

BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION

STATE OF INDIANA

IN RE: THE MATTER OF)
THE PERMIT OF) DL10-32219
GILMORE CONSTRUCTION, INC)
JEFFERSONVILLE, INDIANA)

PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW

The Hearing Judge, James Payne, having held the hearing and heard arguments of counsel on August 26, 2022, does hereby make the following *Findings of Fact & Conclusions of Law*:

Findings of Fact

1. Phoenix Management Group, LLC hereinafter “Phoenix”, obtained permit DL10-30580 hereinafter the “Original Permit” on March 8, 2016.
2. Upon obtaining the Original Permit, Phoenix requested to place the Original Permit with the Indiana Alcohol Tobacco Commission hereinafter the “ATC” in “escrow”; this request was granted and the Original Permit has remained escrowed with the ATC through the date of the signing of this Order, meaning the Original Permit has never been placed in to operation or use.
3. Pursuant to Ind. Code § 7.1-3-1-3 and Executive Order 20-29 the escrow time on the Original Permit was to expire on September 30, 2020.
4. On or before August 6, 2020, Phoenix submitted an application to the ATC, seeking transfer of the Original Permit to a new permittee, Old Salem Liquors, LLC (Permit Transfer Request No. DL10-32219) hereinafter the “Original Transfer Request”.
5. The application for transfer was filed with the ATC, and the matter was set for hearing before the Local Board for the Alcohol Tobacco Commission, Clark County, Indiana hereinafter the “Local Board”.

6. On August 6, 2020, the Local Board held a hearing on the Original Transfer Request.

7. The remonstrator herein, Frankie Garrett, individually and on behalf of Garrett's Grocery, and Garrett's Construction hereinafter, collectively referred to as "Garrett", appeared at the August 6, 2020 Local Board hearing, arguing that the Original Transfer Request was not proper, pursuant to Ind. Code § 7.1-3-1.1-6, for two (2) reasons: (1) The transfer was not an "arms-length transaction," and (2) the permit did not qualify for a transfer because there was no evidence of "exceptional or unusual circumstances" necessitating the transfer.

8. Garrett is a resident of the local municipality (the Town of Utica), is a business owner, operating two (2) separate businesses within the town, and is a Town Board Member (though did not appear in any hearings or meetings related to this permit in his capacity as a Town Board Member).

9. The Clark County Local Board denied Old Salem Liquors, LLC Original Transfer Request.

10. Rather than pursue its administrative remedies, Phoenix attempted to transfer the Original Permit to a different transferee, Gilmore Construction hereinafter "Gilmore" (DL10-32219), which is the transfer request at issue herein hereinafter the "Gilmore Transfer Request".

11. The Gilmore Transfer Request went before the Clark County Local Board at its November 5, 2020 meeting.

12. Garrett was again present at the Local Board meeting, and again remonstrated against the requested transfer of Phoenix's Original Permit to a new entity.

13. This time, the sole issue addressed by Garrett was that there was no evidence presented before the Local Board to demonstrate the existence of "exceptional and unusual

circumstances” that prevented the Original Permit from being placed into operation before the expiration of the Original Permit’s extended escrow period.

14. The record of the Clark County Local Board’s November 5, 2020 meeting does not contain any such evidence or testimony.

15. Despite this evidentiary deficiency, the Clark County Local Board voted to recommend approval of the Gilmore Transfer Request.

16. On December 2, 2020, the ATC held its regular meeting, and the Gilmore Transfer Request was scheduled to be heard at which time the ATC unanimously rejected the Clark County Local Board’s recommendation and therefore denied the Gilmore Transfer Request.

17. In its meeting minutes, the ATC noted that, while “there have been other instances where a transfer was allowed without providing any evidence” of exceptional or unusual circumstances under Ind. Code § 7.1-3-1.1-6, “in this particular case, opposing counsel appeared and presented a challenge pursuant to the statute,” which put the ATC in a different position.

18. Gilmore timely requested review of the ATC’s denial of Gilmore’s Transfer Request.

19. On August 26, 2022, a hearing was held before the Hearing Judge, hereinafter the “Final Hearing”.

20. At the Final Hearing, Gilmore presented the *Permit Sale Affidavit of John Sprigler*, as Gilmore’s Exhibit “1”, hereinafter the “Sprigler Affidavit”.

21. The Sprigler Affidavit details efforts of Phoenix to develop a number of different properties upon which Phoenix represented that it intended to ultimately begin operation of a package liquor store, which would have withdrawn the Original Permit from escrow and putting it into use.

