

ALCOHOL AND TOBACCO COMMISSION

November 1, 2016

10:00 A.M.

1. Call to Order and Noting of Quorum --

2. Disposition of Minutes

October 18, 2016

3. Prosecutor's Recommendations --

PAD Forms

4. Hearing Judge's Recommendations --

5. Consideration of Applications -

599 Renewals

51 New/Transfers

8 Catering

8 1st Year Escrow

4 2nd Year Escrow

4 3rd Year Escrow

7 Renewal Carrier Permits

6. Renewal Letters and Waiver of Fees for Letters of Extension -

7. Applications for Discussion --

DL49-28598 Georgetown Holding, LLC

RR34-11177 Rock Bottom Saloon, LLC -- Renewal with LB voting 3-1 to deny

RR45-32669 The Man Cave Niteclub, LLC -- New with LB voting 4-0 to deny

RR49-05552 Buckingham Properties, LLC -- Requesting reactivation

8. Inactive Files --

1 Permit Subject to Auction

3 Permits Not Subject to Auction

9. Old Business -

LSA Doc 16-326 E-Liquid Rule -

Revocation of Employee permits -- no proof provided

BR1830518 Tina Showecker

BR1736287 Any Beck

Proof of Alcohol Treatment Program --

BR1436505 Jody Barrett -- provided proof

10. New Business --

Probationary Employees --

BR1755937 Caitlin Minor - 1 conviction
BR1760794 Michelle Bravo - 1 conviction
BR1756023 Lauren Elizabeth Kiel - 1 conviction
BR1760780 Melani Vella - 1 conviction
BR1733325 Hannah Cearing - 1 conviction
BR1647673 Adam Pherson - 1 conviction

11. Policy Determinations --

12. Announcements -

13. Adjournment

MINUTES

ALCOHOL AND TOBACCO COMMISSION

NOVEMBER 1, 2016

CALL TO ORDER/NOTING OF QUORUM

Chairman Cook called the meeting to order and noted the quorum and the attendance. Present were Vice Chairman Coleman, Commissioner Maginn and Commissioner Grubb. Prosecutor Mader, Commission Counsel Allen, Executive Secretary Rothenberg, Superintendent Strittmatter, Corporal Lynch and Master Officer Bedwell were also in attendance.

Brooke Barnett, Jeff McKean, Marc Carmichael, Greg Genrich, Schuyler Culver, Davey Neal, Katie Maddox and Lisa McKinney were present as observers.

DISPOSITION OF MINUTES

Vice Chairman Coleman moved to approve the minutes from the October 18, 2016 meeting. Commissioner Maginn seconded. The motion was unanimously approved.

PROSECUTOR'S RECOMMENDATIONS

PARTIES' AGREED DISPOSITIONS – Prosecutor Mader recommended the Commission approve the 29 Parties' Agreed Dispositions that were submitted, totaling \$7,225.00 in fines.

Commissioner Maginn moved to approve the Dispositions that were submitted for the November 1, 2016 meeting. Vice Chairman Coleman seconded. The motion was unanimously approved.

HEARING JUDGE'S RECOMMENDATIONS

No Hearing Judge's Recommendations

CONSIDERATION OF APPLICATIONS

Commissioner Grubb moved to approve and incorporate by reference these lists of permits for renewal, which have been recommended by local boards and reviewed by our staff with the authority of the commission and hereby move for approval of same and the inclusion of these lists as part of the minutes. Commissioner Maginn seconded. The motion was unanimously approved.

Commissioner Grubb moved to approve and incorporate by reference these lists of permit applications for a new permit, or applications for changes in location or ownership or both of existing permits, which have been recommended by local boards and reviewed by at least two commissioners and hereby move for approval of same, pending final floor plan approval by the Indiana State Excise Police, and inclusion of these lists as part of the minutes. Commissioner Maginn seconded. The motion was unanimously approved.

Commissioner Grubb moved to approve and incorporate by reference these lists of applications for catering. Commissioner Maginn seconded. The motion was unanimously approved.

