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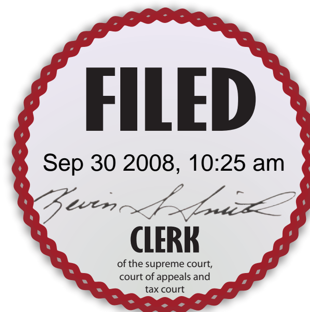

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IN THE
COURT OF APPEALS OF INDIANA

INDIANA ALCOHOL & TOBACCO COMMISSION,

Appellant-Respondent,

vs.

ULTIMATE PLACE, LLC d/b/a ULTIMATE PLACE 2B, and DANIEL L. DUMOULIN, II,

Appellees-Petitioners,

No. 34A05-0804-CV-209

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Rosemary Higgins Burke, Special Judge
Cause No. 34D04-0708-MI-836

September 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After Dan Dumoulin, Sr. (Dan Sr.) and his wife, Joan, transferred ownership of their sports bar and its alcoholic beverage permit to their son, Daniel L. Dumoulin, II (Dan Jr.), Dan Jr. converted the business into an adult entertainment establishment. When he later applied to renew the permit, remonstrators sought to prevent the renewal. After a hearing, the local alcoholic beverage board recommended denying the petition to renew the permit, and the Indiana Alcohol and Tobacco Commission (ATC) agreed. Dan Jr., as the owner of the permit premises, appealed the denial to the Howard Superior Court. The trial court reversed, concluding that the ATC's decision was arbitrary and capricious and unsupported by the evidence because it was based entirely upon the nature of entertainment provided by the business, which does not, by itself, preclude the business from having an alcoholic beverage permit. The ATC now appeals, arguing that it properly denied Dan Jr.'s renewal application. We agree with the trial court that insufficient evidence was presented to the ATC to support the non-renewal of the alcoholic beverage permit. We therefore affirm the trial court.

Facts and Procedural History

The relevant facts and procedural history are as follows. In 2001, Dan Sr. and Joan applied for an alcoholic beverage permit for Hoosier, LLC. The couple intended to use the permit to serve alcohol at their Kokomo business, Ultimate Place 2B (Ultimate Place).

Remonstrators, including Pastor Kevin Smith, objected to the issuance of an alcoholic beverage permit to Hoosier, LLC, because they feared that Ultimate Place

would be an adult entertainment establishment. After communication between Dan Sr., Joan, and the remonstrators, who were represented by attorney Mark McCann, Dan Sr. and Joan promised the remonstrators that they would operate Ultimate Place as a sports bar and grill and would not employ topless dancers. Specifically, on October 19, 2001, Joan presented the following note to Pastor Smith:

> Dan and Joan Dumoulin, the owners of Hoosier LLC wish to inform you that we will never have topless female dancers. Our intentions have always been and still remain that The Ultimate Place 2B will strictly be a sports bar and grill with live entertainment consisting of bands, DJs comedians, and kareoke [sic].

Appellant's App. 1745. Subsequently, on October 26, 2001, Dan Sr. and Joan wrote the following letter to the remonstrators:

> In an effort [to] clear up any misunderstanding regarding the planned purposes for the Ultimate Place 2B, or the "permit premises", Hoosier LLC hereby states as follows:
>
> 1. As long as Hoosier LLC owns the permit premises at 5126 Clinton Drive, Kokomo, Indiana 46902, also known as the Ultimate Place 2B, there will never be topless female dancers, nor will they permit the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, nor the showing of the female breast with less than a fully opaque covering of any part of the nipple.
>
> 2. If the majority ownership of the permit premises is going to change or be transferred, Hoosier LLC will immediately notify Mark A. McCann, Esq. in writing.
>
> *****
>
> 4. If Hoosier LLC plans to sell the permit premises, Hoosier LLC will immediately notify Mark A. McCann, Esq. in writing.

Id. at 1861-62. In response to these communications, the remonstrators withdrew their opposition to the permit. Hoosier, LLC received an alcoholic beverage permit.

