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STATE OF INDIANA
BEFORE THE ALCOHOL AND TOBACCO COMMISSION

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IN THE MATTER OF)
THE PERMIT OF)
SPIRITED SALES, LLC)
9347 B PENDLETON PIKE)
LAWRENCE, IN 46236)

PERMIT NO. WH4929931

Applicant.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW DENYING
SPIRITED SALES A PERMIT TO WHOLESALE LIQUOR
PERMIT

I. BACKGROUND OF THE CASE

Spirited Sales, LLC, 9347 B Pendleton Pike, Lawrence IN 46236, permit number WH4929931 (Applicant), is the applicant for a permit to wholesale liquor in Marion County, Indiana to be issued by the Indiana Alcohol and Tobacco Commission (Commission). On September 19, 2013, the Applicant filed a permit application with the Commission.

Before the application could be considered, Commissioner Melissa Coxey recused herself from participating in the approval/denial process.

On March 4, 2014, as part of the Commission's semi-monthly regularly scheduled meeting, the Commission expressed their intent to deny the Applicant's permit, in accordance with Indiana Code §7.1-3-23-32. On March 4, 2014, as allowed under Indiana Code §7.1-3-23-33, Applicant requested a public hearing at which they could "be heard and offer evidence."

Soon thereafter, Wine and Spirit Distributors and the Indiana Beverage Alliance, Inc. (collectively "Remonstrator") filed for Intervening Remonstrator status, which was denied on March 4, 2014. In conjunction with this ruling, however, the Commission ruled that it would

allow Remonstrator to make presentations at the public hearing, as is the custom at local board hearings for those types of permits which appear at local board hearings (typically the retail tier of Indiana's three-tier system).

On July 11, 2014, Applicant filed a motion to disqualify Commission Chairman Alex Huskey from participating in the proceedings concerning the denial or approval of Applicant's permit. This motion was denied on July 14, 2014. On July 14, 2014, Chairman Huskey voluntarily recused himself from participating in the approval/denial process.

On July 15, 2014, a public hearing was held before Hearing Judge David Rothenberg in order that a Findings of Fact and Conclusions of Law recommendation be composed and presented to the Commission. Following this hearing, both the Applicant and Remonstrator were asked to submit post-hearing briefs and proposed Findings of Fact and Conclusions of Law, which they did on a timely basis. Having been duly advised of the facts and law at issue, the Hearing Officer now submits these Findings of Fact and Conclusions of Law to the Commission for their consideration.

II. EVIDENCE AT THE HEARING

A. WITNESSES

The following witnesses were sworn in and provided testimony at the hearing:

Witnesses called by the Applicant:

1. Mr. Phil Terry (Terry): Chief Executive Officer, Monarch Beverage, Inc. (Monarch); Director, Monarch; Chief Executive Officer, EF Transit (EFT); Director, EFT; Registered Agent, EFT. He testified to the following relevant points:
 - a. Applicant is a limited liability corporation, formed in Delaware, and held entirely by EFT;
 - b. Monarch and EFT are owned by the same individuals, having substantially the same percentage of ownership;

