

**STATE OF INDIANA  
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

|                               |   |                             |
|-------------------------------|---|-----------------------------|
| <b>IN THE MATTER OF</b>       | ) |                             |
| <b>THE PERMIT OF</b>          | ) |                             |
|                               | ) |                             |
| <b>SDTG, INC</b>              | ) | <b>Permit No. RR7126941</b> |
| <b>d/b/a SMITH'S DOWNTOWN</b> | ) |                             |
| <b>110 LINCOLN WAY EAST</b>   | ) | <b>IRF# EX-20-008788</b>    |
| <b>MISHAWAKA, IN 47404</b>    | ) |                             |

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

Comes now the duly appointed Hearing Judge for the Indiana Alcohol and Tobacco Commission (the "Commission") with these Findings of Fact, Conclusions of Law, and Order regarding the pending violation action against SDTG Inc, d/b/a Smith's Downtown ("Respondent") and submits them to the Commission for consideration.

**Procedural History**

1. Respondent holds a retail alcohol permit under permit number RR71-26941.
2. Respondent's permit premises is located at 110 Lincoln Way East, Mishawaka IN 47404.
3. Prosecutor filed a Notice of Violation against Respondent under cause EX20008788. That Notice of Violation alleged that Respondent violated Indiana alcohol rules and

regulations, specifically Indiana Administrative Code 905 IAC 1-27-2: Public Nuisance.

4. On December 11, 2020, the Hearing Judge issued a Scheduling Order. The Scheduling Order, as proposed by the parties, broke the hearing into two parts. The first hearing was set as a fact-finding hearing. If a violation were proven, the Scheduling Order indicated that there would then be a sanction hearing.
5. Prior to the fact-finding hearing, the parties entered into and submitted the Parties' Agreed Stipulations. The document included 30 exhibits which were stipulated as relevant and admissible in advance of the hearing. *Parties' Agreed Stipulations*
6. On January 11, 2021, a fact-finding hearing was held virtually via Microsoft Teams. Respondent appeared and was represented by Attorney Mitch Heppenheimer. Vice-Chairman John Krauss oversaw the hearing as the duly appointed Hearing Judge.
7. Parties were given the opportunity after the hearing to file briefs. Respondent submitted Permittee's Brief via email on March 1, 2021. The Prosecutor submitted Response to Permittee's Brief via email on March 5, 2021.

8. Upon review of the parties' respective briefs and pursuant to the terms of the Scheduling Order, the Hearing Judge notified the parties via email on March 7, 2021 that the alleged violation had been proven.
9. On March 15, 2021, a sanction hearing was held virtually. The parties, as well as the Hearing Judge, appeared via Microsoft Teams.

#### **Findings of Fact**

10. One Hundred percent (100%) of Respondent's corporate shares are held by Ryan Smith ("Smith"). Smith functions as the owner/operator of Respondent's permit. *Stipulations of Fact, Hearing at 2:09:12*
11. Respondent's permit is located in downtown Mishawaka. In addition to Respondent's location, there are five (5) other alcohol permit locations within a close proximity to Respondent's location. *Respondent's Exhibit C*
12. Northeast of Respondent's permit location is a flat, surface parking lot which is connected to Respondent's permit location via an alleyway. Respondent's permit location has a rear door that opens directly into the parking lot. *Respondent's Exhibit C, Hearing at 15:30 – 16:50, 1:02:30*

13. Although it is a public lot, most of the late evening usage of the flat surface parking lot is made of patrons of Respondent's location. *Hearing at 1:04:26 – 1:06:54, 1:35:15 – 1:35:25*
14. Officer Joseph Formato, with the Indiana State Excise Police, was assigned an investigation regarding Respondent's location. The nature of the investigation regarded a complaint from the city of Mishawaka which was based in part upon a high volume of police activity at Respondent's location. *Hearing at 10:30 – 11:27*
15. Officer Formato received from the city of Mishawaka, reports, including police calls for service for Respondent's location, as well as the neighboring alcohol permit holders in the city of Mishawaka. *Hearing at 11:29 – 12:23*
16. Officer Formato compared the volume and nature of the police activity for Respondent's location to that of the other alcohol permit locations in the same general vicinity. From 2016 through the date of the hearing, the reports showed that d/b/a Phoenix Bar had 49 calls to service, d/b/a Absolutely Bar had 12 calls to service, and d/b/a Treehouse Bar had 14 calls to service. However, over the same period, Respondent had 132 calls to service. *Hearing at 13:24 – 14:05*