For the next several years, Dan Sr. and Joan operated Ultimate Place strictly as a sports bar and grill. In March 2005, Dan Sr. and Joan filed an application to transfer the

alcoholic beverage permit to Dan Jr. They retained attorney Richard Russell to provide notice to the previous remonstrators of their intent to transfer the permit. Attorney Russell first called attorney McCann to discuss the necessary means of notice. Then, on March 14, 2005, attorney Russell delivered a letter to attorney McCann, through the Howard County courthouse mailbox system, notifying him of the proposed transfer. For reasons unknown, attorney McCann did not receive this letter until at least a month later. No one objected to the transfer of the permit to Dan Jr., and the local alcoholic beverage board approved the transfer unanimously on April 28, 2005.

In September 2005, Dan Jr. converted Ultimate Place to an adult entertainment establishment. This was met with resistance from the surrounding community. In December 2005, Dan Jr. applied for a renewal of the alcoholic beverage permit. The Howard County Local Board held a hearing on the renewal request and voted unanimously to deny the application. The ATC then adopted the local board's recommendation and denied Dan Jr.'s permit renewal application. Dan Jr. appealed the ATC's decision, and an ATC Hearing Judge conducted a three-day hearing on the matter. The Hearing Judge ultimately tendered proposed findings of fact and conclusions of law to the ATC, agreeing with the denial of the renewal application. The ATC approved the Hearing Judge's findings and conclusions, which held that the evidence showed that Dan Jr. was not of good moral character and noted the circumstances under which the alcoholic beverage license was transferred. Ultimate Place and Dan Jr. appealed the ATC's decision to the Howard Superior Court. Finding that the evidence was insufficient to support the ATC's determination, the trial court reversed. The ATC now appeals.

Discussion and Decision

The issue on appeal is whether the trial court erred in concluding that the ATC's denial of Dan Jr.'s renewal application was arbitrary and capricious and not supported by substantial evidence.[1] The ATC contends that the trial court improperly reweighed the evidence to reject some of the ATC's relevant factual findings and substituted its judgment for that of the ATC.

This case is on appeal from an agency determination. When reviewing a decision of an administrative agency, appellate courts stand in the same position as the trial court. *John Malone Enterprises v. Schaeffer,* 674 N.E.2d 599, 605 (Ind. Ct. App. 1996). A court may only reverse an administrative agency's action pursuant to the limitations provided by the Administrative Orders and Procedures Act:

> if it determines that a person seeking judicial relief has been prejudiced by an agency action that is:
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (2) contrary to constitutional right, power, privilege, or immunity;
> (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (4) without observance of procedure required by law; or
> (5) unsupported by substantial evidence.

Ind. Code § 4-21.5-5-14. We review the record in the light most favorable to the administrative proceedings and cannot reweigh the evidence. *John Malone Enterprises,* 674 N.E.2d at 605. The party challenging the agency action bears the burden of

[1] The ATC raises other arguments in its appellate brief. However, we need not reach the ATC's arguments that "[t]he trial court's decision erroneously determined that two of the Local Board members should have recused themselves due to the participation of their appointing authorities as remonstrators at the Local Board Hearing" and that "[t]he trial court's decision should not have addressed whether the remonstrators should have been granted status as intervening remonstrators as this was not material to the issues in the case," Appellant's Br. p. i, because resolution of these questions would not affect the outcome of this appeal.

establishing its invalidity. *Id.* "We will not reverse an administrative finding of fact unless it conclusively appears that the evidence upon which the decision was made was devoid of probative value or so proportionately inadequate that the finding could not rest on a rational basis." *Id.* (citing *Ind. Alcoholic Beverage Comm'n v. River Rd. Lounge, Inc.,* 590 N.E.2d 656, 658 (Ind. Ct. App. 1992), *trans. denied*). We look at the evidence "as a whole" to determine whether the agency's conclusions are clearly erroneous. *City of Indianapolis v. Hargis*, 588 N.E.2d 496, 498 (Ind. 1992).