- c. Monarch and EFT maintain separate insurance programs, financial books, charts of accounts, bank accounts, tax returns, payrolls, and benefit packages for their employees;
 - d. Monarch holds a wine distribution permit under permit number WH4987358 and a beer wholesaler permit under WH4908938;
 - e. The facility and premises at 9347 Pendleton Pike, Lawrence, IN is owned by Gramercy Property Trust (Gramercy), 521 Fifth Ave., New York, NY 10175, a company having no common ownership interests with either EFT or Monarch, and is leased to EFT;
 - f. Monarch is a guarantor of the lease EFT has with Gramercy;
 - g. EFT subleases the facility and premises, in part, to Monarch and provides logistical services to Monarch for warehousing and delivery of product;
 - h. EFT subleases other parts of the facility to other companies and provides delivery services for other companies as well;
 - i. EFT would sublease the facility and premises, in part, to Applicant and provide logistical services to Applicant for warehousing and delivery of product;
 - j. Mr. Rob Hedges is both the manager of Spirited and an employee of EFT;
 - k. Under Indiana law, as stated in the Indiana Department of Revenue Bulletin Number 12, EFT must demonstrate independence from Monarch to qualify for certain tax exemptions;
 - l. Monarch has approximately 300 employees, while EFT has approximately 350 employees; and
 - m. If the concept of "corporate separateness" is ignored and you look simply at who owns the corporations, a prohibitive interest would exist under the Indiana Alcohol Beverage Laws in the case.
2. Ms. Melissa Coxey (Coxey), member of the Commission and prior Staff Attorney for the Commission. She testified to the following relevant points:
- a. Thousands of applications are processed each year by the Commission, the majority of which do not individually come under personal review by the commissioners;
 - b. There are a set of statutes, which are referred commonly to as the "Prohibited Interest" statutes, that forbids someone from having an interest in one type of permit while maintaining an interest in another type of permit. These statutes do not necessarily pertain to every permit type;
 - c. There have been several instances, over the last approximate eight-year period, where the Commission has approved applications for entities in circumstances that would be consistent with the Applicant's "corporate separateness" argument. Each of these dealt with permits on the retail/dealer tier of Indiana's three tier system; and
 - d. Commissioner Guthrie (served as commissioner until January, 2013) gave advice to applicants to use two different corporations when applying for permit types which fell under the Prohibited Interest statutes.

3. Mr. Jim Purucker (Purucker): Executive Director, Wine and Spirit Distributors of Indiana (Wine and Spirit). He testified to the following relevant points:
 - a. An aspect of Purucker's role as Executive Director of Wine and Spirits is to monitor the State legislature and the Indiana Alcohol and Tobacco Commission for topics of interest to the membership of Wine and Spirits;
 - b. Purucker has advocated with the Governor's office, the Indiana legislature, and the Commission over many years on various topics that he believes impacts his members' interests; and
 - c. Monarch has advocated with the Governor's office, the Indiana legislature, and the Commission over many years in an attempt to enter the spirits business.

Witnesses called by the Remonstrator:

1. John Baker: Chief Operating Officer, RNSC Indiana; Chief Operating Officer, National Wine and Spirits. He testified to the following relevant points:
 - a. Franchise contracts exist for beer wholesalers tying the wholesaler into a territory with a brewer to distribute their beer and may require them to pay money in order to break the contract; and
 - b. Similar territorial contracts do not exist for either wine or liquor wholesalers, creating a market that is more fluid than the beer market, thus making it easier for wine and liquor suppliers to move their product line from one wholesaler to another without contract penalty.

Applicant's Offer of Proof:

1. Applicant made an offer of proof and stated the following:
 - a. Although Applicant was not able to depose or speak with Betsy Burdick, Applicant believes she would testify to the following:
 - i. Ms. Burdick served as Governor Daniels' Chief of Staff;
 - ii. Ms. Burdick had communications with members of the Commission about Indiana Wholesale Wine and Liquor's proposal to transfer its permit location to 9347 Pendleton Pike, which is leased by EFT; and
 - iii. Ms. Burdick would have been asked if she had exercised political influence over the Commission with regards to Applicant (Applicant states that it does not know the answer to that question).
 - b. Although Applicant was not able to depose or speak with Jessica Norris, Applicant believes she would testify to the following:
 - i. Ms. Norris worked in a policy position for Governor Daniels, with one of her responsibilities being that of liaison with the Commission;

- ii. Ms. Norris had communications with members of the Commission about Indiana Wholesale Wine and Liquor's proposal to transfer its permit location to 9347 Pendleton Pike, which is leased by EFT; and
- iii. Ms. Norris would have been asked if she had communicated with the Commission, with the view that the Commission not to approve the transfer of Indiana Wholesale Wine and Liquor's transfer application.