17. Of the numerous reported police activity at Respondent's location, many involved allegations of violence. *Exhibit 1-12, 24-27*
18. Thirty-six (36) total exhibits, which included the Mishawaka Police Department calls to service reports, were introduced at the hearing. Although some of the calls to service reports indicated that the acts of violence were perpetrated outside of the four walls of the permit location, each report showed a nexus between the individuals involved and Respondent's permit premises. *Exhibits 7, 9, 10, 11, 12, 24, and 31*
19. Not only was the volume of calls disproportionately high for Respondent's permit, the nature of the reports themselves indicate a high occurrence of violent conduct by Respondent's patrons.
20. On August 9, 2020, Mishawaka Police Department Officer Daniel Boyd observed between fifteen and twenty individuals directly in front of Respondent's location engaged in a physical altercation. Officer Boyd observed a patron exit Respondent's permit premises and strike one of Respondent's employees who was working as a bouncer. That employee was knocked to the ground and rendered unconscious. While attempting to detain the patron/suspect, a large crowd gathered around the officer,

which placed the officer in danger. *Exhibit 31, Hearing at 1:25:05 – 1:31:26*

21. On September 6, 2020, Officer Boyd responded to Respondent's location regarding a shooting incident. Officer Boyd spoke with witnesses who indicated that the shooting took place immediately north of Respondent's location. Officer Boyd did recover multiple shell casings adjacent to Respondent's permit premises. *Exhibit 12, Hearing at 1:15:45 – 1:20:19.*
22. The witnesses with whom Officer Boyd spoke further stated that they overheard a verbal altercation which escalated into a shooting incident adjacent to Respondent's location. Another witness indicated that the verbal altercation originated within Respondent's location itself. *Exhibit 12, Hearing at 1:20:19 – 1:23:27*
23. On November 8, 2020, Lieutenant Michael Dube of the Mishawaka Police Department responded to a report of a fight in progress at Respondent's location. Lt. Dube observed several large groups of individuals (approximately 20-30 individuals in total) engaged in a physical altercation emanating from Respondent's location and moving toward the adjacent flat surface parking lot. Ultimately, the fight resulted in an arrest of one of Respondent's patrons for

Battery on an Officer and Resisting Law Enforcement Officer.

*Exhibit 24, Hearing at 38:30 – 41:42*

24. December 20, 2020, Mishawaka Police Department responded to a report regarding a large physical altercation involving thirty (30) patrons at Respondent's location. *Exhibit 25*

25. Lt. Dube, as shift commander for the midnight shift of the Mishawaka Police Department, has instructed his officers to gather in the area around Respondent's location around Respondent's closing time due to the high number of calls for service at Respondent's location. Lt. Dube indicated that the manpower requirement of monitoring and responding to the violence at Respondent's location has placed the remainder of the city of Mishawaka at risk due to the actions at Respondent's location. *Hearing at 42:45 – 45:20*

26. In addition to the Mishawaka Police Reports, Respondent has also been subject to numerous administrative violations, including two violations for sale of alcohol to a minor. *Exhibits 1, 13 – 23.*

27. During the 2016 renewal hearing before the St. Joseph County Local Board, Respondent's renewal application was denied. That denial was based in large part upon facts related to the number of police activity reports which

occurred prior to and through 2016. These reports encompassed the area in and around Respondent's permit location, including the adjacent parking lot to the northeast of the permit location. Upon appeal of that denial, Respondent claimed a lack of knowledge of the incidents in the parking lot and a lack of knowledge regarding the city of Mishawaka's concern about the operation of Respondent's permit. The Recommended Findings of Fact/Conclusions of Law, which was issued by the Hearing Judge for the Commission and adopted by the Commission, specifically noted that Respondent is now aware of the issues occurring in the parking lot. Additionally, the Order indicated that any further issues occurring in the parking lot may be cause for action by the Commission. *Judicial Notice of Agency Record, Hearing at 1:40:09*

28. Respondent has not taken any steps to address the violence and/or numerous police activity reports since the 2016 Commission Order. *Hearing 49:50- 51:05, 1:32:01 – 1:32:52*

**Conclusions of Law**

29. The Commission has jurisdiction over this matter pursuant to Indiana Code 7.1-1-2-2 and Indiana Code 7.1-2-3-9.
30. The Hearing Judge may take judicial notice of the Commission file relevant to a case. *905 IAC 1-37-11(e)*