Pursuant to administrative regulation, the ATC may consider a permittee's moral character and reputation in deciding whether to renew an alcoholic beverage permit. 905 Ind. Admin. Code 1-27-1. In evaluating the permittee's moral character and reputation, the ATC

> shall consider whether acts or conduct of the applicant, permittee or his employees or agents, would constitute action or conduct prohibited by the Indiana Penal Code (I.C. 35-41-1-1 et. seq.), or a criminal offense under the laws of the United States. The Commission may also consider the esteem in which the person is held by members of his community, and such assessment of his character as may reasonably be inferred from police reports, evidence admitted in court and commission proceedings, information contained in public records and other sources of information as permitted by I.C. 7.1-3-19-8 and I.C. 7.1-3-19-10.

Id.

Relying upon these factors, the ATC decided not to renew Ultimate Place's alcohol permit. Specifically, the ATC made the following findings of fact which are now at issue:

> 11. Hoosier, LLC hired architect Steven Alexander to design the Ultimate Place 2B with features consistent with an adult entertainment establishment, including raised dance platforms and a dressing room for performers.

*****

> 13. Mr. Alexander was instructed to review the layout of other adult entertainment businesses owned by [Dan Jr.] as a prototype for the construction of the Ultimate Place 2B.
>
> *****
>
> 15. After the structure was completed, an agreement was reached in 2001 by which the remonstrators agreed to withdraw their remonstrance and allow for the present Permit to be issued to the Dumoulins in exchange for the Dumoulins' agreement never to allow the Permit premises to become an adult entertainment business.
>
> *****
>
> 24. McCann did not receive notice of the Dumoulins' intent to sell the Permit premises until more than a month after the transfer application was filed.
>
> *****
>
> 28. [Dan Jr.] claims the purchase of the Ultimate Place 2B . . . from his parents was a *bona fide* purchase for value and was not a sham transaction; however, neither he nor his parents ever produced any written sale agreement, deed transferring ownership of the real estate, property tax receipts, tax returns, or other written evidence of the transaction, despite requests from the Hearing Judge for the same. Joan Dumoulin testified that she cannot recall the price [Dan Jr.] supposedly paid for the Ultimate Place 2B. Dan Dumoulin, Sr. testified that no written agreement exists for the sale of the Ultimate Place 2B.
>
> *****
>
> 31. On November 9, 2005, Officer Jeff Packard of the Kokomo Police cited the Permittee for topless dancing without an opaque covering over the nipples in violation of IC 35-45-4-1.
>
> *****
>
> 33. [Dan Jr.] is not a person of strict integrity and is not held in high esteem in the community in which the Permit premises is located.

Id. at 2352-55 (record citations omitted). From these findings, the ATC reached the following conclusion:

> The decision of the Local Board to deny the Permit was based upon substantial evidence and was neither arbitrary nor capricious. The Local Board heard testimony and reviewed petitions submitted by the Applicant and Remonstrators regarding the community's opinion of the integrity and moral character of the Applicant. The record is clear that the Permit was only granted in consideration of the Dumoulins' promise that the Permit premises would never become an adult entertainment business. Further, the type of business for which the transfer from Hoosier, LLC to Ultimate

> Place, LLC, was granted was to be a sports bar and grill, not an adult entertainment business. *Consequently, a number of bases existed upon which the Local Board could properly deny the Permit, including the Permittee's moral character, the complete change in the nature of business from a family sports bar to an adult entertainment business, and the Permittee's apparent intention to convert the Permit premises to an adult entertainment business shortly after transfer of the Permit to his limited liability company.* Clearly, the Local Board considered the evidence before it and based its decision on that evidence.

Appellant's App. p. 2358 (emphasis added). The trial court disagreed. Concluding that these were insufficient reasons to deny the permit, the trial court wrote:

> That portion of the proposed conclusion to the extent that it states that a number of bases existed on which to properly deny the permit, including Permittee's moral character, change of nature of the restaurant from sports bar to adult entertainment, and the intention to convert after the transfer was approved by the [local board] and the ATC is unsupported by substantial evidence and contrary to law. None of these reasons, by themselves or together, are legitimate reasons to deny the renewal of the permit here and have never been so in the past.

Id. at 32-33.