B. EXHIBITS

Applicant's Exhibits:

1. Applicant's evidence regarding corporate ownership (Tab 1);
2. Applicant's evidence regarding past Commission decisions involving common ownership of separate companies (Tabs 2 (Subtabs 1 through 38) and 3 (Subtabs A through C));
3. Information regarding Republic National Distributing Company (RNDC), Southern Wine and Spirits (Southern), and Glazer Distributing (Glazer) (Tab 4);
4. Department of Revenue Information Bulletin Number 12 (Tab 5);
5. Indiana State Excise Police report concerning EFT and Indiana Wholesaler Wine and Liquor (IWWL), dated May 29, 2012 (Tab 6);
6. Affidavit of Robin Poindexter, Major, Indiana State Excise Police, Retired (Tab 7);
7. Affidavit of Phil Terry (Tab 8 (Subtabs A through K));
8. Applicant's permit application dated September 19, 2013 (Tab 9);
9. Bar graph comparing sales between Southern (national figures), Republic (national figures), Glazer's (national figures), and Monarch (Indiana only) (Tab 10);
10. E-mail from Alex Huskey to Jessica Norris and Tom Snow dated January 7, 2010 (Tab 14);
11. E-mail from Alex Huskey to Jessica Norris dated April 20, 2012 (Tab 18);
12. E-mail from Jon Laramore to Laura Bowker and Melissa Coxey dated July 15, 2014 (Tab 21);
13. Letter from Purucker to Indiana State Excise Police dated August 8, 2014 (Tab 22);
14. E-mail from Jessica Norris to Alex Huskey dated July 20, 2010 (Tab 23);

15. E-mail from Alex Huskey to Dale Grubb, David Johnson, Melissa Coxey, et al. dated October 7, 2013 (Tab 24); and
16. E-mail from Alex Huskey to Jessica Norris dated April 30, 2012.

Remonstrator's Exhibits:

1. Court decisions concerning three-tiered system (Tab A);
2. Excerpt from *Toward Liquor Control* by Raymond Fosdick and Albert Scott (Tab A);
3. Indiana Code sections pertaining to Prohibited Interests, general purposes of Ind. Code 7.1, definitions within Ind. Code 7.1, scopes of various permits under Ind. Code 7.1, and other matters within Ind. Code 7.1 pertaining to this application (Tabs B, C, F, I, and S);
4. Court decisions regarding corporate formalities (Tab D);
5. Material from *Ind. Prac., Business Organizations* §§31.1 and 31.3 concerning closely held businesses (Tab E);
6. *State v. Dugan*, 793 N.E.2d 1034 (Ind. 2003) (Tab G);
7. Court decisions regarding prior agency decisions (Tab H);
8. Information pertaining to Carl Brizzi matter (Tab J);
9. Transcript of Beerco matter, before the Commission on April 30, 1990 (Tab J);
10. Transcript and Finding of Indiana Wholesale matter, before Commission on October 20, 2003 (Tab L);
11. Transcript of Exchange, LLC matter, before the Commission in 2008 (Tab M);
12. Indiana State Excise Police Incident Report for EX-10-006847 concerning Indiana Wholesale Wine & Liquor Company/EF Transit (Tab N);
13. Indiana State Excise Police report concerning EFT and IWWL, dated May 29, 2012 (Tab O);
14. EFT's pending federal Complaint for Declaratory and Injunctive Relief filed on December 6, 2013, Docket Number 1:13-cv-1927 (Tab P);
15. Material from Indiana Secretary of State's (SOS) web site pages pertaining to Monarch and EFT (Tab Q);
16. Material from Monarch's web site (Tab R); and

