

**BEFORE THE
INDIANA ALCOHOL AND TOBACCO COMMISSION**

IN THE MATTER OF)	
THE PERMIT OF)	
)	
FRANCO'S OF HIGHLAND, INC)	PERMIT NO. RR45-14427
2712 CONDIT, AVE)	
HIGHLAND, IN 46322)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

Franco's of Highland, Inc., 2712 Condit Ave., Highland, IN 46322, permit number RR45-14427 (Applicant), is the applicant for the renewal of a permit to sell beer, liquor, and wine, in a restaurant located in an incorporated area to be issued by the Alcohol and Tobacco Commission (ATC). The application was assigned to the Alcoholic Beverage Board of Lake County (Local Board). The Applicant's matter was heard on February 2, 2016, where it was denied by a vote of 2-1. On March 1, 2016, the Commission adopted the findings of the Local Board and denied the permit. On March 10, 2016, the Applicant filed for an appeal hearing regarding the Commission's denial, which was granted.

Prior to the appeal hearing, Kim Nordoff, Caryl Lewis, and Sidney Lewis all filed motions to gain intervening remonstrator status, all of which were denied. Additionally, the Applicant filed a Motion to Suppress and Limine, which was denied in part and granted in part.

The matter was set for hearing on December 16, 2016, 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 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. Frank Calderone, owner, Applicant; and
 2. Henry Wieloch (sp?), employee, 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 appeared before the Local Board against the Applicant in this cause:
1. Kim Nordoff, resident;
 2. Paul Nordoff, resident;
 3. Sindney Lewis, resident;
 4. Caryl Lewis, resident; and
 5. Helen Merkel, resident.
- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:
1. Request for Access to and Disclosure of Public Records including results (Exhibit A);
 2. Letter from Mark Mader, Indiana Alcohol and Tobacco Commission Prosecutor (Exhibit B);
 3. ATC Incident Report EX15-007125 (Exhibit C);
 4. Petition for Emergency Revocation of Liquor License with 21 signatures (Exhibit D);
 5. Various social media posts concerning Applicant (Exhibit E);
 6. Death certificate for Joshua Michael Headley (Exhibit F);
 7. Obituary for Joshua Michael Headley (Exhibit G);
 8. Online petition for the immediate revocation of Applicant's liquor license with 119 supporters (Exhibit H);
 9. Newspaper article dated March 25, 2015 titled "Family, friends remember victim at vigil" from the Post-Tribune (Exhibit I); and
 10. Article from ABC7Chicago.com highlighting incident taking place at Franco's (Exhibit J).

III. EVIDENCE BEFORE THE COMMISSION

- A. The following individuals appeared before the Commission in favor of the Applicant in this cause:
1. Frank Calderone, Owner, Applicant;
 2. Phil Johnson, friend of Calderone and patron of Applicant;
 3. Stanley Latting, friend of Calderone and patron of Applicant; and
 4. Davey Neal, Attorney for Applicant.
- B. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:
1. Applicant's menu (Exhibit A);
 2. Petition in support with approximately 590 names (Exhibit B);
 3. March 24, 2015 letter from Highland police Department to Applicant outlining a discussion at which agreed-upon changes in the Applicant's operation (Exhibit C);
 4. October 16, 2016 letter from Highland Police Department outlining the results of an inspection as to the points outlined in the March 24, 2015 letter (Exhibit D); and
 5. Highland Police Department runs between January 2014 and September 2016 (Exhibit E);
- C. The following individuals testified before the Commission against the Applicant in this cause:
1. Kim Nordoff, resident and mother of Joshua Michael Heady;
 2. Caryl Lewis, resident; and
 3. Ray Lewis, resident.
- D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:
1. Offer and Acceptance of Settlement between Applicant and ATC dated May 18, 2015 (Exhibit 1);
 2. Secretary of State printout on Carmen's Two, Inc. (Exhibit 2);
 3. IN.GOV printout on ownership of Applicant and Carmen's Tow, Inc. (Exhibit 3);
 4. IN.GOV printout of ownership of Jojo's, Inc., Special Auto Sales, LTD, and Tracy Construction, Inc. (Exhibit 4);
 5. Journal Gazette article dated September 18, 2016 "Bar granted reprieve in liquor license fight" (Exhibit 5);
 6. Indiana Excise Citation RJ01-0826-1 dated August 26, 2007 (Exhibit 6); and
 7. Various orders, minutes, and police reports which may or may not have been previously part of the ATC file (Exhibit 7).

