

F&F Inc.)
d/b/a Dodo's Firehouse Tap) RR45-01676
521 Conkey Street)
Hammond, Indiana 46324)

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

BACKGROUND OF THE CASE

The Permittee, F&F, Inc., d/b/a Dodo's Firehouse Tap, 521 Conkey Street, Hammond, Indiana 46324 (Permittee) is the holder of a type 210 Alcohol and Tobacco Commission (ATC) permit, #RR45-01676.¹ On or about June 24, 2009, permittee filed its request for renewal and that application was assigned to the Lake County Local Alcoholic Beverage Board (LB) for hearing. The LB heard the renewal request on April 1, 2010, and on that same day, voted 3 – 1 to recommend denial of the application. The ATC adopted the recommendation of the LB on April 20, 2010 and denied the renewal application.²

The permittee filed a timely notice of appeal and the matter was assigned to the ATC Hearing Judge, E. Edward Dunsmore (HJ). The HJ assigned the matter for hearing on October 27, 2010, and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement. The permittee was represented by attorney Mark C. Webb. There were no remonstrators.³ The HJ took judicial and administrative notice of the entire contents of the file in this matter and now submits his Proposed Findings of Fact and Conclusions of Law to the ATC for consideration.

II.

EVIDENCE PRESENTED BEFORE THE LB

¹ Beer, wine and liquor (restaurant) located in an incorporated area.

² The LB recommended denial of the renewal based on narcotics violations which occurred at the permit premises between April and the end of June, 2009. An Indiana State Excise Police officer wrote several notices of violations to the permittee on July 7, 2009. In addition to the severity of the violations, the conduct of permittee's owner, Dolores Nastoff to the excise officer in her establishment on that day fell below an acceptable standard of conduct for a permittee when dealing with the Excise Police. Based on a combination of the nature of the offenses and Ms. Nastoff's behavior on July 7, 2010, the Commission rejected a proposed settlement calling for the payment of a fine prior to the March 4, 2010 renewal hearing, and instead, took the unusual step of requesting the LB to hear the renewal with the violation still pending. In other words, the Commission in this matter wanted some input from local officials before determining how permittee's July 7, 2010 violations should be settled.

³ Hammond City Attorney Kristina Kantar testified at the LB hearing on April 1, 2010. Although supportive of the permittee's renewal request, she nonetheless indicated on the sign-in sheet before the hearing that she was "opposed" to the renewal. Ms. Kantar informed permittee's counsel that whether or not she supported a particular renewal application, she always indicated her opposition on the sign-in sheet so that she would receive notices of all actions taken in a particular matter by the Commission. Further, Ms. Kantar did not attend the appeal hearing, having notified permittee's counsel *via* electronic mail that she was not going to remonstrate at the hearing and noting permittee's councilman's support for the establishment.

A. The following individuals testified before the LB in support of the permittee in this matter:

1. Dolores (Dodo) Nastoff, owner of permit premises. She is the sole owner of the permittee corporation and is the face of her establishment. She has owned her bar for 31 years with little, if any problems with either the Commission or the LB. Since she began operating, she has had no other forms of employment and everything she owns is wrapped up in her bar. Her bar has two rooms, one of which contains a large dance floor and can accommodate up to 275 people. She has live entertainment approximately 3 times per week. She keeps it clean on a daily basis and feels that it is a very attractive place. She lives above it so therefore she is always on the premises. She recalled the July 7, 2009 encounter with Sgt. Alvin Taylor of the Indiana State Excise Police. She deeply regretted her behavior and apologized before the LB. She has never been a drug user and does not condone the use of illegal narcotics in her establishment. She was unaware of any improprieties inside her establishment until they were brought to her attention through the violations filed against her bar.⁴ She testified that around the time of the violations, she was operating at a near capacity crowd on the weekends and in hindsight, she was unable to adequately supervise her establishment. She has since run her bar at a much lower capacity and is much better able to watch her patrons and establishment. Since she received the violations in July, 2009, she has had no further problems of any kind either with the State Excise Police or with the City of Hammond. She feels that if her permit were to be renewed, that there would be no further problems with her establishment.
2. Kristina Kantar, City Attorney for Hammond. Ms. Kantar testified that she spoke with Anthony Higgs, the President of the Hammond City Council and that Councilman Higgs was in favor of the Ms. Nastoff's establishment staying open. However, she wanted to be sure that no similar problems would occur in the future. She reminded Dodo that she had been warned by the Hammond Police Department that it was concerned about what might be going on at her establishment and that those concerns turned out later to be correct.
3. Anthony Higgs, President of the Hammond City Council. The permit premises is within his district. He has known Dodo for several years and regards her as a very reputable member of the community. He called the incidents at her bar unfortunate, but insisted that Dodo would never have knowingly been a part of such activities and requested that her permit be renewed.

