxicated, April 14, 2010, which was modified to a Class A Misdemeanor January 5, 2012.

IV. FINDINGS OF FACT

1. The Applicant, F J L, Inc., located at 2455 East Wabash, Frankfort, Indiana 46041, permit number RR12-12717, is the applicant for a transfer of location of a type 210 ATC permit. (Local Board Hearing; ATC File)
2. Applicant filed its Application for a New or Transfer Permit (State Form 51189), requesting transfer from its current location to 7 North Jackson Street, Frankfort, Indiana 46041, which was subsequently referred to the Local Board. (ATC File)
3. On or about January 4, 2012, the Local Board recommended denial of Applicant's Application for Transfer by a unanimous vote and found by substantial evidence that Applicant should not be entitled to transfer Applicant's permit number RR12-12717 to 7 North Jackson Street, Frankfort, Indiana 46041. (ATC File; Local Board Hearing)
4. Credible evidence supports the Local Board's decision. (Local Board Hearing)
5. On January 17, 2012, the Commission adopted the recommendation of the Local Board. (ATC File)
6. The Hearing Judge took judicial notice of the entire Commission file, including but not limited to, the Local Board transcript, the ATC file, and the Application for Transfer. (905 IAC 1-36-7; ATC Hearing)

7. Applicant is not in a residential area or within 200 feet of a church or school. (Local Board Hearing; ATC File)
8. Applicant renewed argument heard by the Local Board at the ATC Hearing of Applicant's positive character. (ATC Hearing)
9. Applicant argued for the first time at the ATC Hearing that the transfer sought will contribute to the economic prosperity of the Frankfort, Indiana community. (ATC Hearing)
10. Applicant argued for the first time at the ATC Hearing that a restaurant might be added to Applicant's establishment after the transfer sought is completed. (ATC Hearing)
11. Jonas Lenehan testified at the ATC Hearing that he was a co-owner of Applicant, having received shares from his mother Doris E. Lenehan. (ATC Hearing)
12. Neither record in the ATC system for Applicant's permit number RR12-12717 (one at Applicant's current location and one for the Proposed Transfer Location) lists Jonas Lenehan as president or secretary of Applicant. (ATC File)
13. The ATC File does not contain a Disclosure of Interested Parties, indicating that Doris E. Lenehan had transferred stock to Jonas Lenehan. (ATC File)
14. No evidence is before the Commission that the Proposed Transfer Location will require more employees than Applicant has now at its current location. (Local Board Hearing; ATC File; ATC Hearing)
15. Testimony revealed Applicant's hours of operation begin at 8:00 p.m. and run until 3:00 a.m., which is after most businesses are closed in Frankfort, Indiana, and, therefore, unlikely to draw shoppers to neighboring businesses. (ATC Hearing)

16. The clientele frequenting the existing neighboring businesses, such as the contiguous existing businesses to the Proposed Transfer Location: Jack and Jill Children's Shoppe and HalleluYah Way Christian Store, are likely to be very different from the clientele served by Applicant.
17. Steve Frey's testimony of cigarette butts, trash, broken bottles, vomit and urine left by patrons of the previous bar at the Proposed Transfer Location years ago and numerous complaints to law enforcement regarding the same, demonstrate a negative impact on the neighborhood and community. (ATC Hearing)
18. The contiguous property owners, a children's clothing store and religious bookstore, may suffer a decline in business, and no doubt a decline in the overall value of their businesses, should they decide to sell their businesses, if Applicant's Application to Transfer is approved. (ATC File, *see* Montgomery written statement; ATC Hearing)
19. The Courthouse Square in Frankfort is a historical gathering place for the community, different from the rest of downtown Frankfort. (ATC File, *see* Montgomery written statement; ATC Hearing) The City of Frankfort uses its square as a gathering place for parades, festivals, and special events often associated with holidays, such as: Christmas, Halloween and Homecoming parades; a Hot Dog Festival; "Kids Day;" a weekly Farmer's Market during the summer; and, beginning this summer, a three (3) hour car show on the first and third Thursdays of each month. (ATC File, *see* Carol Montgomery written statement; ATC Hearing)
20. While petitions both supporting and opposing transfer each include over 500 signatures, the owners of seven (7) retail properties located within 500 feet of the Proposed Transfer Location presented testimony in opposition to Applicant's