17. Agenda from Commission meeting July 15, 2014 (Labeled AA).

III. FINDINGS OF FACT

2. Applicant is applying for a Liquor Wholesaler's permit (type 203) with the Indiana Alcohol and Tobacco Commission under permit number WH49-29931. *(ATC File)*.
3. EF Transit, Inc., 9347 E. Pendleton Pike, Lawrence, IN 46236, is the holder of a permit to transport alcohol with the Commission under permit number C1644297. *(ATC File)*.
4. Monarch Beverage, Inc. 9347 E. Pendleton Pike, Lawrence, IN 46236, is the holder of a permit to wholesale beer with the Commission under permit number W 49-08938. *(ATC File)*.
5. On March 4, 2014, Commissioner Coxey recused herself from any deliberation or decision-making process as it pertains to the Applicant's pending application. *(ATC File)*.
6. On March 4, 2014, the Commission expressed its intent to deny the Applicant the permit. *(ATC File)*.
7. On March 4, 2014, Applicant requested the Commission to hold a public hearing as per Ind. Code §7.1-3-23-33 in order to present evidence concerning the approval of the application. *(ATC File)*.
8. On July 15, 2014, the Commission appointed Hearing Judge David Rothenberg to conduct the public hearing and make a recommendation to the Commission concerning approval or denial of the Applicant's application. *(ATC File)*.
9. On July 15, 2014, Chairman Huskey recused himself from any deliberation or decision-making process as it pertains to the Applicant's pending application. *(ATC File)*.
10. EFT and Monarch are all closely held corporations, with the same three (3) voting-rights shareholder and the two (2) non-voting rights shareholders owning 100% of the stock in the same proportion in both companies. *Applicant Exhibit 1.*
11. Applicant is a closely held company, with 100% of ownership belonging to EFT. *Applicant Exhibit 1.*
12. In the Affidavit of Robin Poindexter, ex-employee of the Indiana State Excise Police, he states that the Commission "encouraged permit applicants to use a new corporation or LLC to receive a permit that the original permit-holder would be precluded from holding by statute, again, so as to ensure that they did not run afoul of the prohibited interest statutes." *Applicant Exhibit 7.*

13. On March 4, 2010, Officer Richard Swallow conducted an investigation after which he concluded that EFT and Monarch, despite the separation of business formalities, operated as the same company and a liquor wholesaler, entering into a contract with EFT, would in reality be entering into a contract with Monarch for the sake of the Prohibited Interest provisions under Ind. Code § 7.1. *Remonstrator Tab N.*
14. Some EFT trucks are labeled with "Monarch Beverage" on the side. *Remonstrator Tab O.*
15. Monarch's website portrays Monarch and EFT as one company, using terminology such as "Phil Terry is the CEO of Monarch and EF Transit. As CEO, Phil oversees the strategic direction of **the company**. With his help, **Monarch Beverage** has grown substantially in the last decade – now employing over **650** Hoosiers." *Remonstrator Tab R, emphasis added.*
16. Employment ads for Monarch Beverage requests applicants for truck drivers – for trucks belonging to EFT.
<https://ch.the.taleo.net/CH03/ats/careers/requisition.jsp?org=MONARCHBEVERAGE&cws=1&rid=695> last visited September 11, 2014.
17. No examples given by Applicant of approvals of common ownership involve two wholesalers of any type. *Applicant Exhibit 2.*
18. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

IV. CONCLUSIONS OF LAW

- A. There are general powers granted to the Commission by the legislature to determine the qualifications, and the approval or denial of an applicant.
 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. *Ind. Code §§ 7.1-1-2-2, 7.1-2-3-9.*
 2. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4 and the Commission is authorized to act upon proper application. *Ind. Code § 7.1-3-1-4.*
 3. The Commission has the power to conduct inquiries and hold hearings before the commission or its representative. *Ind. Code §§ 7.1-2-3-4(a) and (c)*
 4. The Hearing Judge conducted a public hearing as requested by Applicant, which included review of the documents in the Commission file. *Ind. Code § 7.1-3-23-33, 905 IAC 1-37-11(e)(2).*
 5. The Commission shall have the power to ascertain the business relationships, including non-alcoholic business relationships, between permittees under this title.