22. Specifically, Phoenix investigated development on four (4) separate parcels of real property, which were not feasible to use as a liquor store location for the following reasons:

- a. 407 Gunther Street—“[W]as found to be economically infeasible....”
- b. 108 4th Street—“[P]ackage store could not be located there due to the proximity of Utica Praise Church...within 200 feet of the proposed premises.”
- c. 208 4th Street—“[P]resent owner...was unwilling to discuss terms of sale.”
- d. 103 4th Street—“Utica Town Council would not approve the site for a package liquor store.”

23. Finally, Phoenix indicates in the Sprigler Affidavit that: “Zoning approval was finally granted in December 2019 for the Old Salem Road development and plans were made to put the permit into a developed spot at the site which would include a hotel and various retail outlets (See Exhibit C – Development Plan; and, Exhibit D –Traffic Generator).”

24. “Exhibit C,” which is referenced in paragraph 22 of the Sprigler Affidavit, contains a signed purchase agreement, between Morgan Lee (the buyer), and Richard Michael Myers, and William Scott (the sellers), dated February 6, 2020 at 3:00 P.M., which indicates that the sale of the real property is “Contingent upon zoning approvals.”

25. Absent, is a copy of any deed(s) showing that the real property was ultimately conveyed, or any evidence showing that the specific condition (i.e., that the sale was contingent upon zoning approvals), was ever realized.

26. Exhibit “D”, which is also referenced in paragraph 22 of the Sprigler Affidavit, is an elevation drawing of what Sprigler states to be a development upon which a package liquor store would be operated, however, absent is any approval(s) of the local governing body and/or bodies that would grant zoning approval for such projects or uses.

27. In paragraph 25 of the Sprigler Affidavit, Sprigler states that “due to exceptional and unusual circumstances of environmental, zoning, city and road development, and restrictions in accordance with the laws of the state of Indiana regarding proximity to a church, I was unable to,” open a package liquor store within the requisite escrow period.

28. Absent from the Sprigler Affidavit, or the record before the Local Board or the ATC, is any mention of a concrete plan for putting the permit into use, or any mention of a timetable for the implementation of the proposed plan.

29. If any of finding of fact is more appropriately a conclusion of law, it is so interpreted.

Conclusions of Law

1. Ind. Code § 7.1-1-1-1 provides the general purposes and the legislative policies of the Title of the Indiana Code that regulates Alcoholic Beverages within the State of Indiana:

The following are the general purposes of this title:

- (1) To protect the economic welfare, health, peace, and morals of the people of this state.
- (2) To regulate and limit the manufacture, sale, possession, and use of alcohol and alcoholic beverages.
- (3) To regulate the sale, possession, and distribution of tobacco products.
- (4) To provide for the raising of revenue.

2. Because of the economic purposes underlying the regulation of alcoholic beverages, the Indiana Legislature and the ATC have placed time limitations upon a permittee holding a dealer permit in “escrow,” i.e., not putting the permit to use.

3. Ind. Code § 7.1-3-1.1-2 sets out a time table for the placement of a permit in escrow "... if the permit holder is unable to immediately operate the business for which the permit was issued..." for successive periods of time equaling five (5) years.

4. Ind. Code § 7.1-3-1.1-3 provides for reversion of a permit to the ATC if the term or terms of the escrow deposit approved by the ATC under Ind. Code § 7.1-3-1.1-2 expire without an approved extension, and the permit has remained inactive for the escrow period.

5. Ind. Code § 7.1-3-1.1-4 sets out a procedure and process for the permit holder to request a deposit of a permit or extension of a term of escrow deposit including the initial request for deposit; any request of extension of the initial request and granting of deposit; and the requirement of the submission to the commission "...any other documentation of the permit holder's efforts to..." justify the escrow request(s) "... including: (A) contracts for construction or renovation of the permit premises; (B) zoning applications and approvals; and (C) building permits and any other necessary government approvals."

6. The Indiana statutes and Indiana Administrative Code provide that "a permittee may deposit the permit with the ATC for a period of time with extensions, however, this escrowing option has limitations in that a "...request for such action shall be in writing and shall state the reasons why the permittee is unable to immediately operate the business to which the permit applies," and further the permittee is required to "include a proposed timetable and plan for putting the permit into use." Ind. Code § 7.1-3-1.1-4 and 905 Ind. Admin. Code 1-30-1.