IV. FINDINGS OF FACT

1. Franco's of Highland, Inc., 2712 Condit Ave., Highland, IN 46322, permit number RR45-14427, is the applicant for the renewal of a permit to sell beer, liquor, and wine. (ATC File).

2. The Applicant meets the qualifications to hold a permit pursuant to Ind. Code §§ 7.1-3-4-2(a)(1), (2)(B), and (3) through (13). (Local Board Hearing; ATC Hearing).

3. Applicant has operated the business for approximately 12 years and serves a full menu of food. (ATC Hearing).

4. Beginning on or about 2007 and culminating a run of which the death of a patron was the result, the Applicant has had a number police runs to the premises, involving fights, a stabbing, indecent exposure, theft, and mischief. (ATC Hearing).

5. In 2007, Applicant was cited for an employee acting without a permit (§7.1-5-6-3), serving after hours (905 IAC 1-10-2), and violation of closing hours (905 IAC 1-10-1), of which a fine was paid (ATC File).

6. In 2010, Applicant was cited for an employee acting without a permit (§7.1-5-6-3), of which a fine was paid (ATC File).

7. In 2013, Applicant was cited for serving after hours (905 IAC 1-10-2) and violation of closing hours (905 IAC 1-10-1), of which a fine was paid. (ATC File).

8. On March 22, 2015, an incident in the bar occurred resulting in the death of Joshua Michael Heady. (Local Board Hearing; ATC Hearing).

9. As a result of the March 22, 2015 incident, on April 7, 2015, Applicant was cited for Determination of Qualifications (905 IAC 1-21-1), Public Nuisance (905 IAC 1-27-

2(O), and Failure to Maintain a High and Fine Reputation (Ind. Code §7.1-3-9-10), of which a fine was paid. (ATC File).

10. In resolution to the April 7, 2015 citation, Applicant agreed to implement all changes proposed by the highland police Department, as noted in point 12 below. (ATC File).

11. Frank Calderone was on the premises of Applicant the night/morning of the March 22, 2015 incident. (ATC Hearing).

12. As a result of a meeting with the Highland Police stemming from the March 22, 2015 incident, the Highland Police and the Applicant devised a list of suggestions for the Applicant to help with the clientele that was causing some criminal activity. (ATC Hearing).

13. Above-mentioned suggestions include:

- i. Contact 911 anytime if a disturbance is detected;
- ii. Issue trespass warnings when needed and disperse crowd in orderly fashion;
- iii. Provide video surveillance of public areas both inside and out;
- iv. Cameras should be clean and equipped with a flashing red light to indicate the camera is recording;
- v. Signage should be posted to indicate video recording is taking place;
- vi. Increase lighting both inside and out of building;
- vii. Eliminate the use of DJ's;
- viii. Eliminate drink specials;
- ix. Close bar at 2 am with all patrons off premises by 2:30 am;
- x. Hire one off-duty police officer to assist with security, maintaining it both inside and out; and

xi. Implement the use of an ID scanner.

14. Applicant did not meet the requirement with the ATC to follow the suggestions listed in point 12 above, including the continuance of drink specials, increased outside lighting, and following through on outside security. (ATC Hearing).

15. Any verbal adjustments made between the Highland Police Department and the Applicant did not absolve the duty owed by the Applicant to the ATC to follow the recommendations in Point 12 above, including allowing drink specials after a period of time. (ATC Hearing).

16. It is the Applicant's policy to remove patrons from the premises engaging in illegal activities or fighting. (ATC Hearing).

