

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

IN THE MATTER OF)	
THE PERMIT OF:)	
)	
JIMMY'S NAIL SPA, LLC)	Permit No: RR49-32843
1811 N. MERIDAN ST.)	
INDIANAPOLIS, IN 46202)	
)	
)	
)	

RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

Jimmy's Nail Spa, LLC, ("Jimmy's" or "Applicant"), 1811 N. Meridian St., Indianapolis, Indiana 46202 ("Permit Premises"), filed its application for renewal of a Type 210¹ alcoholic beverage permit under permit number RR49-32843 ("Permit"). The Application was assigned to the Marion County Local Alcoholic Beverage Board ("Local Board") for hearing. The Local Board conducted its hearing on June 3, 2019, and voted 3-0 to reject the application for renewal. The Indiana Alcohol and Tobacco Commission ("ATC" or "Commission") adopted the Local Board's recommendation on June 18, 2019.

On or about June 20, 2019, Jimmy's received notification of the Commission's decision. Jimmy's filed a timely Notice of Appeal and the matter was set for appeal hearing on July 23, 2019. At that time, witnesses were sworn, evidence was received and heard, and the matter was taken under advisement. The Hearing Officer also took judicial notice of the entire contents of the ATC file related to the Permit, including the Local Board hearing and exhibits therein. Having

¹ Restaurant Retailer of Liquor, Beer and Wine in an Incorporated Area.

been duly advised of the facts and law at issue, the Hearing Officer now submits these Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. EVIDENCE BEFORE THE LOCAL BOARD

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

1. Jimmy Tuyen Vo, owner of applicant.

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

1. None.

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

1. Lt. William Carter, Indianapolis Metropolitan Police Department.

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

1. Group of photos labeled "Exhibit 1, Fall 2018;"
2. Group of photos labeled "Exhibit 2, 2-27-19;"
3. Group of photos labeled "Exhibit 3, 3-18-19;"
4. Group of photos labeled "Exhibit 4;" and
5. E-mail correspondence with group of photos.

III. EVIDENCE BEFORE THE COMMISSION

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

1. Jimmy Tuyen Vo, owner of applicant.

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

1. Petitions, labeled Exhibit A.
2. Letter from Margie Ledgerwood, labeled Exhibit B.
3. Agreed Judgment and Order between Metropolitan Development Commission of Marion County, Indiana and Eagle 1811 Leather Private Club, LLC, labeled Exhibit C.

C. The following evidence was introduced and included in the Commission's file between the local board hearing and the appeal hearing:

1. Motion to Vacate Compliance Hearing between Metropolitan Development Commission of Marion County, Indiana and Eagle 1811 Leather Private Club, LLC, file stamped July 22, 2019 ("Motion to Vacate.")
2. Letter dated June 6, 2019 from Jimmy Tuyen Vo.

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

1. Lt. William Carter, Indianapolis Metropolitan Police Department.

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

- a. None.

IV. FINDINGS OF FACT

1. Jimmy's Nail Spa, LLC, ("Jimmy's" or "Applicant"), 1811 N. Meridian St., Indianapolis, Indiana 46202 ("Permit Premises"), filed its application for renewal of a Type 210² alcoholic beverage permit under permit number RR49-32843 ("Permit").

2. Jimmy Tuyen Vo, Member of Jimmy's, is the present lessee of the Permit Premises.

(Local Board Hearing; ATC Hearing).

3. At the Local Board Hearing, Lt. William Carter, Indianapolis Metropolitan Police Department, expressed concern over the following legal violations:

- a. Failure to comply with order of the fire marshal, including failure to install the required fire suppression system;

² Restaurant Retailer of Liquor, Beer and Wine in an Incorporated Area.

- b. Use of Permit Premises for an adult entertainment business in violation of §740-1005.A.7 of the Revised Code of the Consolidated City of Indianapolis and Marion County; and
- c. Amendment of a floor plan in violation of 905 Indiana Administrative Code 1-41-2(e).

4. Jimmy's expanded operations beyond the original nail salon on the first floor to include a bar area on the second floor of the Permit Premises used for adult entertainment. The second floor is a residential area that does not include the required fire suppression system for this use. Local board hearing.

5. Jimmy's was notified about the violations and issues listed in paragraph 3 in October 2018. Local board hearing.

6. Re-inspection in March 2019 revealed that the violations and issues listed in paragraph 3 remained uncorrected.

7. In recommending denial of the transfer of the Permit, the Local Board members stated the following reasons for denial:

- a. Failure to maintain a high and fine reputation;
- b. No need for services in the neighborhood; and
- c. Permit Premises was allowed to become a public nuisance. Local Board hearing at 2:17:20.