7. Finally, Ind. Code § 7.1-3-1.1-6(b) provides that "[t]he commission may not accept an application for transfer of ownership of the permit except upon a showing to the satisfaction of the commission of both of the following: (1) Exceptional and unusual circumstances that

necessitate a transfer of ownership of the permit, including bankruptcy or death of the permit holder. (2) That the permit holder does not intend to speculatively sell the permit.”

8. In order for the commission to review an application for transfer of ownership, it must file the documents so they can be reviewed pursuant to the statute and the IAC and the policies and procedures of the commission – the steps require a showing to the satisfaction of the commission pursuant to Ind. Code § 7.1-3-1.1-6(b) and acceptance does not occur until that is completed.

9. 905 Ind. Admin. Code 1-30-4 mirrors this limitation on the transfer of escrowed permits.

10. Neither the Indiana Code, nor the Indiana Administrative Code, set forth a definition of “exceptional and unusual circumstances,” however, the statute states and therefore the Legislature provided some guidance that “bankruptcy or death of the permit holder” are examples or evidence of events that would qualify. *See* Ind. Code § 7.1-3-1.1-6(b)(1).

11. Case law provides no interpretation or direction to this code cite in defining or providing examples of the term “exceptional or unusual circumstances”, other than to provide guidance as to statutory interpretation in general. *See Ind. Alcohol & Tobacco Commission v. Spirited Sales, LLC*, 79 N.E.3d 371 (Ind. 2017).

12. The *Spirited Sales* Court sets out a clear framework for statutory interpretation:

The goal of statutory interpretation is to determine and abide by the legislature’s intent. In doing so, we aim “to determine and give effect to the intent of the legislature.” We start with the plain language of the statute, giving its words their ordinary meaning and considering the structure of the statute as a whole.” No word or part of the statute should be rendered meaningless if it can be reconciled with the rest of the statute. As we interpret the statute, we are mindful of both “what it ‘does say’ and what it ‘does not say.’” To the extent ambiguity exists, we determine and give effect to the intent of the legislature as best it can be ascertained. We may not

add new words to a statute which are not the expressed intent of the legislature.

In addition to our well-established statutory interpretation precedent, Indiana's alcohol statutes provide additional interpretive guidance. Specifically, Indiana Code Section 7.1-1-2-1 directs us to construe the provisions of Title 7.1 "liberally . . . so as to effectuate the purposes of [the] title."

Id. (citations omitted).

13. Once a permit has been placed in escrow under Ind. Code § 7.1-3-1.1-2, the Statute specifically requires a showing of "exceptional and unusual circumstances" to qualify for a transfer of ownership. Ind. Code § 7.1-3-1.1-6 (b).

14. Looking to the examples provided in the language of the Statute, it is clear the Legislature contemplated some rather extreme circumstances, such as "bankruptcy or death of the permit holder." – not ordinary or anticipated issues or concerns *See id.*

15. According to Merriam-Webster's online dictionary, the word "exceptional" is an adjective that means (among other things): "forming an exception: rare."¹

16. Similarly, the word "unusual" is an adjective that means: "not usual: Uncommon, rare."²

17. In keeping with the *Spirited Sales* Court's observations, the terms "exceptional and unusual" should be interpreted liberally "so as to effectuate the purpose of the title," (*see Ind. Alcohol & Tobacco Commission v. Spirited Sales, LLC*, 79 N.E.3d 371, 376 (Ind. 2017)), one of which, is: To provide for the economic welfare of the people of the State of Indiana and to raise revenue. *See* Ind. Code § 7.1-1-1-1.

¹<https://www.merriam-webster.com/dictionary/exceptional>

² <https://www.merriam-webster.com/dictionary/unusual>

18. This conclusion is especially true in light of the other, strict requirements placed upon permittees who have escrowed their permits. *See* 905 Ind. Admin. Code 1-30-3; *see also* 905 Ind. Admin. Code 1-30-1.

19. As such, in order to effectuate the purpose of the statutory scheme, the permittee seeking to transfer an escrowed permit must make a showing of some “rare” circumstance that necessitated the transfer.

20. The records of the proceedings are devoid of any such “rare” circumstances which have necessitated the transfer of Phoenix’s permit: Phoenix simply was not able to or did not make it financially feasible within the required period of time.

