

STATE OF INDIANA
BEFORE THE ALCOHOL & TOBACCO COMMISSION

IN THE MATTER OF)
THE PERMIT OF:)
)
GLADYS BOTINA) **PERMIT NO. RR49-24057**
d/b/a HOOKA LOUNGE CALI BOGALOO)
3671 W. 86TH STREET)
INDIANAPOLIS, IN 46268)
Applicant

REVISED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Background of the Case

Gladys Botina (“Applicant”) is an applicant for renewal of Alcohol and Tobacco Commission permit type 111. The Alcoholic Beverage Board of Marion County (“Local Board”) held a hearing and voted to recommend denial of the application for renewal. The Alcohol and Tobacco Commission (“Commission” or “ATC”) remanded the matter to the Local Board who again voted to recommend denial. The Commission upheld the Local Board’s recommendation to deny the application. Applicant filed a timely notice of appeal. Applicant, by counsel Jeffrey McKean of MCKEAN LAW FIRM, P.C., participated in an appeal hearing held before N. Davey Neal (“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 is the holder of an Alcohol and Tobacco Commission permit type 111, numbered RR49-24057 (“Permit”).
2. On March 15, 2010, Local Board recommended denial of the Applicant’s renewal application.

3. On November 18, 2010, the Commission ordered the matter remanded back to the Local Board.
4. On February 22, 2011, the Local Board reheard the matter and recommended denial of the Applicant's renewal application.
5. On March 1, 2011, the Commission upheld the Local Board's recommendation to deny the renewal.
6. On March 17, 2011, the Applicant filed a Notice of Appeal.
7. The matter was continued several times at the request of the Applicant.
8. On January 24, 2012, the Commission heard the Applicant's appeal of the Commission's denial of the renewal application.

III. Evidence Before the Local Board

1. The following individuals testified before the Local Board on February 22, 2011, in favor of the Applicant:
 - a. The Applicant, as well as counsel Mark Webb of Voyles, Zahn, Paul, Hogan and Merriman, responded to questions from the Local Board.
2. The following evidence was introduced and admitted before the Local Board in favor of the Applicant:
 - a. No exhibits were formally entered.
3. The following individuals testified before the Local Board on August 15, 2011, against the Applicant:
 - a. Sgt. William Carter, Indianapolis Metropolitan Police Department ("IMPD")
 - b. Mary Walker, MCANA
 - c. Susan Blair, Pike Township Residents' Association
4. The following evidence was introduced and admitted before the Local Board against the Applicant:
 - a. Memorandum by Sgt. William Carter of IMPD requesting denial of permit.

- b. Incident History Detail reports (a document generated by IMPD) detailing IMPD involvement in the Applicant's premises. (Local Board exhibits 1-3, 7, 11-12,)
- c. Case Report 09-0089473-0000 detailing an aggravated assault with a gun on June 21, 2009. (Local Board exhibit 4)
- d. Photos of the victim from the aggravated assault with a gun on June 21, 2009. (Local Board exhibit 5-6)
- e. Supplemental case report #DP090089473, providing more detail on the aggravated assault with a gun on June 21, 2009. (Local Board exhibit 10)
- f. Supplemental case report #DP090140428, providing detail on a homicide on September 19, 2009. (Local Board exhibit 13)
- g. Indiana State Excise Police incident report form detailing various violations issued to the Applicant. (Local Board exhibit 14, 19)
- h. A collection of photos purportedly posted online featuring activities at the Applicant's premises. (Local Board exhibit 15)
- i. IMPD case reports detailing IMPD interaction with the Applicant premises. (Local Board exhibits 16-17)
- j. A letter from Susan Blair, president of the PTRAs, stating opposition to the renewal of Applicant's permit. (Local Board exhibit 18)

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 19, 2011, in favor of the Applicant:
 - a. The Applicant, through its owner Gladys Botina, responded to questions from the Hearing Judge.
 - b. Applicant was represented by legal counsel Jeffrey McKean, MCKEAN LAW FIRM, P.C.
 - c. Michael Sarriu, son of the Applicant and manager of Applicant's premises.
3. The following evidence was introduced and admitted before the Hearing Judge in favor of the Applicant:
 - a. GoogleEarth overhead map of the intersection of 86th Street and Michigan in Indianapolis, IN. Applicant's premises is in a commercial property to the West of that intersection. (Applicant's exhibit 1)

