

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

BEFORE THE
ALCOHOL AND TOBACCO COMMISSION

CAUSE NO: EX19001921

John F. Cunningham & Associates, Inc.)
d/b/a Kork and Keg Liquors XV)
 Permittee / Respondent)
 Permit No.: DL06-05706)
)
1317 W. South St)
Lebanon, IN 46052)

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Comes now the Hearing Judge for the Alcohol and Tobacco Commission and submits to the duly appointed Alcohol and Tobacco Commission (the “Commission”), pursuant to 905 IAC 1-37-12, this Proposed Findings of Fact and Order against John F Cunningham & Associates, Inc., d/b/a Kork and Keg Liquors XV (“Respondent”).

Procedural History

1. Respondent holds a package liquor store permit, under permit number DL06-05706.
2. Respondent is located at 1317 W. South St, Lebanon IN 46052.
3. Permit DL06-05706 is held by John F Cunningham & Associates, Inc. (“Permittee”).
4. On March 7, 2019, the Prosecutor for the Alcohol and Tobacco Commission filed a Notice of Violation against Respondent under cause EX19001921. That Notice of Violation alleged that Respondent (1) Failed to maintain qualifications to hold

permit DL06-05706 and (2) did not meet the character of business test for a package liquor store permit.

5. On March 7, 2019, a copy of the Notice of Violation was mailed to the address of record for Respondent.
6. On October 21, 2019, a final hearing was held in regard to the alleged violations in EX19001921.
7. On October 21, 2019, Mr. John Cunningham (“Cunningham”) appeared on behalf of Permittee, along with attorney N. Davey Neal, of the law firm of Clark Quinn. Commission Prosecutor Josh Harrison represented the Alcohol and Tobacco Commission.
8. Respondent was granted an opportunity to supplement the record of the October 21, 2019 proceedings on December 4, 2019. Attorney Neal appeared on behalf of permittee and Commission Prosecutor Josh Harrison appeared on behalf of the Alcohol and Tobacco Commission.

Findings of Fact

9. Cunningham is president of John F. Cunningham and Associates, Inc. He has held alcohol permits for thirty-five (35) years. In that time period, he has opened and operated fifteen (15) package liquor stores in the state of Indiana. (Hearing at 59:00 – 59:36)
10. Cunningham’s various locations do business as Kork and Keg. In addition to Cunningham, the Kork and Keg locations are run by one general manager and one regional manager. (Hearing at 1:00:35 – 1:01:06)

11. As of August of 2016, DL06-05706 is located 1317 W. South St, Lebanon Indiana. (Judicial notice of address of record for permit and Hearing at 14:08).
12. Cunningham owns the building at 1317 W. South St, Lebanon Indiana. (Hearing at 13:42, 2:04:33)
13. Cunningham also holds permit DL06-81334. (Judicial notice of agency file)
14. DL06-81334 is located at 1315 W. South St, Lebanon Indiana. (Judicial Notice of address of record for permit).
15. Cunningham owns the building at 1315 W. South St, Lebanon Indiana (Hearing at 13:42, 2:04:38)
16. Permit DL06-05706's location at 1317 W. South St, Lebanon Indiana is located across a parking lot from permit DL06-81334's location at 1315 W. South St, Lebanon Indiana (State's Exhibit 1).
17. Cunningham acquired permit DL06-05706 in 2011. Cunningham paid a total sum of four hundred thousand dollars (\$400,000) to acquire the permit from the prior permit holder. (Hearing at 32:33, 1:02:42, 1:45:35)
18. Sergeant John Copeland ("Copeland") is currently a sergeant with the Indiana State Excise Police. He has been employed with the Indiana State Excise Police for forty (40) years. (Hearing at 28:16)
19. Copeland was involved in the investigation of a number of package liquor stores in 2013. The investigations included two package liquor stores in the city of Lebanon. Pursuant to Alcohol and Tobacco Commission records, both locations were active

and open to the public. However, Copeland observed neither location to be open and operating as a package liquor store. (Hearing at 28:48 – 29:38)

