

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

IN THE MATTER OF)	
THE PERMIT OF)	PERMIT NO. DL45-28669
)	
H&R PETRO FOOD)	
MART INC)	

**PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. BACKGROUND OF THE CASE

H&R Petro Food Mart Inc. (“Applicant”) located at 1500 Grant Street, Gary, Indiana 46404, permit #DL45-28669, is the applicant for a type 115 Alcohol and Tobacco Commission (“Commission” or “ATC”) permit. The application was assigned to the Alcoholic Beverage Board of Lake County (“Local Board”). The Local Board held a hearing on March 6, 2012, and at the conclusion of the hearing, voted unanimously to recommend denial of the Application for a new Permit based upon the finding that there was no need for the services of the appellant and that the community did not desire the services. The Commission adopted the Local Board’s recommendation on March 20, 2012.

Applicant filed a timely Notice of Appeal on April 10, 2012, and the matter was assigned to Commission Hearing Judge N. Davey Neal, however, the matter was actually heard by Vice Chairman Johnson (“Hearing Judge”). The matter was set for hearing (“ATC Hearing”) on June 12, 2012, and , at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement. The Hearing Judge, having reviewed the transcript of the Local Board hearing, the evidence submitted to the Commission during the appeal hearing and the contents of the entire Commission file, now tenders his Proposed Findings of Fact and Conclusions of Law for recommendation to the members of the Commission.

II. EVIDENCE BEFORE THE LOCAL BOARD

- A.** One witness, Denise Singh, Wife of a (fifty) 50 percent owner of the corporate applicant, testified before the Local Board in favor of the Applicant in this cause.
- B.** No evidence was introduced or admitted before the Local Board in favor of the Applicant in this cause.
- C.** The following individuals testified before the Local Board against the Applicant in the cause:
1. Carolyn Rogers, Fourth District Council person for the City of Gary, Indiana.
 2. Nadiyah Muhammad, member of Gary Muslim Center located at 1473 West 15th Avenue.
 3. Rufus Purnell, who lives within three (3) blocks of the applicant's location.
- D.** No evidence was introduced or admitted before the Local Board against the Applicant in this cause.

III. EVIDENCE BEFORE THE COMMISSION

- A.** The following individuals testified before the Commission in favor of the Applicant in this cause:
1. Denise Singh, wife of Owner/Applicant.
 2. Patricia Lucas, Gary, Indiana Resident.
 3. Kenneth Edmonds, Gary, Indiana Resident and customer of applicant's store.
- B.** A Petition in favor of the Permit Application with twenty-seven (27) signatures and Customer Surveys signed by five (5) individuals in favor of the Permit Application were admitted before the Commission.
- C.** Rufus Purnell, a resident who lives within three (3) blocks of the applicant location, testified before the Commission against the Applicant in this cause.
- D.** No evidence was introduced and admitted before the Commission against the Applicant.

IV. FINDINGS OF FACT

1. The Applicant, H&R Petro Food Mart, Inc, located at 1500 Grant, Gary, Indiana, permit #DL45-28669, is the applicant for a Type 115 ATC permit. (Local Board Hearing; ATC File)
2. Applicant filed its Application for a New Permit, which was subsequently referred to the Local Board. (ATC File)
3. On or about March 6, 2012, the Local Board recommended denial by a unanimous vote and found by substantial evidence that Applicant should not receive a Type 115 permit. (ATC File; Local Board Hearing)
4. Credible evidence supports the Local Board's decision. (Local Board Hearing)
5. On March 20, 2012, the Commission adopted the recommendation of the Local Board. (ATC File)
6. The Hearing Judge took judicial notice of the entire Commission file, including, but not limited to, the Local Board transcript, the ATC file, and the Application for Transfer. (905 IAC 1-36-7; ATC Hearing)
7. Applicant is not in a residential area or within 200 feet of a church or school. (Local Board Hearing; ATC File)
8. Applicant renewed argument heard by the Local Board at the ATC Hearing of Applicant's positive character. (ATC Hearing)
9. Applicant presented testimony, in addition to the Applicant's wife, from two (2) other people that were supportive of this application. Applicant also presented thirty-three (33) signatures on Petitions and surveys in favor of a Type 115 Beer and Wine permit being awarded to Applicant.