On appeal, the ATC contends that the ATC's factual findings 11, 13, 15, 24, 28, 31, and 33 are supported by substantial evidence and that these findings properly led the ATC to deny Ultimate Place's permit renewal application. We review each of these factual findings in turn in light of the arguments made in the ATC's appellate brief.

I. ATC Factual Finding 11

The ATC found that Hoosier, LLC, hired architect Alexander to design Ultimate Place consistent with adult entertainment establishments. Contrary to the ATC's position, ATC factual finding 11 is unsupported by the evidence because it is undisputed that neither Joan nor Dan Sr. consulted with architect Alexander during the construction process about creating building plans consistent with adult entertainment venues. *Id.* at

673. Alexander testified before the ATC Hearing Officer that, although he was retained by Hoosier, LLC, he did not speak with Joan or Dan Sr. about incorporating adult entertainment themes into the building project or receive approval from them to do so. *Id.*; *see also id.* at 714 (corroborating testimony from Joan).

II. ATC Factual Finding 13

The ATC also found that architect Alexander was instructed to use the layouts of adult entertainment businesses owned by Dan Jr. as prototypes for Ultimate Place. While it is true that Alexander examined two adult entertainment facilities owned by Dan Jr. while drawing up the plans for Ultimate Place, this fact is irrelevant to the question of whether Ultimate Place's original owners, Joan and Dan Sr., hoped to provide adult entertainment in their business. First, Alexander testified that he was unaware about what Joan and Dan Sr. knew about his dealings with Dan Jr. *See, e.g., id.* at 663 (Alexander testified, "I can't testify what [Joan] knew."). Second, as Alexander testified before the ATC Hearing Officer, he toured Dan Jr.'s other clubs and looked at their kitchens, employee locker rooms, and security measures, all of which are common features to both adult and family oriented businesses. *Id.* at 667-68 ("[Dan Jr.] took us to the other clubs and showed us how the security worked, how the locker rooms worked, how the kitchen operations were. He wanted us to model the kitchen, you know, and how to improve things and make it work better at the new location. . . . Including athletic events on the roof."). Thus, ATC factual finding 13 is unsupported by substantial evidence to the extent that it reflects that Ultimate Place's original owners intended that it be designed as an adult entertainment business.

III. ATC Factual Finding 15

The ATC found that Joan and Dan Sr. promised remonstrators that Ultimate Place would never be an adult entertainment business. However, it is clear from the record that Joan and Dan Sr. did not agree with the remonstrators that the permit premises would *never* become an adult entertainment business. Rather, Joan and Dan Sr. promised that "[*a*]*s long as Hoosier LLC owns the permit premises* at 5126 Clinton Drive, Kokomo, Indiana 46902, also known as the Ultimate Place 2B," there would be no adult entertainment there. *Id.* at 1861. The Dumoulins' assurance to the remonstrators said nothing of what any future business owners might do with the space. *See id.* at 1861-62. Thus, this finding is not supported by substantial evidence.[2]

IV. ATC Factual Finding 24

The evidence also does not support ATC factual finding 24. The ATC found that attorney McCann did not receive notice of Joan and Dan Sr.'s intent to sell Ultimate Place until at least a month after the transfer application was filed. However, the record evidences that the Dumoulins' attorney orally notified attorney McCann of the transfer application *before* it was filed. *Id.* at 618 (McCann testified, "There was a comment made to me in passing by the applicant's attorney, Richard Russell, to me, briefly, orally, saying that my clients are going to apply to transfer the license. That was in circuit court jury room during a break, having coffee."). Thus, the evidence is undisputed that attorney McCann *did* receive prompt notice of the transfer application, albeit oral rather than written. *Id.*

[2] Under section V, we discuss further why Dan Jr. was not a party to his parents' 2001 promise.

The record is also undisputed that attorney McCann ultimately received written notice of the transfer application. *Id.* Given that it is undisputed that the Dumoulins ultimately provided written notice of the transfer application and that attorney McCann also received oral notice *before* the Dumoulins filed their transfer application, we perceive neither impropriety in the Dumoulins' fulfillment of their notice obligation nor any resulting harm to the remonstrators from the manner in which notice was provided.

