

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

<b>IN THE MATTER OF</b>	)	
<b>THE PERMIT OF</b>	)	
	)	
<b>THE RUDICEL MASK, INC.</b>	)	
<b>d/b/a AFTERBURNERS</b>	)	<b>PERMIT NO. RR52-23985</b>
<b>1755 NORTH LANCER STREET</b>	)	
<b>PERU, INDIANA 46970</b>	)	
	)	
<b>Applicant.</b>	)	

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

**I. BACKGROUND OF THE CASE**

The Rudicel Mask, Inc., d/b/a Afterburners, 1755 North Lancer Street, Peru, Indiana 46970, permit number RR52-23985 (Applicant), is the Applicant for renewal of a type 209<sup>1</sup> Alcohol and Tobacco Commission (Commission or ATC) permit. The application was assigned to the Alcoholic Beverage Board of Miami County (Local Board). The Local Board held a hearing on October 17, 2012, and voted 4-0 to recommend denial with respect to this permit. On November 7, 2012, the Commission voted to deny the application at its regularly held meeting.

On November 26, 2012, the Applicant filed a request for appeal hearing and the matter was assigned to the Commission Attorney Melissa Coxey (Hearing Officer). The matter was set for hearing on April 11, 2013, and that time, witnesses were sworn, evidence was heard, and the matter was taken under advisement. The Hearing Officer also took judicial notice of the entire contents of the file related to this cause. Having been duly advised of the facts and

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<sup>1</sup> Liquor, beer and wine (restaurant) retailer located in an unincorporated area.

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

## **II. PROCEDURAL HISTORY**

1. On November 17, 2012, the Applicant received the Notice of Denial stating that the Commission rejected its application.
2. On November 26, 2012, the Applicant timely filed its request for administrative review and request for appeal within the fifteen (15) day deadline required by 905 IAC 1-36-2.
3. No remonstrators filed a petition for intervention as remonstrator, as required by 905 IAC 1-36-2.
4. On April 11, 2013, the Hearing Officer conducted a hearing regarding this appeal.

## **III. EVIDENCE BEFORE THE LOCAL BOARD**

- A. The following individuals testified before the Local Board in favor of the Applicant in this cause:
  1. Michael Rudicel, Applicant; and,
  2. Sheri Rudicel, Applicant.
- B. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:
  1. Memorandum regarding food figures.
- C. The following individuals testified before the Local Board against the Applicant in this cause:
  1. None.
- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:
  1. None.

#### **IV. EVIDENCE BEFORE THE COMMISSION**

- A. The following individuals testified before the Commission in favor of the Applicant in this cause:
1. Michael Rudicel, Applicant.
- B. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:
1. None.
- C. The following individuals testified before the Commission against the Applicant in this cause:
1. None.
- D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:
1. None.

#### **V. FINDINGS OF FACT**

1. The Rudicel Mask, Inc., d/b/a Afterburners, 1755 Lancer Street, Peru, Indiana 46970, permit number RR52-23985, is the Applicant for renewal of a Type 209 permit. (ATC File).
2. The Applicant meets the qualifications to hold a permit pursuant to Ind. Code § 7.1-3-4-2, Ind. Code § 7.1-3-5-2, Ind. Code § 7.1-3-10-2 and Ind. Code § 7.1-3-15-2. (Local Board Hearing; ATC Hearing).
3. The Applicant is of good moral character and of good repute in the community as required by 905 IAC 1-27-1. (Local Board Hearing; ATC Hearing).
4. The Applicant's store is similar to restaurants of competitors holding alcoholic beverage permits in Indiana. (Local Board Hearing; ATC Hearing; ATC File).

5. No persons appeared at the Local Board Hearing to remonstrate against the issuance of this permit.
6. No persons appeared at the ATC Hearing to remonstrate against the issuance of this permit. (Local Board Hearing; ATC Hearing; ATC File).
7. Applicant obtained the permit in 2008. Applicant timely filed renewals annually since that time. (ATC File).
8. Applicant never achieved the required minimum food figures; however, renewals were never denied for that reason. (ATC File).
9. Applicant disclosed food sales for 2010 totaling \$13,557. (Local Board Hearing).
10. Applicant disclosed food sales for 2012 totaling \$17,737. (Local Board Hearing).
11. Applicant is located in close proximity to Grissom Air Reserve Base (Grissom.) (Local Board Hearing; ATC Hearing).
12. Applicant is located in close proximity to approximately one thousand four hundred (1,400) housing units. (ATC Hearing).
13. Grissom base commander disallows uniformed personnel from patronizing the establishment; therefore, they primarily patronize the establishment in the evening. (ATC Hearing).
14. The permit premises provides seating for approximately fifty (50) customers. (Local Board Hearing).
15. Applicant serves a wide variety of items on its menu. (Local Board Hearing).

16. Applicant is in the process of upgrading the menu to attract more customers for lunch and dinner. (ATC Hearing).

17. Dean Baldwin Painting (Dean Baldwin) recently opened in close proximity to permit premises. (ATC Hearing).

18. Dean Baldwin recently hired eighty (80) employees. (ATC Hearing).

19. During the first three (3) months of 2013, Applicant has totaled \$7,500 in food sales. (ATC Hearing).

20. Dean Baldwin intends to hire at least one hundred fifty (150) new employees by August 2013. (ATC Hearing).

21. Applicant believes additional lunch business from Dean Baldwin will allow them to meet minimum food figures within twenty four (24) months. (ATC Hearing).

22. Applicant is a family owned business. It is the sole source of income for the entire family. (ATC Hearing).

23. Prior to 2012, Applicant was not questioned about failure to meet minimum food figures. (ATC Hearing).

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

## VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2 and 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 Commission is authorized to act upon proper application. *Id.*

4. The Hearing Officer 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 Officer 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).

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. 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 and Ind. Code § 7.1-3-9-10.

8. The permit location is not in a residential district. Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1.

9. The permit location is more than 200 feet from a church or school. Ind. Code § 7.1-3-21-10 and Ind. Code § 7.1-3-21-11.

10. The Applicant is not disqualified from holding an ATC permit. Ind. Code § 7.1-3-4-2; Ind. Code § 7.1-3-5-2 and Ind. Code § 7.1-3-15-2.

11. 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.

12. The weight of the evidence indicates that there is a need and desire in the community to receive the services of this Applicant. *Id.*

13. Indiana law charges the Commission with ensuring that laws and regulations are enforced uniformly throughout the state. Ind. Constitution, Art. IV, Sec. 23; *See, Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

14. To deny the application to this Applicant while granting other similarly situated applications would be arbitrary and capricious and otherwise not in accordance with the law. Ind. Code § 7.1-3-19-11.

15. The holder of a type 209 permit must have annual gross food sales of at least one hundred thousand dollars (\$100,000) annually.

16. 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 weight of the evidence supports a finding that the Applicant should be granted an additional twenty four (24) months to meet minimum food figures. The Alcohol and Tobacco Commission should approve said application. The application of The Rudicel Mask, Inc., d/b/a Afterburners, 1755 North Lancer Street, Peru, Indiana, 46970 for the Type 209 permit number RR52-23985 is GRANTED.

DATE: May 9, 2013

  
Melissa L. Coxey, Hearing Officer