20. One of the two package liquor stores under investigation at that time was DL06-05706, which was held by Cunningham. (Hearing at 32:05)
21. In 2013, Cunningham owned all of the three (3) available package liquor store permits in the city of Lebanon. (Hearing at 34:55)
22. Permit DL06-05706 was not in escrow as of the date of the investigation in 2013. (Hearing at 32:43)
23. Copeland spoke with Cunningham about permit DL06-05706. Cunningham indicated that he was only open at that location for about an hour a week, just long enough so that he did not have to place the permit into escrow. (Hearing at 46:44 and 52:55, State's Exhibit 4)
24. An administrative action was initiated against permit DL06-05706, under cause number EX13015703. (State's Exhibits 4 and 8)
25. EX13015703 alleged that DL06-05706 should be revoked for failing to maintain qualifications to hold a package liquor store. (State's Exhibit 8)
26. The violation alleged in EX13015703 was resolved by agreement on July 7, 2014. That agreement included language that permit DL06-05706 would be placed in escrow with an effective escrow date of May 1, 2011. (State's Exhibit 8).
 - a. During the December 4, 2019 supplemental hearing, Attorney Neal submitted documentation arguing a scrivener's error by the Commission on the above-

mentioned agreement and that the effective escrow date should have been February 1, 2013. This evidence was not compelling. (Exhibit E).

- b. Even if the time of escrow was February 1, 2013, the permit would have needed to be made active within five (5) years under Indiana Code 7.1-3-1-3.5.
27. Officer Jeremiah Gillam (“Gillam”) has been an officer with the Indiana State Excise Police for thirteen (13) years. (Hearing at 9:03)
28. Gillam is assigned to District Three (3) of the Indiana State Excise Police. Gillam is currently assigned as a local board officer for eight (8) of that district’s sixteen (16) counties. (Hearing at 9:24)
29. As local board officer, Gillam is responsible for the review of applications, floor plans, and petitions for transfer of permits. (Hearing at 9:50)
30. Gillam was contacted by Cunningham in August of 2016, in regard to a transfer of location of permit DL06-05706. Cunningham indicated a desire to relocate the permit, and then he wished to immediately return the permit to the status of escrow. (Hearing at 10:28)
31. Gillam went to the proposed location for DL06-05706 to verify the posting of the orange sign, as required by Indiana law, and noted that there were exterior signs at the time of that visit indicating that the location was being used as a karate studio. (Hearing at 11:25)
32. July 21, 2017, Gillam was contacted in regard to taking DL06-05706 out of escrow and making active at 1317 W. South St, Lebanon Indiana. (Hearing at 14:35)

33. At that time, Gillam conducted a follow up inspection of the permit premises at 1317 W. South St, Lebanon Indiana. (Hearing at 14:56)
34. Gillam observed that the location had a card table with a cash box as the only point of sale system on the permit premises at that time. (Hearing at 15:11)
35. Gillam observed no decorations or any indications that the location was functioning as a package liquor store at that time. There were no exterior signs indicating the location was a package liquor store, nor were there any hours of service posted. Gillam did not observe any shelves or wallpaper within the building. (Hearing at 15:19 – 15:39, State’s Exhibits 2 and 3)
36. Cunningham indicated to Gillam that the intent of that location was to operate a high-end wine store. (Hearing at 17:31)
37. Gillam indicated that the physical building did not appear to be prepared to function as a high end wine shop at the time of the physical inspection on July 21, 2017 (Hearing at 17:40)
38. Cunningham stated that the 1317 W. South St location was used by appointment only in 2017. He stated that an employee of permit DL06-81334, located at 1315 W. South St, would retrieve items from permit DL06-05706, located at 1317 W. South St, and then conduct the sale at the 1315 W. South St. location. (Hearing at 1:12:25 – 1:13:17, 1:57:31)
39. These transactions were cash only. (Hearing at 1:59:44)
40. Due to this, there are no records of any actual sales being conducted at DL06-07506, 1317 W. South St, Lebanon Indiana. (Hearing at 2:02:04)

