

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

IN THE MATTER OF)	
THE PERMIT OF)	
)	
SADDLE-UP SALOON, LLC)	
d/b/a SADDLE-UP SALOON)	PERMIT NO. RR7133465
13261 CHIPPEWA BLVD)	
MISHAWAKA, INDIANA 46545)	
)	
Applicant.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

Saddle-Up Saloon, LLC, 13261 Chippewa Blvd., Mishawaka, IN 46545, permit number RR7133465 (Applicant), is the applicant for a new permit to sell beer, wine, and liquor, in a restaurant located in an unincorporated area to be issued by the Alcohol and Tobacco Commission (ATC). The application was assigned to the Alcoholic Beverage Board of Saint Joseph County (Local Board). The Applicant's matter was heard by the Local Board on August 23, 2017, where it was denied by a vote of 4-0. On October 3, 2017, the Commission adopted the findings of the Local Board and denied the permit. The Applicant received notice of the Commission decision on October 20, 2017. On November 3, 2017, the Applicant timely filed for an appeal hearing regarding the Commission's denial.

The matter was set for hearing on May 22, 2018, 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. David Goff, Applicant, represented by attorney Ryan M. Dvorak.
- B. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:
1. Exhibit A-1 – Letter from John Gonsolves.
- C. The following individuals testified before the Local Board against the Applicant in this cause:
1. Ross E. Uitdenhowen, Saint Joseph County Sheriff's Department.
- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:
1. R-1 – packet of documents including:
 - a. Two photographs;
 - b. Three page summary of concerns;
 - c. Seven pages of screen shots of property tax information;
 - d. Seven pages of property tax information generated on May 4, 2017;
 - e. Four pages of letters from John Gonsolves to Ross Uitdenhowen regarding a business operated by Joann McCune;
 - f. Two page article titled “Advice for Buying a Restaurant and Selling a Restaurant;”
 - g. Three page internet forum titled “Other than location, what are the most important factors to consider when opening a new restaurant?;”
 - h. One page article titled “How to Start Your Own Successful Bar – Crave Online;”
 - i. Two page article titled “Food Network Chef Robert Irvine Shares the Top 5 Reasons Restaurants Fail;”
 - j. Two page website titled “Top 5 Reasons Bars Fail;” and
 - k. Two page article titled “Bonus Report – Top 5 Reasons Restaurants Fail.”
 2. R-2 – packet of thirty-seven photos.

III. EVIDENCE BEFORE THE COMMISSION

- A. The following individuals testified before the Commission in favor of the Applicant in this cause:
1. David Goff, Applicant, represented by attorney Ryan M. Dvorak;

- 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. Ross E. Uitdenhowen, Saint Joseph County Sheriff's Department.
- D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:
1. None

IV. FINDINGS OF FACT

1. Saddle-Up Saloon, LLC, 13261 Chippewa Blvd., Mishawaka, IN 46545 (Premises), permit number RR7133465 (Applicant), is the applicant for a new permit to sell beer, wine, and liquor, in a restaurant located in an unincorporated area to be issued by the Alcohol and Tobacco Commission (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. Applicant entered a lease with an option to purchase the property located at 13261 Chippewa Blvd. St. Joseph, IN 46545 from John Gonsalves (Local Board Hearing; ATC Hearing).
4. Applicant submitted a Property Tax Clearance Form signed by the Saint Joseph County Treasurer at the time of application indicating that the property was current on property taxes. (ATC File.)