The Commission shall have the power to regulate or prohibit a practice, relationship, or dealing by or between permittees, which in the judgment of the Commission is inimical to or a violation of a provisions of this title or rule or regulation of the Commission. *Ind. Code § 7.1-2-3-22.*

- B. If one looks past the “corporate separateness” doctrine, there is a prohibited interest in owning both a liquor wholesaler’s permit and a beer wholesaler’s permit.
1. The term “person” includes a corporation and a limited liability company, as well as a natural individual. *Ind. Code § 7.1-1-3-31.*
 2. An applicant for a beer wholesaler’s permit shall have no interest in any other permit to wholesale alcoholic beverages. *Ind. Code § 7.1-5-9-4(2).*
 3. An applicant for a beer wholesaler’s permit shall have no interest through stock ownership or otherwise, a partnership, limited liability company, or corporation that holds any other permit to wholesale alcoholic beverages. *Ind. Code § 7.1-5-9-4(3)(B).*
 4. It is unlawful for a holder of a liquor wholesaler to have an interest in a beer permit of any type under title 7.1. *Ind. Code § 7.1-5-9-6.*
 5. The Commission may not issue a beer wholesaler’s permit to a person who holds a wine wholesaler’s permit and a liquor wholesaler’s permit. *Ind. Code § 7.1-3-3-19.*
- C. There is a limited “corporate separateness” between Applicant and EFT and Monarch.
1. Applicant is an LLC, established in Delaware and wholly owned by EFT. *Applicant Exhibit 9.*
 2. Monarch and EFT are owned by the same individuals in approximately the same proportionate shares. *Applicant Exhibit 1.*
 3. Applicant, EFT, and Monarch all maintain separate insurance programs, financial books, charts of accounts, bank accounts, tax returns, payrolls, and benefit packages for their employees. *Hearing transcript pp 40-45, July 15, 2014.*
 4. In many cases of hiring ads, website information, and asset labeling, Monarch and EFT are portrayed as one company, Monarch Beverage. *Findings of Fact Herein, No. 18, 19, 20.*
- D. Indiana law allows the Commission, in some limited cases, to look past the “corporate separateness” doctrine, which is also known as “piercing the corporate veil”, when certain factors exist, including the use of the corporation to promote injustice or illegal activities.

1. When a court exercises its equitable power to pierce a corporate veil, it engages in a highly fact-sensitive inquiry. *Smith v. McCleod Distrib. Inc.*, 744 N.E.2d 459, 462 (Ind. Ct. App. 2000).
 2. "As a general rule, Indiana courts are reluctant to disregard corporate identity and do so only to protect third parties from fraud or injustice when transacting business with a corporate entity." *Lambert v. Farmers Bank*, 519 N.E.2d 745, 747 (Ind. Ct. App. 1988).
 3. "A party seeking to pierce the corporate veil bears the burden of establishing that the corporation was so ignored, controlled or manipulated that it was merely the instrumentality of another, and that the misuse of the corporate form would constitute a fraud or promote injustice." *Gurnik v. Lee*, 587 N.E.2d 706, 710 (Ind. Ct. App. 1992).
 4. "In deciding whether the party seeking to pierce the corporate veil has met its burden, Indiana courts consider whether the party has presented evidence showing: (1) undercapitalization; (2) absence of corporate records; (3) fraudulent representation by corporation shareholders or directors; (4) use of the corporation to promote fraud, injustice, or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; or (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form." *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994).
 5. "However, Aronson specifically concerned piercing the corporate veil in order to hold a shareholder personally liable for a corporate debt... [w]e do not believe the eight Aronson factors were intended to be exclusive, particularly when a court is asked to decide whether two or more affiliated corporations should be treated as a single entity." *Smith v. McLeod Distrib., Inc.*, 744 N.E.2d 459, 463 (Ind. Ct. App. 2000).
- E. The Commission already looks beyond mere corporate title on various permit types as it is statutorily bound to evaluate owners and/or members of companies and corporations in order to qualify those companies and corporations to receive an alcohol permit.
1. A "permittee" is the person who holds the valid permit under Title 7.1 and includes an agent, servant, or employee of, or other person acting on behalf of, a permittee, whenever a permittee is prohibited from doing a certain act under Title 7.1. *Ind. Code § 7.1-1-3-30*.
 2. An application for a permit to sell alcoholic beverages of any kind requires a corporation, if one exists, to disclose the names and addresses of the president and secretary of the corporation. *Ind. Code § 7.1-3-1-5*.
 3. In considering whether the Commission can issue a Brewer's Permit for a brewery that produces over thirty thousand (30,000) barrels of beer in a calendar year, the