B. The following exhibits were offered into evidence before the LB in support of the permittee in this cause:

1. Letter of February 18, 2010, from Anthony W. Higgs, 3rd District Councilman, City of Hammond
2. Letter of February 16, 2010, from John T. Slater, Hammond
3. Letter of March 2, 2010, from Rhonda Lynn Halper, Hammond
4. Letter of February 18, 2010, from Lee R. Garton, Hammond
5. Letter of February 19, 2010, from Jeff Schreiber, Hammond
6. Letter of February 25, 2010, from Janet A. Jenkin, Hammond

⁴ Indeed, no evidence was ever introduced either before the LB or before the Commission on appeal to support any inference that Ms. Nastoff had any personal knowledge of any illegal acts occurring within her establishment.

7. Letter of February 19, 2010, from Russell Booth
8. Letter of February 23, 2010, from Cheryl A. Bogacyz, Dodo's Firehouse Tap, Hammond
9. Letter March 1, 2010, from James and Caroline Pruss
10. Letter of February 11, 2010, from Joanne Stypriceis, Gary
11. Letter from Paula M. Broyles
12. Letter of February 26, 2010, from Thomas and Joanne Nastoff, brother and sister-in-law of Dolores Nastoff
13. Petitions in support of Dodo's Firehouse Tap (6 pages)

C. The following persons testified before the LB against the permittee

None.

D. The following exhibits were offered into evidence before the LB in opposition to the renewal application in this cause:

1. Letter of April 13, 2010, from Chief Brian Miller to permittee.
2. Indiana State Excise Police Report dated July 1, 2009.

III.

EVIDENCE PRESENTED BEFORE THE ATC

A. The following individuals testified before the ATC in favor of the permittee in this matter:

1. Dolores (Dodo) Nastoff, owner of the permit premises. She is 73 years old. She has owned the permit premises for 31 years. Her establishment is her entire livelihood and is all that she has. She acknowledged her improper behavior to Sgt. Alvin Taylor of the Indiana State Excise Police when he entered her establishment on July 7, 2009. Following the LB proceedings, she invited Officer Alvin Taylor of the Indiana State Excise Police to her establishment in an attempt to mend fences with the Excise Police. She apologized to Officer Taylor for her behavior on that day. Since the date of the violations, she has corrected her problems and has had no similar violations or problem encounters with either the Excise Police or the City of Hammond. She also invited and met with Chief Brian Miller of the Hammond Police Department at her bar in September, 2010. There, Chief Miller informed her that neither he nor his department had any current problems or concerns with her establishment and that he felt that the problems which led to the July, 2009 violations had been remedied.⁵ During the entire 31 years she has owned her establishment she has never had a problem of the magnitude surrounding this appeal. She was unaware of the actual wrongdoings which would have happened in her bar during the times in question. She has always lived upstairs and constantly monitors the premises. She has no questions regarding the conduct expected between law enforcement and permittees. She has sufficient help on the premises to handle any crowd that is present. She testified that her waitresses and bartenders are properly trained on how to deal with trouble, and additionally, she has a security guard who assists on the

⁵ Chief Miller wrote a letter to Ms. Nastoff stating that there were no current problems between her establishment and the City of Hammond. This letter was introduced following the appeal hearing as Exhibit 27.

weekends. When asked how things got so out of hand between April and July, 2009, she indicated that she was having as many as 200 persons on the weekends and even though she was there every evening and had security, she never saw any illegal acts occurring. Many of the persons present were not her regular patrons during this time.⁶ She realizes that even though her establishment will legally hold that many patrons, she cannot adequately monitor what is occurring when there are that many people present. Therefore, she has reduced her crowd to approximately 75-100 persons on the weekends, even though it has cost her a significant drop in revenues. Prior to the appeal hearing before the Commission, Ms. Nastoff received a telephone call from Officer Collins of the LB who among other things, wished her good luck with her appeal.

