

STATE OF INDIANA
BEFORE THE ALCOHOL & TOBACCO COMMISSION

IN THE MATTER OF)	
THE PERMIT OF:)	
)	
SABOR BOHEMIO, LLC)	PERMIT NO. RR49-21637
4002 E. WASHINGTON STREET)	
INDIANAPOLIS, IN 46216)	
Applicant		

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Background of the Case

Sabor Bohemio, LLC (“Applicant”) is an applicant for renewal of Alcohol and Tobacco Commission permit type 112. The Alcoholic Beverage Board of Marion County (“Local Board”) held a hearing and voted 2-1 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 Jeffrey McKean of MCKEAN LAW FIRM, P.C., 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 112, numbered RR49-21637 (“Permit”).
2. On February 28, 2011, Applicant submitted an application to the Commission for the purpose of renewing its Permit.
3. On June 20, 2011, the Local Board voted 2-2 with no recommendation for the Commission.

4. On July 5, 2011, the Commission remanded the application back to the Local Board for further consideration.
5. On September 6, 2011, the Local Board voted 2-1 to recommend denial of the application for renewal
6. On September 20, 2011, the Commission adopted the Local Board's recommendation and denied the application for renewal.
7. On February 9, 2012, 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 September 6, 2011, in favor of the Applicant:
 - a. The Applicant, as well as his counsel Jeffrey McKean, responded to questions from the Local Board.
 - b. Zeferino Alvarez, on behalf of the Applicant.
 - c. Monolo Menendez
 - d. Samantha Stillings
 - e. Nancy Peralta
 - f. Christina Ramirez
 - g. Jerry Ishak
 - h. Jesus Peralta
2. The following evidence was introduced and admitted before the Local Board in favor of the Applicant:
 - a. Petitions in support of Applicant.
 - b. Electronic mail from City Prosecutor's office stating that there were no pending legal cases in Marion County Superior Court against the Applicant.
 - c. A receipt detailing expenses incurred by the Applicant to install a video surveillance system.
3. The following individuals testified before the Local Board on September 6, 2011, against the Applicant:

- a. Sgt. William Carter, Indianapolis Metropolitan Police Department
 - b. Pat Vernon, Grace Tuxedo Neighborhood Association
 - c. Patsy Boyce, neighbor
4. The following evidence was introduced and admitted before the Local Board against the Applicant:
- a. IMPD law enforcement run reports detailing police involvement at the address of the Applicant's premises.
 - b. Several Indiana State Excise Police incident report forms detailing violations issued to the Applicant.
 - c. Petition circulated by the Grace Tuxedo Neighborhood Association opposing the Applicant's renewal.
 - d. Photos dated November, 2008, of women in scant clothing posted to a MySpace page purportedly maintained by Applicant.

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 February 9, 2012, in favor of the Applicant:
 - a. The Applicant, through its owner Zeferino Alvarex and counsel, Jeffrey McKean, responded to questions from the Hearing Judge.
 - b. Mercedes Reyes
 - c. David Luna
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. Sgt. William Carter, IMPD.

5. The following evidence was introduced and admitted before the Hearing Judge against the Applicant:
 - a. Indiana State Excise Police incident report form detailing violations issued subsequent to the Local Board hearing for allowing minors to loiter and furnishing alcohol to a minor.

V. Findings of Fact

1. Applicant is the holder of an Alcohol and Tobacco Commission permit type 112, numbered RR49-21637. (ATC File)
2. Zeferino Alvarez is the principal operator of the permit premises. (ATC File)
3. On October 28, 2011, the Applicant was cited by Indiana State Excise Police for furnishing alcohol to a minor and for allowing a minor to loiter. (ATC File)
4. Petitions against the Applicant were signed by the Marion County Prosecuting Attorney, the city's Director of Public Safety and the city's Chief of Police.
5. Some of the police runs cited by remonstrators as evidence in favor of denial were initiated by the Applicant seeking to address criminal activity in and around the permit premises. (Appeal hearing; Local Board hearing)
6. The Applicant has made a substantial effort to address security concerns, minimum food concerns and to remove elements of the business that might run afoul of other city zoning ordinances. (Appeal hearing)
7. 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 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 use of police runs as evidence of poor character or poor repute may only be considered where there is a nexus between the police runs and conduct at the permit premises. Police runs in and around the area of the permit premises with no connection to the permit premises are not evidence of bad acts by the permit holder. *John F. Hanley v. Eastern Indiana Development (Ind. Ct. App. 1999)*

11. The Applicant contends the Local Board's decision not to renew 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. Ind. Code § 7.1-3-19-11
12. 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).
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. While the Applicant's qualifications and fitness to hold an alcohol permit are legitimately in question, the Applicant has made efforts to improve internal security procedures and to request assistance from local law enforcement. 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 unsupported by substantial evidence. IND. CODE § 7.1-3-19-11

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 for the limited period of one year.

It is, further, ORDERED, ADJUDGED AND DECREED that the Permit shall be investigated by the Local Board upon proper application for one year renewal. Thereafter, should the Commission approve another year of renewal, the Permit shall be investigated on a typical biennial basis.

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 26, 2012

N. Davey Neal
Hearing Judge