

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

BEFORE THE INDIANA
ALCOHOL AND TOBACCO COMMISSION

Jo-Fran, Inc.)
d/b/a Liquor Shop II)
Permittee)
) DL3228487
)
57 N. Washington Street)
Danville, IN 46122)

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner is the holder of DL3228487 (the "Permit") in Danville, Hendricks County, Indiana. Petitioner acquired the Permit at the 2011 decennial census auction. Permit was approved in 2012. Petitioner held the Permit in escrow until 2016 when Petitioner was approved to transfer the Permit and activate it as 57 N. Washington Street in Danville (the "Premises"). Permit was renewed each year without opposition by the Hendricks County Local Board ("Local Board").

At the 2022 Local Board hearing for renewal, the Local Board voted to deny the Permit. The Local Board did not specifically state on the record the reason for denial. The Indiana Alcohol and Tobacco Commission (the "Commission" or "ATC") voted to uphold the Local Board recommendation.

Petitioner timely filed an objection and request for appeal. Appeal hearing was held on June 16, 2022. Petitioner's owner, James Williams, and corporate secretary, John Williams, testified on behalf of Petitioner.

BRIEF DISCUSSION OF THE MATTER

Petitioner has held beverage alcohol permits to sell off-premises alcohol since 1981. Petitioner closed Premises in March, 2020 due to the global pandemic. Petitioner was unable to re-open due to ongoing staffing shortages in the retail sector.

Petitioner made investments in real estate, wine and liquor product, signage, display cases, credit card point-of-sale processing equipment, and parking spaces. Petitioner opened the Premises to the public of Danville. Petitioner continued, up to the time of the hearing, paying utilities and phone bills.

FINDINGS OF FACT

1. Petitioner possesses nearly 40 years of experience owning/operating package liquor store permits in Indiana. (Hearing testimony.)
2. Petitioner holds three package liquor store permits, specifically:
 - a. DL3213388 in Lizton, Indiana;
 - b. DL3200714 in Danville, Indiana; and
 - c. DL3228487 (subject permit) in Danville, Indiana.
3. Commission records show that Permittee obtained the only package liquor store permit in Danville, Indiana in 1988 currently operating under permit number DL3220714.
(ATC File.)
4. The increase in population of Danville, Indiana at the time of the 2010 decennial

census led to the creation of a second package liquor store permit in Danville, Indiana.

(ATC File.)

5. Permittee acquired Permit for \$95,000.00 at the ATC decennial census auction in 2011.

6. Permit was approved by the Local Board and Commission and immediately placed in escrow on February 27, 2012. (Hearing testimony. ATC File.)

7. Permittee purchased a location in the downtown Danville square to use as a retail space for a wine and spirits shop. (ATC Hearing.)

8. Permittee transferred Permit to Premises on October 24, 2016, and Permit status was changed from Escrow to Active. (ATC File. ATC Hearing.)

9. Petitioner testified that the Premises looked substantially similar from the time of the final inspection up to March 2020 when it closed due to the public health emergency. (ATC Hearing. Exhibit A.)

10. Petitioner converted operations to curbside delivery during the public health emergency caused by the COVID-19 pandemic. Petitioner had insufficient staff to run three separate curbside pick-up operations. (ATC Hearing.)

11. The corporate secretary was diagnosed with cancer in October 2021 further limiting his ability to expand hours of operation at the Premises. (ATC Hearing.)

12. Petitioner has not reopened Premises since the 2020 closure. (ATC Hearing.)

13. Petitioner continues to struggle finding clerks for the two operational stores and owner is constantly moving back and forth between Lizton and Danville to keep those stores open when staffing is tight. The corporate secretary is unable to provide much coverage as medical treatments take priority. (ATC Hearing.)

14. Petitioner has had "help wanted" signs posted at both locations for years with little interest expressed in the available positions. (ATC Hearing.)

15. Since 2016, Petitioner has paid all utilities for the Premises. (ATC Hearing.)

16. Petitioner has maintained the Premises in a state of readiness to re-open once sufficient staffing was hired. The corporate secretary was feeling strong enough to start covering shifts again, but re-opening/staffing was placed on hold when the Local Board denied the request. (ATC Hearing.)