17. Applicant implemented Bingo Night, Trivia Night, and Half-Price Pizza Day. (ATC Hearing).

18. Applicant believes his business has slowed and he now sells more food than alcohol. (ATC Hearing).

19. There are been six (6) police runs to the premises in 2016. (ATC Hearing).

20. Frank Calderone has had prior corporations which were administratively revoked or dissolved after they had been closed. (ATC 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. In determining whether to renew a permit, the Commission may consider whether the applicant refuses to comply 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 the moral character and repute of the applicant. *905 IAC 1-27-1*.
9. Police runs to an establishment are insufficient to show bad character unless it can be established that there is a nexus between the criminal conduct and the permittee's moral character. *Hanley v. Eastern State Inv. Corp., 706 N.E.2d 576 at 578 (Ind. Ct. App. 1999)*.
10. In determining whether to renew a permit under the standards of 905 IAC 1-27-1, the Commission may consider the esteem in which the person is held by members of his

community, and such assessment of his character as may be reasonably inferred from police reports, evidence admitted in court, and other commission proceedings. *Id.*

11. In order to deny a permit there must be a nexus between the criminal conduct and the applicant's moral character. For example, “[i]f the record showed that the permit holder knew a certain drug dealer was utilizing its hotel to carry on drug trafficking, and took no steps to prevent it, this would allow an inference that the applicant was not of good moral character. The arrest of the same person for prostitution, in the permit premise, on numerous occasions would allow one to infer that the permittee was not of good moral character.” *Id.*

12. In determining whether to renew a permit, the Commission may consider whether the licensed premises has become a public nuisance, or is the scene of acts or conduct which are prohibited by the Indiana Penal Code. *905 IAC 1-27-2.*

13. The elements for maintaining a public nuisance require that the permittee allows the licensed premises to become a public nuisance or be the scene of acts or conduct prohibited by the laws of the United States or Indiana. *Indiana Alcoholic Beverage Comm. v. River Road Lounge, 590 N.E. 2d 656, 658 (Ind. App. 1992).* “Allow” has been construed by Indiana courts to mean “concede, consent to, and to grant.” *Id.* In light of such definition, the permittee must have direct or indirect knowledge of illegal activity on its premise. *Id.*

14. The court shall consider the efforts the owner of the business took to abate the public nuisance. *Ind. Code §7.1-2-6-1(c).*

15. 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.*

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

IV. CONCLUSION

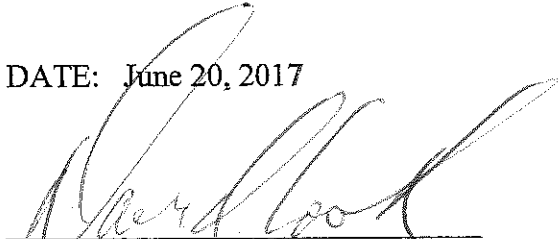
The Applicant has had a history of numerous police runs to the premises in the past which have included various acts of violence. In accordance with case law, one measure of an applicant's character are the number of police runs to the premises, but only if a nexus between the applicant and the acts causing the police run can be shown. This would include either involvement in the acts or knowledge of the acts. In this case, the number of police runs to the premises over a long period of time should have put the Applicant on notice as to the acts. The culmination of these acts was a police run on March 22, 2015, the resulted in the death of a patron.

In working with the Highland Police Department, a number of suggestions were given to the Applicant to implement. On April 29, 2015, the Applicant signed an Offer and Acceptance of Settlement, which included the wording: "Permit holder shall implement all changes proposed by the Highland Police Department administration on March 24, 2015 including change numbers 6 & 7 relating to eliminating drink specials and closing the bar nightly at 2:00 am with all patrons to be removed no later than 2:30 am." Regardless of any future agreements after that date between the Highland Police Department and the Applicant curtailing any of the suggestions, the Commission finds that the Applicant was still bound by his agreed Offer and Acceptance of Settlement and did not fulfill those requirements.

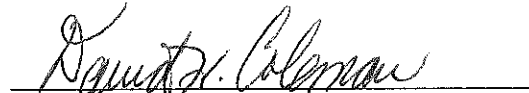
As to the death of Joshua Headey on March 22, 2015, any culpability the Applicant may have in that incident is speculative, based on the evidence presented before the Commission.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Lake County Local Board resulting in a 2-1 vote and the Commission vote to deny the application for the permit number RR45-14427, should be upheld and the application of Franco's of Highland, Inc., 2712 Condit Ave., Highland, IN 46322 for a beer, liquor, and wine retail permit, thus applied for herein, be DENIED.

DATE: June 20, 2017




David Cook, Chairman



David Coleman, Vice Chairman



Dale Grubb, Commissioner



Marjorie Maginn, Commissioner

