

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

IN THE MATTER OF)	
THE PERMIT OF)	
)	
WAIL ODTALLAH)	PERMIT NO. RR45-29938
1008-1010 W. 5th AVENUE)	
HIGHLAND, IN 46322)	
)	
Applicant.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

Wail Odtallah, 1008-1010 W. 5th Avenue, Highland, IN 46322, permit number RR45-29938 (Applicant), is the applicant for renewal of a permit to sell beer, wine, and liquor in a restaurant located in an incorporated area to be issued by the Alcohol and Tobacco Commission (Commission). The application was assigned to the Alcoholic Beverage Board of Lake County (Local Board). On June 2, 2015, the Local Board voted 3-0 to deny the renewal of the permit based on recent violations and operating outside of the scope of the permit. On July 7, 2015, the Commission accepted the Local Board's recommendation and denied renewal of the permit.

Applicant filed Petitioner Request for Appeal Hearing, and the matter was assigned to the Hearing Officer. The matter was set for hearing on September 14, 2015, and at 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 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. Wail Odtallah, Applicant.
- B. The following 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. Rodney Pol, Assistant City Attorney, Gary;
 2. Ron Brewer, Councilman at Large, Gary; and
 3. Brian Evans, Commander of Special Operations, Gary Police Department.
- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:
1. None.

III. EVIDENCE BEFORE THE COMMISSION

- A. The following individuals testified before the Commission in favor of the Applicant in this cause:
1. Wail Odtallah, Applicant;
 2. Tony Veals, Store Manager; and
 3. Rinzer Williams III, Attorney for Applicant.
- B. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:
1. Cease and Desist Order, dated May 28, 2015, Gary City Court (Exhibit 1); and
 2. 12 photographs of the premises, including three (3) pictures of liquor bottles displayed, five (5) pictures of menu boards/food counters, and four (4) pictures of the lobby area, including food items (Exhibit 2).
- C. The following individuals testified before the Commission against the Applicant in this cause:
1. Rodney Pol, Assistant City Attorney, Gary; and

2. Brian Evans, Commander of Special Operations, Gary Police Department.

D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

1. Letter from Michael Protho, Gary IN Councilman, unsigned, sent via e-mail 9/15/15 19.08 (Exhibit A);
2. Screenshot from social media depicting two people and some vodka bottles, sent via e-mail 9/15/15 19.12, objected to on foundational basis (Exhibit B);
3. Screenshot from social media, depicting interior of premises, sent via e-mail 9/15/15 19.14, no objection (Exhibit C);
4. Three (3) pictures of posters on premises walls and menu board advertising the fact that Applicant ID's and they have the coldest beer in town, sent via e-mail 9/15/15 19.27, no objection (Exhibit D); and
5. Four (4) pictures of exterior signage and bottles of liquor behind glass shielding, sent via e-mail 9/15/15 19.37, no objection (Exhibit E).

IV. FINDINGS OF FACT

1. Wail Odtallah, 1008 – 1010 W. 5th Street, Highland, Indiana 46402, permit number DL45-29938, is the Applicant for a Type 210 permit renewal. (ATC File).

2. The Applicant meets the qualifications to hold a permit pursuant to Ind. Code § 7.1-3-4-2. (Local Board Hearing; ATC Hearing).

3. The permit was originally awarded to Applicant after an appeal hearing was held on April 16, 2014. (ATC File; ATC Hearing).

4. At the April 16, 2014 appeal hearing, Applicant stated that he had almost 20 years of experience in dealing with alcohol either at his family restaurant business, or as a manager at a liquor store in East Chicago. (Findings of Fact and Conclusions of Law §11 dated April 29, 2014).

5. At the April 16, 2014 appeal hearing, Applicant stated the he and his brother would operate the business as a 50/50 partnership and one of them would always be present in the restaurant. (Id §10).

6. On July 29, 2014, Applicant was issued a citation by the Indiana State Excise Police (INSEP) for operating outside of the scope of a restaurant permit by operating, in effect, a package liquor store in the one of the suites operated by Applicant. Officer Patrick of the INSEP stated in the report that he had personally spoken with the Applicant several times about what was and what was not allowed under the scope of a retail permit. A Settlement Letter was executed by Applicant on January 13, 2015. (ATC File).

7. On December 24, 2014, Applicant was issued a citation by the INSEP for, among other things, selling alcohol to a minor, as part of a routine alcohol compliance check. During this check, neither the Applicant nor his brother was present at the premises. A Settlement Letter was executed on April 22, 2015. (ATC File, ATC Hearing).

8. On February 25, 2015, Applicant was issued a citation by the INSEP for alteration of floor plan and operating as a package liquor store. The officer noted that there was pricing on alcohol to go, but no pricing on the menu board for alcohol posted for in-store customers. A Settlement Letter was executed on April 28, 2015. (ATC File).

