

**STATE OF INDIANA
BEFORE THE FIRE PREVENTION AND BUILDING
SAFETY COMMISSION**

IN RE:) CAUSE NO.
)
ETA4U, LLC) DHS-1512-FPBSC-008
)

NOTICE OF NON-FINAL ORDER

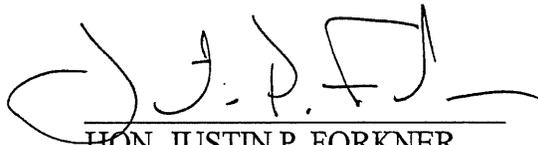
You are hereby notified that the attached document entitled **Findings of Fact, Conclusions of Law, and Non-Final Order** has been entered by the Administrative Law Judge in accordance with Indiana Code § 4-21.5-3-27.

The ultimate authority in this matter is the Fire Prevention and Building Safety Commission. Indiana Code § 4-21.5-3-29(d) requires a party seeking to preserve an objection to this order for judicial review to file a written objection that

1. identifies the basis of the objection with reasonable particularity; and
2. is filed with the Commission within fifteen days (or any longer period set by statute) after this order is served.

In the absence of an objection from a party or notice from the Commission of its intent to review any issue related to this order, the Commission shall affirm this order in accordance with Indiana Code § 4-21.5-3-29(c). **This order will be considered by the Commission on December 1, 2015, at 9:00 a.m. (EST), in Conference Center Room B, Indiana Government Center South, 302 West Washington Street, Indianapolis, IN 46204.**

Date: October 21, 2015



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A copy of the foregoing was served by U.S. Postal Service upon the following parties and attorneys of record:

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REPRESENTATIVE FOR RESPONDENT
Chief Courtney Gordon
Indianapolis, Indiana

**STATE OF INDIANA
BEFORE THE INDIANA FIRE PREVENTION AND BUILDING
SAFETY COMMISSION**

IN RE:) ADMINISTRATIVE CAUSE NO.
)
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ETA4U, LLC) DHS-1512-FPBSC-008
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**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
NON-FINAL ORDER**

An agent of the Indianapolis Fire Department inspected a facility leased by an entertainment provider named ETA4U, LLC. ETA4U intends to operate the facility as an indoor paintball center. The Indianapolis Fire Department identified the facility as a “Special Amusement Building” under the Indiana Fire and Building Codes and cited ETA4U for not complying with the code requirements accompanying that designation. ETA4U appealed.

For the reasons set forth below, the Administrative Law Judge finds that the Indianapolis Fire Department correctly categorized ETA4U’s facility as a special amusement building.

Procedural Background

On March 31, 2015, the Respondent in this matter, the Indianapolis Fire Department, conducted an inspection of a facility operated by the Petitioner, ETA4U, and issued an order following that inspection. The Petitioner filed a petition for review of the results of the Respondent’s order, which the Commission granted as timely on June 2, 2015. The undersigned Administrative Law Judge was appointed to adjudicate the appeal.

An initial prehearing conference was set for July 1, 2015. The Respondent appeared by its representative, but the ALJ was unable to reach the Petitioner's representative and the initial prehearing conference was reset for July 15, 2015. On July 15, 2015, the Respondent appeared by representative, but the ALJ was again unable to reach the Petitioner's representative. The initial prehearing conference was reset for August 5, 2015. On that date, both parties appeared by their representatives.¹ The parties indicated that informal resolution was not possible given the nature of the dispute, but they agreed that no formal evidentiary hearing in this matter was necessary; their evidence and arguments could be submitted by written briefs and documentary evidence.

The ALJ approved this form of proceeding and issued an initial prehearing order and order setting briefing schedule on August 10, 2015. On September 3, 2015, the Respondent filed its brief and evidence. The Petitioner filed its brief and evidence on September 4, 2015.

