

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

IN THE MATTER OF:)	
)	
Harmony Tree Resorts, Inc.)	Permit No. RR07-40473
1348 State Road 135 South)	
Nashville, Indiana 47448,)	
)	
<i>Applicant.</i>)	

FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND FINAL ORDER

This matter comes before the Indiana Alcohol and Tobacco Commission (“ATC” or “Commission”) following its 3-1 vote on August 6, 2024, to approve the issuance of permit number RR07-40473 (“Permit”), and rejecting the Proposed Findings of Fact and Conclusions of Law drafted by the hearing judge following an appeal to reconsider the Commission’s previous denial of the permit. In consideration thereof, the Commission hereby adopts the findings of fact, conclusions of law, and final order set forth below.

I. BACKGROUND

On September 25, 2023, the Brown County Local Alcoholic Beverage Board (“Local Board”) considered an application for a beer, wine and liquor retail restaurant permit in an unincorporated area filed by the Harmony Tree Resort, Inc. (“Applicant”). The local board voted 2-1 in favor of recommending approval of Applicant’s permit application. On October 3, 2023, the ATC voted 3-0 to deny the permit application due to the close proximity of the proposed permit premises to a residential area. Applicant subsequently appealed the Commission’s denial of its application for a retail alcoholic beverage permit and an appeal hearing was held on January 25, 2024. Later, on August 6, 2024, the Commission considered the proposed findings of fact and conclusions of law submitted by the hearing judge to the full Commission, as well as the objections filed by the Applicant. The Commission ultimately rejected the proposed findings of fact and conclusions of law recommending denial of the permit and voted 3-1 to approve the issuance of the alcoholic beverage permit to Applicant.

II. EVIDENCE BEFORE THE LOCAL BOARD

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

1. Craig Finke, owner of the Applicant.
2. Aaron Badgett, neighbor two houses down.

B. No evidence was introduced or admitted before the Local Board in favor of the Applicant.

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

1. Jill Lagigla – next door neighbor of proposed permit location.
2. A.L. – neighbor and 8-year-old daughter of Jill Lagigla.
3. Derek Baldwin – neighbor.
4. Becky Yant – neighbor.
5. Diane Thompson – neighbor.
6. Raymond Thompson – neighbor.

D. No evidence was introduced and admitted before the Local Board against the Applicant.

E. A list of Remonstrators in attendance at the local board hearing included six (6)

individuals opposed to the permit application, one (1) individual in favor of the permit application, and one (1) remonstrator with no listed address or preference concerning the permit application.

III. EVIDENCE BEFORE THE HEARING JUDGE

A. The following individuals testified before the Hearing Judge in favor the Applicant:

1. Craig Finke, owner of the Applicant.
2. Brent Burns, minority investor in Applicant.
3. Carrie Finke, wife of the owner of Applicant.
4. Approximately eleven (11) community members appeared in support of Applicant.

B. The following evidence was introduced and admitted as evidence before the Hearing Judge in favor of the Applicant:

1. Exhibit 1 – PowerPoint presentation setting out argument of Applicant's appeal.

2. Exhibit 2 – Letter from the ATC on October 5, 2023, advising the Applicant that the decision of the Local Board had been reviewed and the permit application had been denied.

3. Exhibit 3 – Site plan for the proposed permit premises.

4. Exhibit 4 – Petition signed by 186 individuals in support of the permit application, with 29 indicating an address in Nashville or Brown County.

5. Exhibit 5 – Letter of William Jones, a resident of Nashville, Indiana, supporting approval of the permit application.

6. Exhibit 6 – Letter of Austin Finke supporting approval of the permit application.

7. Exhibit 7 – Letter of Al Neal, a neighbor of proposed premises, supporting approval of the permit application.

8. Exhibit 8 – Letter of Bruce Koehl, a resident of Nashville, supporting approval of the permit application.

9. Exhibit 9 – Letter of Andy Rumph, a resident of Freetown, supporting approval of the permit application.

10. Exhibit 10 – Proposed floor plan of the location of the proposed permit location.

11. Exhibit 11 – Documents disclosing container stays, glamping domes, A-frame tree houses, and a plat of the glamping site.

C. The following individuals testified before the Hearing Judge against the Applicant:

1. Jill Lagigla – next door neighbor of the proposed permit premises.

2. A.L. – 8-year-old daughter of Jill Lagigla.

D. The following evidence was introduced and admitted before the Hearing Judge against the Applicant:

1. Exhibit A – Petition signed by eighteen (18) local residents opposed to the issuance of the permit, all indicating an address in Nashville or Brown County.