9. Pictures of the interior of the premises tendered by the Applicant show advertisements for alcohol by the bottle on the wall, no posted prices or advertisements for in-store single serving drinks on the menu boards, and two small starbursts advertising shots for \$5.00. (Exhibit 2, ATC Hearing).

10. On May 20, 2015, Applicant was issued a citation by the INSEP for, among other things, selling alcohol to a minor, as part of a routine alcohol compliance check. The officers issued the citation to an individual other than the Applicant or his brother, and did not indicate that they spoke to the Applicant or his brother, so it is unclear as to whether either was present at the time. (ATC File).

11. As of the date of the appeal hearing, the pylon sign for the 5th Plaza center, where the Applicant is located, has listed "Liquor Store" as Applicant's sign, and offers 59¢ Wings and Grey Goose Rem VSOP for 19.99. (Exhibit E, ATC Hearing).

12. As of the appeal hearing date, the storefront sign stated (Exhibit E, ATC Hearing):

PHILLY. LIQUOR
TOBACCO
LIQUOR . COLD . BEER . WINE

13. 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 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 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).

5. 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).

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. In determining whether to renew a permit, the Commission may consider whether the Applicant complies with the provisions and the rules and regulations of the Commission. Ind. Code 7.1-3-23-5.

8. In determining whether to renew a permit, the Commission may consider whether the Applicant alters the type of business then engaged in, which qualifies him to hold the particular type of permit he holds. Ind. Code 7.1-3-23-12.

9. In determining whether to renew a permit, the Commission may consider whether a substantial portion of the business carried on in the premises in respect to which the permit allows is in the nature of the Applicant's main business function in the premises. Ind. Code 7.1-3-1-19.

10. The Commission may reverse a local board's action in denying an application for 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.

11. In this case, the local board based their decision upon the number of recent violations and operating outside of the scope of a retailer's permit. (ATC file).

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

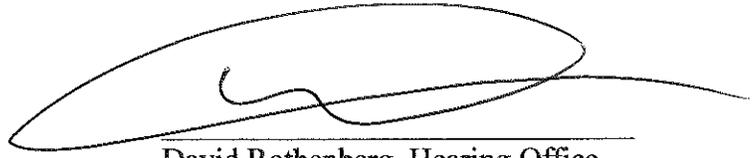
CONCLUSION

Under RR45-29938, Mr. Odtallah is able to operate a retail establishment in which he is allowed to offer carry-out alcohol. That, however, does not allow him to operate the establishment in a manner similar to that of a package liquor store. The above-listed are indicia of a package liquor store. The manager himself used the term "liquor store" during his testimony and, although the "liquor store"-half of this premises has been closed, the outdoor signage advertises the fact that he is operating like a package liquor store, while the inside point-of-sales merchandising does not advertise any alcoholic beverages which can be purchased for on-premises consumption.

Furthermore, the premises has received citations for serving a minor – which occurred while neither Mr. Odtallah nor his brother were present in the store. During Mr. Odtallah's appeal a year ago, which resulted in the awarding of this permit, one of the major factors the Commission took into consideration was the experience he and his brother had in the alcohol business and the promise that one of them would be there, always, to make sure minors were not served. This has not been done.

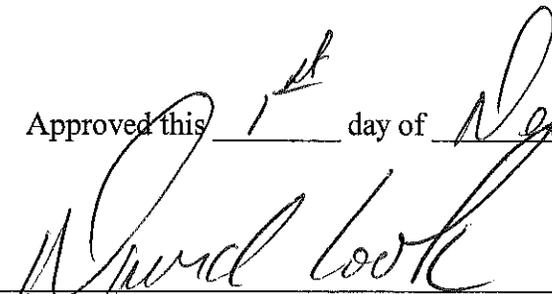
THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Lake County Local Board resulting in a 3-0 vote to deny the application for the permit number RR45-29938, was supported by substantial evidence, was not arbitrary, and the Alcohol and Tobacco Commission should deny said application. The application of Wail Odtallah, 1008 – 1010 W. 5th Avenue, Gary, Indiana, for the Type 210 permit number RR45-29938, was sufficient and the permit applied for herein is DENIED.

DATE: OCTOBER 27, 2015

A handwritten signature in black ink, consisting of a large, sweeping loop on the left side that crosses over itself and extends to the right, ending in a long, thin horizontal stroke.

David Rothenberg, Hearing Office

Approved this 1st day of December, 2015.



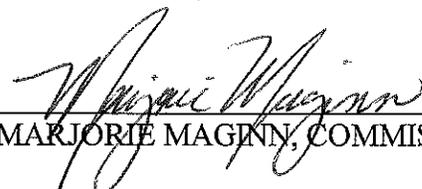
DAVID COOK, CHAIRMAN



DAVID COLEMAN, VICE CHAIRMAN



DALE GRUBB, COMMISSIONER



MARJORIE MAGINN, COMMISSIONER