2. Cheryl Bogaczyk. She has worked for the permit premises for 17 years as a bartender, but considers Dodo to be a part of her family. In the past she has been full-time, but now, with a daughter, she works 3 days per week. She stated that over the past five or so years, that the neighborhood had declined, but that the bar remained a safe and comfortable location for patrons to gather and it fulfilled an important role in the community. She indicated that when the allegations against the bar came to light, that the bar's regular patrons could not believe that Dodo would have had any knowledge of those activities. She said that the environment today is significantly different from the environment in 2009 when the problems occurred. The crowd then was largely patrons unknown to the bar and its regulars, and now is much smaller and an environment in which everyone knows everyone. She testified that Dodo has a wonderful reputation and everyone in the neighborhood looks up to her. She was present at the April 2010 meeting with Sgt. Taylor and corroborated Dodo's account that the meeting was very productive and cordial. Finally, she indicated that she hoped Dodo would be in business another 31 years, that she has a heart of gold and that she has learned her lesson.
3. Mark C. Webb, counsel for permittee. Mr. Webb was present for the April 16, 2010 meeting between Ms. Nastoff and Sgt. Taylor and described it as a cordial meeting in which Ms. Nastoff sincerely apologized for her behavior in July, 2009 to Sgt. Taylor and Sgt. Taylor accepted it. The meeting lasted about an hour and was very positive. Moreover, on or about July 16, 2010, Mr. Webb had a telephone discussion with Sgt. Taylor, in which Sgt. Taylor again stated that he had no problem with Ms. Nastoff or her establishment and felt that there would be no further problems in the future.
4. JoAnne Starcevic. She has known Dodo for 40 years. She always decorates her establishment for each holiday and has a wonderful collection of Elvis Presley memorabilia. She would never turn away a hungry person. Her problems stem from the neighborhood changing over the years and Dodo not turning people away. She has, in many instances, given gifts to people who could not afford them or repay her. Ms. Starcevic indicated that Dodo is beloved in the neighborhood and that the neighborhood will miss her when she is gone.
5. Shirley Carter. She has known Dodo for 50 years. She used to use off-duty police officers for security. However, the present city administration ended that policy for all of

⁶ Ms. Nastoff indicated that during this time she had hired a disc jockey with whom she was unfamiliar on the recommendation that he would help increase her crowds and revenues. However, he also brought in patrons that were also unknown to her and apparently were the cause of most of her problems. This appears to be a reasonable conclusion because the DJ is gone, his followers no longer come to her bar, and her problems have been eliminated.

the bars and taverns in the city. She indicated that she stops by for coffee every morning and if Dodo leaves, it will leave a big void in the neighborhood.

- B. The following exhibits were introduced before the ATC in favor of the permittee in this matter:
14. Petition containing additional signatures of patrons supporting the renewal of this permit.
 15. Letter of Shirley E. Carter of Hammond.
 16. Letter of March 30, 2010, from Terry Guerrero of Hammond.
 17. Letter of Sarah Koeuez of Hammond.
 18. Letter of April 1, 2010, from Gail Swortfiger of Hammond.
 19. Letter of March 27, 2010, from Sharon Gamblin of Hammond.
 20. Letter of March 27, 2010, from Joan Clark of Hammond.
 21. Letter of March 27, 2010, from Gene Howard of Hammond.
 22. Letter of Kenneth McGary of Hammond.
 23. Letter of Kim DeRorske of Hammond.
 24. Letter of Randall Osborn of Hammond.
 25. Letter of Betty Stark of Hammond.
 26. Email communication of September 9, 2010, from Kristina Kantar, Hammond City Attorney to counsel for permittee.⁷
 27. Letter of September 13, 2010, from Chief Brian Miller, Hammond Police Department to Dolores Nastoff.⁸

- C. The following individuals testified before the ATC in favor of the remonstrators and against the permittee in this matter:

None.

