

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

**IN THE MATTER OF
THE PERMIT OF:**

**MDG ENTERPRISES, LLC
3748 N. SHERMAN DRIVE
INDIANAPOLIS, IN 46218**

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) **Permit No: RR49-34760**
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RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

MDG Enterprises, LLC, ("MDG" or "Applicant"), 3748 N. Sherman Drive, Indianapolis, Indiana 46218 ("Permit Premises"), filed its application for transfer of ownership only on a Type 210¹ alcoholic beverage permit on September 7, 2018 under permit number RR49-34760 ("Permit"). The Application was assigned to the Marion County Local Alcoholic Beverage Board ("Local Board") for hearing. The Local Board conducted its hearing on December 3, 2018, and voted 3-0 to reject the application for transfer. The Indiana Alcohol and Tobacco Commission ("ATC" or "Commission") adopted the Local Board's recommendation on December 18, 2018.

On or about January 3, 2019, MDG received notification of the Commission's decision. MDG filed a timely Notice of Appeal and the matter was set for appeal hearing on February 14, 2019. At that time, witnesses were sworn, evidence was received and heard, and the matter was taken under advisement. The Hearing Officer also took judicial notice of the entire contents of the ATC file related to the Permit, including the Local Board hearing and exhibits therein. Having

¹ Restaurant Retailer of Liquor, Beer and Wine in an Incorporated Area.

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

II. EVIDENCE BEFORE THE LOCAL BOARD

- A. The following individuals testified before the Local Board in favor of the Applicant in this cause:
 - 1. Demetheus D. Wilson, Member, MDG/Applicant
- B. The following documentary evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:
 - 1. None
- C. The following individuals testified before the Local Board against the Applicant in this cause:
 - 1. Mina Jung, neighboring property owner;
 - 2. Marcella Taylor, member of Audubon Gardens neighborhood association;
 - 3. Cecelia Dodson, member of Audubon Gardens neighborhood association; AND
 - 4. William Carter, Indianapolis Metropolitan Police Department.
- D. The following documentary evidence was introduced and admitted before the Local Board against the Applicant in this cause:
 - 1. Color photo of aerial view of Applicant's establishment;
 - 2. Listing of alcoholic beverage permits in the 46218 zip code; AND
 - 3. Map of alcoholic beverage permits in the 46218 zip code.

III. EVIDENCE BEFORE THE COMMISSION

- A. The following individuals testified before the Commission in favor of the Applicant in this cause:
 - 1. Demetheus D. Wilson, Member, MDG/Applicant;
 - 2. Robert Young, area resident and former employee of predecessor entity at proposed Permit premises;
 - 3. Phyllis Meadows, area resident and frequent patron of predecessor entity at proposed Permit premises; and
 - 4. Angela P. Krahulik, Ice Miller LLP, Attorney for MDG.
- B. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:

1. Petitions in favor of the issuance of the Permit- containing 69 signatures, including those of the owners of an adjacent salon and an adjacent pizza shop;
 2. List of active permits within 2 miles of the proposed Permit Premises;
 3. Photos of the proposed Permit Premises;
 4. Proposed menu;
 5. Executed Leases for parking areas surrounding proposed Permit premises; and
 6. Aerial photographic map of proposed Permit premises.
- C. The following individuals testified before the Commission against the Applicant in this cause:
1. Marcella Taylor, member of Audubon Gardens neighborhood association;
 2. Cecelia Dodson, member of Audubon Gardens neighborhood association; and
 3. William Carter, Indianapolis Metropolitan Police Department.
- D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:
1. Fox 59 internet news articles:
 - a. Regarding a January 2019 shooting at Brotherman Tavern, 2947 Sherman Drive;
 - b. Regarding a May 2018 shooting at a gas station located at 34th Street and Sherman Drive; and
 - c. Regarding a July 2018 shooting near 30th Street and Sherman Drive.