21. Finding of Fact 22 through 26 describe efforts by Phoenix to investigate four separate parcels of real estate for the development for use of the permit, state that zoning was approved for a parcel of real estate, but that environmental, zoning, city and road development prevented from it from making the permit active- if the legislature had intended for those circumstances to qualify exceptional and unusual circumstances, they could have included those.

22. The fact that a permit holder who deposits the permit with the ATC has construction, development, renovation, zoning or building permit issues are specifically to be reported at the initial request or extensions of deposit and the fact that they are required to be reported under Ind. Code § 7.1-3-1.1-4 and are not listed as qualifications of “exceptional and unusual circumstances” indicate that they do not qualify under Ind. Code § 7.1-3-1.1-6 (b) as exceptional or unusual circumstances qualifying for transfer of the permit.

23. While the Sprigler Affidavit attempts to justify Phoenix’s failure to timely put the Original Permit into use, the information provided in the Sprigler Affidavit does not even meet the requirements for deposited (escrowed) permits set forth in the Administrative Code, which requires

a “proposed timetable and plan for putting the permit into use,” (905 Ind. Admin. Code 1-30-1), and does not “detail all efforts made to conform to the plan...and include any amendments to the timetable or plan.” 905 Ind. Admin. Code 1-30-3.

24. Gilmore argues the ATC may have in the past allowed escrowed permit transfers without a showing of such “exceptional and circumstances”.

25. Gilmore further mentions that to require such a showing now, despite not doing so in the past is “arbitrary and capricious.”

26. However, the reference to this standard governs courts reviewing an agency’s action, and the reviewing court “may only set aside 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. *See* I.C. § 4-21.5-5-14(d); *see also* 255 *Morris, LLC v. Ind. Alcohol & Tobacco Commission*, 93 N.E.3d 1149, 1153 (Ind.App. 2018).

27. The fact that other cases may not have been decided “in accordance with law,” and without knowing whether or not the facts in other cases were the same or similar to these or whether or not there was an objection made at the time of the transfer request that there was not sufficient evidence to demonstrate “exceptional and unusual circumstances” makes it all the more important for this case to be decided “in accordance with the law.”

28. The fact that a statute was either not applied and/or was not challenged in the past does not justify misapplication of that statute here.

29. If any conclusion of law is more appropriately stated as a finding of fact, it is so interpreted.

**IN ACCORDANCE WITH THE FOREGOING, IT IS HEREBY ORDERED,
ADJUDGED AND DECREED AS FOLLOWS:**

The ATC's determination to unanimously DENY the request to Transfer (Permit No. DL10-32219) is hereby affirmed and the permit is hereby reverted to the Indiana Alcohol and Tobacco Commission.

The parties to this proceeding have fifteen (15) days to respond or object to these written Findings of Fact and Conclusions of Law pursuant to 905 IAC 1-37-13(c).

Further, the status of the permit remains as it is until the time for appeal has passed

This is a final, Appealable Order, and is appealable in accordance with the Indiana Administrative Orders and Procedure Act.

SO ORDERED ON: November 9, 2022



**JAMES PAYNE, HEARING JUDGE
INDIANA ALCOHOL AND TOBACCO
COMMISSION**

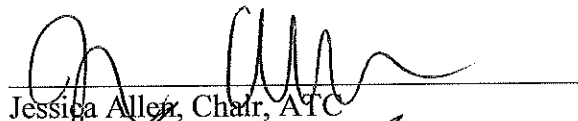
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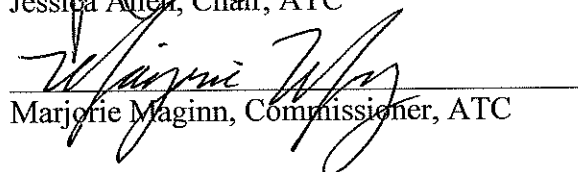
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The Indiana Alcohol and Tobacco Commission pursuant to 905 IAC 1-37-13 hereby accepts the proposed final order of the Hearing Judge and designates this as its final order.

DATED this 4th day of December 2022



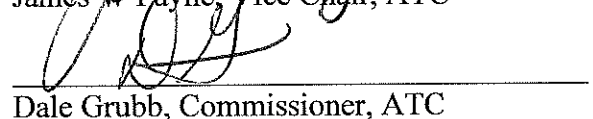
Jessica Allen, Chair, ATC



Marjorie Maginn, Commissioner, ATC



James W. Payne, Vice Chair, ATC



Dale Grubb, Commissioner, ATC