

STATE OF INDIANA
BEFORE THE ALCOHOL & TOBACCO COMMISSION

IN THE MATTER OF)	
THE PERMIT OF:)	
)	
WILBY’S, INC)	PERMIT NO. DL43-28946
d/b/a WILBY’S GAS & GOODIES)	
307 W MAIN)	
MENTONE, IN 46539)	
Applicant)	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Background of the Case

Wilby’s, Inc (“Applicant”) is an applicant for a new Alcohol and Tobacco Commission permit type 115. The Alcoholic Beverage Board of Kosciusko County (“Local Board”) held a hearing and voted 3-0 to recommend denial of the application. Applicant requested an appeal hearing before the Alcohol and Tobacco Commission (“Commission” or “ATC”). Applicant, by counsel, Jack Birch, 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. Applicant applied for an Alcohol and Tobacco Commission permit type 115, numbered DL43-28946 (“Permit”) on March 28, 2012.
2. On June 7, 2012, the Local Board conducted a hearing on the application and voted 3-0 to recommend denial of the application.
3. On June 19, 2012, the Commission voted 4-0 to adopt the recommendation of the Local Board to deny the application.

4. On December 10, 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 June 7, 2012, in favor of the Applicant:
 - a. Scott Williams, Applicant; and
 - b. Jack Birch, Attorney for Applicant.
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 June 7, 2012, against the Applicant:
 - a. Dannie Hurd, Competitor;
 - b. Amy Hurd, Competitor; and
 - c. Jim Eads, Resident.
4. The following evidence was introduced and admitted before the Local Board against the Applicant:
 - a. Letter from Dannie Hurd, owner of Viking Liquors, in opposition;
 - b. Letter from Tim Croy, Mentone town council president, in opposition;
 - c. Letter from Rod Utter, Pastor of Cornerstone Church, in opposition; and
 - d. Petition in opposition with one hundred fifty-seven (157) signatures.

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 10, 2012, in favor of the Applicant:
 - a. The Applicant, Scott Williams.

- b. Applicant was represented by legal counsel Jack C. Birch.
3. The following evidence was introduced and admitted before the Hearing Judge in favor of the Applicant:
 - a. Petition Supporting Beer and Wine Sales License for Wilby's; 39 pages with 542 signatures.
4. The following individuals testified at the Appeal Hearing on December 10, 2012, against the Applicant:
 - a. Amy Hurd, co-owner of Viking Liquor.
 - b. Dannie Hurd, co-owner of Viking Liquor.
5. The following evidence was introduced and admitted before the Hearing Judge against the Applicant:
 - a. ISEP TRIP inspections data.
 - b. Letter from Jim Eads, Mentone Town Marshal, dated December 8, 2012.
 - c. Comprehensive Community Plan for Kosciusko County dated August 31, 2011.
 - d. Maps of residences surrounding Wilby's.
 - e. Maps of Wilby's and Church.
 - f. Letters from
 - i. Anna Stiles, Mentone resident and store owner.
 - ii. Karen Clark, resident and owner of Teel's.
 - iii. Mr. and Mrs. Eugene Warner, Mentone residents.
 - iv. April Irons.
 - v. Geoff Bailey.
 - vi. Richard Bose, resident.
 - vii. Mr. and Mrs. Stonesburner
 - g. U.S. Census Bureau 2010 data for Mentone, IN

V. Findings of Fact

1. Applicant is applying for the aforementioned permit. (Local Board Hearing; ATC File).
2. Wilby's is the only gas station and the only convenience store in Mentone. (Local Board)

