

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

CLOUD 9 SMOKE AND VAPES)	
14821 W. 101ST AVE.)	
DYER, IN 46311)	IN THE MATTER OF THE
INDIANAPOLIS, IN 46311)	DENIAL OF TRANSFER OF
)	CERTIFICATE NO. TC15616001
Petitioner.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

Petitioner is the holder of the certificate listed above to sell tobacco and e-liquid products as a retail tobacco certificate holder issued by the Alcohol and Tobacco Commission (“Commission”) at 14821 W. 101st Ave., Dyer, IN 46311 (“Certificate”). Petitioner applied for Certificate by the online application on December 14, 2021. On the online application, the Petitioner indicated that his permit was within 200 feet of a primary or secondary school. Commission staff reached out to Petitioner on the application answers. Petitioner completed a second paper application indicated that the certificate premises is more than 1000 feet from a primary or secondary school. The permit was issued. Following complaints received by Indiana State Excise Police, measurements were taken of the distance between certificate premises and the nearest school which showed at distance between 265 and 267 feet. The Commission set this matter for an Order to Show Cause hearing for petition to show cause why the permit should not be revoked for being in violation of Ind. Code § 35-46-1-11.4. Show Cause hearing was held on June 30, 2022. Hearing Judge took judicial notice of the ATC file for certificate. Having been duly advised of the facts and law at issue, Hearing Judge now submits these Proposed Findings of Fact and Conclusions of Law to the full Commission for its consideration.

II. EVIDENCE BEFORE THE HEARING JUDGE

- A. The following individuals testified before the Hearing Judge in favor of the Petitioner in this cause:
1. Michael Droney, owner of certificate holder; and
 2. Jim Crum, attorney for Petitioner.
- B. The following evidence, other than testimony, was introduced and admitted before the Hearing Judge in favor of the Petitioner in this cause:
1. Photographs of the certificate premises and neighboring businesses (Exs. A and B); and
 2. Email communication between Petitioner and Commission staff (Ex. C).
- C. The following individuals testified before the Hearing Judge against the Petitioner in this cause:
1. Lt. Nick Canal, Indiana State Excise Police.
- D. The following evidence was introduced and admitted before the Hearing Judge against the Petitioner in this cause:
1. None.

III. FINDINGS OF FACT

1. Petitioner applied for a retail tobacco certificate on December 14, 2021, using the Commission's online application ("Online Application"). (ATC File).
2. Petitioner answered the following on Online Application¹:
 - i. "Question 11) Do you understand that a new business selling tobacco may not operate within 200 feet of a public or private elementary or secondary school? Y"; and

¹ Ind. Code § 35-46-1-11.4 was adopted in 2020 prohibiting the operation of a tobacco or vaping business within 1000 feet of a public or private elementary or secondary school. Commission's Online Application was not updated with the new statutory requirements at the time the Online Application was submitted.

- ii. “Question 12) Is your business located within two hundred (200) feet of a public or private elementary or secondary school? Y.” (ATC File; Attachment 1).
3. Petitioner answered “Y” to Question 12 because all of the other answers were “Y.” (Show Cause hearing).
4. Commission staff contacted Petitioner to clarify the answer to Questions 11 and 12. (Exhibit C).
5. Petitioner responded “Good morning, no the business is nowhere near a school. (ATC 11) Y (ATC 12) N.” (Exhibit C).
6. Commission staff requested that Petitioner complete the mail-in State Form 51357, Application for Tobacco Sales Certificate which Petitioner completed and signed digitally on December 17, 2021 (“Mail-in Application”). (ATC File; Attachment 2).
7. Petitioner answered the following on Mail-in Application²:
 - i. “11. For New Applicants, do you understand that a new business selling tobacco may not operate within one thousand (1,000) feet of a public or private elementary or secondary school? Yes”; and
 - ii. “12. Is your business located within one thousand (1,000) feet of a public or private elementary school? No.” (ATC File; Attachment 2).
8. Petitioner signed a lease, contingent on obtaining the retail tobacco certificate, for the certificate premises in October 2021. (ATC Hearing).
9. Drywall was completed in February 2022 and the business opened in April 2022. (ATC Hearing).