31. Pursuant to Indiana Code 7.1-3-23-2, the Commission may:
  - a. Fine or suspend or revoke the permit of; or
  - b. Fine and suspend or revoke the permit of;  
a permittee for the violation of a provision of this title or  
of a rule or regulation of the commission.
32. Indiana Code 7.1-2-6-1(a)(1)(A) states that “[t]he following are declared to be a public nuisance: (1) A room, a house, a building, a boat, a structure, an automobile, other vehicle, or place of any kind where at least one (1) of the following occurs: (A) An alcoholic beverage of any type is sold, possessed, manufactured, bartered, or given away in violation of law or rule of the commission.”
33. 905 IAC 1-27-2 states that “[i]f a licensed premise becomes a public nuisance, or the licensed premises becomes the scene of acts or conduct which are prohibited by the Indiana Penal Code (IC 35-21-1-1 et seq.), or by the criminal laws of the United States, the premises shall be subject to the sanctions specified in IC 7.1-2-6-1 through IC 7.1-2-6-14.”
34. The Indiana Supreme Court noted in 1843 that public nuisance itself was not a defined term, but noted that locations which “encourage idleness, to corrupt the public morals, and to draw together numbers of disorderly persons to the annoyance of the neighborhood” are nuisances. (*The*

*State v. Bertheol*, 6 Blackf. 474, 474 (Ind. 1843)). The Court went on to say that locations “in which idle and dissolute persons are encouraged to assemble, and are permitted to drink, swear, quarrel, and shout, by night as well as by day, as the same evil tendencies as the nuisances referred to.” (*Id* at 474)

35. As recent as 2018, the Indiana Court of Appeals has upheld that criminal acts which occur outside of the four walls of the permit fall squarely within the definition of public nuisance as it relates to alcohol establishments. (See 255 *Morris, LLC vs Indiana Alcohol and Tobacco Commission*, 93 N.E.3d 1149 (Ind. Ct. App. 2018). In that case, the Alcohol and Tobacco Commission upheld the Marion County local board recommendation of denial of the renewal of the permit of 255 Morris, LLC d/b/a Lenny’s Gentleman’s Club (“Lenny’s”) based upon a series of criminal acts in the area external to the permit premises of the permit holder. These acts included public urination, the firing of a weapon in the air, and physical altercations. The Court of Appeals upheld the Commission’s determination that these acts constituted a public nuisance, and the Court upheld the subsequent denial of the renewal of the permit based upon those acts.

36. The Court found that the public nuisance determination was appropriate not based on activities which occurred within the four walls of the permit premises, but the overall effect upon the community due to activities which took place outside of the permit premises of Lenny's. The court specifically upheld the Commission's determination that the denial was appropriate based upon "conduct in the parking lot of [Lenny's] which not only may constitute what could be considered a public nuisance, but also threatens the health, peace, and morals of the citizens of the state." (*Id* at 1152)
37. Courts have held that a permittee is responsible for the activities which occur outside of the four walls of their permit premises in civil proceedings. (*See Cavanaugh's Sports Bar & Eatery, Ltd. v. Porterfield*, 123 N.E.3d 170 (Ind.Ct.App. 2019). The Court rejected the argument "that a bar owner's duty to protect its patrons extends only to herding them through the exits at closing time is to essentially immunize the bar owner for violence that ensues between patrons immediately thereafter in its parking lot." (*Id.* at 175)
38. Witnesses testified that the parking lot, which is northeast of Respondent's location in which the most violent reports occurred, is adjacent to and is predominantly utilized by

Respondent's patrons at the hours in which the criminal activities took place.

39. In total, the evidence showed that between 2016 and 2021, Mishawaka Police Department officers responded to One Hundred Thirty-Two (132) calls for service at or attributed to Respondent's permit. Over the same period of time, the nearest alcohol permit establishments reported only forty-nine (49), fourteen (14), and twelve (12) respectively.
40. The high volume of police activity, especially those calls to service regarding acts of violence, in conjunction with the administrative violations regarding Respondent's permit, show beyond a preponderance of the evidence that Respondent's permit location is a public nuisance and is in violation 905 IAC 1-27-2 as alleged.

**Order**

**THEREFORE, I ORDER** the following:

1. Judgement shall be entered against STDG, Inc. (d/b/a Smith's Downtown), permit number RR71-26941 on the following:
  - a. Count I: Public Nuisance (905 IAC 1-27-2)
2. Permit RR71-26941 shall be **REVOKED**.



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John L. Krauss  
Hearing Judge  
Indiana Alcohol and Tobacco  
Commission

April 20<sup>th</sup>, 2021

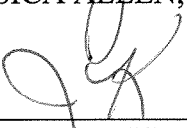
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Approved this 2nd day of June, 2021.

  
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JESSICA ALLEN, CHAIR

  
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JOHN KRAUSS, VICE CHAIRMAN

  
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DALE GRUBB, COMMISSIONER

  
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MARJORIE MAGINN, COMMISSIONER