17. The Local Board stated that one possible factor for denial was the Petitioner held both permits in Danville Indiana as evidence that Petitioner was simply forcing out competition. (LB transcript.)

18. The Local Board stated that being open did not include “just sitting in there” and that Petitioner should have more sales because it is a “high traffic area.” (LB transcript.)

19. The final recommendation was to deny renewal of the Permit on a 3-1 vote. The Local Board did not state a reason as required under 905 Ind. Admin. Code 1-27 as to why the three votes to deny the renewal were cast. (LB transcript.)

20. Petitioner incorrectly believed that following the pandemic, it was not required to place the Permit in escrow. Petitioner also incorrectly believed that the Commission would not allow it to place the Permit back into escrow after using up the initial five-year escrow period. (Hearing testimony.)

21. The permit holder orders for all stores on a commonly owned group purchase agreement. (ATC Hearing.)

22. There was not evidence of significant transfer of product from the group purchase agreement to this permit premises. (ATC Hearing.)

23. This permit premises had a lack of sales, even prior to shutting down due to the COVID-19 pandemic. (LB transcript. ATC Hearing.)

24. Permittee is requesting to transfer the permit in an arm’s length transfer and for renewal to be granted for that purpose. (ATC File.)

CONCLUSION OF LAW

1. All findings of fact stated *infra* are hereafter incorporated by reference as conclusions of law.

2. The Commission has jurisdiction over this matter pursuant to *Ind. Code* § 7.1-1-2-2; *Ind. Code* § 7.1-2-3-9.

3. The Hearing Judge conducted a *de novo* review of the matter on behalf of the Commission, including a public hearing. 905 *Ind. Admin. Code* 1-36-7(a); *Ind. Code* § 7.1-3-19-11.5

4. The Hearing Judge may consider as evidence all documents in the ATC File, including the transcript of proceedings and exhibits before the Hearing Judge. 905 *Ind. Admin. Code* 1-37.

5. The Hearing Judge may also consider as evidence Commission orders and any codes and standards that have been adopted by an agency of this state. *Id.*

6. 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 noted in the proceeding. 905 *Ind. Admin. Code* 1-37-11(e); *Ind. Code* § 4-21.5-3-27(d).

7. Courts interpret statutes for the purpose of ascertaining legislative intent. *Zoercher v. Indiana Associated Telephone Corp.*, 1937, 211 Ind. 447, 7 N.E.2d 282; 50 Am.Jur., Statutes, 200. Such intent must be determined primarily from the language of the statute itself, 50 Am.Jur., Statutes, 210, which language must be so reasonably and fairly interpreted as to give it efficient operation and to give effect, if possible, to the expressed intent of the legislature. *State ex rel. Roberts v. Graham*, 231 Ind. 680 (1953).

8. The Indiana General Assembly set the number of package liquor store permits in an

incorporated city or town at one (1) package liquor store dealer's permit for each eight thousand (8,000) persons, or fraction thereof. *Ind. Code* §7.1-3-22-5.

9. For the escrow period from 2012 to 2016, the following escrow statute applied:

IC 7.1-3-1-3.5 Deposit of permits; business not in operation

Sec. 3.5. A permittee to whom a retailer or dealer permit has been issued under this title, may deposit that permit with the commission for a period of one (1) year if the permittee is unable to immediately operate the business to which the permit applies. The commission may extend the term of the deposit for not more than four (4) additional one (1) year periods if the permittee is able to show to the satisfaction of the commission that the permittee is making a good faith effort to put the permit into operation.

10. The Alcohol Code Revision Commission in 2017 - 2018 made recommendations relating to escrow indicating that escrow should not be used to limit competition and stating “[i]f the permit holder cannot demonstrate progress towards land acquisition, environmental and regulatory permitting, financing, and zoning, and other relevant requirements during the escrow period, then the permit is made available to the general public.” *Final Report, Alcohol Code Revision Commission*, (Ind. 2017 - 2018) at p. 8-9.

11. In 2019, *Ind. Code* §7.1-3-1-3.5 was amended and *Ind. Code* §7.1-3-1.1 was added to increase scrutiny over permits deposited and held in what is commonly referred to as “escrow” status.