Burden and Standards of Proof

Indiana Code § 4-21.5-3-14(c) provides that at each stage of an administrative review, “the agency or other person requesting that an agency take action or asserting an affirmative defense specified by law has the burden of persuasion and the burden of going forward with the proof of the request or affirmative defense.” That burden rests upon the agency when the agency is, in essence, prosecuting a petitioner for a regulatory violation. See Peabody Coal Co. v. Ralston, 578 N.E.2d 751, 754 (Ind. Ct. App. 1991). But when it is the petitioner who has sought an agency action or claimed entitlement to an exemption from regulatory requirements, the burden rests upon that petitioner. See Ind. Dep’t of Natural Res. v. Krantz Bros. Constr. Corp., 581 N.E.2d 935, 938 (Ind. Ct. App. 1991).

Proceedings held before an ALJ are de novo, Ind. Code § 4-21.5-3-14(d), which means the ALJ does not—and may not—defer to an agency’s initial determination, Ind. Dep’t of Natural Res.

¹ The parties were advised, in writing, of their right to be represented by counsel during this proceeding. The Administrative Orders and Procedures Act, however, permits a party to be represented by counsel “or, unless prohibited by law, by another representative.” Ind. Code 4-21.5-3-15(b). Here, the Petitioner is represented by a fire protection and building code consulting service and the Respondent is represented by its Fire Marshal; both types of representative are common occurrences in matters before the Commission.

The ALJ commends and thanks the representatives of both parties for their professionalism and cooperation through this appeal.

v. United Refuse Co., Inc., 615 N.E.2d 100, 104 (Ind. 1993). Instead, in its role as fact-finder the ALJ must independently weigh the evidence in the record and matters officially noticed, and may base its findings and conclusions only upon that record. Id.; see also Ind. Code § 4-21.5-3-27(d).

At a minimum, the ALJ's findings "must be based upon the kind of evidence that is substantial and reliable." Ind. Code § 4-21.5-3-27(d). "[S]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support the decision." St. Charles Tower, Inc. v. Bd. of Zoning Appeals, 873 N.E.2d 598, 601 (Ind. 2007). It is "something more than a scintilla, but something less than a preponderance of the evidence." State ex rel. Dep't of Natural Res. v. Lehman, 177 Ind. App. 112, 119, 378 N.E.2d 31, 36 (1978) (internal footnotes omitted).

When a Fourteenth Amendment interest is put at risk by an agency action, however, a higher standard of proof is required. Pendleton v. McCarty, 747 N.E.2d 56, 64–65 (Ind. Ct. App. 2001), trans. denied. "[I]n cases involving the potential deprivation of . . . protected property interests, the familiar 'preponderance of the evidence standard' [is] used." Id. at 64. But the higher "clear and convincing" standard is required when a protected liberty interest is at stake. Id. That is to say, this standard applies when "individual interests at stake in a particular state proceeding are both 'particularly important' and 'more substantial than the mere loss of money' or necessary to preserve fundamental fairness in a government-initiated proceeding that threaten[s] an individual with 'a significant deprivation of liberty' or 'stigma'." Burke v. City of Anderson, 612 N.E.2d 559, 565 (Ind. Ct. App. 1993), trans. denied (quoting In re Moore, 453 N.E.2d 971, 972 (Ind. 1983)); see also Pendleton, 747 N.E.2d at 64.

Findings of Fact

Present in the record of proceedings is the Respondent's inspection order, the Petitioner's petition for administrative review, the Commission's notice granting the petition for administrative review, and the orders and notices issued by the ALJ. The Respondent submitted as evidence with its brief a marked copy of its inspection order; floor plans indicating wall construction and exit sign locations for two phases of the Petitioner's facility; and a Class 1 (Commercial) Structural

Permit Application filed by the Petitioner.² The Petitioner submitted as evidence with its brief its Class 1 (Commercial) Structural Permit Application; the Respondent's inspection order; renderings of other indoor paintball facilities; and photographs of the facility in its current state.³ Based solely on that evidentiary record and any additional items specifically noted below, the ALJ hereby issues the following findings of fact:

1. The Petitioner is the lessee of Unit 580 of the Washington Square Mall ("the Facility"), located at 10202 E. Washington Street, Indianapolis, IN 46229.
2. The Facility is located in a C-4 Zoning District and the Petitioner is proposing an A-3 Use and Occupancy classification.
3. On or about March 16, 2015, the Petitioner filed a Class 1 (Commercial) Structural Permit Application as a prerequisite to remodeling the Facility from the prior mall tenant's use into an indoor paintball and tactical laser tag facility.
4. The Facility is a large, open-bay style building, within which the Petitioner has constructed a number of smaller temporary structures and emplaced a variety of physical obstacles—including low walls, containers, and vehicles—behind (and through) which participants may pass or hide. The arrangement of these temporary structures and obstacles is not fixed. The Facility could operate in low lighting levels, short of complete darkness.
5. On March 31, 2015, a representative of the Respondent conducted an inspection of the Facility and cited the Petitioner for violating the Indiana Fire and Building Code provisions with respect to exit sign requirements in a special amusement building.