V. ATC Factual Finding 28

ATC factual finding 28 appears to question Joan, Dan Sr., and Dan Jr.'s veracity pertaining to whether Dan Jr. bought Ultimate Place from his parents in 2005. Instead of actually reaching a conclusion about whether the transaction was valid, factual finding 28 merely points out what documents the Dumoulins did not provide to the ATC to prove the transaction. What this finding fails to acknowledge, however, is that Joan, Dan Sr., and Dan Jr. all testified before the Hearing Officer about the circumstances surrounding the sale. Dan Sr. testified that there was no written sale contract, *id.* at 899-900, and Joan testified about the terms of the contract, *id.* at 791. Our review of the record uncovers no concrete evidence revealing that the sale was anything less than a *bona fide* transaction. To the contrary, the Hearing Officer heard testimony that Dan Jr. took out a $460,000 loan using his personal residence as collateral and used that money to pay off loans relating to Ultimate Place. *Id.* at 803. Further, the evidence reveals that Dan Jr. is responsible for paying $2.1 million for the business. *Id.* at 803-04. To the extent that ATC factual finding 28 reflects a finding that Dan Jr. did not engage in a *bona fide* sale transaction to obtain Ultimate Place, it is not supported by substantial evidence. Further,

to the extent that the remonstrators contend that the circumstances surrounding this sale transaction prove that Dan Jr. has always been an owner of Ultimate Place and was therefore bound by his parents' 2001 promise to the remonstrators, such a conclusion is not supported by substantial evidence.

VI. ATC Factual Finding 31

The ATC found that an officer from the Kokomo Police Department issued a citation in November 2005 for an employee's violation of Indiana's public indecency statute. This is supported by testimony from Kokomo Police Chief Russell Ricks. *Id.* at 834-836. Thus, the finding *that a citation was issued* is supported by substantial evidence. However, the record is devoid of evidence that this citation ever led to an adjudication.

VII. ATC Factual Finding 33

Finally, the ATC found that Dan Jr. is not a person of strict integrity and is not held in high esteem within his community. This simply is not supported by the record. First, it is true that Ultimate Place, while under the ownership of Dan Jr., received a citation for violating nude dancing restrictions and a citation for failing to display its alcoholic beverage permit, *id.* at 2017, both of which were resolved by a small civil penalty . *Id.* However, there is no documentation proving that these citations related to anything but isolated incidents.[3] We have previously described our review of whether

[3] As found by the ATC in Factual Finding 31, an earlier separate citation was issued pertaining to public indecency. However, our review of the record reveals that it contains only allegations about the conduct leading to this citation and does not contain documentation that an adjudication or penalty resulted from it. Appellant's App. p. 1714, 1718-19. The State does not direct us to any such documentation in the record. Appellant's Br. p. 7-8, 16, 20.

criminal activity on licensed premises indicates poor moral character of the permittee as follows:

> In order to deny a permit there must be a nexus between the criminal conduct and the applicant's moral character. If 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.

Hanley v. E. Ind. Inv. Corp., 706 N.E.2d 576, 579 (Ind. Ct. App. 1999) (emphasis added), *trans. denied*. In this case, the two violations were discovered on the same occasion. The record also contains documentation that Dan Jr. did not immediately file a change of floor plan with the ATC. Appellant's App. p. 2015. However, this was quickly remedied, and the ATC did not cite this in support of its decision to deny Dan Jr.'s renewal application. These citations by themselves are insufficient evidence to show that Dan Jr. lacks good moral character and is not held in high esteem in his community. *See Hanley*, 706 N.E.2d at 579 (holding that evidence of two citations for violating state alcoholic beverage laws was "insufficient to permit an inference that [the petitioner] lacked good moral character or is not held in high esteem by the community.").