Commissioner Grubb moved to approve and incorporate by reference these lists of permits to be placed in escrow for not more than five years, which have been reviewed and recommended by a commissioner as appropriate for escrow and hereby move for approval of same and the inclusion of these lists as part of the minutes. Commissioner Maginn seconded. The motion was unanimously approved.

Commissioner Grubb moved to approve the renewal carrier permits. Commissioner Maginn seconded. The motion was unanimously approved.

Five hundred ninety-nine (599) renewals approved, fifty-one (51) new and/or transfer applications approved, eight (8) permits approved for catering, eight (8) permits approved for first year escrow, four (4) permits approved for second year escrow, four (4) permits approved for third year escrow, and seven (7) renewal carrier permits approved.

RENEWAL LETTERS AND WAIVER OF FEES

Vice Chairman Coleman moved to approve the renewal and fee waived letters of extension for the preceding weeks. Commissioner Maginn seconded. The motion was unanimously approved.

APPLICATIONS FOR DISCUSSION

DL49-28598 GEORGETOWN HOLDING, LLC – Commissioner Maginn stated this permit has been in escrow since 2012. Notifications have been mailed to the permittee regarding the renewal of the permit/escrow status. The permittee did not renew the permit, so the Commission made it dead. The permittee has requested the permit be reinstated and allowed to finish the remainder of the five years of escrow.

Commissioner Maginn moved to allow 30 days for all renewal fees to be paid and to reinstate the permit for the remainder of the fifth year of escrow. Vice Chairman Coleman seconded. Chairman Cook asked for clarification of the motion. Commissioner Maginn stated this matter would be set out 30 days (12-6-2016 meeting) to give the permittee time to submit renewals and fees. If that is completed, the Commission will reinstate the permit into escrow for the remainder of the escrow period. The motion was unanimously approved.

RR34-11177 ROCK BOTTOM SALOON, LLC – Chairman Cook noted this is a renewal with the local board voting 3-1 to deny. It was continued from the last meeting. The permit is subject to a possible sale.

Chairman Cook stated there are still some issues with regard to the Department of Revenue that are holding up the transfer.

Commissioner Maginn moved to continue this to the November 15, 2016 meeting. Commissioner Grubb seconded. The motion was unanimously approved.

RR45-32669 THE MAN CAVE NITECLUB, LLC – Chairman Cook noted this is a new application with the local board voting 4-0 to deny. This was continued from the last meeting because a formal

complaint was made with the Public Access Council, regarding local board procedures. The Council has dismissed this complaint. The response is part of the minutes.

Vice Chairman Coleman stated this establishment would like to be an Asian hostess bar. Remonstrators were present stating there was no need for these services.

Commissioner Maginn noted this location was previously a strip bar. The remonstrators questioned whether there would be strippers during private rentals and if there was a fully functioning kitchen, or if food trucks would provide food service.

Vice Chairman Coleman moved to uphold the local board's recommendation and deny the permit. Commissioner Maginn seconded. The motion was unanimously approved.

RR49-05552 BUCKINGHAM PROPERTIES, LLC – Commission Counsel Allen stated this permit was placed in escrow in 2011. The permit was made dead at what was thought to be the end of the fifth year of escrow, however, there is a question as to what the actual date is. The permittee has requested the permit be reinstated for purposes of transferring the permit. Counsel Allen recommended the Commission continue this matter until the question regarding the end of the fifth year escrow period is answered.

Commissioner Maginn moved to continue this matter to the November 15, 2016 meeting. Vice Chairman Coleman seconded. The motion was unanimously approved.

INACTIVE FILES

Commissioner Grubb moved to make four (4) permits inactive. Three of the permits are not subject to auction and one permit is subject to auction. Commissioner Maginn seconded. The motion was unanimously approved.

OLD BUSINESS

REPORT ON SPIRITED SALES APPEAL HEARING – Prosecutor Mader gave an update on an investigation regarding this appeal. The transcript of the update is part of the minutes.

