

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

IN RE:)
)
SADLER & SADLER, LLC)
d/b/a WINE THYME) **PERMIT NO. DL29-26331**
11677 OLIO ROAD)
FISHERS, INDIANA 46037)

Applicant

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

I. BACKGROUND OF THE CASE

Sadler & Sadler, LLC d/b/a Wine Thyme, 11677 Olio Road, Fishers, Indiana, 46037 (“Applicant”) filed its application on September 8, 2009, seeking a Type 115¹ Alcohol and Tobacco Commission (“ATC” or “Commission”) permit, assigned as permit number DL29-26331. The application was assigned to the Hamilton County Local Alcoholic Beverage Board (“Local Board”) for hearing. The Local Board conducted its hearing on December 8, 2009, and voted 3-1 to reject the application. The Commission adopted the Local Board’s recommendation.²

The Applicant filed a timely Notice of Appeal and the matter was assigned to ATC Hearing Judge E. Edward Dunsmore (“Hearing Judge”). The matter was set for hearing on February 3, 2010, and at that time it was discovered that public notice of the hearing had not been accomplished. The hearing was continued and scheduled for February 19, 2010. At the request of the remonstrators, the February 19, 2010 hearing was continued. The hearing was rescheduled for March 12, 2010 (“ATC Hearing”), and at that time, witnesses were sworn, evidence was heard, and matters were taken under advisement. The Applicant was represented by Attorney Andi M. Metzler, of Benesch Freidlander Coplan & Aronoff, LLP. Remonstrators were represented by Attorney Matthew M. Price, of Bingham McHale, LLP.

The Hearing Judge, having reviewed the Memorandum of the Local Board hearing, the evidence submitted to the Commission during the appeal hearing, and the contents of the entire ATC file, now tenders these Proposed Findings of Fact and Conclusions of law to the Commission for consideration.

¹ Beer (grocery) dealer located in an incorporated area.

² The audio recorder at the Local Board Hearing was not functioning. All parties present at the Local Board Hearing were represented by counsel and were afforded the opportunity to continue the hearing due to the malfunctioning recorder. With the consent of all parties present and their respective counsel, the Local Board Hearing was conducted without the use of a functioning recorder. A written Memorandum of the Local Board Hearing was prepared and submitted to the ATC.

II. EVIDENCE BEFORE THE LOCAL BOARD

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

1. Ian Sadler, Applicant Owner/Operator
2. John Sadler, Applicant Manager and Owner/Operator
3. Jeffrey A. Abrams, Attorney for Applicant.

B. The following exhibits were introduced before the Local Board in favor of the Applicant:

1. Local Board Exhibit 1- Wine Thyme Pamphlet
2. Local Board Exhibit 2 – Wine Thyme Floor plan

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

1. Jon Sinder, for Crown Liquors
2. Brad Rider, for United Package Liquors
3. Matthew M. Price, Attorney for Remonstrators-- Crown Liquors, United Package Liquors and Payless Liquors

D. The following exhibits were introduced before the Local Board against the Applicant:

1. Copy of Indiana Code § 7.1-1-3-18.5

III. EVIDENCE BEFORE THE COMMISSION

A. The following individuals testified at the ATC Hearing in favor of the Applicant:

1. Ian Sadler, Applicant Owner/Operator
2. Jon Sadler, Applicant Manager and Owner/Operator
3. Carrie Thrift
4. Mike Cole II
5. Benjamin J. Cahill
6. Jose Kruetz

B. The following exhibits were introduced at the ATC Hearing in favor of the Applicant:

1. Exhibit A – Proposed Interior Design and Floor Plan
2. Exhibit B – Elevations/Site Renderings of Geist Landing of Fishers
3. Exhibit C – Site Information Depicting Geist Landing of Fishers (Proposed Premises Identified)
4. Exhibit D - Aerial View of Geist Landing of Fishers Showing that Proposed Location is Not a Residential District and Showing Proximity of Proposed Location to Nearest School
5. Exhibit E – Inventory List of Specialty /Gourmet Food & Inventory Items

6. Exhibit E-1 – Inventory List of Specialty/Gourmet Food & Inventory Items, Promotional Materials, Specialty/Gourmet Food Consultants
7. Exhibit F – Letters of Support Showing Good Moral Character and Showing Need and Desire
8. Exhibit G – Local Board Hearing Memorandum & Exhibit List
9. Exhibit H – List of Individuals Present at February 3, 2010 Hearing
10. Exhibit I – Notice of Hearing on February 19, 2010
11. Exhibit J – Notice of Hearing on March 12, 2010
12. Exhibit K - On-Line Petition in Support Showing Need and Desire

C. The following individuals testified at the ATC Hearing against the Applicant:

1. John Sinder of Crown Liquors

D. The following exhibits were introduced at the ATC Hearing against the Applicant:

1. Exhibit 1A – Photographs of “Pairings”, a former “gourmet grocery store” on East 82nd Street.
2. Exhibit 1B - Photographs of “Pairings”, a former “gourmet grocery store” on East 82nd Street.
3. Exhibit 1C - Photographs of “Pairings”, a former “gourmet grocery store” on East 82nd Street.