41. Since 2017, Gillam has been to the location at 1317 W. South St, Lebanon Indiana on multiple occasions. In those times, he has observed that the location was closed. (Hearing at 18:18)
42. Gillam did make one purchase of alcohol from the permit location. At that time he spoke with an employee of Respondent. The employee indicated that the location had only been opened since April of 2019. (Hearing at 19:22)
43. While in the location, Gillam noticed that there were additional shelves built near the front of the location, but the rear of the location remained as it was observed in 2017. Gillam also observed the same cash box in use as it was in 2017. (Hearing at 19:16)
44. Currently, Cunningham also owns all of the three (3) available package liquor store permits in the city of Lebanon. (Hearing at 35:14, 1:44:23)
45. Copeland has made observations at the permit location of 1317 W. South St, Lebanon Indiana between fifty (50) and sixty (60) times in the two years preceding the hearing. (Hearing at 37:00)
46. During these observations, all of which occurred during hours which Respondent purported to be open to the public, Copeland did not observe any customers. The only exception to this was during the site visit conducted by Gillam in which Gillam spoke with the employee at Respondent's location. (Hearing at 37:09 and 40:10)
47. Indiana State Department of Revenue records for permit DL06-05706, located at 1317 W. South St, Lebanon Indiana, indicate that no sales tax has been remitted for sales at that location since the permit was made active in 2017. (State's 7)

48. Indiana State Department of Revenue records for permit DL06-81334, located at 1315 W. South St, Lebanon Indiana, show sales records for that location for calendar year 2018. These records show an average monthly sales in an amount of approximately one hundred fifty thousand dollars (\$150,000) for Cunningham's package liquor store at 1315 W. South, St, Lebanon Indiana. (State's 6)
49. On January 30, 2019, Commission processor for District 3, where DL06-81334 is located, indicated that mail he had sent to the business had been returned as undeliverable. (Judicial notice of the Incident Report Form).
50. After Gillam issued the notice of violation on this matter, Cunningham began a series of updates. These updates included major overhauls of electrical, plumbing, and structural issues. (Hearing at 1:18:57, 2:02:27 – 2:04:26)
51. Prior to the issuance of the notice of violation, Respondent did not have official hours that were open to the public. (Hearing at 1:19:07)
52. In April of 2019, one month after the notice of violation was issued in his matter, Respondent's business model changed to an outlet store. (Hearing at 1:24:38)
53. A Registered Retail Merchant Certificate was issued for Respondent's location at 1317 W. South St, one month after the issuance of the notice of violation in this matter. That authorization was issued by the Department of Revenue on May 17, 2019. (Hearing at 1:25:14, State's Exhibit 7)
54. Cunningham acknowledged that it is a common practice for package liquor store owners to buy all of the permits in a particular jurisdiction. Cunningham stated that by purchasing both permits in Tipton, Indiana, he was able maintain the profits of

both stores at a single location and eliminate the overhead of the other store.

(Hearing at 1:32:01)

55. Cunningham indicated that by holding all of the package liquor store permits in a single jurisdiction, he can eliminate competition and therefore control and dictate prices in that jurisdiction. (Hearing at 1:32:13)

Conclusions of Law

1. The Commission has jurisdiction over this matter pursuant to Indiana Code 7.1-1-2-2 and Indiana Code 7.1-2-3-9.
2. The Hearing Judge may take judicial notice of the Commission file relevant to a case. 905 IAC 1-37-11(e).
3. 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.
4. Indiana Code 7.1-3-23-12 states that the Commission may revoke the permit of a permittee if he 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 qualifies him to hold that permit, required for the issuance of that particular type of permit under this title.
5. Indiana Code 7.1-3-1-3.5 states that a permittee to whom a dealer permit has been issued may deposit that permit with the commission for a period of no more than

five (5) years.