LSA DOC 16-326 E-LIQUID RULE – Vice Chairman Coleman moved to adopt LSA Doc 16-326 as the final rule. Commissioner Maginn seconded. The motion was unanimously approved.

BR1436505 JODY BARRETT – Commissioner Grubb moved to remove this employee from probationary status because she provided proof of completing an alcohol treatment program. Commissioner Maginn seconded. The motion was unanimously approved.

REVOCAION OF PROBATIONARY EMPLOYEE PERMITTEES – Commissioner Grubb moved to revoke the employee permit of the following permittees, due to the fact no proof of completion of an alcohol treatment program was provided to the Commission, as required. Commissioner Maginn seconded. The motion was unanimously approved.

BR1830518 Tina Showecker and BR1736287 Amy Beck

NEW BUSINESS

PROBATIONARY EMPLOYEE PERMITS - Commissioner Grubb moved, pursuant to IC 7.1-3-18-9.5, to order the following employee permit holder(s) to complete an alcohol evaluation and treatment program within the next six months and provide proof of same to the Commission. The Commissioner further moved to reschedule for the May 2, 2017 meeting. Commissioner Maginn seconded. The motion was unanimously approved.

BR1755937 Caitlin Minor; BR1760794 Michelle Bravo; BR1756023 Lauren Elizabeth Kiel; BR1760780 Melani Vella; BR1733325 Hannah Cearing; BR1647673 Adam Pherson

POLICY DETERMINATIONS

No Policy Determinations

ANNOUNCEMENTS

2016 ALCOHOL AND TOBACCO COMMISSION AUCTION – Chairman Cook stated the auction is scheduled for November 2, 2016.

ADJOURNMENT

Vice Chairman Coleman moved to adjourn the meeting. Commissioner Maginn seconded. The motion was unanimously approved.

Approved this 15 day of November, 2016.
David Cook

DAVID COOK, CHAIRMAN

David N. Coleman

DAVID COLEMAN, VICE CHAIRMAN

Dale Grubb

DALE GRUBB, COMMISSIONER

Marjorie Maginn

MARJORIE MAGINN, COMMISSIONER

1 Chairman Cook Before we begin the agenda items on old business, I've asked
2 Prosecutor Mader to just give the commission a brief report. In Spirited
3 Sales appeal hearing, there were some evidence presented about seven
4 or so permits that the commission had approved that were in violation
5 of prohibited interest. I asked the prosecutor and the Excise Police to
6 conduct an investigation. Can you just give us a brief report of what
7 you found on those, Prosecutor Mader, and what, if anything, you've
8 done about them.

9 Prosecutor Mader Mr. Chairman, as you know, the initial concern was that prohibited
10 interest did not still remain. So, primarily my investigation, at least for
11 the first seven, was regarding whether or not any of those interests still
12 contain private prohibited interests. In that respect, four of the seven
13 contained no prohibited interest. Currently, those four were Olinger,
14 Glazer's, Dimrod LLC, Harry & Izzy and Kahn's. Olinger, Glazer
15 obviously is not a problem since it was subsequently acquired. And,
16 besides that, this was a vacant, former beer warehouse that requested a
17 temporary warehouse permit. Dimrod---their primary concern was that
18 an individual by the name of Thomas McDonald had prohibited
19 interest. Mr. McDonald has no alcohol permits currently. Harry &
20 Izzy's---that was Carl Brizzi's ownership of stock in a related company
21 that the commission sought an attorney general's opinion, which was
22 issued. Obviously, this has been made moot by the fact that Mr. Brizzi
23 is no longer the Marion County prosecutor and also, coincidentally, no
24 longer owns stock in Harry & Izzy's. Kahn's---the allegation was that