IV. FINDINGS OF FACT

The Hearing Judge took judicial notice of the Commission file relevant to the case, including the Memorandum of the Local Board Hearing and the exhibits submitted therein. (ATC Hearing).

1. The Applicant, Sadler & Sadler, LLC d/b/a Wine Thyme, 11677 Olio Road, Fishers, Indiana, 46037, permit number DL29-26331, is the applicant for a Type 115 Alcohol and Tobacco Commission permit. (ATC File).

2. The Applicant proposes to operate a specialty or gourmet food store primarily engaged in the retail sale of miscellaneous specialty foods not for immediate consumption and not made on the premises. (Local Board Hearing; ATC Hearing; Exhibits A-K).

3. The Applicant is a fit and proper Applicant, has maintained a reputation for decency and law obedience, and is well qualified to hold an alcoholic beverage permit under Indiana law. (Local Board Hearing; ATC Hearing; Testimony of Carrie Thrift; Mike Cole II, Benjamin J. Cahill, Jose Kruetz and Exhibits F and K).

4. The Applicant is of good moral character and good repute in the community in which proposes to conduct its business and is qualified to hold the permit it seeks. (Local Board Hearing; ATC Hearing; Testimony of Carrie Thrift; Mike Cole II, Benjamin J. Cahill, Jose Kruetz and Exhibits F and K).

5. Applicant submitted letters from 79 individuals in favor of the issuance of a permit at the proposed permit premises, evidencing a need and desire to receive the services of the Applicant at the proposed permit premises. (ATC Hearing; Exhibit F).

6. Applicant submitted a petition containing 560± signatures from individuals in favor of the issuance of a permit at the proposed permit premises, evidencing a need and desire to receive the services of the Applicant at the proposed permit premises. (ATC Hearing; Exhibit K).

7. The services of the Applicant at the proposed permit premises would have a positive impact on other businesses in the neighborhood or community in which the proposed permit premises is located. (ATC Hearing; Testimony of Carrie Thrift, Mike Cole II, Benjamin J. Cahill, Jose Kruetz and Exhibits A - K).

8. The services of the Applicant at the proposed permit premises would have a positive impact on the neighborhood or community in which the proposed permit premises is located. (ATC Hearing; Testimony of Carrie Thrift, Mike Cole II, Benjamin J. Cahill, Jose Kruetz and Exhibits A - K).

9. There is a need for the services of the Applicant at the proposed permit premises. (Local Board Hearing; ATC Hearing; Testimony of Carrie Thrift, Mike Cole II, Benjamin J. Cahill, Jose Kruetz and Exhibits A – K).

10. Other businesses in Fishers that are competitors of Applicant possess alcoholic beverage permits. (Local Board; ATC Hearing; Testimony of Jon Sinder).

11. Applicant seeks to offer a variety of products and services to customers not otherwise available in the neighborhood or community in which the proposed permit premises is located. (Local Board; ATC Hearing; Testimony of Carrie Thrift, Mike Cole II, Benjamin J. Cahill, Jose Kruetz and Exhibits A – K).

12. The proposed permit premises is located more than 200 feet from a church or school and does not violate Indiana Code § 7.1-3-21-11. (Local Board; ATC Hearing; Testimony of Carrie Thrift, Exhibits B - D).

13. The proposed permit premises is zoned for commercial use. (ATC Hearing; Testimony of Carrie Thrift, Exhibits B - D).

14. The proposed permit premises is not in a residential district. (Local Board; ATC Hearing; Testimony of Carrie Thrift, Exhibits B - D).

15. The Applicant has indicated that it will provide appropriate security policies and procedures if the permit is granted. (ATC Hearing; Testimony of Ian Sadler, Jon Sadler).

16. There exists on the ATC's quota for Fishers, Indiana, an opening for a Type-115 permit. (ATC Records; Local Board Hearing; ATC Hearing).