12. *Ind. Code* § 7.1-3-1.1-4(2) requires a written request from and appearance at a public hearing by a permit holder before the commission can grant a term of deposit in escrow. The written request must include documentation of:

- a. The specific reasons why the business for which the permit was issued is not immediately operational;

- b. A timetable for making the business and the permit active; and
- c. A detailed statement of the permit holder's efforts to make the business operational and the permit active.

13. *Ind. Code* §§ 7.1-3-1-3.5 and 7.1-3-1.1-1 through 7.1-3-1.1-6 use the terms “operational” and “active.”

14. “Active” is a licensing status in the permit database used by the ATC.

15. “Operational” and “active” are not defined in Title 7.1 of the Indiana Code.

16. The plain meaning of operational is “of or relating to operation or to an operation” or “of, relating to, or based on operations.” <https://www.merriam-webster.com/dictionary/operational>. “Operation” is “the quality or state of being functional or operative” or “a method or manner of functioning.” <https://www.merriam-webster.com/dictionary/operation>.

17. The plain meaning of “active” is “marked by present operation, transaction, movement, or use,” “characterized by action rather than by contemplation or speculation,” or “producing or involving action or movement.” <https://www.merriam-webster.com/dictionary/active>.

18. The combined use of the words “operational” and “active” indicates an intent for a permit to be active as a behavior or procedure, not just “active” as a license status in a computer database.

19. A plain reading of *Ind. Code* §7.1-3-23-12, specifically “ceases to possess any of the qualifications, including the alteration or cessation of the particular business or type of business then engaged in, which qualifies him to hold that permit, required for the issuance of that particular type of permit under this title,” requires the permittee to be engaged in the business of a package liquor store.

20. The permittee should be able to demonstrate that it is operational and active in the business as package liquor store.

21. *Ind. Code* §7.1-3-1-19 requires that “whenever the character of the business in which an applicant is engaged is material to his being issued a permit..., or is material to his being qualified to continue to hold the permit, it must be made to appear to the satisfaction of the commission that a substantial portion of the business carried on, or to be carried on, in the premises in respect to which a permit is applied for is in the nature of the applicant’s main business function in the premises.”

22. *Ind. Code* § 7.1-1-2-5 states that “whenever a person is prohibited from doing a certain act or holding a certain interest directly, he shall be prohibited also from doing that act or holding that interest indirectly.”

23. In this situation, a package liquor store permit holder is prohibited from holding a permit in escrow or non-operational for longer than the statutorily allowable timeframes.

24. A package liquor store permit holder would also be prohibited from holding a permit with a licensing status of “active” in the database but not making the permit active or operational as a behavior or procedure.

25. Holding a monopoly of all permits in a jurisdiction while operating one in a significantly different manner does indicate an intent to limit competition or circumvent the five year limitation on escrow.

26. The full closure of the store as a result of the public health emergency and operational changes due to executive orders was a significant external factor for the permittee unlike anything experienced by permittees previously.

27. It is difficult to determine for the year 2020 and the years that followed what the business operations would have been for the permittee without the impact of the public health emergency.

28. Permittee already has a buyer, if permitted to transfer. (ATC File.)

29. Due to the unusual circumstances and timing of this matter, the interest of the commission is to get the permit transferred to a new owner that will, subject to permissible escrow, get the permits to an active *and* operational status that fits the character of business test for a package liquor store.

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

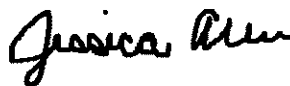
Recommendation

WHEREFORE, Petitioner requested to transfer the permit in an arm's length transfer to a new permit holder and has identified said new permit holder, the Commission hereby orders as follows:

1. The transfer application shall be on file with the commission within 30 days of the adoption of this order.
2. The transfer shall be complete within 120 days of the transfer being filed.
3. The transfer shall be an arm's length transfer.
4. The permit shall be renewed for the purpose of the transfer. If additional renewals are required during the transfer period those renewals will also be granted.
5. THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED, that permit number

DL32-28487 shall be RENEWED and be placed in escrow while the permit is being transferred.

SO ORDERED ON: June 30, 2023.



Jessica Allen, Chairwoman and Hearing Judge

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Approved this 5th day of July, 2023.



JESSICA ALLEN, CHAIR



JAMES PAYNE, VICE CHAIRMAN

DALE GRUBB, COMMISSIONER



MARJORIE MAGINN, COMMISSIONER