3. Applicant, Scott Williams, owns five similar stores in the county.
4. Applicant's Warsaw and Syracuse locations have had a total of four violations for sales of tobacco to minors since 2010.
5. Applicant currently has a type 115 permit at his Syracuse store.
6. The Syracuse store has not had any alcohol violations.
7. Wilby's has implemented a policy to card everyone for tobacco and alcohol sales.
8. Wilby's entrance is at least 200 feet from Cornerstone Church.
9. Amy and Dannie Hurd are the owners of Viking Liquors, which is the only package liquor store in Mentone.
10. The Hurds are concerned that new competition will adversely affect their business. (Local Board Hearing)
11. Viking Liquors has had decreased beer sales over the last two years.
12. The Hurds coordinated the remonstrance for the community. (Local Board Hearing)
13. Remonstrators obtained 157 signatures on a petition against Wilby's acquiring a permit. (Local Board Exhibit)
14. Wilby's obtained 542 signatures on a petition in support of Wilby's being able to sell beer and wine.
15. The remonstrators are against children being allowed in place where alcohol is sold.
16. The Hurds have witnessed children left unattended in vehicles while the children's guardian is inside Viking Liquors. (Appeal Hearing)
17. The local board does not approve of alcohol at gas stations. (Local Board Hearing)
18. The same local board member who stated he was against alcohol at gas stations, clarified with the designated member the procedure for the remonstrators to continue the objection at the appeal level before the local board even voted.

19. The aforementioned board member then made the motion to deny the application.

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 Commission may issue a beer dealer's permit to an applicant who is the proprietor of a grocery store. Ind. Code 7.1-3-5-2(a)
13. The term "grocery store" means a store or part of a store that is known generally as a convenience store or food mart and is primarily engaged in the retail sale of automotive fuels and the retail sale of a line of goods that include milk, bread, soda and snacks. Ind. Code 7.1-1-3-18.5 (a)(2)(B)
14. Wilby's has established that the Mentone store is a convenience store or food mart which is primarily engaged in the retail sale of automotive fuels and the retail sale of a line of goods that include milk, bread, soda and snacks.
15. 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. 950 IAC 1-27-1; Ind. Code 7.1-3-19-10
16. Applicant is of good moral character and in good repute in the community in which it does business, and is qualified to hold the permit it seeks. 950 IAC 1-27-1; Ind. Code 7.1-3-4-2(a)(2)(A)
17. The Applicant is not disqualified from holding an ATC beer and wine grocery permit. Ind. Code 7.1-3-4-2; Ind. Code 7.1-3-5-2; Ind. Code 7.1-3-15-2
18. In determining whether to issue a permit, the Commission may consider the geographic desirability of the 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
19. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. *Id.*
20. "Need" means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a)
21. "Desire" means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b)
22. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*

23. Where an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b)
24. There is no other permit store in Mentone that would allow for one stop shopping for groceries, beer and wine. (Local Board Hearing, Appeal Hearing)
25. The Applicant has proven that there is a need for a beer and wine grocery permit at the Applicant's location. 905 IAC 1-27-4(a)
26. The Applicant has proven that the neighborhood and community desire to receive the services of an alcoholic beverage permit at the Applicant's location. 905 IAC 1-27-4(b)
27. All laws shall be general and administered with uniform application throughout the State. *Ind. Constitution*, Art. IV, Sec. 23; See also, *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982)
28. Applicant has submitted substantial evidence that it is qualified to hold an ATC Type 115 beer and wine grocery permit.
29. No evidence was submitted which would disqualify Applicant from holding a Type 115 beer and wine grocery permit at its Mentone store location.
30. To deny Applicant's application, while granting other similarly situated applicants' applications, would be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Ind. Code 7.1-3-19-11
31. The Local Board denied this application without sufficient evidence that would support a finding that this permit should not be issued.
32. The law is with the Applicant and against the Remonstrators at the Local Board Hearing.
33. The initial findings of the Local Board were: 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. Ind. Code 7.1-3-19-11

Therefore, it is ORDERED, ADJUDGED AND DECREED that the finding of the Local Board to deny this application was not based on substantial evidence and must fail.

It is hereby further ORDERED, ADJUDGED AND DECREED that the evidence produced at the Appeal Hearing was in favor of the Applicant, and the appeal of Wilby's, Inc., for this Type 115 permit, Permit # DL43-28946, is granted, and the permit applied for at its Mentone store location is hereby GRANTED.

DATED: _____

Douglas M. Kowalski
Hearing Judge