- D. The following exhibits were introduced before the ATC in favor of the remonstrators and against the permittee in this matter:

None.

IV. FINDINGS OF FACT

1. The permittee, F&F Inc., d/b/a Dodo's Firehouse Tap, 521 Conkey Street, Hammond, Indiana 46324 (Permittee) is the holder of a type 210 Alcohol and Tobacco Commission (ATC) permit, #RR45-01676.
2. Said permit was first issued to the permittee in approximately 1970, and has been annually renewed since that time.

⁷ This communication is significant because it indicates that the City of Hammond does not intend to remonstrate further in this matter, and that Councilman Higgs, of the Hammond City Council spoke favorably regarding the establishment. Thus it appears reasonable to conclude that the City of Hammond does not oppose the renewal of the permit in this cause.

⁸ This letter is likewise significant because it indicates that the Hammond police do not have any further concerns with Ms. Nastoff or her establishment.

3. F&F, Inc. is owned 100% by Dolores A. Nastoff of Hammond. (ATC Hearing).
4. Permittee, prior to July 7, 2009, had never had any serious violations or problems with the Indiana State Excise Police or the Commission. (ATC Hearing; ATC Records).
5. The permit premises is located in a working class neighborhood with several businesses nearby. (ATC Hearing).
6. The permit premises provides a safe and friendly environment for its patrons and has a regular following of steady customers from the surrounding neighborhood and beyond. (ATC Hearing).
7. Permittee's establishment consists of two (2) large rooms, side-by-side, each with a separate entrance. One room contains the bar itself, and the other room contains a dance floor with a location for a band, and customer table seating. The room with the dance floor received more use when permittee had either a band or a disc jockey to provide entertainment to her patrons. (ATC Hearing).
8. Permittee's location is approved by the Indiana State Fire Marshall for up to 275 persons. (ATC Hearing).
9. Permittee's hours of operation are from 9:00 a.m., until 3:00 a.m., the following day. (ATC Hearing).
10. Permittee's level of staffing consists of four (4) bartenders who staff three (3) shifts per day, 9:00 a.m. – 3:00 p.m.; 3:00 p.m. – 9:00 p.m.; and 9:00 p.m. – 3:00 a.m. Additionally, permittee utilizes security guards in the evenings on weekends. (ATC Hearing).
11. Permittee's owner, Dolores Nastoff, lives above her establishment and makes a good-faith attempt to monitor what is occurring on her premises. (LB Hearing; ATC Hearing).
12. Ms. Nastoff, age 73 years, is a single woman whose entire assets are wrapped up in her establishment, which provides her sole means of support. (ATC Hearing).
13. Permittee gets along with its neighbors, both residential and business. (ATC Hearing).
14. On or about July 7, 2009, Permittee received written violations from Sgt. Alvin Taylor of the Indiana State Excise Police for five (5) counts of dealing in cocaine; one (1) count of possession of cocaine; one count of failing to maintain a high and fine reputation; one count of retail to retail sales; and one count of maintaining a common nuisance. (ATC Records).
15. During her July 7, 2009 encounter with Sgt. Taylor, she berated Sgt. Taylor for writing her these violations and refused to acknowledge receipt of them in writing. (LB Hearing; ATC Hearing).⁹
16. Permittee never observed, nor had any or personal involvement in, any illegal acts which occurred on her premises. (LB Hearing; ATC Hearing).
17. Permittee has never been charged with, nor implicated in, any illegal acts which occurred on her premises. (LB Hearing; ATC Hearing).
18. The July 7, 2009 Notice of Violations issued to permittee were unresolved as of the April 1, 2010 LB Hearing; and also as of the October 27, 2010 appeal hearing in this matter. (LB Hearing; ATC Hearing).
19. On April 13, 2009, Chief Brian Miller of the Hammond Police Department warned permittee in a letter regarding potential drug and gang problems which might be or were occurring at her bar. Although permittee made efforts to remove certain patrons which she felt might be a part of the problem, her efforts were insufficient to prevent further police involvement. (LB Hearing).
20. Beginning in mid-late 2008, the economic recession began to adversely affect bars and restaurants in Hammond, including permittee's establishment. Permittee began efforts to