Our inquiry need not focus, however, upon these citations because it is clear from the record that the remonstrators' concern and the ATC's determination that Dan Jr. lacks good moral character and is not held in high esteem in his community were ultimately based upon the fact that Dan Jr. converted Ultimate Place into an adult entertainment establishment. Notably, *none* of those individuals who testified against the renewal application testified about the quality of Dan Jr.'s character from personal dealings with

him, *see* Appellant's App. p. 727 (Mayor McKillip); 809-39 (Kokomo Chief of Police Russell Ricks testifies about the business but not about Dan Jr.'s character); 845 (Pastor Kevin Smith), and all firsthand character testimony regarding Dan Jr. was positive, *id.* at 753 (Kokomo Police Officer James Lushin); 757 (Kokomo Police Officer Brent Wines); 763-64 (Bartender Lonnie Cook); 770 (State Trooper Vern Robinson). Instead, opposition was based upon a generalized resistance to adult entertainment establishments or businesses serving alcohol, concern that adult entertainment businesses might consume police resources, or a belief that Dan Jr. was bound by his parents' 2001 promise not to feature adult entertainment at Ultimate Place. *See id.* at 870 (Senior Pastor Jeffrey Harlow testified that he would not oppose the renewal but for the sexual nature of the business); 876 (Former stock analyst Nancy Hurt testified that she believed Dan Jr. "lied" in order to acquire Ultimate Place and that the business degrades women: "It's a matter of right and wrong and what they're doing to women. It's very degrading to women."); 2327 ("Mayor McKillip stated that the community does not desire these services at this location."); 2327-28 (Howard County Councilman Jim Papcheck testified that he was "concerned about the types of patrons that frequent adult entertainment businesses" and that Dan Jr. "should be bound by the agreement made by the Dumoulins that would restrict adult entertainment at that location."); 2329 (Associate Pastor Kevin Smith testified that "[t]he members of his church do not want the establishment being operated in its current format and the renewal of the Permit would have a negative impact on the neighborhood."); 2330 (Pastor Ted Griffith and Vic Sanborn both testified about the effect of adult entertainment establishments upon the city.); 2347 ("Pastor Smith is not

opposed to the Permit, but rather, the presence of adult entertainment."); 2343-44 (Mayor McKillip testified about the negative impact of adult entertainment establishments upon a community.). None of these bases is sufficient to support denying the application for a permit renewal.

We have already determined that the record reflects that Joan and Dan Sr. fulfilled their notice obligation under their 2001 agreement with remonstrators. Further, we have examined the record and determined that it evidences a *bona fide* sale of Ultimate Place to Dan Jr. and that he was not an owner of the business when his parents made the 2001 agreement. Thus, Dan Jr. was not a party to Joan and Dan Sr.'s 2001 promise to the remonstrators. Therefore, substantial evidence does not support denying the permit renewal based upon claims that Dan Jr. deceived remonstrators or intended to convert the business into an adult entertainment establishment before he actually did so. *See id.* at 2358 (ATC's conclusion that a proper basis for the local board's denial of the permit was Dan Jr.'s "apparent intention to convert the Permit premises to an adult entertainment business shortly after transfer of the Permit to his limited liability company"). It follows that allegations of Dan Jr.'s alleged plot to convert the business were insufficient to establish that his moral character or reputation within the community were poor.

Neither was Dan Jr.'s conversion of Ultimate Place from a family sports bar to an adult entertainment business a legitimate basis for denying the permit renewal. *See id.* Alcoholic beverage permit holders are permitted by law to allow adult-oriented dancing on the licensed premises without obtaining prior authorization from the ATC, subject to

floor plan approval. 905 I.A.C. 1-16.1-1. Thus, the ATC's reliance upon this basis for its decision was arbitrary and capricious.[4]

From the foregoing, we conclude that the ATC's, and the local board's, decision to deny Ultimate Place's application for an alcoholic beverage permit renewal was not based upon substantial evidence and was arbitrary and capricious. The trial court did not improperly reweigh the evidence. The decision of the trial court is affirmed.

Affirmed.

KIRSCH, J., and CRONE, J., concur.

[4] We appreciate the position of those individuals and organizations who do not want additional adult entertainment in their local community. However, we are entrusted with the duty to adhere to the language and spirit of the Indiana Code and the Indiana Administrative Code.