

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

IN THE MATTER OF)	
THE PERMIT OF)	
)	
FIRST CAPITOL LIQUORS, INC)	PERMIT NO. DL3129572
LOCATION PENDING)	
ELIZABETH, IN 47117)	
)	
Permittee.)	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

First Capitol Liquors, Inc., Location Pending, Elizabeth, Indiana 47117 (Permittee), permit number DL3129572 (Permit), is the permit holder of a beer, wine, and liquor package store dealer permit in an incorporated area. Permit was placed in escrow on February 20, 2013. Current permit year expires February 20, 2019.

At the July 3, 2018 meeting of the Alcohol and Tobacco Commission (Commission), the Commission ordered that this permit be made active or transferred by December 31, 2018. Permit was not transferred or made active by December 31, 2018. Commission reviewed the status of the Permit at the January 3, 2019 Commission meeting and ordered Permittee to appear for a hearing on January 16, 2019 to show cause why the permit should not be revoked pursuant to IC 7.1-3-23-5 for refusing to comply with a provision of Title 7.1, specifically IC 7.1-3-1-3.5, or pursuant to IC 7.1-3-23-12 for ceasing to possess the qualifications required for the issuance of that particular permit type under Title 7.1 of the Indiana Code. Permittee appeared and an order to show cause hearing was held on January 16, 2019.

Judicial notice is taken of the entire Commission file for permit number DL3129572, including the documents attached hereto as Exhibit 1 and Exhibit 2.

II. FINDINGS OF FACT

1. First Capitol Liquors, Inc., Location Pending, Elizabeth, Indiana 47117 (Permittee), permit number DL3129572 (Permit), is the permit holder of a beer, wine, and liquor package store dealer permit in an incorporated area. (ATC File.)
2. Permit was approved by the Commission direct to escrow with location pending and February 19, 2013. Permit was issued February 20, 2013. (Exhibit 1, ATC File.)
3. On November 18, 2013, Permittee requested the permit remain in escrow. (Exhibit 2.)
4. Permittee is current on annual permit fees. (ATC File.)
5. The annual permit year will expire February 20, 2019. (ATC File.)
6. Permittee held the permit in escrow for more than five years. (ATC File.)
7. The Commission ordered at its July 3, 2018 meeting that the Permittee must make Permit active or transfer it by December 31, 2018. (ATC File.)
8. The Commission reviewed the status of the Permit at its January 3, 2019 Commission meeting. (ATC File.)
9. The Commission found that the Permit remained in escrow. (ATC File.)
10. The Commission order the Permittee to appear for a hearing on January 16, 2019 and show cause why Permit should not be revoked. (ATC File.)
11. The Permittee appeared for the order to show cause hearing. (Administrative Hearing.)
12. Permit has not been active under Permittee's ownership. (ATC File.)

13. Permittee has been pursuing a location in Elizabeth. (Administrative Hearing.)
14. Elizabeth has a four way stop, three (3) churches, and a community center. It is hard to find a location within the guidelines of the state. (Administrative Hearing.)
15. Permittee believes that if the permit reverts to the state, it likely will not be applied for and any new permit holder will have the same problem finding a location. (Administrative Hearing.)
16. Permittee made offers for locations but people did not want to sell to a package liquor store. (Administrative Hearing.)
17. Permittee made offers on properties last fall but has not heard back. (Administrative Hearing.)
18. Permittee requested to rent a property owned by the Town of Elizabeth and the Town of Elizabeth has the request under advisement. (Administrative Hearing.)
19. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2 and Ind. Code § 7.1-2-3-4.
2. A permittee shall have no property right in a retailer's or dealer's permit of any type. Ind. Code § 7.1-3-1-2.

A. CESSATION OF QUALIFICATIONS

1. Ind. Code § 7.1-2-3-4 grants the Commission the power to hold permits on deposit as authorized by Ind. Code § 7.1-3-1-3.5.

2. Ind. Code § 7.1-3-1-3.5 allows a retailer or dealer permittee to deposit a 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.

3. The total number of years a permit may be held in escrow is five (5) one (1) year periods. Ind. Code § 7.1-3-1-3.5.

4. Ind. Code § 7.1-2-3-4.5 states that the chairman may exercise only those express powers enumerated in this title; however, this section does not limit the powers granted to the commission by section 31 of this chapter.