⁹ Ms. Nastoff's conduct with Sgt. Taylor clearly fell below the standard of conduct expected for a permittee in its dealings with law enforcement.

- maintain or increase her crowd in an effort to mitigate her establishment's financial losses. (ATC Hearing).
21. From approximately December, 2008 and into June, 2009, permittee, among other things, hired a disc jockey with whom she had never worked before on the recommendation that he had an established following of fans. (ATC Hearing).
 22. This disc jockey brought patrons into her establishment with whom permittee was unacquainted, and, on weekends, would bring more than 200 persons into her establishment. (ATC Hearing).
 23. The problems, which culminated in the July 7, 2009 violations being written to permittee, resulted from a situation where permittee was simply unable to adequately monitor the number of patrons in her establishment with her level of staffing. (ATC Hearing).
 24. Despite the significantly increased size in her crowds, especially on weekends, other than adding an additional security guard when she used her second room, permittee made no other significant increases in staffing to accommodate the increased number of patrons in her establishment. (ATC Hearing).
 25. On or about April 16, 2010, permittee invited Sgt. Taylor to her establishment. During the meeting with him, she apologized for her conduct on July 7, 2009, and let him know that not only he, but all law enforcement officials were welcome in her establishment at any time, and that she had taken and would continue to take steps to ensure that her establishment would never in the future be a problem for either the State Excise Police or the Hammond Police Department. (ATC Hearing).
 26. Ms. Nastoff has accepted responsibility for what occurred at the permit premises on July 7, 2009, and deeply regret that incident. (ATC Hearing).
 27. Permittee is remorseful over the violations which have occurred on the permit premises. (LB Hearing; ATC Hearing).
 28. The incidents which formed the basis of the violations issued on July 7, 2009, were an aberration in the manner of how the permit premises operates and was completely out of character for what normally occurs there. (ATC Hearing).
 29. Permittee has taken positive steps since her 2009 problems, including materially decreasing her crowd, and barring people whom she feels could cause trouble for her. (LB Hearing; ATC Hearing).
 30. Permittee has had no similar problems at her establishment since the July 7, 2009 notices of violations were issued to her. (LB Hearing; ATC Hearing).
 31. Permittee's crowd is now around 100 patrons at any one time on the weekends, which results in a much more manageable number given her current staffing level. (ATC Hearing).
 32. Permittee has never received any complaints from the neighbors regarding the operation of the licensed premises. (ATC Hearing).
 33. Permittee has submitted numerous letters written by patrons, friends, neighbors and other persons, as well as petitions signed by residents of Hammond attesting to its positive reputation for decency, law obedience, good moral character and repute within the community. (ATC Hearing).
 34. Permittee's establishment sits in an area of Hammond represented by Hammond City Council President Anthony Higgs. (LB Hearing).
 35. Councilman Higgs wrote a letter in support of permittee and also attended the LB hearing, testifying on her behalf and requesting that the permit in this matter be renewed. (LB Hearing).
 36. No member of the public-at-large testified that the permit renewal in this matter should be denied. (LB Hearing).

37. Ms. Nastoff is a caring bar owner who shows genuine concern for her patrons and the surrounding neighborhood. (ATC Hearing).
38. Permittee has a significant financial investment at stake with respect to the permit premises. (ATC Hearing).
39. The permit premises is Ms. Nastoff's only significant asset. (ATC Hearing).
40. The continued operation of the permit premises and renewal of this permit will not result in any adverse effect on the surrounding neighborhood. (ATC Hearing; LB Hearing).
41. Denying the renewal of this permit would result in the loss of an establishment that means a great deal to the neighborhood and contributes positively to the surrounding community. (ATC Hearing).
42. Any finding of fact may be considered a conclusion of law if the context so warrants.

