

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

**IN THE MATTER OF** )  
**THE PERMIT OF:** )  
 )  
**KC'S BAR AND GRILL, INC.** ) **PERMIT NO. RR45-08575**  
**KENNETH CAWTHON, PRESIDENT** )  
**2940 DEKALB STREET** )  
**NEW CHICAGO, INDIANA 46405** )  
**Applicant**

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

**I. BACKGROUND OF THE CASE**

KC's Bar & Grill, Inc. ("Applicant"), by counsel Daniel J. Ostojic, is the Applicant for the transfer of ownership of a Type 210 Alcohol and Tobacco Commission permit ("permit"), permit #RR45-08575. The Applicant was assigned to the Alcohol Beverage Board of Lake County ("Local Board"). The Local Board held a hearing and voted two (2) to one (1) to recommend denial of the permit.

The Alcohol and Tobacco Commission ("Commission") voted four (4) to zero (0) to adopt the Local Board's recommendation. The Applicant timely filed Objections and Petition for Appeal. The matter was assigned to Commission Hearing Judge N. Davey Neal ("Hearing Judge"). The Hearing Judge heard the appeal and at that time, witnesses were sworn, evidence was received and the matter was taken under advisement. The Hearing Judge, having read the transcript from the Local Board hearing, the evidence and testimony submitted during the appeal hearing and the contents of the entire ATC file, as well as having taken official notice of the same as well as the codes and standards adopted by this State, now tenders his Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

**II. PROCEDURAL HISTORY**

1. Applicant applied to transfer ownership of the permit on July 19, 2011.
2. The application was referred to the Local Board for consideration and a hearing was held on September 7, 2011.
3. The Local Board voted two (2) to one (1) to recommend denial of the permit.

4. The Commission voted four (4) to zero (0) on September 20, 2011, to disapprove the permit.
5. The Applicant timely filed Objections and Petition for Appeal on October 4, 2011.
6. The matter was set for hearing before the Commission on December 1, 2011.

### **III. EVIDENCE BEFORE THE LOCAL BOARD**

- A. The following individuals testified before the Local Board in favor of the Applicant in this cause:
  1. Applicant responded to questions from the Local Board.
- B. The following individuals testified before the Local Board against the Applicant in this cause:
  1. Dan Sebben, Chief, New Chicago Police Department.
  2. Sue "Cammey" Wilson, Manager, Mathers Lathers Laundry
  3. E. Richard Mathers, Owner, Mathers Lathers Laundry
  4. Steven Steinke, Realtor, S.A.S. Properties, Inc.
- C. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:
  1. None.
- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:
  1. None.

### **IV. EVIDENCE BEFORE THE COMMISSION**

- A. The following individuals testified before the Commission in favor of the Applicant in this cause:
  1. Laurie Robbins, President, New Chicago Town Council
  2. Lloyd Mullen, New Chicago Town Attorney
  3. Sue Pelfrey, Vice President, New Chicago Town Council
- B. The following evidence was introduced and admitted before the Commission in Favor of the Applicant in this cause:
  1. Contract for Conditional Sale of Liquor Permit, Real Estate and Business

Assets.

2. Town of New Chicago Business License. Cost if license is \$100.00
  3. Town of New Chicago Building Permit. Cost of permit is \$150.00.
  4. Town of New Chicago Receipt of Electrical Inspection. Cost of inspection is \$100.00.
  5. H.M.A. Paving and Sealcoating Proposal for parking lot work totaling \$7,500.00.
  6. Gary-Hobart Roofing Co., Inc. receipts (seven total) for materials purchased in the renovation of permit premises. A register tape totaling \$2,014.06 (which matches a "totaled" amount on the first of seven materials receipts.)
  7. Bud Insurance Agency receipt for commercial insurance at the permit premises. Premium cost is \$453.63
  8. Bud Insurance Agency receipt for renewal of commercial insurance at the permit premises. Premium renewal cost is \$615.00
  9. Expenditures to date report for Kenneth Allen Cawthon. The total expenditures, \$43,190.73, include the itemized costs listed in Applicant's Exhibits #1-#8.
  10. Letter dated November 21, 2011, from Laurie Robbins, in her official capacity as President of the Town of New Chicago Council. The letter recounts Applicant's official business with the council.
  11. Affidavit of Melody Neagu, associate broker, Ennis, Moore & Associates, Inc. The affiant recounts conversations between Remonstrator Mathers and herself regarding the permit premises.
- C. The following individuals testified before the Commission against the Applicant in this cause:
1. Sue "Cammey" Wilson, Manager, Mathers Lathers Laundry
  2. E. Richard Mathers, Owner, Mathers Lathers Laundry
- D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:
- A. Remonstrator Wilson's Notice of Appeal dated November 4, 2011, from Commission Hearing Judge. Following the letter is fourteen pages of signatures collected under the heading: "Petition to Keep KC's Bar and Grill Incorporated at 2940 Michigan Ave. Closed."
  - B. A black-and-white photocopied map of New Chicago, Indiana and the

surrounding areas of Lake Station, Indiana. The map is colored with highlighter to indicate the proximity of the permit premises to schools, other bars, liquor stores, and Remonstrator Mather's business.