IV. FINDINGS OF FACT

1. MDG Enterprises, LLC, 3748 N. Sherman Drive, Indianapolis, Indiana 46218, permit number RR49-34760, is the applicant for transfer of a permit to sell liquor, beer and wine, in a restaurant located in an incorporated area to be issued by the Indiana Alcohol and Tobacco Commission. (ATC file).
2. MDG seeks to transfer ownership only of a permit that was previously used by another entity at the same location doing business as Masterpiece Lounge Bar & Grill (the "Masterpiece") for many years. (ATC file).
3. Demethus Wilson, Member of MDG, acquired and is the present owner of the proposed Permit Premises. (Local Board Hearing; ATC Hearing).

4. At the Local Board Hearing, Sgt. William Carter, Indianapolis Metropolitan Police Department, expressed concern over crime in the surrounding area and 2 past incidents near or outside of the Permit Premises. (Local Board Hearing).

5. Sgt. Carter provided a map and listing of all active alcoholic beverage permits in the Permit Premises zip code of 46218 and asserted that there are ample outlets to purchase alcohol in the area of the proposed Permit Premises. Sgt. Carter also expressed concern that the Applicant may not be planning to serve food at the Permit Premises as required. (Local Board Hearing).

6. At the Local Board Hearing, Mina Jung, a neighboring property owner expressed concern over potential crime outside the Permit Premises, a lack of adequate parking for the Permit Premises and the presence of trash and illegally dumped items in the alley way behind the Permit Premises. (Local Board Hearing).

7. At the Local Board Hearing, Marcella Taylor and Cecelia Dodson, both members of the Audubon Gardens neighborhood association, expressed concern over crime in the surrounding area generally and with adding any more businesses offering alcoholic beverages for sale to the area. They also expressed concern that the Permit Premises may not offer food as required. (Local Board Hearing).

8. The remonstrators at the local board hearing all stated that they had no issue with the Applicant in particular, but would oppose the issuance of any alcoholic beverage permit in the area. (Local Board Hearing).

9. At the Local Board hearing, Mr. Wilson, the owner of the Permit Premises and Member of MDG, testified about the long history of the Masterpiece at the Permit Premises, his investment in and improvements to the Permit Premises, and his plans for offering food and acquisition of a pizza oven for the kitchen. He also testified regarding MDG's clean-up of the

alley behind the Permit Premises and possible, but not yet secured, options for parking in the area and his intention to bring revenue and opportunity to the community. (Local Board Hearing).

10. In recommending denial of the transfer of the Permit, the Local Board members all stated that their reason was due to lack of need for the services at the proposed location and/or that the neighborhood/community did not desire the services. (Local Board Hearing).

11. Since acquiring the Permit Premises, Mr. Wilson has made significant investment in and improvements to the Permit Premises, including the complete renovation of the upstairs bar area and has substantial work in progress on the kitchen renovation. MDG presented photographs showing the condition of the Permit Premises upon acquisition and the improvements. The photographs also showed an installed commercial grade vent system for the kitchen area renovation and improvements being made to the lower level bar area and kitchen. (ATC Hearing; Exhibit 4).

12. MDG presented a petition with signatures of 69 area residents in favor of the permit transfer, including the signatures of the proprietors of 2 adjacent businesses--a salon and a pizza shop. The Petition stated in relevant part:

We believe that Applicant maintains a high and fine reputation in the community, that there is a need for the services of Applicant at the proposed location, that the neighborhood and/or community desire the services, and that the services at the proposed location would not have any negative impact on other businesses in the neighborhood or on the neighborhood in general. For all the foregoing reasons, we urge the Marion County Alcoholic Beverage Board and the Commissioners of the Indiana Alcohol and Tobacco Commission to APPROVE the issuance of said permit.

(ATC Hearing, emphasis added; Exhibits 1a, 1b, 2 and 3).

13. MDG presented a listing of active permits within 2 miles of the Permit Premises. The listing included only 4 restaurant retailer permits and of those 4 permits, one is not operating on a daily basis, being used instead an event hall on occasion. Each of the 4 permits listed is at least 1 mile away from the Permit Premises. (ATC Hearing; Exhibit 8).

14. MDG provided its proposed menu for the Permit Premises, which included hot food items, sandwiches, pasta, chili and various drinks, including coffee, soft drinks and milk. (ATC Hearing; Exhibit 6).