5. Permittee held the permit in escrow for more than five (5) years.

6. The five (5) years and eleven (11) months in escrow exceeds the statutorily permissible five (5) one (1) year periods.

7. Permittee is not entitled to additional time to hold the permit deposited in escrow.

8. The Commission's express powers in Ind. Code § 7.1-2-3-4 do not give the Commission the authority to grant escrow time outside of that allowed by Ind. Code § 7.1-3-1-3.5.

9. The Commission may only allow Permittee to continue holding Permit as an active permit.

10. The commission may issue a liquor's dealer permit to the proprietor of a package liquor store. Ind. Code § 7.1-3-4-2.

11. Permittee is not the proprietor of a package liquor store.

12. Permittee ceases to meet the qualifications required for a beer, wine, and liquor package store dealer permit in an incorporated area.

13. The Commission may revoke a permit of a permittee if the permittee at any time ceases to possess any of the qualifications, including the alteration or cessation of the particular business or type of business then engaged in, which qualified the permittee to hold that permit, required for the issuance of that particular permit under Title 7.1. Ind. Code § 7.1-3-23-12.

B. REFUSAL TO COMPLY WITH A PROVISION OF TITLE 7.1

1. Commission ordered Permittee to make the permit active or transfer the permit by December 31, 2018. (ATC File.)

2. The Commission's order was an order to comply with a provision of Title 7.1, specifically Ind. Code § 7.1-3-1-3.5.

3. The Commission may revoke a permit on account of the refusal to comply with a provision of Title 7.1. Ind. Code § 7.1-3-23-5.

4. Permittee had more than five (5) years to bring the permit into compliance with Title 7.1 and failed to do so.

5. Following the Commission order to comply with Title 7.1, Permittee still did not bring the permit into compliance with Title 7.1.

6. Permittee's failure to bring the permit into compliance is a refusal to comply with a provision of Title 7.1, specifically Ind. Code § 7.1-3-1-3.5.

7. The five (5) years of statutorily allowable escrow time is the only time for a permit to be held in a non-operational status. All development, including construction, zoning, and financing, should be completed in that five (5) years.

8. The commission cannot grant a request to continue holding Permit in escrow because the grant of such a request would not be permissible under Title 7.1, specifically Ind. Code § 7.1-3-1-3.5.

9. The July 3, 2018 order from the Commission to make the permit active or transfer the permit by December 31, 2018 put the Permittee on notice that the Commission would not grant additional time to hold the permit on deposit pursuant to Ind. Code § 7.1-3-1-3.5.

10. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

IV. RECOMMENDATION

Permittee held Permit in escrow for more than the five (5) years allowed by Ind. Code § 7.1-3-1-3.5. The Commission does not have the authority to grant additional escrow time. Permittee does not qualify for additional escrow time and the Permittee ceases to possess the qualifications necessary to hold a beer, wine, and liquor package store dealer permit in an incorporated area, specifically Permittee is not the proprietor of a package liquor store. Further, Permittee refuses to comply with Title 7.1 by holding the permit in escrow longer than the statutorily permissible five (5) one (1) year periods.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that permit number DL3129572 shall be REVOKED.

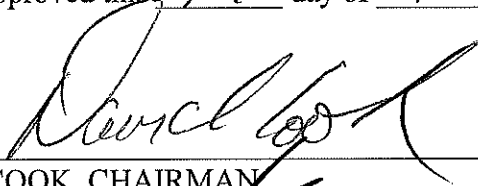
DATE: January 28, 2019



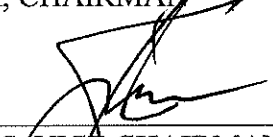
Jessica Allen, Hearing Officer

Distribution:

Approved this 19 day of February, 2019.



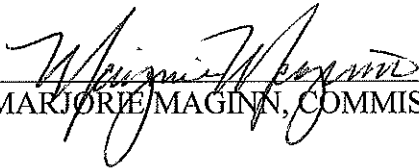
DAVID COOK, CHAIRMAN



JOHN KRAUSS, VICE CHAIRMAN



DALE GRUBB, COMMISSIONER



MARJORIE MAGINN, COMMISSIONER