² Mail-in Application included the correct statutory prohibitions contained in Ind. Code § 35-46-1-11.2.

10. Petitioner spent just under \$15,000 for the build out of the premises and the sign. (ATC Hearing).

11. Petitioner drives past the school but it does not look like an “ordinary” school. (ATC Hearing).

12. Petitioner’s check of Apple Maps for schools in the area prior to completing Online Application and Mail-in Application did not reveal any schools. (ATC Hearing).

13. Commission received complaints that premises was located within one thousand (1,000) feet of a school. (ATC File).

14. Indiana State Excise Police Lt. Nick Canal and Officer Michelle Traugher reviewed the area near the premises and measured the distance from the premises to the nearest school. (ATC Hearing).

15. The distance between the premises and the nearest school is between 265 and 267 feet measured from the wall of the premises within the strip mall to the nearest wall of the school. (ATC Hearing).

16. 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 § 7.1-2-3-9.

2. The Commission provided written notice of the alleged violation to the Petitioner as required by Ind. Code § 7.1-3-18.5-5 in the form of the order to appear of a show cause hearing for the Petition to show cause why the permit should not be revoked.

3. The Commission shall revoke the certificate of a person upon a finding by a preponderance of the evidence that the person has violated Ind. Code § 35-46-1-11.4. Ind. Code § 7.1-3-18.5-5.

4. 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. Ind. Code § 4-21.5-3-27(d).

7. “The substantial evidence standard is met if a reasonable person could conclude that the evidence and the logical inferences therefrom are of such a substantial character and probative value as to support the administrative determination.” *John Malone Enterprises, Inc. v. Schaeffer*, 674 N.E.2d 599, 606 (Ind. Ct. App. 1996). Also, “[a]n administrative decision is contrary to law if any statute, constitutional provision, legal principle, or rule of substantive or procedural law has been violated.” *Id.* (citing *Mills v. Princeton Mining Co.*, 133 Ind. App. 486, 488, 183 N.E.2d 359, 360 (1962)); *see also* Ind. Code § 7.1-3-19-11(a)(3) (providing that the Commission must deny a recommendation from a local board if after *de novo* review it determines that such recommendation would be “in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights . . .”).

9. Article 1, Section 23 of the Indiana Constitution states, “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.”

10. The Petitioner asks that Commission find that Ind. Code § 35-46-1-11.2, -11.4 violate Article 1, Section 23 of the Indiana Constitution and allow the Certificate to remain active in good standing and the Premises be available to operate. (ATC Hearing). Specifically, the Petitioner asserts violations of Article 1, Section 23 in how Indiana law regulates: (A)

different types of businesses that sell tobacco and vaping products; and (B) businesses that sell tobacco and vaping products compared with businesses that sell alcohol or firearms.

(Petitioner’s Proposed Findings at 4-6)

11. In *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994), the Supreme Court of Indiana set out a two-prong test for determining whether a law violates Article 1, Section 23 of the Indiana Constitution. First, for a law creating disparate treatment to be found constitutional, the disparate treatment that the law creates must first be “reasonably related to the inherent characteristics which distinguish the unequally treated classes.” *Collins*, 644 N.E.2d at 80. “Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.” *Id.*

12. Although it is not a third prong to the test, “courts must exercise substantial deference to legislative discretion.” *Id.* The burden is on the challenger “to negative every conceivable basis which might have supported the classification.” *Id.* (citing *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 397, 404 N.E.2d 585 (1980)). “Legislative classification becomes a judicial question only where the lines drawn appear arbitrary or manifestly unreasonable.” *Id.*

13. According to Ind. Code § 35-46-1-1, a “tobacco and vaping business” is defined as: “the primary activity is the sale of: e-liquids; e-liquid accessories; electronic cigarettes; tobacco; tobacco products; tobacco accessories; or any combination of the products listed . . . and the sale of other products is incidental.” The Indiana General Assembly chose to distinguish these types of business from other businesses that sell tobacco and vaping products such as gas stations, convenience stores, as well as alcohol businesses and firearms dealers. Mr. Droney’s business is primarily engaged in the sale of tobacco and e-liquid products. The business is not a gas station or alcohol business.