#### V. FINDINGS OF FACT

1. Applicant is seeking transfer of ownership of permit. (LB hearing; ATC file).
2. The Applicant's business is in a commercial area of New Chicago. (LB hearing; Appeal hearing)
3. The prior permit holder under the same permit number was known as Stetson's Pub (LB hearing; Appeal hearing; ATC file)
4. The prior permit holder was issued several Notices of Administrative Violation by officers of the Indiana State Excise Police for violation of Indiana Code § 7.1-3-9-10 to wit Ind. Code § 35-48-4-13(b) (LB hearing; Appeal hearing; ATC file)
5. The prior permit holder was given six months to sell or transfer the permit or face revocation proceedings before the Commission. (ATC file)
6. Patrons of the prior permit holder caused property damage to nearby property owners within the commercial node shared by Remonstrator Mathers. (LB hearing; Appeal hearing)
7. Patrons of the prior permit holder caused physical harm to Remonstrator Wilson, as well as Remonstrator Mathers' customers and other bystanders. (LB hearing; Appeal hearing)
8. Applicant did not have any involvement with the previous permit holder. (Appeal hearing; ATC file)
9. Applicant has expended financial resources to secure the permit and premises, as well as improve the appearance of the premises. (Appeal hearing)
10. Remonstrator Mathers has expended financial resources to maintain the commercial node he shares with permit premises, including improving the appearance of the permit premises while the building sat vacant. (Appeal hearing)
11. Remonstrator Wilson evinces a reasonable fear that if patrons who frequented the previous permit holder return to Applicant's business, Remonstrator Mathers' customers will cease their patronage of the laundromat as their safety may be in jeopardy (LB hearing; Appeal hearing).
12. Remonstrator Sebben testified about his experiences as Chief of Police of New Chicago in relation to the prior permit holder. (LB hearing)

13. Remonstrator Sebben also testified about his concern for adding another retail alcohol permit in the small confines of New Chicago, IN. (LB hearing)
14. Remonstrator Sebben, as well as Remonstrator Wilson, expressed serious doubts about the ability of New Chicago Police or other local law enforcement to properly respond to the types of public safety threats brought by the previous permit holder should they arise again with the applicant. (LB hearing; Appeal hearing)
15. Remonstrator Steinke, on behalf of a trailer park residential community, stated the serious potential for breaches of peace faced by the trailer park with the presence of another alcohol permit in this small community. (LB hearing)
16. Applicant has expressed no interest in welcoming the kind of patrons found at the previous permit holder's business. (Appeal hearing).
17. Applicant has expressed a willingness to abide by all local, state and federal laws, especially those governing the retail sale of alcohol. (Appeal hearing)
18. Applicant did not have an opportunity to present supporting or rebutting evidence at the Local Board hearing. (LB hearing; Appeal hearing; ATC file)
19. Any Finding of Fact may be considered a Conclusion of Law, if the context so warrants.

## VI. CONCLUSIONS OF LAW

1. The ATC has jurisdiction over this matter pursuant to Ind. Code 7.1-1-2-2; Ind. Code 7.1-2-3-9.
2. The permit application was properly submitted pursuant to Ind. Code 7.1-3-1-4.
3. The ATC is commissioned to act upon proper application. Id.
4. The Hearing judge conducted a *de novo* review of the appeal on behalf of the ATC, including a public hearing. 905 IAC 1-36-7(a); Ind. Code 7.1-3-19-11.5
5. The Hearing Judge may consider as evidence all documents, codes and standards that have been adopted by an agency of this state. 905 IAC 1-36-8(e)
6. The Hearing Judge may consider as evidence all documents in the ATC file, including the transcript of proceedings and exhibits before the Local Board. 905 IAC 1-36-7(a)
7. 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 substantial and reliable evidence in the record of proceedings and on matters officially noted in the proceedings. 905 IAC 1-37-11(e); Ind. Code 4-21.5-3-27(d)

8. The Commission has discretion to grant or refuse a Permit application. Ind. Code §§ 7.1-3-19-1, *et seq.*
9. 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, 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.
10. 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 would constitute action or conduct prohibited by the Indiana Penal Code or United States Code. 905 IAC 1-27-1.
11. The Applicant contends the Local Board's decision not to transfer the Permit was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to 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; and/or (e) unsupported by substantial evidence.
12. An administrative agency action is arbitrary and capricious "where there is no reasonable basis for the action." *Ind. Civil Rights Comm'n v. Delaware County Cir. Ct.*, 668 N.E.2d 1219, 1221 (Ind. 1996).
13. 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.*
14. The evidence favors granting denial.
15. The initial findings of the Local Board were supported by substantial evidence. Ind. Code 7.1-3-19-11

It is, therefore, ORDERED, ADJUDGED AND DECREED that the evidence adduced at the Local Board hearing and at the appeal hearing was not in favor of the Applicant, the appeal of the Applicant is DENIED, and the transfer of permit applied for by the Applicant is hereby DENIED.

Dated: January 12, 2012

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N. Davey Neal  
Hearing Judge