2. Exhibit B – Email from Jill Lagigla to Craig Fink on September 14, 2023.

3. Exhibit C – Document describing a restaurant to be open near the proposed site (Firebird Tap House).

FINDINGS OF FACT

1. In 2021, Applicant acquired several parcels of real property totaling approximately fifty-six (56) acres in Brown County, Indiana.
2. Applicant's initial development of the land includes a restaurant at the top of the hill that currently holds an alcoholic beverage permit (RR07-38042), and the next phase of Applicant's development plans includes camping or "glamping" facilities with a second restaurant down the hill along the roadside.
3. Applicant intends to operate a second restaurant in an existing building on the property that has the necessary utilities, septic, and water connections.
4. Applicant previously asked the Brown County Area Planning Commission ("APC") to rezone the site for the second restaurant from "Primary Residential" to "General Business".
5. Following a hearing, the APC voted unanimously to approve the Applicant's rezoning request, which was also ultimately approved by the Brown County Board of Commissioners.
6. After obtaining zoning approval, Applicant filed a permit application for a beer, wine and liquor retail restaurant permit on or about May 31, 2023.
7. On September 25, 2023, the local board held a hearing on the Applicant's permit application.
8. At the local board hearing, Applicant stated that he wishes to use an existing building on the property, which was the subject of the rezoning request, to open a second restaurant to provide services to those staying in its overnight camping or "glamping" facility who cannot easily access the existing restaurant at the top of the hill.

9. Applicant also testified under oath and in pleadings that it would voluntarily compromise by putting up a fence and/or berm, or some other buffering, between its property and the nearest adjacent residential property in order to address their concerns.

10. Applicant also indicated that guests staying at the “glamping” site of the Applicant are already permitted to bring and consume their own alcohol.

11. Aaron Badgett, a neighbor that lives two houses down from the proposed permit location and is employed by the Applicant, testified about the positive impact the Applicant has had in the community.

12. Jill Lagiglia (“Remonstrator”) and her eight-year-old daughter, A.L., expressed concerns about the proposed permit location, including increased traffic and the proximity of the restaurant to a residential property, and pointed out that there is an existing restaurant on the property already. They also expressed some concerns about individuals who consume alcohol and stated that her concerns were with the alcohol permit, not the restaurant.

13. Having heard the testimony and having reviewed the evidence before it, the local board voted to recommend approval of the issuance of a permit application by vote of 2 (in favor) to 1 (against).

14. Afterwards, the local board’s recommendation was transmitted to the ATC for its consideration at its meeting on October 3, 2023.

15. Having reviewed the local board’s recommendation and the testimony and evidence presented at the local board hearing, on October 3, 2023, the ATC voted unanimously to deny the Applicant’s permit application, citing concerns regarding the proximity of the proposed permit premises to the Remonstrator’s residence.

16. Following the Commission’s determination, a letter was sent to the Applicant informing it that the ATC had denied the Applicant’s request for a permit. However, due to agency error, the letter inaccurately stated that the local board also voted to deny the Applicant’s permit request.

17. On or about October 20, 2023, in response to the notice informing the Applicant of its denied permit application, the Applicant timely filed an administrative appeal request concerning the ATC's determination.

18. After preliminary matters were concluded, the appeal hearing was held by the Hearing Judge on January 25, 2024.

19. At the appeal hearing, it was acknowledged by all present that the Hearing Judge could consider the records of ATC and the local board.

20. Craig Finke reaffirmed his previous testimony at the local board meeting and at the Brown County APC and Commissioner's meeting about his vision for the 56 acre site; the "glamping" and camping in the lower level; the need for the proposed location of the new restaurant and alcohol permit for the campers; the need to use the current rezoned building as a restaurant/bar due to economical reasons; and, that the rezoned location would provide services for those staying at the overnight glamping/camping site to utilize the existing driveway adjacent to the building so that they would not have to drive out on to Road 135 and up the hill to the existing restaurant and alcohol permit.

21. Carrie Finke, wife of the owner, testified that patrons and overnight campers consuming alcohol at the site have not made her feel uncomfortable and that the site remains quiet and safe.

22. Brent Burns, a minority investor and resident of Bloomington, Indiana, testified in favor of the Applicant indicating that the existing restaurant is busy with repeat customers.

23. Approximately eleven (11) community members were present at the appeal hearing to express their support for Applicant, eight (8) of whom were employees or shareholders of Applicant.

24. Jill Lagiglia ("Remonstrator") reaffirmed her earlier testimony that Applicant is a good neighbor and is considerate, respectful, and helpful, but that she and her daughter, A.L., are opposed to the alcohol permit being so close to their residence.

25. Remonstrator stated that her residence is 209 feet from the proposed permit location, with an unobstructed view of the building that is the subject location of the permit application. Applicant

indicated that there is an obstructed view due to an existing tree line of evergreens between the proposed premises and the remonstrators' house.

26. While Remonstrator testified that the currently licensed restaurant and permit location has a road leading to it that is a steep hill and incline, she also stated that she would not want to drive a car on the road leading to the restaurant after having a drink. This is also the road leading from the existing alcohol permit back to the glamping location.

27. Applicant testified under oath and stated in pleadings that it is willing to install an additional privacy fence/berm on its property so that there is not a direct line of sight to the restaurant from the Remonstrator's home.

28. The only persons identified as residing within 1,000 feet of the location for the proposed permit premises are Remonstrator and her daughter A.L., who live next door to the proposed permit premises.