- Application to Transfer. (ATC Hearing) Long term renters of properties within 500 feet of the Proposed Transfer Location presented testimony in opposition. (ATC Hearing) The Mayor of the City of Frankfort, the Executive Director of the Clinton County Chamber of Commerce and Partners in Progress (a Frankfort, Indiana organization) all presented testimony or letters in opposition stating they do not desire the transfer of Applicant's establishment to the proposed location on the Historic Courthouse Square of the City of Frankfort, Indiana. (ATC File, ATC Hearing)
21. Owners of the contiguous properties to the Proposed Transfer Location, the owner of four (4) additional properties, and one 20 year business renter all located within less than 500 feet gave testimony in opposition to the proposed transfer at the ATC Hearing. (ATC hearing)
 22. Eight of the written letters in favor of the Applicant were from business owners located more than 1000 feet from the proposed location, away from the Historic Courthouse Square of Frankfort, Indiana. (ATC File; ATC Hearing)
 23. The Mayor of the City of Frankfort testified that a bar on Frankfort's Courthouse Square is contrary to the plan for the City of Frankfort. (ATC Hearing)
 24. The citizens of Frankfort, Indiana are not deprived of places to purchase and consume alcohol in the area surrounding the Proposed Transfer Location. There are two (2) full service restaurants with full service bars, and two (2) bars/nightclubs within 500 feet of the Proposed Transfer Location. (ATC File, ATC Hearing)
 25. Substantial evidence exists to conclude the neighborhood and community do not need or desire the services of Applicant at the Proposed Transfer Location. The testimony

and evidence of remonstrators opposing transfer was persuasive and credible. (Local Board Hearing; ATC Hearing; ATC File)

26. The community and neighborhood would not benefit from Transfer of Applicant's permit. (Local Board Hearing; ATC File; ATC Hearing)

27. 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 Indiana Code § 7.1-1-2-2.

2. The Application to Transfer was properly submitted and the Commission is authorized to act upon proper application pursuant to Ind. Code § 7.1-3-1-4.

3. 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).

4. 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); 905 IAC 1-37-11; *see also* Ind. Code § 4-21.5-3-27(d).

5. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. 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).

6. 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).
7. Based on the entire record, the Local Board's recommendation to deny the transfer of the Applicant's permit is based on reasonable and sound evidentiary support, and is, therefore, supported by substantial evidence. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.* 615 N.E.2d 100, 104 (Ind. App. 1993).
8. The Commission is charged to uphold local board action on a permit application unless upon review that action runs contrary to the well-established provisions of Indiana Code 7.1 and 905 Indiana Administrative Code.
9. The Commission's denial of the permit on January 17, 2012, was based upon the recommendation of the Local Board, and was based upon substantive and substantial evidence.
10. The local board is charged to conduct an investigation of an alcohol permit application even before the Commission may act. Ind. Code § 7.1-3-19-3. The statute gives local boards discretion to consider any and all relevant sources of information. Ind. Code § 7.1-3-19-8. Although the Commission may conduct its own investigation (Ind. Code § 7.1-3-19-10), it is also required to follow the local boards' recommendations unless they are 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.
11. The Commission is required to follow the recommendation of the local board when the local board votes to deny an application by a majority vote. *Indiana Alcoholic Beverage Commission v. Harmon*, 379 N.E.2d 140, 147 (Ind. 1978).
 12. The Transfer Application must conform in respect to notice and publication and investigation before the local board as in the case of an original application for a permit and shall be made upon the terms and under the rules and regulations that the Commission may prescribe. Ind. Code § 7.1-3-24-3.
 13. The Commission shall investigate a permit issuance in regard to its geographical location; determine the need for such services at the proposed location; the desire of the neighborhood or community to receive such services; and the impact of the proposed permit location on the community and neighborhood and on area businesses. 905 IAC 1-27-4.
 14. “Need” means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).
 15. “Desire” means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).
 16. A determination of whether there exists a need for the permit, or a desire for the services, and to what degree of impact of such services have on the neighborhood and area businesses turns on the facts on each case. *Id.*
 17. Viewed as a whole, the record demonstrates that the community does not need or desire the proposed services at the Proposed Transfer Location. Substantial evidence

shows that the transfer of Applicant's permit is not in the public's best interest and will have a significant negative impact on the neighborhood and area businesses. 905 IAC 1-27-4(a); Ind. Code § 7.1-3-19-10.

18. The Commission shall follow the Local Board unless upon review of that recommendation it finds that to follow that recommendation would be (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. Ind. Code § 7.1-3-19-11.
19. The Local Board's decision in denying the transfer of Applicant's permit was not (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. *Id.*
20. Any conclusion of law may be considered a finding of fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the finding of the Alcohol & Tobacco Commission in denying the transfer of Applicant, FJL, Inc, d/b/a O'Lenahan's Pub, located at 2455 E Wabash St., Frankfort, Indiana 46041, permit number RR12-12717, was based on substantial evidence and must be sustained. It is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing was not sufficient to

overturn the recommendation of the Clinton County Alcoholic Beverage Board, or to issue a finding in favor of the Applicant and against the recommendation of the Local Board. The appeal of Applicant for transfer of Applicant's Type 210 permit is hereby DENIED and the recommendation of the Local Board in this matter is UPHELD.

DATED: _____

Commissioner Johnson, Hearing Judge
Alcohol & Tobacco Commission