15. MDG provided executed lease agreements for parking to be utilized by patrons of the Permit Premises. These parking lots are: (1) adjacent to the Permit Premises to the south and (2) across Sherman Dr. to the east. Mr. Wilson showed the locations of these parking lots on an aerial map of the Permit Premises and surrounding area. These parking lots provide ample parking capacity for the Permit Premises, which has a maximum capacity of 75. (ATC Hearing; Exhibits 5 and 7).

16. Mr. Wilson testified about MDG's acquisition of the property, efforts and expenditures to improve the property, his investment in food related equipment and plans to serve hot meals. (ATC Hearing).

17. Mr. Wilson testified that he has employees and in particular, cooks, already lined up to start working if the Permit Premises receives the permit transfer. (ATC Hearing).

18. Mr. Wilson and Robert Young testified regarding the long history of the Masterpiece in the neighborhood, its status as a place to relax for the working class and older members of the community and its offering a unique atmosphere not otherwise available in the neighborhood or community in which the proposed Permit Premises is located. (ATC Hearing).

19. Phyllis Meadows testified that there is a group of 6-8 women who have been dubbed the "Ladies of the Masterpiece" who used to gather at the Permit Premises regularly and that it was a place of respite for them. The Ladies of the Masterpiece also did various activities and organized charitable giving and assistance for those in need in the neighborhood. Ms. Meadows testified that her group is very eager to have a place to gather and to relax back in operation in the area and that there is no place like it nearby. (ATC Hearing).

20. Mr. Young, the previous disc jockey of approximately 17 years at the Masterpiece, and Ms. Meadows, testified about how much their friends in the neighborhood greatly miss having a place to

gather relax and unwind and stated that they now have no place near their homes to congregate and socialize where they feel safe and welcomed. They feel the patrons at the Permit Premises will largely be older citizens. (ATC Hearing).

21. Mr. Wilson further testified regarding MDG's procurement of the leases to provide ample parking for patrons in the future and MDG's strict alcohol service policies and security plans. (ATC Hearing).

22. Sgt. Carter, Ms. Dodson and Ms. Taylor each commented that they were impressed with the improvements to the Permit Premises and MDG's plans for its business. (ATC Hearing).

23. Sgt. Carter, Ms. Dodson and Ms. Taylor reiterated their concerns expressed at the Local Board about adding alcohol permits in the area and potential for increased crime, with Sgt. Carter providing 3 internet news articles regarding crime at other nearby locations, including shootings at alcoholic beverage permit premises. (ATC Hearing; Exhibit R1).

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

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Ind. Code §7.1-1-2-2; §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 Applicant meets the qualifications to hold a permit pursuant to Ind. Code. § 7.1-3-4-2.

5. The Applicant's proposed menu items satisfy the minimum required food items. 905 IAC 1-20-1.

6. 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).

7. 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. 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). In a hearing *de novo*, new evidence may be submitted by the Applicant and remonstrators.

8. 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).

9. The Commission may reverse a local board's action in denying an application for transfer of a permit only if it finds that the local board's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; or (d) without observation of procedure required by law, or unsupported by substantial evidence. Ind. Code § 7.1-3-19-11. The Applicant contends the Commission's decision to deny the permit transfer was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and unsupported by substantial evidence.

10. The Commission may only consider:

- a. the need for the permit at the proposed location,
- b. the community's desire for the permit, and
- c. the impact of the permit on the community and other businesses

upon the application for a new permit or transfer of location only. 905 IAC 1-27-4.

11. Upon application for transfer of ownership, the commission may consider:

- a. The applicant's eligibility to hold the permit;
- b. Whether the applicant is of good moral character and of good repute;
- c. The esteem in which the person is held in the community; and
- d. Prior violations of alcoholic beverage laws and rules. 905 IAC 1-27-1 and 3.

12. The applicant is eligible to hold the permit.

13. No testimony was presented that the applicant lacks good moral character or good repute. Mr. Young and Ms. Meadows testified about the good moral character and good repute of Mr. Wilson.

14. Criminal activity in the permit vicinity generally or criminal activity at the proposed Permit Premises when operated by a past proprietor are not properly considered in deciding upon the transfer application as to Applicant because there is no nexus between that conduct and this Applicant. *Hanley v. Eastern State Inv. Corp.*, 706 N.E.2d 576, 578 (Ind. Ct. App. 1999).