25 an individual by the name of James J. P. Arnold had both restaurants
26 and package stores. My investigation indicated that Mr. Arnold has one
27 current alcohol permit and that's a package store that he owns with his
28 wife. He is 40% owner and his wife is the 60% owner. Other than that,
29 he has no other alcohol permits at this time. Of the three remaining,
30 briefly, one was determined that Cedar Creek Winery had no current
31 prohibited interest. Simmons Winery...the trade relations officer and
32 myself met with the owners of Cedar Creek Winery and Simmons
33 Winery to look at their particular operation and determined that Cedar
34 Creek doesn't have any current violations with respect to the ownership
35 of the various entities. Simmons Winery does need some divestment
36 and that is underway. With respect to the last of the seven, Gateway
37 Triangle, I met with the principal owner of Gateway Triangle and
38 advised him that package stores could not own convenience
39 stores/grocery stores and that divestment would be required. I've been
40 advised by an attorney who is representing them that that divestment is
41 in process. That attorney has agreed to let me know what progress
42 they're making. With respect to the four remaining, I've looked at them
43 briefly. One has no violation currently. One may require some
44 divestment. Another one will require some substantial divestment.
45 Those would be the other four. That is where we are in that process.
46 We will continue to work with the remaining four to bring them in line
47 with current statutes and will continue to follow-up on the other two
48 that have divestment problems that are in process.

49 Chairman Any questions?

50 Vice Chairman Coleman Is this something that should be reported either to the trial judge, or to
51 the Supreme Court, in our motion?

52 Chairman I believe we have shared the information and the substance of the
53 reports with the Attorney General's Office and they're well aware of
54 where we are on everything.

55 Vice Chairman Coleman Okay.

56 Chairman And, just for the record, the four that you spoke of that were the
57 remaining permits were ones that were submitted for the first time on
58 judicial review. Those weren't a part of the original allegations that
59 were made during the commission's appeal hearing. So, first time we
60 heard about those additional ones were on judicial review and they have
61 a whole bunch of sub comings and goings, so it's not an uncomplicated
62 investigation as I understand it. So, we'll get further reports from Mark
63 on that. Thank you, Mark.



STATE OF INDIANA

MICHAEL R. PENCE, Governor

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October 19, 2016

Mr. Donald E. Schliz
3201 Dunes Highway
Gary, Indiana 46402

Re: Formal Complaint 16-FC-265; Alleged Violation of the Open Door Law by the Indiana Alcohol and Tobacco Commission (Priority)

Dear Mr. Schliz:

This advisory opinion is in response to your formal complaint alleging the Indiana Alcohol and Tobacco Commission ("Commission") violated the Open Door Law ("ODL"), Indiana Code § 5-14-1.5-1 et. seq. The Commission has responded via Mr. David Cook, Esq., Chairman. His response is enclosed for your review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on October 11, 2016. Your complaint has been granted priority status.

BACKGROUND

Your complaint dated October 11, 2016, alleges the Indiana Alcohol and Tobacco Commission violated the Open Door Law by conducting public meetings without proper notice and failing to post an agenda.

On or about July 26, 2016, you filed an application for a two-way liquor license from the Commission. The application was delegated to the Lake County Local Board ("Local Board"). The Local Board denied the application at an October 4, 2016 public meeting. You allege there was no notice of this meeting. You have provided a copy of the Indiana Alcohol and Tobacco Commission Local Board Handbook for reference wherein it states Local Boards are subject to the Open Door Law.

You also allege the Local Board failed to post an agenda of the meeting. Additionally, you allege two (2) of four (4) Local Board members communicated 'ex parte' with remonstrators before the hearing and discussed the denial of the application. For these reasons, you seek for this Office to void the denial.

ANALYSIS

It is the intent of the Open Door Law (ODL) the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. See Indiana Code § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. See Indiana Code § 5-14-1.5-3(a).

