

STATE OF INDIANA
BEFORE THE ALCOHOL & TOBACCO COMMISSION

IN THE MATTER OF)	
THE PERMIT OF:)	
)	
REST. MEX LLC)	PERMIT NO. RR49-19875
d/b/a TAQUERIA JALISCO)	
3636 N. HIGH SCHOOL ROAD)	
INDIANAPOLIS, IN 46224)	
Applicant		

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Background of the Case

Rest. Mex Inc. (“Applicant”) is an applicant for renewal of Alcohol and Tobacco Commission permit type 103. The Alcoholic Beverage Board of Marion County (“Local Board”) held a hearing and voted 3-0 to recommend denial of the application for renewal. Applicant requested an appeal hearing before the Alcohol and Tobacco Commission (“Commission” or “ATC”.) Applicant, by counsel Abraham Murphy of RAMIREZ AND MURPHY, LLP, 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 103, numbered RR49-21637 (“Permit”).
2. On July 14, 2011, Applicant submitted an application to the Commission for the purpose of renewing its Permit.
3. On November 21, 2011, the Local Board voted 3-0 to recommend denial of the application for renewal.

4. On December 6, 2011, the Commission voted 4-0 to adopt the recommendation of the Local Board to deny the application for renewal.
5. On March 22, 2011, the Hearing Judge heard the Applicant's appeal of the Commission's denial of the application for renewal.

III. Evidence Before the Local Board

1. The following individuals testified before the Local Board on November 21, 2011, in favor of the Applicant:
 - a. The Applicant was represented by the corporate agent who 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. A letter, not formally marked as an exhibit, from Edgar Cisneros claiming that his security company provides security to Applicant on Friday, Saturday and Sunday nights. The business card of Indianapolis Metropolitan Police Department ("IMPD") Patrolman Jason Zotz was also attached to the letter.
3. The following individuals testified before the Local Board on November 21, 2011, against the Applicant:
 - a. Sgt. William Carter ("Sgt. Carter"), Indianapolis Metropolitan Police Department ("IMPD").
4. The following evidence was introduced and admitted before the Local Board against the Applicant:
 - a. A memorandum prepared by Sgt. Carter detailing different statutes Applicant has violated.
 - b. IMPD case reports detailing police runs to or near the Applicant's premises. (Local Board exhibits 1-3, 5, 6a, 7 and 9-10)
 - c. Indiana State Excise Police ("ISEP") Incident Report Forms detailing ISEP investigations and subsequent administrative violations. (Local Board exhibits 4, 6, 8 and 11)

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 March 22, 2012, in favor of the Applicant:
 - a. The Applicant, through part-owner Benito Brito, testified with the assistance of an interpreter.
3. The following evidence was introduced and admitted before the Hearing Judge in favor of the Applicant:
 - a. Applicant's #1: A GoogleEarth overhead image of the corporate plaza that shows the Applicant's premises.
 - b. Applicant's #2: A GoogleEarth street-level view of the corporate plaza that shows the Applicant's premises.
 - c. Applicant's #3: The letter from Edgar Cisneros referenced above in section III, paragraph 2.
 - d. Applicant's #4: Security camera footage from the night of March 14, 2011.
4. The following individuals testified at the Appeal Hearing on March 22, 2012, against the Applicant:
 - a. Sgt. Carter
5. The following evidence was introduced and admitted before the Hearing Judge against the Applicant:
 - a. None.

V. Findings of Fact

1. Applicant is the holder of an Alcohol and Tobacco Commission permit type 103, numbered RR49-19875. (ATC File)
2. Benito Brito is the part owner and manager of the Applicant's premises. (ATC File)

3. There was no evidence to substantiate that the Applicant has operated the premises in a manner consistent with the time period 2008 to 2009, when the premises was cited numerous times for drug, nudity and dispensing to minors violations. (Appeal hearing)
4. Sgt. Carter testified that the Applicant's operations have improved when reviewing police runs to the Applicant's premises over the last two years. (Appeal hearing)
5. Applicant testified that it will no longer allow any dancers or entertainers who perform acts of a sexual nature or in any manner of nudity. (Appeal hearing)
6. Applicant currently employs a private security firm, as well as IMPD off-duty officers, for security both inside the premises and in the surrounding parking lot. (Appeal hearing)
7. The homicide of March 14, 2011, did involve patrons of the Applicant, but did not take place on the Applicant's premises. (Appeal hearing)
8. No evidence was submitted that would substantiate a claim made by at the Local Board that the Applicant recklessly prevented patrons from leaving the premises on the night of March 14, 2011. Nor does the evidence suggest that the Applicant intentionally did not provide medical care to the victim of the homicide on the same date. (Appeal hearing)
9. The Local Board and Sgt. Carter, expressed serious and valid concern about the repeated presence of minors and patrons who attract violence or drugs.
10. 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 based on alleged violations of Indiana law and, therefore, was (a) in excess of its authority because the Commission acted, previous to the Local Board's hearings, to dismiss all criminal and civil charges against Applicant; (b) contrary to well defined constitutional principles regarding a presumption of innocence in matters not

finally adjudicated by an authoritative body; and (c) contrary to required procedures associated with the adjudication of citations by ISEP. (Appeal Hearing)

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 Applicant's qualifications and fitness to hold an alcohol permit are legitimately in question, and the fitness of the Applicant should be reviewed prior to the two-year renewal period. Substantial evidence, given the totality of the record and proceedings, must form the basis for the Commission's decision. *Indiana Alcoholic Beverage Comm. v. River Road Lounge*, 590 N.E. 2d 656, 659 (Ind. App. 1992).
14. The initial findings of the Local Board were unsupported by substantial evidence.
IND. CODE § 7.1-3-19-11

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

It is, however, further ORDERED, ADJUDGED AND DECREED that the Permit shall be RENEWED for one year only.

It is, further, ORDERED, ADJUDGED AND DECREED that the Permit shall be subject to investigation by the Local Board prior to the permit being approved after the one year time period has elapsed. The Application shall pursue the normal renewal process.

It is, finally, ORDERED, ADJUDGED and DECREED that the appeal of the Applicant is GRANTED, and the renewal of permit for the limited use by Applicant as stated above is hereby GRANTED.

Dated: March 23, 2012

N. Davey Neal
Hearing Judge