- b. GoogleEarth overhead map of 3671 W. 86th Street in Indianapolis, IN. The view reveals the commercial property where Applicant's premises is located as well as a residential property to the South of Applicant's premises. (Applicant's exhibit 2)
 - c. Law enforcement reports; CAD search results prepared by IMPD detailing police runs to the Applicant's address from January 1, 2008 to January 19, 2012. (Applicant's exhibit 3)
 - d. A petition in favor of Applicant's renewal application. The petition is signed by 139 individuals. Not all individuals placed their address or distance from the premises on the petition. (Applicant's exhibit 4-5)
4. The following individuals testified at the Appeal Hearing on December 19, 2011, against the Applicant:
 - a. Sgt. William Carter, IMPD
 - b. Chris Schneider, owner of 86th Street Pub, a commercial neighbor to Applicant
 - c. Susan Blair, president of Pike Township Residents' Association
 - d. Bennie Shobe, owner of Divine Design, a commercial neighbor to Applicant
5. The following evidence was introduced and admitted before the Hearing Judge against the Applicant:
 - a. An article from TheIndyChannel.com, dated January 22, 2012, detailing an Indiana State Excise Police investigation at another permit premises, Double Apple Lounge, owned by Mr. Sarriu, son to the Applicant and former manager of Applicant's premises. (Remonstrator exhibit 1)
 - b. An article from IndyStar.com, dated January 23, 2012, detailing the same Indiana State Excise Police investigation into the Double Apple Lounge. (Remonstrator exhibit 2)
 - c. A screenshot from the Business Entity Search feature of the Indiana Secretary of State's business services division website. The screenshot is basic corporate information for RB & MS LP, a limited partnership that operates under the assumed business name of Double Apple Lounge. (Remonstrator exhibit 3)
 - d. A binder, not formally marked as an exhibit, with statements from remonstrators Schneider and Shobe explaining the nature of their remonstrance. The binder further contains petitions signed by clients of the businesses of both remonstrators. Petitioners did not have to state their address or other identifying mark to state if they work or live within proximity to the Applicant.

V. Findings of Fact

1. Applicant is the holder of an Alcohol and Tobacco Commission permit type 111, numbered RR49-24057. (ATC File)
2. Gladys Botina is the owner and operator of the permit premises and the Applicant for the renewal application. (Local board hearing; Appeal hearing; ATC File)
3. Michael Sarriu is the son of the Applicant, a former manager of the permit premises, and the current owner of another active alcohol permit. (Appeal hearing)
4. The Local Board cited previous violations as reason for recommending denial of the Applicant's renewal application both in March 2010 and in February 2011. (Local board hearing; Appeal hearing; ATC File)
5. Indiana State Excise Police has issued several violations to the Applicant before the renewal application was filed, after the application was filed, but before the Local Board investigated the application and after the Local Board investigated the matter and recommended denial. (Local Board hearing; Appeal hearing; ATC File)
6. Commercial neighbor Bennie Shobe has seen a negative impact to his business. (Local Board hearing, Appeal hearing)
7. Commercial neighbor Chris Schneider has seen a negative impact to his business. (Appeal hearing)
8. The 86th Street Pub does not attract the same customer base, and is not a competitor of the Applicant. (Appeal hearing)
9. The presence of private security at the Applicant's premises is an indication of proactive steps to address security issues, but does not alleviate serious concerns about the fitness of this applicant to hold an alcohol permit. (Appeal hearing)
10. The occurrence of an Indiana State Excise Police investigation at the permit premises of a relative of the Applicant does not warrant consideration by the Commission. (Appeal hearing)

11. Applicant did call IMPD to address possible criminal activity taking place in front of the Applicant's premises. (Appeal hearing)
12. The Local Board has twice recommended denial of the Applicant's permit. (ATC File)
13. The Commission has twice upheld the Local Board's recommendation of denial. (ATC File)
14. Any Finding of Fact may be considered a Conclusion of Law, if the context so warrants.