6. Respondent acquired permit DL06-05706, in June of 2011.
7. Respondent's permit was subject to similar administrative action under cause number EX13015703. In the final resolution of that violation, Respondent agreed that the period of escrow would be treated as beginning on May 1, 2011. Furthermore, in that settlement document, Respondent agreed to put DL06-05706 in use within twelve (12) months of the date of that agreement on July 7, 2014.
8. Pursuant to Indiana Department of Revenue records, no sales were conducted at Respondent's location in 2017 or 2018.
9. Respondent had no employees assigned to that location.
10. Respondent did not have working restroom facilities at that location.
11. Respondent did not have a Registered Retail Merchant Certificate for that location until May of 2019.
12. As Respondent lacked a Registered Retail Merchant Certificate, Respondent did not meet the qualifications necessary to hold a package store dealer permit.
13. Respondent failed to put the permit in use during either time period allotted under the escrow provisions, as well as the agreed upon terms of the July 7, 2014 settlement agreement.
14. Respondent has failed to maintain qualifications to hold a package liquor store dealer permit by failing to put the permit into use within both the statutory provisions and/or the provisions of the Commission's adopted settlement agreement of 2014.

15. Indiana Code 7.1-3-1-19 states that whenever the character of the business in which an applicant is engaged in 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 in the premises in respect to which a permit is in the nature of the applicant's main business function in the premises.
16. Respondent holds a beer, wine, and liquor dealer permit. Such a permit allows the holder to sell alcohol for off-premises consumption. However, pursuant to Indiana Department of Revenue records, Respondent has made no sales of alcoholic beverages for off-premises consumption since the permit became active in July of 2017.
17. While there is no explicit statutory provisions that set a bright line rule as to the minimum number of hours or minimum amount of sales required for a package liquor store permit, a complete lack of sales indicates that the character of the business conducted under DL06-05706, was not that of a package liquor store.
18. Respondent's lack of a Registered Retail Merchant Certificate indicates that it was not functioning as a package liquor store dealer permittee.
19. Respondent did not have working restroom facilities for its employees, conducted any applicable transactions at the neighboring permit location, did not have exterior signage, nor regular store hours. Respondent did not hold themselves out as a package liquor store dealer permittee.
20. Respondent did receive shipments into DL06-05706, and sort those shipments for use at other locations. In all respects, Respondent's character of business was that

of a warehouse.

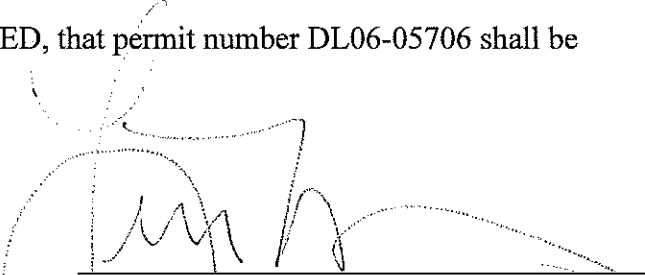
21. As a substantial portion of the business carried on in the premises of DL06-05706 was not in the nature of the permittee's main business function as a package liquor store dealer permittee, Respondent failed to meet the character of business test for a package liquor store dealer's permit.

Proposed Order

THEREFORE, Respondent ceased to qualify to hold permit DL06-05706 and Judgement shall be entered against John F. Cunningham and Associates, Inc. (DL06-05706) on the following:

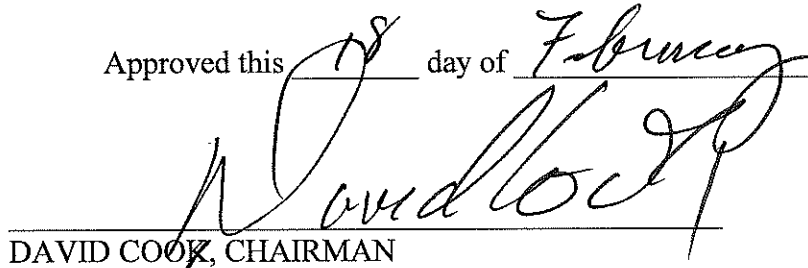
- a. Count I: Cessation of Qualifications (IC 7.1-3-23-12)
- b. Count 2: Character of Business Test (IC 7.1-3-1-19)

It is **ORDERED, ADJUDGED, AND DECREED**, that permit number DL06-05706 shall be **REVOKED**.



Lindsay Hyer
Hearing Judge
Alcohol and Tobacco Commission

Approved this 18 day of February, 2020.



DAVID COOK, CHAIRMAN



JOHN KRAUSS, VICE CHAIRMAN



DALE GRUBB, COMMISSIONER



MARJORIE MAGINN, COMMISSIONER