29. Four neighbors residing in Nashville or Brown County remonstrated against the proposed permit location.

30. A petition against granting the permit included eighteen (18) signatures in Nashville or Brown County, including Remonstrator and her daughter A.L., and three of the other remonstrators testifying against the proposed permit location.

31. A petition in favor of granting the permit included twenty-nine (29) signatures in Nashville or Brown County, including William Jones who also submitted a letter in support.

32. A letter submitted in support of the permit application includes three (3) Nashville or Brown County residents, including one described as a "neighbor of the proposed premises."

33. Eleven (11) community members were present at the appeal hearing, including three (3) that are not employees of Applicant or investors in the proposed permit premises.

34. Any finding of fact may be considered a conclusion of law if the context so warrants.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to IC 7.1-1-2-2 and IC 7.1-2-3-9.

2. The permit application was submitted pursuant to IC 7.1-3-1-4, and the Commission is authorized to act upon properly submitted applications. *Id.*

3. These findings are based exclusively upon substantial and reliable evidence in the record of the proceedings and all matters officially noticed in the preceding. 905 IAC 1-37-11(e)(2).

4. In accordance with 905 IAC 1-36-7, an appeal hearing regarding the denial of Applicant's permit application was held on January 25, 2024. The hearing judge presiding over the appeal hearing took judicial notice of the Commission's files concerning the Applicant's permit application, including any transcript of the local board hearing and any exhibits or evidence presented to the local board members, and properly admitted additional evidence from the Applicant and the remonstrators. 905 IAC 1-36-7(a).

5. IC 7.1-2-4-16 states, in relevant part, that "... a local board may take action only upon the affirmative votes of at least three (3) of its members" (emphasis added). Because the local board voted 2-1 in favor of recommending issuance of the permit, there were not at least three affirmative votes of the local board members in this case. The Indiana Supreme Court addressed this issue in *Indiana Alcoholic Beverage Commission v. State ex rel. Harmon*, 379 N.E. 2d 140, when it held the following:

a. Local alcoholic beverage boards act as a recommending body to the Commission. *Id.* at 147. See also IC 7.1-3-19-11.

b. The ATC has absolute discretion in deciding whether to not to grant or deny permits authorized by Title 7.1 of the Indiana Code and is only obligated to follow a local board's recommendation when a majority (3 or more) of the members of the local board vote to grant or deny a permit application. *Id.* at 146. See also IC 7.1-2-3-9. IC 7.1-3-19-10. IC 7.1-3-19-11.

c. The fact that a local board does not approve an application for a permit with at least three (3) affirmative votes does not render the Commission powerless to act upon that

application because implied within the Commission's absolute discretion to grant or deny a permit application is a duty to act. *Id.*

6. In accordance with *Harmon*, the fact that the local board's recommendation concerning the Applicant's permit application lacked three (3) affirmative votes means that the local board did not take official action on the permit, but this did not render the ATC powerless to act upon the application because the ATC has absolute discretion in granting or denying an application for an alcoholic beverage permit. IC 7.1-2-3-9.

7. The ATC is only required to follow the recommendation of the local board when a majority of the local board votes in the affirmative with respect to a particular permit an application, unless the local board's recommendation is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. IC 7.1-3-19-11.

8. The ATC was required to act upon the Applicant's permit application even without the affirmative votes of at least three (3) members of the local board.

9. On October 3, 2023, the ATC did not reverse or overturn the recommendation of the local board but rather exercised its absolute discretion in denying the application where there was no official action taken by the Local Board.

10. IC 7.1-2-4-22(b) authorizes the ATC to give greater weight to a person who gives testimony and owns real property or a business or resides not more than one thousand (1,000) feet from the location for which the permit is requested demonstrating greater weight to those living and owning businesses closer to the proposed premises.

11. At the local hearing, the local board seemed to give little weight to the testimony of Jill Lagiglia and her daughter, and there was little evidence presented by the applicant demonstrating a need and desire for the services.

12. Appeal hearings are conducted *de novo* and an applicant can present additional evidence during administrative appeal proceedings. IC 7.1-3-19-11; 905 IAC 1-36.

13. The hearing judge conducted a *de novo* review of the Commission's initial determination to deny the permit application, which included a public hearing and a review of the agency record and documents in the Commission file.

14. In determining 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.


15. At the appeal hearing, Applicant presented additional testimony and documentary evidence, including letters and petitions, demonstrating a sufficient need and desire for the permit.

16. Any conclusion of law may be considered a finding of fact if the context so warrants.

FINAL ORDER

17. Based on the foregoing, the initial decision of the ATC to deny the requested permit was proper based on based on information available to the Commission at the time. However, after conducting a *de novo* appeal hearing and reviewing the full agency record pertaining to this matter (including additional documents and testimony presented during the appeal proceeding), the Commission voted 3-1 on August 6, 2024, to approve the issuance of permit RR07-40473.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the application for permit number RR07-40473 is hereby **GRANTED**.

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Jessica Allen, Chair

Signed by:

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Marjorie Maginn, Commissioner

James Payne, Vice Chair

Signed by:

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Mark Jones, Commissioner

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Remonstrators