10. There is a restaurant that serves alcoholic beverages and a liquor store within close proximity to Applicant's location.
11. The Applicant has operated this convenience store since December of 2000. To date there has never been alcoholic beverages sold at this location.
12. The evidence does not establish a history of problems at this store that would necessarily be complicated by the sale of alcoholic beverages. However, about three years ago a robbery at the store resulted in the murder of a store employee. Those opposing this application fear the atmosphere and safety around the store will be jeopardized by the sale of alcohol and will create loitering situations by those who purchase said beverages.
13. The evidence presented by Applicant is not convincing. The evidence against the application for the permit is more substantive and convincing that the neighborhood and community do not need or desire the services that would be provided with a Type 115 permit. The testimony and evidence of remonstrators opposing the permit was more persuasive and credible.
14. 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 Indiana Code § 7.1-1-2-2.
2. The Application for a new permit was properly submitted and the Commission is authorized to act upon proper application pursuant to Ind. Code § 7.1-3-1-4.

3. 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).
4. 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); 905 IAC 1-37-11; *see also* Ind. Code § 4-21.5-3-27(d).
5. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. 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).
6. 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).
7. Based on the entire record, the Local Board's recommendation to deny the application for a new permit is based on reasonable and sound evidentiary support, and is, therefore, supported by substantial evidence. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.* 615 N.E.2d 100, 104 (Ind. App. 1993).

8. The Commission is charged to uphold local board action on a permit application unless upon review that action runs contrary to the well-established provisions of Indiana Code 7.1 and 905 Indiana Administrative Code.
9. The Commission's denial of the permit on March 20, 2012, was based upon the recommendation of the Local Board, and was based upon substantive and substantial evidence.
10. The local board is charged to conduct an investigation of an alcohol permit application even before the Commission may act. Ind. Code § 7.1-3-19-3. The statute gives local boards discretion to consider any and all relevant sources of information. Ind. Code § 7.1-3-19-8. Although the Commission may conduct its own investigation (Ind. Code § 7.1-3-19-10), it is also required to follow the local boards' recommendations unless they are 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.
11. The Commission is required to follow the recommendation of the local board when the local board votes to deny an application by a majority vote. *Indiana Alcoholic Beverage Commission v. Harmon*, 379 N.E.2d 140, 147 (Ind. 1978).
12. The Application for a new permit must conform in respect to notice and publication and investigation before the local board and shall be made upon the terms and under the rules and regulations that the Commission may prescribe. Ind. Code § 7.1-3-24-3.
13. The Commission shall investigate a permit issuance in regard to its geographical location; determine the need for such services at the proposed location; the desire of the neighborhood or community to receive such services; and the impact of the

- proposed permit location on the community and neighborhood and on area businesses. 905 IAC 1-27-4.
14. “Need” means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).
 15. “Desire” means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).
 16. A determination of whether there exists a need for the permit, or a desire for the services, and to what degree of impact of such services have on the neighborhood and area businesses turns on the facts on each case. *Id.*
 17. Viewed as a whole, the record demonstrates that the community does not need or desire the proposed services of a Type 115 Permit at this location.
 18. The Commission shall follow the Local Board unless upon review of that recommendation it finds that to follow that recommendation would be (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a 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; or (e) unsupported by substantial evidence. Ind. Code § 7.1-3-19-11.
 19. The Local Board’s decision in denying the Applicant’s request for this permit was not (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a 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; or (e) unsupported by substantial evidence. *Id.*

20. Any conclusion of law may be considered a finding of fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the finding of the Alcohol & Tobacco Commission in denying the Permit Application filed by H & R Petro Food Mart, located at 1500 Grant Street, Gary, Indiana, permit #DL45-28669, was based on substantial evidence and must be sustained. It is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing was not sufficient to overturn the recommendation of the Lake County Alcoholic Beverage Board, or to issue a finding in favor of the Applicant and against the recommendation of the Local Board. The appeal of Applicant for a new Type 115 permit is hereby DENIED and the recommendation of the Local Board in this matter is UPHELD.

DATED: _____

Vice Chairman David Johnson
Hearing Officer
Alcohol and Tobacco Commission