5. Previous alcoholic beverage permits at Premises caused concerns for Indiana State Excise Police and/or local law enforcement. (Local Board Hearing. ATC Hearing.)
6. John Gonsalves was involved with prior alcoholic beverage permits at the Premises. (Local Board Hearing. ATC Hearing.)
7. John Gonsalves is the owner of the property located at 13261 Chippewa Blvd., Mishawaka, Indiana 46545.
8. John Gonsalves has no business ties to Saddle-Up Saloon, LLC, or Applicant beyond the lease agreement and normal landlord-tenant relationship. (Local Board Hearing. ATC Hearing.)
9. Some work has already been completed to the parking lot at the Premises. (ATC Hearing.)
10. Applicant intends to operate the premises as a country and western karaoke restaurant/bar that serves food and alcohol with a focus on pool and darts, including featuring pool tournaments and dart leagues. (Local Board Hearing, ATC Hearing.)
11. There is a similar concept business in Mendon, Michigan, approximately 90 minutes from Premises. A local business has a similar concept one night per week. (Local Board Hearing.)
12. Applicant's brother who has prior experience in restaurant kitchens will be employed as a chef. (ATC Hearing.)
13. Applicant will be open for lunch to serve lunch to employees of local businesses in the industrial area. (ATC Hearing.)
14. Applicant intends to hire off-duty law enforcement on weekends. (ATC Hearing.)

15. Remonstrator expressed concerns that John Gonsalves will be involved with the Applicant and the Applicant's business. (Local Board Hearing. ATC Hearing.)

16. Remonstrator expressed concerns that Applicant does not have experience operating a restaurant or bar and will not be successful. (Local Board Hearing. ATC Hearing.)

17. Remonstrator expressed concerns that Premises is in deplorable conditions. (Local Board Hearing.)

18. Remonstrator expressed concerns about the payment of property taxes. (Local Board Hearing.)

19. Remonstrator expressed concerns that Applicant will not meet the required gross food sales requirements for the permit type.

20. The local board based their vote to deny the permit on the neighborhood/community not desiring the services, the neighborhood/community not needing the services, and the business having a negative impact on the community. (Local Board Hearing.)

21. 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 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. 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.

8. 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.

9. In determining whether to award an applicant a new permit, the Commission shall investigate the need for such services at the proposed location and the desire of the neighborhood or community to receive such services. 905 IAC 1-24-4(a) and (b).

10. Where the choice for the product is slim or nil, that will usually show a need, which would shift the burden to remonstrators to show that there are alternatives, of that whether or not need exists, there is simply no desire for the product. *See John Malone Enterprises, Inc. v. Schaeffer, et al.*, Ind. App. (1996), 674 N.E.2d 599.

11. "Need" means whether the services are available at the location or in some close geographical proximity. 905 IAC 1-27-4(a).

12. "Desire" means whether the individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).

13. 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.*

14. Existing beer, wine, and liquor retail restaurant applicants in unincorporated areas must have annual gross food sales of at least one hundred thousand dollars (\$100,000) per year. For the first two year period a business is open, the beer, wine, and liquor retail restaurant must meet a two hundred thousand dollar (\$200,000) per two year requirement. Upon initial application, food sales requirements are based on projections. Ind. Code § 7.1-3-20-12 and 13.

15. Upon initial application and renewal, the Applicant shall submit a Property Tax Clearance Form 1 to the Commission signed by the county treasurer indicating that the property is current on all property taxes owed. Ind. Code § 7.1-3-21-15.

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. A licensed premises may become a public nuisance even if the permit holder does not allow or acquiesce to the behavior creating the public nuisance. *255 Morris, LLC v. Ind. Alcohol and Tobacco Comm.*, 93 N.E. 3d 1149, 1154 (Ind. Ct. of App. 2018).¹

18. 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*.

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

IV. RECOMMENDATION

A new or transfer of location permit can be denied for many reasons. For example, the proximity to a church or school, lack of high and fine reputation in the community, and the need and desire of the community for such services are all reasons listed in statute or rule. In the case of the above examples, the premises is not located within the 200-foot mark of the wall of a school or church and there is no evidence that the Applicant does not have a high and fine reputation in the community. The Local Board stated that their decision was based on the lack of need and/or desire of the community to have such services and negative impact on other businesses.

¹ The Indiana Court of Appeals decided *255 Morris, LLC* in February 2018 distinguishing from prior decisions such as *Ind. Alcoholic Beverage Com'n v. River Road Lounge, Inc.*, 590 N.E. 2d 656 (Ind. Ct. App. 1992) in which the court stated that a permittee must *allow* the public nuisance to exist. This change is based on a 2001 amendment to 905 IAC 1-27-2 which removed the word "allow" from the language of the rule.