Conclusions of Law

Applying the law set forth in this decision to the factual findings supported by the evidence, the ALJ hereby reaches the following conclusions of law with respect to the issues presented:

² These exhibits are marked and—in the absence of any objections—admitted as Respondent's Exhibits 1, 2, 3, and 4, respectively.

³ The permit application, inspection order, and renders are marked and—in the absence of any objections—admitted as Petitioner's Exhibits 1, 2, and 3 respectively. The photographs are likewise admitted, but marked individually as Petitioner's Exhibits 4 through 13.

1. The Respondent here alleges that the Petitioner is in violation of a regulatory scheme. Accordingly, the Respondent bears the burdens of proof and production. Ind. Code § 4-21.5-3-14(c); Peabody Coal, 578 N.E.2d at 754.

Because this is not a matter in which the Respondent is seeking to deprive the Petitioner of a protected property or liberty interest, however, the higher standards of proof used in those cases are not applicable here. Cf. Pendleton, 747 N.E.2d at 64. Instead, the usual standard of proof for administrative appeals set forth in Indiana Code § 4-21.5-3-27(d)—that of substantial and reliable evidence—applies.

To succeed carry its burden, the Respondent must therefore produce substantial and reliable evidence that the Facility is a special amusement building as that term is defined in the Indiana Fire and Building Codes.

2. The Indiana Code creates the Fire Prevention and Building Safety Commission and requires it to adopt statewide building and fire safety laws. Ind. Code §§ 22-12-2-1, 22-13-2-2. In 2014, the Commission amended and adopted the International Building Code, 2012 Edition, first printing dated May 2011, as the 2014 Indiana Building Code. See 675 Ind. Admin. Code 13-2.6-1 *et. seq.* It also amended and adopted the International Fire Code, 2012 Edition, first printing dated May 2011, as the 2014 Indiana Fire Code. See 675 Ind. Admin. Code 22-2.5-1 *et. seq.*
3. The 2014 Indiana Building Code defines a special amusement building as

[a]ny temporary or permanent building or portion thereof that is occupied for amusement, entertainment or educational purposes and that contains a device or system that conveys passengers or provides a walkway along, around or over a course in any direction so arranged that the *means of egress* path is not readily apparent due to the visual or audio distractions or is intentionally confounded or is not readily available because of the nature of the attraction or mode of conveyance through the building or structure.

2014 Ind. Bldg. Code § 202 (adopted without amendment by 675 Ind. Admin. Code 13-2.5-3). This same definition is incorporated into the Indiana Fire Code. See 2014 Ind. Fire Code § 202 (adopted as amended by 675 Ind. Admin. Code 22-2.5-3(80)).⁴

4. Breaking that definition down into its component subparts shows that a special amusement building has the following requisite elements:

⁴ The Respondent's inspection order cites to the Indiana Fire Code, but the proper reference is actually the Indiana Building Code as cited below.

- A. A temporary portion or permanent building or portion thereof.
 - B. Occupied for amusement, entertainment or educational purposes.
 - C. That
 - 1. contains a device or system that conveys passengers; or
 - 2. provides a walkway along, around or over a course in any direction.
 - D. So arranged that the means of egress path
 - 1. is not readily apparent due to the visual or audio distractions; or
 - 2. is intentionally confounded; or
 - 3. is not readily available because of the nature of the attraction or mode of conveyance through the building or structure.
5. Among other things, a special amusement building must comply with additional exit sign requirements set out in the Indiana Building Code. Compare 2014 Ind. Bldg. Code § 1011 (adopted as amended by 675 Ind. Admin. Code 13-2.6-11(r)) (exit signs generally) with 2014 Ind. Bldg. Code § 411.7 (adopted without amendment by 675 Ind. Admin. Code 13-2.6-5) (exit marking in special amusement buildings).
6. The Respondent argues that the Facility is a special amusement building based on this definition, and must therefore comply with these additional requirements:

There is no question this facility will be used for the purpose of providing amusement and entertainment to the public. Furthermore, the playfield makes the means of egress not readily apparent to the users by the use of landscape obstacles of visual distractions. Finally, protective eye gear, obstacles, or other distractions, such as lighting and noise utilized or placed in the play field fail to provide a natural pathway to the exits.