15. Remonstrators agreed that the applicant was not responsible for actions of a previous owner.

16. If a licensed premises becomes a public nuisance, or the licensed premises becomes the scene of acts or conduct which are prohibited by the Indiana Penal Code, or by the criminal laws of the United States, the premises shall be subject to the sanctions specified in IC 7.1-3-6-1 through IC 7.1-2-6-14. 905 IAC 1-27-2.

17. If a licensed premises ceases to make the required minimum food available, the premises shall be subject to sanctions.

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

VI. RECOMMENDATION

The Local Board stated that their decision was based on the lack of need and/or desire of the community to have such services. A new or transfer of owner permit cannot be denied based on the need and desire of the community for such services or the impact of the permit on the community and other businesses. There is no evidence that the Applicant does not have a high and fine reputation in the community. In fact, the remonstrators stated repeatedly that they had no issue with the Applicant specifically.

The remonstrators stated that their concerns with this establishment are that it may not offer the required minimum food items, there was debris or trash in the back alley, there was not sufficient parking for the establishment at the permit premises, the issuance of the Permit may increase crime in the area, and that they oppose the issuance of any additional alcohol permits in the area, regardless of the nature of the business.

The Applicant testified under oath that he intends to have food service and a full kitchen. He presented photos of his kitchen area, including commercial grade vent hood, and a proposed menu that meets the minimum food requirements. There are no statutory requirements that an applicant have experience in operating a restaurant before application. To deny a permit for this reason would not be in accordance with the law and in excess of statutory authority granted to local boards and the commission.

Applicant likewise demonstrated that he made significant and costly improvements to the Permit Premises, including removal of the trash or debris in the alley and that MDG had obtained leases for ample parking for patrons of the establishment. The remonstrators all commented


positively on these achievements. Thus, these issues are no longer concerns with the proposed Permit Premises.

No evidence was presented that there is a connection between Applicant and any criminal act in the area--past or recent. To deny a permit to Applicant while a prior permit holder was operating at the same location would be an abuse of discretion, not otherwise in accordance with the law, and unsupported by substantial evidence. If the location were to become a public nuisance under Applicant's operation, the Commission may revoke or deny a renewal of a permit.

The local board based their decision to deny the permit on the neighborhood/community not desiring the services and/or the neighborhood/community not needing the services. To deny a permit for a transfer of ownership only based on need or desire of the neighborhood or the impact on the neighborhood or businesses would be an abuse of discretion and not otherwise in accordance with the law.

THEREFORE, IT IS RECOMMENDED that the decision of the Marion County Local Board and the Commission to deny the application for MDG Enterprises, LLC, 3748 N. Sherman Drive, Indianapolis, Indiana 46218 under permit number RR49-34760, be reversed and the application of MDG Enterprises, LLC for the transfer of ownership only of a beer, wine, and liquor retail permit in an incorporated area, thus applied for herein, be APPROVED.

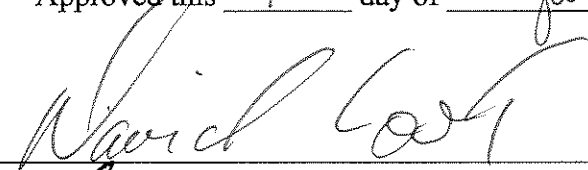
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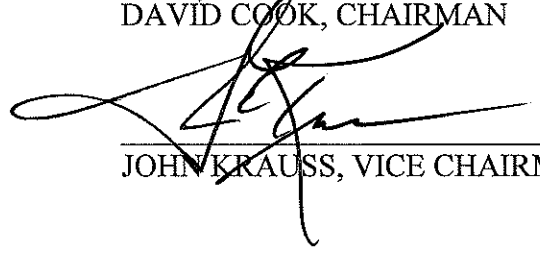
Jessica Allen, Hearing Officer

The Commission hereby adopts the findings of the hearing judge to reverse the local board and approve the permit application for a one year permit term.

Approved this 4th day of June, 2019.



DAVID COOK, CHAIRMAN



JOHN KRAUSS, VICE CHAIRMAN

DALE GRUBB, COMMISSIONER



MARJORIE MAGINN, COMMISSIONER