V.
CONCLUSIONS OF LAW

1. The permittee, F&F Inc., d/b/a Dodo's Firehouse Tap, 521 Conkey Street, Hammond, Indiana 46324, is the holder of a Type 210 Alcohol & Tobacco Commission permit, No. RR45-01676. Said permit was first issued to the permittee in 1979, and has been annually renewed since that time.
2. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2 and Ind. Code § 7.1-2-3-9.
3. The permit application was properly submitted, pursuant to Ind. Code § 7.1-3-1-4.
4. The ATC is authorized to act upon proper application. *Id.*
5. 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)*.
6. 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. *IC 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); see also IC 4-21.5-3-27(d)*.
7. 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); IC 4-21.5-3-27(d)*.
8. The Applicant is a fit and proper applicant, has maintained a reputation for decency and law obedience, and is qualified to hold an alcoholic beverage permit under Indiana law. *905 IAC 1-27-1; IC 7.1-3-9-10*.
9. The Applicant is not disqualified from holding an ATC permit. *IC 7.1-3-4-2; IC 7.1-3-5-2; IC 7.1-3-15-2*.
10. Permittee is of good moral character and good repute in the community in which she resides. *IC 7.1-3-4-2(a)(2)(A)*.
11. Permittee has a high and fine reputation in the community in which she operates. *IC 7.1-3-9-10*.
12. Permittee is held in high esteem by members of the community. *905 IAC 1-27-1*.
13. Permittee has done much to ameliorate the problems which led to issues of renewal before the LB. *IC 7.1-2-6-1(c); 905 IAC 1-27-2*.
14. The LB's recommendation is clearly erroneous, if there is a lack of substantial evidence which supports it. *IC 7.1-3-19-11*.

15. 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. *Roberts v. County of Allen*, 773 N.E.2d 850, 853 (Ind. App. 2002).
16. The LB's recommendation to deny the renewal is clearly erroneous where the permittee has the full support of its surrounding community, neighbors and patrons. *905 IAC 1-27-3*.
17. Where, on the basis of a violation issued to a permittee which is unresolved as of the LB hearing and where the LB recommends denial of renewal despite no witnesses testifying or requesting such action, and where there is significant evidence of support for the permittee, the LB action to recommend denial of renewal is arbitrary and capricious and contrary to the Commission's authority. *IC 7.1-3-19-11; IC 7.1-3-19-1*.
18. The Commission may grant or deny an application accordingly as it deems the public interest will be served best. *IC 7.1-3-19-10*.
19. Where the permittee provides a safe environment for its patrons and the surrounding neighborhood and neighborhood association feel that the community's interest will be best served if the permit is renewed, renewal of the permit would be in the public's best interest. *Id.*
20. Where permittee has had no violations of any kind issued to it in a period of more than one (1) year, and where permittee has shown the ATC that it is making serious efforts to improve its business practices and to conform them to the rules and regulations of the Commission, and where the permittee makes a positive contribution to its surrounding neighborhood and community, the penalty of nonrenewal of the permit in this instance is disproportionate to the offenses committed. *IC 7.1-3-19-1*.
21. The Local Board's decision in recommending denial of the permit in this case was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a 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; or (e) unsupported by substantial evidence. *IC 7.1-3-19-11*.
22. Any conclusion of law may be considered a finding of fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the recommendation of the LB to deny the renewal application in this matter was not based on substantial evidence and must be reversed. And it is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing was in favor of the Permittee and against the recommendation of the LB. The appeal of the permittee, F&F Inc., d/b/a Dodo's Firehouse Tap, 521 Conkey Street, Hammond, Indiana 46324, for the renewal of this Type 210 permit, No. RR45-01676 is granted and the recommendation of the LB in this matter is reversed.

DATED: _____

E. EDWARD DUNSMORE, Hearing Judge
Alcohol & Tobacco Commission