(Resp. Br. at 2.)

The Petitioner, however, contends that the Facility is not a special amusement building, and it must therefore only comply with Section 1011.1 of the 2014 Indiana Building Code. The Petitioner states that a haunted house, maze, or house of mirrors would be an example of a special amusement building containing a “system that conveys passengers”—and mobile carnival rides, theme park rides, and water park rides and devices would be examples of special amusement buildings containing a “device that conveys passengers.”

(Pet. Br. at 2.) And in some instances, the Petitioner says, “extreme laser tag facilities” might constitute special amusement buildings—where they are constructed as a maze, for example, or are operated under black lights and/or have loud music playing. (Pet. Br. at 2.)

But the Petitioner argues that the Facility—and tactical laser tag and paintball generally—is “a different playing field” altogether:

The game is played of larger scale realistic building layouts and bunkers . . . This facility operates in low lighting levels but not in the dark as extreme laser tag does. There is no single direct path of egress or maze limiting access to exits. Mirrors, mazes or other designs are not utilized that disguise the path of egress travel such that they are not apparent.

(Pet. Br. at 2.)

Under the facts of this case, and in looking at the plain language of the Indiana Building Code’s definition of special amusement building, the Respondent has the better argument.

7. The Facility is a portion of a permanent building—a portion of Washington Square Mall—to be occupied for amusement or entertainment as a tactical paintball and laser tag facility. It therefore meets elements A and B of the definition above.

Moreover, the Facility provides multiple walkways over a course—the playing field—along, around, or over which the players may navigate the playing field in any direction. Specifically, the playing field provides multiple directions of travel and movement along, around, or over the temporary obstacles and structures within the Facility. This satisfies element C above.

Finally, the means of egress path from that playing field is not—or may not be—readily apparent due to a number of factors. The obstacles and temporary structures might block a player’s view of the means of egress, the lighting might be dim, safety gear might impede vision, the noise of the game itself would create an audible distraction, and the nature of the attraction—a high-intensity, frenetic, tactical combat simulation—inherently inhibits what would need to be the calm, rational, thought process required to find an egress path in an emergency.⁵ This therefore satisfies element D above.

⁵ And as the Petitioner says, “[i]n tactical laser tag the playing field is constructed as mobile structures to be moved to continue to present new and challenging layouts for the players.” (Pet. Br. at 2.) So a player who participated in a scenario at the Facility on Monday and was able to discern the egress path might return on Tuesday and find that same egress path is no longer readily apparent (or available) because the playing field itself had substantially changed.

8. The Petitioner is probably correct that the Facility does not present the same level of safety concerns presented by other special amusement buildings such as black-lit mazes, indoor carnival and theme park rides, haunted houses, or a house of mirrors. But that is more a matter of degree than of actual distinction. And while it might lend support to an application for a variance from all or some of the additional requirements that come with such a designation, the difference in degree of concern does not change the conclusion here that the Facility nevertheless also satisfies the elements of a special amusement building.

Decision and Non-Final Order

The Petitioner's facility, a tactical laser tag and paintball facility located within the Washington Square Mall in Indianapolis, Indiana, is a "Special Amusement Building" as that term is defined in Section 202 of the 2014 Indiana Building Code. It must, therefore, comply with the additional requirements for such facilities as set forth in the Indiana Fire and Building Codes.

The Fire Prevention and Building Safety Commission is the ultimate authority in this matter. It will consider this non-final order in accordance with the provisions of Indiana Code §§ 4-21.5-3-27 thru -29 and the terms of the Notice of Non-Final Order also issued today.

Date: October 21, 2015

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