VI. 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. Applicant properly submitted an application for renewal of its Permit in accordance with IND. CODE § 7.1-3-1-4.
3. The Commission is authorized to act upon proper application. IND. CODE § 7.1-3-1-4.
4. The Commission is required to follow the recommendation of the Local Board when the Local Board votes to deny an application by 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.
5. The Hearing Judge may take judicial notice of the ATC File, including the transcript of proceedings and exhibits before the Local Board. 905 IND. ADMIN. CODE 1-36-7(a).
6. The Hearing Judge may consider as evidence all documents, codes, and standards that have been adopted by the State of Indiana. 905 IND. ADMIN. CODE 1-36-8(e).
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 ATC File. IND. CODE § 7.1-3-19-11(a); 905 IND. ADMIN. CODE 1-36-7(a).

8. A renewal application may be denied for one of the following reasons: (1) the permittee does not maintain a high and fine reputation, and is not of good moral character and good repute in the community; (2) the permittee has allowed the licensed premises to become a public nuisance, or the scene of acts or conduct which are prohibited by the criminal laws of Indiana or the United States; (3) the permittee violates or refuses to comply with a provision or a rule or regulation of the Commission; (4) the permittee has ceased to possess any of the qualifications, including alteration or cessation of the particular business or type of business then engaged in, which qualifies him to hold that particular type of permit; or (5) the applicant has not fully disclosed the true facts in respect of the location of the permit premises for which the permit is applied. 905 IND. ADMIN. CODE 1-27-1, 2, and 3.
9. In determining a Applicant's eligibility to hold, renew, or continue to hold a permit, particularly where the applicant is of good moral character and of good repute, the Commission shall consider whether acts or conduct of the applicant or agents or employees constitutes action or conduct prohibited by the Indiana Penal Code or United States Code. 905 IND. ADMIN. CODE 1-27-1.
10. The Applicant contends the Local Board's decision not to renew the Permit was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; and/or (e) unsupported by substantial evidence. Ind. Code § 7.1-3-19-11
11. Where an issue involves a charge of moral turpitude, the presumption of innocence obtains in civil as well as in criminal cases; hence when in a civil action a party is charged with a crime, the evidence should be sufficient to overcome the presumption of innocence. *Spurlin v. State*, 20 Ind. App. 342 (Ind. Ct. App. 1898).
12. Substantial evidence is the standard to be applied by the Commission in review of the record of proceedings. Substantial evidence requires something more than a scintilla, and less than a preponderance of evidence; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Indiana Alcoholic Beverage Comm. v. River Road Lounge*, 590 N.E. 2d 656, 659 (Ind. App. 1992); see also *Roberts v. County of Allen*, 773 N.E.2d 850, 853 (Ind. App. 2002). Substantial evidence is more than speculation or conjecture. *Id.*
13. The function of a local board is that of a recommending body. The Commission itself is the ultimate decision maker; it is required to follow the recommendation of the

local board only when a majority of the members of the local board vote to deny the application for a permit. In all other instances the Commission can act with or without the approval of the local board. *Indiana Alcoholic Beverage Com. v. State*, 269 Ind. 48, 58 (Ind. 1978).

14. The initial findings of the Local Board were not (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; and/or (e) unsupported by substantial evidence. Ind. Code § 7.1-3-19-11
15. The Commission, at its discretion, however, may allow the Applicant to place the denied Permit into escrow and allow a reasonable time for the Applicant to sell the Permit to a bona fide purchaser for value in an arms length transaction subject to the approval of the Commission. 905 IND. ADMIN. CODE 1-36-2(c).

Therefore, it is ORDERED, ADJUDGED AND DECREED that the recommendation of the Local Board to deny this renewal application must be UPHeld.

It is, further, ORDERED, ADJUDGED and DECREED that the appeal of the Applicant is DENIED, and the renewal of permit is hereby DENIED.

Dated: April 17, 2012

Dave Johnson
Vice Chairman