Public notice of the date, time, and place of any meeting of a governing body, shall be given at least forty-eight (48) hours before the meeting. See Indiana Code § 5-14-1.5-5. Additionally, a governing body of a public agency utilizing an agenda shall post a copy of the agenda at the entrance to the location of the meeting prior to the meeting. See Indiana Code § 5-14-1.5-4. It appears as if the Indiana Alcohol and Tobacco Commission published notice in the local newspaper and the Commission posted it (and an agenda) on the Commission web site. It concedes the Local Board failed to publish notice or an agenda at the physical location of the meeting.

The question is whether this completely de-legitimizes the meeting and the deficiencies become a fatal flaw to the public meeting process. While the absence of notice and agenda is certainly a violation of the Open Door Law, it remains to be seen whether the oversight deprived the opportunity of the public to observe the meeting. As a participant in the meeting, you have not suggested that you have been prejudiced in any way by not knowing when or where the meeting took place -you were clearly at the meeting. Similarly, the remonstrators were also aware of the date, time and location of the meeting.

When evaluating whether non-compliance under the Open Door Law rises to the level of a substantive deficiency, the Courts will look to whether a complainant has been denied the right to attend a meeting or any other statutory entitlement. Consider Indiana Code § 5-14-1.5-7(d):

In determining whether to declare any policy, decision, or final action void, a court shall consider the following factors among other relevant factors:

- (1) The extent to which the violation:
 - (A) affected the substance of the policy, decision, or final action;
 - (B) denied or impaired access to any meetings that the public had a right to observe and record; and
 - (C) prevented or impaired public knowledge or understanding of the public's business.

While this question is clearly for the Courts to decide, my opinion is that your presence and participation in the meeting may compromise your standing to obtain relief.

You also allege in your complaint that two (2) of four (4) members of the Local Board discussed amongst themselves and others the upcoming decision. A meeting is defined under the ODL as a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. See Indiana Code § 5-14-1.5-2(c). You argue that two (2) of four (4) members constitute a majority. The term "majority" is not defined under the ODL; therefore, as a general rule of statutory construction, if a statute is unambiguous (i.e., susceptible to but one meaning), Indiana courts give the statute its clear and plain meaning. *Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 942 (Ind. 2001). Webster's Dictionary defines a majority as: "a number that is greater than half of a total; a number of votes that is more than half of the total

number; the group or party that is the greater part of a large group. Merriam-Webster Learner's Dictionary (2016).

Two (2) of four (4) members is not a majority. Two (2) of four (4) cannot ratify a decision or make a binding final decision or vote. It must be a numerical majority. For this reason, I do not consider the pre-hearing discussion of two (2) members to be a violation of the Open Door Law.

You also allege that the two (2) members engaged in ex parte communication with remonstrators outside the public hearing. A determination of whether this is a due process violation is outside the scope of this Office's jurisdiction.

Although you have asked this Office to void any action taken at the October 4, 2016 hearing, please be advised the Public Access Counselor does not have the enforcement capability to do so. Only a trial court can overturn a vote or final action as a remedy to a lawsuit. See Indiana Code § 5-14-1.5-7. The decision whether to declare void any policy, decision, or final action taken by a public agency in violation of the Open Door Law is a matter left to the trial court's discretion. *Hinojosa v. Bd. of Pub. Works & Safety*, 789 N.E.2d 533, 543 (Ind. Ct. App. 2003).

Another question is whether the Local Board's technical (or substantive) non-compliance with the Open Door Law is reviewable through the Alcohol and Tobacco Commission appellate process. The Local Board is clearly an instrumentality of the Commission, however, the Commission is the ultimate authority over the permit application process. Exhaustion of administrative relief may be accomplished through an appeal to the Commission. Whether a hearing was conducted properly can be reviewed by the Commission before judicial review. In fact, it can be argued that a final decision has not yet been made as the appeal deadline has not elapsed. If allowable under its statute or administrative rules, it may very well be the Commission remand the hearing back to the Local Board to conduct a hearing with proper notice. But that is beyond the scope of my jurisdiction or recommendations.

Regards,



Luke H. Britt
Public Access Counselor

Cc: Mr. David Cook, Esq.; Mr. Joe Svetanoff, Esq.