The remonstrator stated that his concerns with this establishment are that John Gonsalves will be involved with the business, that David Goff does not have the experience to run the business, that property taxes are not or will not be paid, that Applicant will not meet the food sales requirements, and generally that prior public nuisance issues at the location continue under Applicant's operation of a business at this location.

No evidence was presented that there is a connection between Applicant and Gonsalves that would lead to Gonsalves involvement in the business. A denial of the permit because of the character of Mr. Gonsalves is unsupported by substantial evidence that he will be involved in the business.

There are no statutory requirement 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.

The Form 1 submitted by the Applicant with the initial application stated that property taxes were current which meets the statutory requirements for the issuance of a new permit. Property taxes must be current at the time of renewal. The statutory requirements for property taxes are met by the Applicant and to deny a permit on these grounds would not be in accordance with the law.

The Applicant testified under oath that he intends to have food service and a full kitchen. He also indicated under oath that he understands the food sales requirements and intends to meet them. Upon renewal, the Applicant must provide the amount of gross food sales and the amount of gross alcohol sales. The Applicant must have at least two hundred thousand (\$200,000) in food sales at the end of the first two years of operations to continue to qualify to hold this permit. To deny a permit based on the possibility that gross food sales

requirements will not be met, is not in accordance with the law and unsupported by substantial evidence.


Applicant has no history of violations with the Alcohol and Tobacco Commission. To deny a permit to Applicant based on public nuisance allegations against a prior permit holder 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 continues as a public nuisance under Applicant's ownership, 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, the neighborhood/community not needing the services, and the business having a negative impact on the community. The only evidence of need was information presented by the Applicant that there is not a similar business concept full time within ninety (90) minutes. There is one business locally that has a similar concept but only one day per week. The only evidence of desire of services was presented by the Applicant. The Applicant indicated that he wanted to open this concept because of his involvement in pool tournaments and his connections to people that would be involved in the tournaments. Finally, there was no evidence presented of what the negative impact on the community would be outside of the concerns of one remonstrator. For the reasons stated previously, the concerns of the remonstrator are either unsupported by substantial evidence or not in accordance with the law. Gross food sales requirements and future property tax payments are handled through statutory processes at renewal and to deny an initial application for those reasons would not be in accordance with the law. To deny a permit for the character or prior violations of a person that is not involved in the business or for public nuisance concerns at the location under prior ownership would be an abuse of discretion, not in

accordance with law, and in excess of the statutory jurisdiction granted to the local board and the commission.

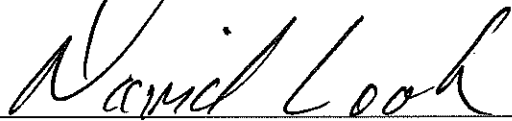
THEREFORE, IT IS RECOMMENDED that the decision of the Saint Joseph County Local Board and the Commission to deny the application for the permit number RR7133465, should be reversed and the application of the Saddle-Up Saloon, LLC, 13261 Chippewa Blvd., Mishawaka, IN 46545, for a beer, wine, and liquor retail permit in an unincorporated area, thus applied for herein, be APPROVED.

DATE: July 2, 2018

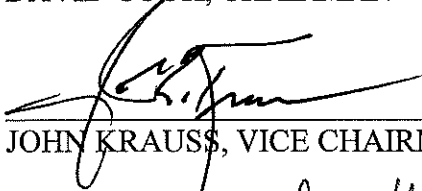


Jessica Allen, Hearing Officer

Approved this 17th day of July, 2018.



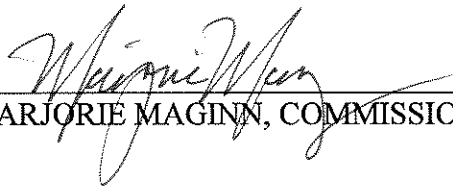
DAVID COOK, CHAIRMAN



JOHN KRAUSS, VICE CHAIRMAN



DALE GRUBB, COMMISSIONER



MARJORIE MAGINN, COMMISSIONER