17. The weight of the evidence, which includes a petition submitted by the Applicant, letters and a petition in support of the Applicant, and the availability of Type 115 permit in

Fishers, Indiana, indicates that there is a need and desire in the Fishers community for the Applicant to obtain the permit.

18. The local Board voted 3-1 to deny the Permit. (ATC File; Local Board Hearing).

19. Three of the Local Board members voted to deny the permit “based on the belief that the intention of the Sadlers is focused primarily on the sale of wine and wine products, and not the sale of specialty foods.” (Local Board Hearing).

20. Applicant’s proposed total inventory includes over 365 food and beverage items and over 300 cooking-related items, excluding alcoholic beverages for retail sale in the premises. (ATC Hearing; Testimony of Ian Sadler, Jon Sadler, Exhibits A, E, and G)

21. Applicant’s proposed inventory includes over 250 miscellaneous specialty foods, excluding meat, fish, seafood, fruits, vegetables, confections, nuts, popcorn and baked goods, for retail sale in the premises. (ATC Hearing; Testimony of Ian Sadler, Jon Sadler, Exhibits A, E and G).

22. Applicant’s proposed inventory of alcoholic beverages includes less than 250 types of wine and beer for retail sale in the premises. (ATC Hearing; Testimony of Ian Sadler, Jon Sadler).

23. Applicant could provide no data or information relative to anticipated sales of food in comparison to wine and wine products: the amount of display space and/or area devoted to wine, wine products and beer compared to food; or the dollar value investment for tenant improvements necessary for food displays and storage compared to the storage and displays of wine and wine products. (ATC Hearing).

24. Jonathan Sadler testified that the store was not ready for final inspection because the tenant improvements had not been installed. (ATC Hearing).

25. The Applicant agreed to provide the Local Board with the actual sales' figures at its renewal hearing next year, should the Local Board's decision be reversed. (ATC Hearing).

26. The weight of the evidence indicates that the proposed permit premises will be operated as a specialty or gourmet food store primarily engaged in the retail sale of miscellaneous specialty foods, not for immediate consumption and not made on the premises. (Local Board Hearing; ATC Hearing; Exhibits A-K).55

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 and § 7.1-2-3-9.

2. The permit application was submitted properly to the Commission and according to Indiana Code §7.1-3-1-4.

3. The Commission is authorized to act upon this proper application. Indiana Code §7.1-3-1-4.

4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the record of proceedings and exhibits before the Local Board. 905 IAC 1-36-7(a) and 905 IAC 1-36-8(e).

5. The Hearing Judge conducted a de novo review of the appeal on behalf of the Commission, including a review of the record and documents in the Commission file. Indiana Code § 4-21.5-3-27(d) and § 7.1-3-19-11(a); 905 IAC 1-36-7(a); and 905 IAC 1-36-8.

6. Evidence at the ATC Hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings made herein are based

exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceedings. Indiana Code § 4-21.5-3-27(d); 905 IAC 1-36-8.

7. Applicant is a fit and proper applicant, has maintained a reputation for decency and law obedience and is well qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1.

8. Applicant is of good moral character and in good repute in the community in which it proposes to do business and is qualified to hold the permit it seeks. 905 IAC 1-27-1.

9. The proposed permit premises is located more than 200 feet from a church or school. Indiana Code §7.1-3-21-10 and §7.1-3-21-11.

10. The proposed permit premises is not in a residential district. Indiana Code § 7.1-1-3-38; § 7.1-3-19-13; and 905 IAC 1-18-1.

11. There exists a Type-115 permit under the Commission's quota requirements for Fishers, Indiana. Indiana Code § 7.1-3-22-4.

12. In deciding whether to issue a permit, the Commission may consider the geographic desirability of a proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.

13. The Commission may consider both need and desire for the permit in determining whether a permit should be issued. 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.

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

16. 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. 905 IAC 1-27-4.

17. Applicant provided evidence that it seeks to offer a variety of products and services to customers not otherwise available in the neighborhood or community in which the proposed permit premises is located, demonstrating a need for such services at the proposed location. 905 IAC 1-27-4(a).

18. Applicant provided evidence that customers would be willing to purchase alcoholic beverages, if they were available for sale, demonstrating a desire to receive such services at the proposed location. 905 IAC 1-27-4(b).

19. Applicant provided evidence of support from businesses, residents and the surrounding communities, demonstrating a need and a desire to receive such services at the proposed location. 905 IAC 1-27-4(a) and (b).