8. At the appeal hearing, Jimmy's presented:

- a. a petition with seventy-five notes and signatures in support of an alcohol permit for Jimmy's Nail Salon, LLC (Exhibit A);

- b. a letter from the owner of the property at 1811 Norther Meridian Street, Indianapolis, Indiana stating that permittee will not be permitted, pursuant to their lease, to open another bar in the building (Exhibit B); and
- c. motions and orders relating to the zoning violation case brought by the City of Indianapolis against Eagle 1811 Leather Private Club, LLC, stating that re-inspection of the premises on July 22, 2019 showed the property to be in compliance (Exhibit C and Motion to Vacate.)

9. Lt. William Carter (Carter) with the Indianapolis Metropolitan Police Department testified at the appeal hearing that upon re-inspection of the Permit Premises, the second floor was empty and the bar and adult items were removed. Appeal hearing at 18:30.

10. Carter testified that he had no concerns with alcohol at the nail salon and believes that the second floor will remain in compliance with city ordinances, state laws, and rules relating to the fire marshal. Appeal hearing at 19:00 and 24:05.

11. 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 Ind. Code §7.1-1-2-2; §7.1-2-3-9.
- 2. The permit application was properly submitted pursuant to Ind. Code §7.1-3-1-4.
- 3. The Commission is authorized to act upon proper application. *Id.*
- 4. 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).

5. 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), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d). In a hearing *de novo*, new evidence may be submitted by the Applicant and remonstrators.

6. 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).

7. In considering whether to renew a permit, the Commission may consider whether the applicant has allowed the premises to become a public nuisance, or the scene of acts prohibited by the Indiana Penal Code. 905 IAC 1-27-2.

8. The elements for maintaining a public nuisance require that the permittee allows the licensed premises to become a public nuisance or be the scene of acts or conduct prohibited by the laws of the United States or Indiana. *Indiana Alcoholic Beverage Comm. v. River Road Lounge*, 590 N.E. 2d 656, 658 (Ind. App. 1992). “Allow” has been construed by Indiana courts to mean “concede, consent to, and to grant.” *Id.* In light of such definition, the permittee must have direct or indirect knowledge of illegal activity on its premise. *Id.*

9. The court shall consider the efforts the owner of the business took to abate the public nuisance. Ind. Code §7.1-2-6-1(c).

10. A permittee is required to maintain good moral character and good repute. The Commission may also consider the esteem in which the person is held by members of the community which may be inferred from police reports, evidence admitted in court and commission proceedings, information contained in public records. 905 IAC 1-27-1.

11. The Commission may reverse a local board's action in denying an application for transfer of a permit only if it finds that the local 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; or (d) without observation of procedure required by law, or unsupported by substantial evidence. Ind. Code §7.1-3-19-11.

12. The Commission may only consider:

- a. the need for the permit at the proposed location,
- b. the community's desire for the permit, and
- c. the impact of the permit on the community and other businesses

upon the application for a new permit or transfer of location only. 905 IAC 1-27-4.

13. This application is not an application for a new permit, therefore, the need for the permit at the proposed location cannot be considered.

14. To the extent that the decision of the local board was based on the need for services, that decision is arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law.

15. New evidence submitted at the *de novo* appeal hearing demonstrates that the efforts of the owner of the business to abate the public nuisance resulted in the full elimination of any matters giving rise to the public nuisance.

16. New evidence submitted at the *de novo* hearing demonstrates that the remonstrator believes that any issues that created a public nuisance will not continue.

17. There is no longer substantial evidence to support denial of the Permit.

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

VI. RECOMMENDATION

The applicant has a history of violations of local ordinances, orders from the fire marshal, and Title 7.1 of the Indiana Code. These violations remained uncorrected for approximately five (5) months after Permittee was put on notice of the violations. Evidence presented at the *de novo* appeal hearing demonstrated that Permittee was now in compliance with those ordinances, laws, and orders. Any issues relating to the public nuisance were fully eliminated.

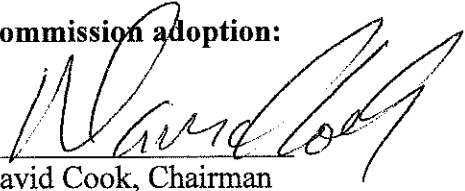
THEREFORE, IT IS RECOMMENDED that the decision of the Marion County Local Board and the Commission to deny the application for Jimmy's Nail Spa, LLC, under permit number RR49-32843, be reversed and the application of Jimmy's Nail Spa, LLC, for the renewal of a beer, wine, and liquor retail permit in an incorporated area, thus applied for herein, be APPROVED for a one year period. Jimmy's Nail Spa, LLC, shall fully comply with all local ordinances, state laws, and regulations of the fire marshal.

DATE: November 13, 2019

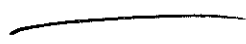


Jessica Allen, Hearing Officer


Commission adoption:



David Cook, Chairman

Date: 11-19-19


John Krauss, Vice Chairman


Victoria Taylor


Marjorie Maginn, Commissioner

object to this order



Dale Grubb, Commissioner