Commission shall verify that all of the members of an LLC are bona fide residents of Indiana. *Ind. Code § 7.1-3-2-2(a)(3)*.

4. The Commission cannot issue an alcoholic beverage permit to a person unless they turn in a verified list containing the name and address of each person who is, or will be, financially or beneficially interested in the permit and the business conducted under it. *Ind. Code § 7.1-3-21-8*.
 5. Any time there is a change in the list required by Ind. Code §7.1-3-21-8, this change must be filed with the Commission within ten (10) days of such change. *Ind. Code § 7.1-3-21-8*.
 6. Each officer and stockholder of a corporation shall possess all other qualifications required of an individual applicant for that particular type of permit. *Ind. Code § 7.1-3-21-5(c)*.
 7. Each manager and member of a limited liability company must possess all other qualifications required of an individual applicant for that particular type of permit. *Ind. Code § 7.1-3-21-5.4(c)*.
- F. Allowing a person to skirt a statutorily Prohibited Interest and obtain a permit by merely forming a separate company or corporation would lead to a legally absurd result whereby the Prohibited Interest statutes in the Indiana Alcohol Beverage Laws could be easily circumvented, become totally ineffective, and it would be legally absurd for the Legislature to have intended such a result when the prohibitions, and the statute as a whole, were created.
1. The provisions in Indiana Title 7.1 are to be liberally construed so as to effectuate the purposes of the Title. *Ind. Code § 7.1-1-2-1*.
 2. Whenever a person is prohibited from holding a certain interest directly, he shall be prohibited from holding that interest indirectly. *Ind. Code § 7.1-1-2-5*
 3. The Indiana Alcohol Beverage laws contain numerous Prohibited Interest statutes which preclude someone having an interest in one type of alcoholic beverage permit from having an interest in another type of alcoholic beverage permit. See *Ind. Code §§ 7.1-3-3-19, 7.1-5-9-2(a) & (b), 7.1-5-9-3(b), 7.1-5-9-4(1)&(2), 7.1-5-9-6, 7.1-5-9-7, 7.1-5-9-8, 7.1-5-9-9, 7.1-5-9-10, 7.1-5-9-13, and 7.1-5-9-13*.
 4. “[I]t is important to keep in mind that the purpose of this fiction [corporations] is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is


to protect the rights of these people.” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (U.S. 2014).

