

STATE OF INDIANA
BEFORE THE ALCOHOL & TOBACCO COMMISSION

IN THE MATTER OF)	
THE PERMIT OF:)	
)	
NIRMAL PETROLEUM INC)	PERMIT NO. DL43-29022
d/b/a KATTIE’S KWIK MART)	
101 SOUTH MAIN STREET)	
LEESBURG, IN 46538)	
Applicant		

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Background of the Case

Kattie’s Kwik Mart (“Applicant”) is an applicant for renewal of Alcohol and Tobacco Commission permit type 115. The Alcoholic Beverage Board of Kosciusko County (“Local Board”) held a hearing and voted 3-1 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 Bryon Berry, participated in an appeal hearing held before Douglas M Kowalski (“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. On April 9, 2012, Applicant submitted an application to the Commission for a new permit type 115, numbered DL43-29022 (“Permit”).
2. On July 5, 2012, the Local Board voted 3-1 to recommend denial of the application for renewal.
3. On August 7, 2012, the Commission voted 4-0 to adopt the recommendation of the Local Board to deny the application for renewal.

4. On December 20, 2012, the Hearing Judge heard the Applicant's appeal of the Commission's denial of the application for renewal.

III. Evidence Before the Local Board

1. The following individuals testified before the Local Board on July 5, 2012, in favor of the Applicant:
 - a. The Applicant, Nirmal Gujjar, owner of Nirmal Petroleum Inc., responded to questions from the Local Board.
2. The following evidence was introduced and admitted before the Local Board in favor of the Applicant:
 - a. None.
3. The following individuals testified before the Local Board on July 5, 2012, against the Applicant:
 - a. Judy Timmons, resident of Leesburg.
4. The following evidence was introduced and admitted before the Local Board against the Applicant:
 - a. None.

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 December 20, 2012, in favor of the Applicant:
 - a. The Applicant, Nirmal Gujjar.
 - b. Applicant was represented by legal counsel, Bryon Berry.
3. The following evidence was introduced and admitted before the Hearing Judge in favor of the Applicant:

- a. Exhibit 1: A map of Kosciusko County.
4. The following individuals testified at the Appeal Hearing on December 20, 2012, against the Applicant:
 - a. None. There were no sworn remonstrators.
5. The following evidence was introduced and admitted before the Hearing Judge against the Applicant:
 - a. None.

V. Findings of Fact

1. Applicant is applying for the aforementioned permit. (Local Board Hearing; ATC File).
2. The sole remonstrator stated that she believes there are already enough places to buy alcohol in the community. (Local Board Hearing).
3. Remonstrator did not speak to anyone else about the permit or distribute a petition. (Local Board Hearing).
4. Remonstrator does not personally consume alcohol. (Local Board Hearing).
5. The Local Board noted that remonstrator had a family history of remonstrating against alcohol permits. (Local Board Hearing).
6. Applicant has had numerous customers state they are in favor of Applicant selling beer and wine. (Local Board Hearing; Appeal Hearing).
7. Applicant is one of the only, if not the only, gas station between Warsaw and Tippecanoe Lake and other surrounding lakes. (Appeal Hearing).
8. Applicant has lake traffic well in excess of Leesburg's population. (Appeal Hearing).
9. The Local Board stated there is a board policy against permits at gas stations. (Local Board Hearing).
10. The Local Board admitted their policies had been found to be capricious in the past. (Local Board Hearing).
11. The Local Board stated that the Board's vote may not stop you (Applicant), but it might delay you. (Local Board Hearing).

12. The Local Board did not elicit any testimony, from Local Board members or remonstrators, that Applicant is unfit to hold the permit or that there was any defect in Applicant's permit. (Local Board Hearing).
13. Any Finding of Fact may be considered a Conclusion of Law, if the context so warrants.

VI. Conclusions of Law

1. The ATC has jurisdiction over this matter pursuant to Ind. Code 7.1-1-2-2; Ind. Code 7.1-2-3-9.
2. The permit application was properly submitted pursuant to Ind. Code 7.1-3-1-4.
3. The ATC is commissioned to act upon proper application. Id.
4. The Hearing judge conducted a *de novo* review of the appeal on behalf of the ATC, including a public hearing. 905 IAC 1-36-7(a); Ind. Code 7.1-3-19-11.5
5. The Hearing Judge may consider as evidence all documents, codes and standards that have been adopted by an agency of this state. 905 IAC 1-36-8(e)
6. The Hearing Judge may consider as evidence all documents in the ATC file, including the transcript of proceedings and exhibits before the Local Board. 905 IAC 1-36-7(a)
7. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon substantial and reliable evidence in the record of proceedings and on matters officially noted in the proceedings. 905 IAC 1-37-11(e); Ind. Code 4-21.5-3-27(d)
8. The Commission has discretion to grant or refuse a Permit application. Ind. Code §§ 7.1-3-19-1, *et seq.*
9. The Commission shall consider the acts of the applicant, or its employees or agents, in determining the moral character and repute of the Applicant. 905 IAC 1-27-1.
10. The Commission may infer the esteem with which the Applicant is held by the community from police reports, evidence submitted at Commission proceedings, and information contained in public records. Id.
11. The Commission is required to follow the recommendation of the Local Board when the Local Board votes to deny an application by a 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.

12. The Applicant contends the Local Board's decision to not issue the Permit was arbitrary and capricious, and unsupported by substantial evidence.
13. An administrative agency action is arbitrary and capricious "where there is no reasonable basis for the action." *Ind. Civil Rights Comm'n v. Delaware County Cir. Ct.*, 668 N.E.2d 1219, 1221 (Ind. 1996).
14. 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.*
15. 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. 905 IAC 1-27-1; Ind. Code 7.1-3-19-10
16. The initial findings of the Local Board were arbitrary, capricious and unsupported by substantial evidence.

Therefore, it is ORDERED, ADJUDGED AND DECREED that the findings of the Local Board to deny this application were not based on substantial evidence and must be REVERSED.

It is further ORDERED, ADJUDGED AND DECREED that the evidence adduced at the Appeal Hearing was in favor of the Applicant, and the application of Good Oil Co., Inc. for the issuance of permit #RR43-29022, is APPROVED.

Dated: December 27, 2012

Doug Kowalski
Hearing Judge