14. According to Ind. Code § 35-46-1-10, sales of tobacco and vaping products are illegal to or on behalf of a person under the age of twenty-one.

15. Ind. Code § 35-46-1-11.8 provides that the sale of tobacco or electronic cigarettes cannot be acquired by a patron through self-service. Patrons must request their desired products from an employee. *Id.* However, this prohibition does not apply to self-service displays at establishments “in which tobacco products, electronic cigarettes, and e-liquids account for at least eighty-five percent (85%) of the retail establishment’s gross sales” and prohibits entry by persons who are less than twenty-one (21) years of age. *Id.*

16. According to Ind. Code §§ 35-46-1-11.2, -11.4, Indiana law prohibits the operation of tobacco and vaping businesses within one thousand (1,000) feet of a public or private elementary or secondary schools.

17. According to Ind. Code § 35-46-1-11.7, “[p]ersons less than twenty-one years of age [are] prohibited from entering retail establishment[s] that primarily sells tobacco [and vaping] products.” Notices of the age requirement must be conspicuously posted at entrances to the business. *Id.*

18. Neither the distance requirement nor the age restriction applies to businesses such as gas stations and convenience stores.

19. The disparate treatment of tobacco and vaping businesses created by Ind. Code § 35-46-1-11.4 and Ind. Code § 35-46-1-11.8 is reasonably related to the unique or inherent characteristics that distinguish them from other businesses that sell tobacco and vaping products such as gas stations and convenience stores. In particular, these businesses are excepted from the general prohibition against self-service displays found at Ind. Code § 35-46-1-11.8(b), and it is therefore reasonable for the General Assembly to place additional restrictions, such as the

distance requirement and the age restriction, on them. The Petitioner's argument accordingly fails the first part of the *Collins* test.

20. Regarding Petitioner's second argument, it cites to Ind. Code 35-47-2-7, which is in reference to the sale of firearms to minors. This statute does not address the regulation of firearms based on location like the statute in question – Ind. Code 35-46-1-11.4 (2022). The statute focuses on the sale of firearms to certain individuals. Furthermore, the statute also makes a reference to federal firearm sale regulations.

21. Petitioner also points to disparate distance requirements for alcohol businesses. There are distance requirements for alcohol businesses in relation to schools and churches. Generally, an alcohol business cannot be located within two-hundred feet of a school or church. Ind. Code § 7.1-3-21-10. Furthermore, if an alcohol business is in a consolidated city and the business is within one-thousand feet of a school or church they must disclose the proximity. Ind. Code § 7.1-3-1-5.5, 5.6.

22. Even assuming Petitioner's argument constitutes a cognizable claim under Article 1, Section 23, tobacco and vaping businesses are readily distinguishable from businesses that are primarily focused on the sale of alcohol or firearms. Recognizing that the legislature is entitled to substantial deference in making decisions on how to regulate these different types of establishments, the Commission cannot say that any violation of Article 1, Section 23 of the Indiana Constitution is present.

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

VI. RECOMMENDATION

Petitioner filed an application for Certificate at a Premises within 1000 feet of a school in contravention of Ind. Code § 35-46-1-11.4. Petitioner requests that the Commission finds that the Ind. Code 35-46-1-11.4 violates Article 1, Section 23 of the Indiana Constitution, which is unsupported. The petitioner has failed to negate every possible basis that would support the classification that the Indiana General Assembly has made in reference to businesses that primarily sell tobacco and vape products. The lines drawn between these business types do not appear to be arbitrary or manifestly unreasonable. The substantial evidence standard has been met as a reasonable person could conclude from the finding of fact that the Petitioner's business was located within one thousand feet of a school in contravention of Indiana Code 35-46-1-11.4. Thus, the statute is constitutional under *Collins*.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that certificate number TC15616001 shall be REVOKED.

DATE: November 9, 2022



Jessica Allen, Hearing Officer

Distribution:

Jim Crum, Attorney for Petitioner
255 E. Carmel Dr.
Carmel, IN 46032
317-844-4693

Approved this 20th day of December, 2022.




JESSICA ALLEN, CHAIR



JAMES PAYNE, VICE CHAIRMAN



DALE GRUBB, COMMISSIONER



MARJORIE MAGINN, COMMISSIONER