20. Applicant provided evidence that competing stores located in the Fishers community are selling alcohol, demonstrating a desire to purchase the product. 905 IAC 1-27-4.

21. The Commission may issue an alcoholic beverage permit to the proprietor of an establishment when it appears to the satisfaction of the Commission that a substantial portion of the business to be carried out on the premises is in the nature of the applicant's main business function in the premises. Indiana Code § 7.1-3-1-19.

22. The Commission may issue a beer and wine permit to an applicant when a substantial portion of the applicant's business is in the nature of a "grocery store." Indiana Code § 7.1-1-3-18.5; § 7.1-3-1-19; and § 7.1-3-5-2.

23. The Commission may issue an alcoholic beverage permit to the proprietor of a specialty or gourmet food store when it appears to the satisfaction of the Commission that it is

primarily engaged in the retail sale of miscellaneous specialty foods, not for immediate consumption and not made on the premises, not including: (A) meat, fish, and seafood; (B) fruits and vegetables; (C) confections, nuts, and popcorn; and (D) baked goods. Indiana Code § 7.1-1-3-18.5-(a)(4); Indiana Code § 7.1-3-1-19.

24. All laws shall be general and administered with uniform application throughout the State. Ind. Constitution, Art. IV, Sec. 23; *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind.App.1982).

25. To deny the application of the Applicant, while granting other similarly situated applicants' applications, would be arbitrary and capricious and otherwise not in accordance with the law. Indiana Code § 7.1-3-19-11.

26. A local board's recommendation is erroneous, if there is a lack of substantial evidence which supports it. Indiana Code § 7.1-3-19-11.

27. The word "substantial," as used in Indiana Code §7.1-3-1-19, means something more than a nominal amount, something more than seeming or imaginary, it does not mean 50% or more. *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind.App.1982).

28. Where an Applicant proposes to carry and sell a large number of miscellaneous specialty foods excluding meat, fish, seafood, fruits, vegetables, confections, nuts, popcorn and baked goods for retail sale in the premises, such sales are "substantial" within the meaning of the "character of business" test. Indiana Code § 7.1-3-1-19.

29. Where an Applicant proposes to carry and sell a large number of miscellaneous specialty foods excluding meat, fish, seafood, fruits, vegetables, confections, nuts, popcorn and

baked goods for retail sale in the premises, such Applicant is “primarily engaged in the retail sale of miscellaneous specialty foods.” Indiana Code § 7.1-1-3-18.5.

30. The Applicant has established that a substantial portion of its business at the proposed permit premises is in the nature of a “grocery store” under Indiana law. Indiana Code § 7.1-1-3-18.5.

31. The evidence submitted by the Applicant demonstrates that the Applicant has satisfied the “character of business” test for a “grocery store” and is qualified to hold a Type 115 permit.

32. The Local Board denied this application without sufficient evidence to support a finding that this permit should not be issued.

33. The Commission may decline to follow the recommendation of the Local Board where the recommendation is not based upon substantial evidence. Indiana Code § 7.1-3-19-11.

34. The Commission may reverse a local board’s action in denying an application for permit, if it finds that the 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; (d) without observance of procedure required by law; and/or (e) unsupported by substantial evidence.

35. The Local Board’s action in denying the issuance of the permit to the Applicant 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; (d) without observance of procedure required by law; and (e) unsupported by substantial evidence.

36. The Commission is charged with the duty to determine that a permittee initially meets the “character of the business” test and that the permittee continues to meet this test. Indiana Code § 7.1-3-1-19.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the findings of the Hamilton County Local Board to recommend denial of the permit application of the Applicant was arbitrary and capricious, not based upon substantial evidence and contrary to law and cannot be sustained.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the evidence adduced at the ATC Hearing was in favor of the Applicant, Sadler & Sadler, LLC d/b/a Wine Thyme, 11677 Olio Road, Fishers, Indiana, 46037, permit number DL29-26331, and that said request is approved, the recommendation of the Hamilton County Local Board is reversed and the permit applied for herein is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Applicant, Sadler & Sadler, LLC d/b/a Wine Thyme shall, on and with the annual filing of its request for renewal of its permit, provide to the Commission annual sales figures in a form sufficient to show to the satisfaction of the Commission that it continues to meet the “character of the business” test as required by Indiana Code § 7.1-3-19-11 and Indiana Code § &.1-1-3-18.5 (a)(4).

SO ORDERED this ____ day of _____, 2010.

E. Edward Dunsmore, Hearing Judge

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