

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

IN THE MATTER OF)	
THE PERMIT OF)	
)	
EL SARAPE, LLC)	
d/b/a EL SARAPE)	PERMIT NO. RR20-26251
23821 US 33 EAST)	
ELKHART, INDIANA 46517)	
)	
Applicant.)	

**PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. BACKGROUND OF THE CASE

El Sarape, LLC, d/b/a El Sarape, 23821 US 33 East, Elkhart, Indiana 46517, permit number RR20-26251 (Applicant), is the Applicant for a type 209¹ Alcohol and Tobacco Commission (Commission) permit. The application was assigned to the Alcoholic Beverage Board of Elkhart County (Local Board). The Local Board held a hearing on March 21, 2013, and voted 3-0 to recommend denial with respect to this permit. On April 2, 2013, the Commission voted to deny the application at its regularly held meeting.

On April 17, 2013, the Applicant filed a request to appeal Commission's denial. On June 21, 2013, notice of an appeal hearing was mailed to Applicant. The matter was assigned to Commission Hearing Officer Melissa Coxey (Hearing Officer). The matter was set for hearing on August 19, 2013. Applicant failed to appear at the hearing. The Hearing judge took judicial notice of the entire contents of the file related to this cause. Having been duly advised of the facts and law at issue, the Hearing Officer now submits these Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

¹ Liquor, beer and wine (restaurant) retailer located in an unincorporated area.

III. EVIDENCE BEFORE THE LOCAL BOARD

- A. The following individuals testified before the Local Board in favor of the Applicant in this cause:
 - 1. Loida Chavarria, Applicant; and,
 - 2. Mary Lou Salazar, witness for the Applicant.

- B. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:
 - 1. Table outlining monthly food sales.

- C. The following individuals testified before the Local Board against the Applicant in this cause:

None.

- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:

None.

V. FINDINGS OF FACT

- 1. El Sarape, LLC, d/b/a El Sarape, 23821 US 33 East, Elkhart, Indiana 46517, permit number RR20-26251, is the Applicant for renewal of a Type 209 permit. (ATC File).

- 2. Applicant failed to meet minimum food sales requirements pursuant to Ind. Code § 7.1-3-20-12(3).

- 3. Because Applicant failed to appear at the Appeal Hearing, no evidence was presented to rebut documentation presented to Local Board regarding minimum food sales. (ATC Hearing).

- 4. The weight of the evidence indicates the Local Board was justified in recommending denial of the application. (Local Board Hearing).

5. On August 14, 2013, Applicant filed an application for a type 112² permit. (ATC File).

6. Applicant stated she “need[s] the extension to be able to continue opening [her] business until [she] switch[es] the license to a two-way license.” (ATC File).

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

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2 and Ind. Code § 7.1-2-3-9.

2. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.

3. The Commission is authorized to act upon proper application. *Id.*

4. The Hearing Officer may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

5. The Hearing Officer conducted a *de novo* review of the appeal on behalf of the Commission, including a public hearing and a review of the record and documents in the Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).

6. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).

² Beer & Wine Retailer in an unincorporated area.

7. The Applicant is a fit and proper applicant, has maintained a reputation for decency and law obedience, and is qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1 and Ind. Code § 7.1-3-9-10.

8. The recommendation of the Local Board was based on substantial evidence. (Local Board Hearing).

9. The Commission may reverse a local board's action in denying an application for a permit only if it finds that the local board's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; or (d) without observation of procedure required by law, or unsupported by substantial evidence. Ind. Code § 7.1-3-19-11.

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

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Elkhart County Local Board resulting in a 3-0 vote to recommend denial of the application for the permit number RR20-26251 was supported by substantial evidence, was not arbitrary and capricious, and otherwise in accordance with law, and the Alcohol and Tobacco Commission should deny said application.

Further, Commission shall process application for type 112 permit. Commission shall approve extensions to the existing 209 permit until the application for the type 112 permit is either approved or denied. Once the 112 permit application is either approved or denied, Applicant shall surrender type 209 permit to the Commission.

DATE: August 19, 2013

Melissa L. Coxey, Hearing Officer