5. “[A]n examination of the entire licensing scheme and the public policy behind this scheme is necessary to reach a more accurate picture of what the legislature intended.” *Jules, Inc. v. Boggs*, 165 W. Va. 510, 513 (W. Va. 1980).
 6. “It is presumed that the Legislature does not intend an absurdity, and such a result will be avoided if the terms of the act admit of it by a reasonable construction; and ‘absurdity’ meaning anything which is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of men of ordinary intelligence and discretion.” *Words and Phrases, Permanent Edition*, Vol. 1, p. 177, and case cited. *Marks v. State*, 220 Ind. 9, 18-19 (Ind. 1942).
 7. “[A]s Judge Learned Hand said, ‘the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing,’ nevertheless ‘it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.’” *Cabell v. Markham*, 148 F. 2d 737, 739 (CA2), *aff’d*, 326 U.S. 404 (1945). *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 454-455 (U.S. 1989).
 8. “All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.” *United States v. Kirby*, 74 U.S. 482, 486-487 (U.S. 1869).
 9. “Because statutes are examined as a whole, it is often necessary to avoid excessive reliance on a strict literal meaning or the “selective reading of individual words.” *Collier v. Collier* 702 N.E.2d 351, 354 (Ind. 1998). The legislature is presumed to have intended the language used in the statute to be applied logically and not to bring about an unjust or absurd result. *Riley v. State*, 711 N.E.2d 489 (Ind. 1999). Thus, we should consider the objects and purposes of the statute as well as the effects and repercussions of such an interpretation. *State v. Windy City Fireworks, Inc.*, 600 N.E.2d 555, 558 (Ind. Ct. App. 1992), adopted by 608 N.E.2d 699 (Ind. 1993). *State v. Dugan*, 793 N.E.2d 1034, 1038 (Ind. 2003).
- G. It is not arbitrary or capricious for the Commission to deny Applicant their license based on prohibited interests if the Commission has “allowed” other companies to form and operate as such, seemingly allowing prohibited interests via the “corporate separateness” doctrine.

1. Indiana Code 4-21.5, commonly known as the Administrative Orders and Procedures Article, does not apply to determinations made by the Commission. *Ind. Code §4-21.5-2-6(a)(2)*.
2. An action of an administrative agency is arbitrary and capricious only where there is no reasonable basis for the action. *Natural Resources Comm'n v. Sugar Creek Mobile Estates*, 646 N.E.2d 61, 64 (Ind. Ct. App. 1995), trans. denied. *Indiana Civil Rights Comm'n v. Delaware County Circuit Court*, 668 N.E.2d 1219, 1221 (Ind. 1996).
3. "A decision is arbitrary and capricious if it is made without any consideration of the facts and lacks any basis that may lead a reasonable person to make the same decision made by the administrative agency. *Indiana-Kentucky Elec.*, 820 N.E.2d at 776. A decision may also be arbitrary and capricious where only speculation furnishes the basis for a decision. *Indiana State Bd. of Registration and Ed. for Health Facility Adm'rs v. Cummings*, 180 Ind. App. 164, 171, 387 N.E.2d 491, 495-96 (1979). Simply said, an agency decision is arbitrary and capricious where there is no reasonable basis for the decision. *Chesser v. City of Hammond*, 725 N.E.2d 926, 930 (Ind. Ct. App. 2000)." *Ind. State Bd. of Health Facility Adm'rs v. Werner*, 841 N.E.2d 1196, 1206-1207 (Ind. Ct. App. 2006).
4. "If the basis for denial is a failure to meet a requirement of the governing ordinance, albeit one previously enforced laxly or not at all, the inquiry is not whether there are prior inconsistent decisions, but rather whether there is substantial evidence supporting the agency's decision. As Chief Judge Sharpnack pointed out, if the administrative agency is, in effect, estopped by its prior decisions, it becomes unable to correct its errors in subsequent determinations. In short, past weak enforcement does not invalidate an otherwise valid requirement, and inquiry into the Commission's subjective motivation is improper unless there is a claimed denial of due process or equal protection." *Equicor Dev. Inc. v. Westfield-Washington Twp. Plan Comm'n*, 758 N.E.2d 34, 38-39 (Ind. 2001).

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED, consistent with the Conclusions of Law set forth above, that Spirited Sales, LLC's application numbered WH4929931 be DENIED on the basis that it would create a prohibited interest in conflict with Indiana Code §§ 7.1-5-9-4(3)(B) and 7.1-5-9-4(2).

Date: December 16, 2014



David A. Rothenberg, Hearing Judge

Approved this 20th day of January, 2015.



DAVID COOK, CHAIRMAN



DAVID JOHNSON, VICE CHAIRMAN



DALE GRUBB, COMMISSIONER

MELISSA COXEY, COMMISSIONER