

Protestants objected to the issuance of the permits on the basis of lack of law enforcement manpower in Sterling County to police the premises, diminished traffic safety, a loss of peace and serenity, and lack of control of the proposed premises. The Staff alleged that the Application constituted a subterfuge, or a scheme, to allow the unauthorized use of the permits.

This proposal finds (1) the Application constitutes a subterfuge, and (2) that there are reasonable grounds to believe the place or manner in which Applicant will conduct its business warrants refusal of the permits based on traffic concerns. The Administrative Law Judge (ALJ) recommends the permits not be issued.

II. JURISDICTION AND PROCEDURAL HISTORY

On March 12, 2003, SCFOE filed an application for the permits. Staff informed Applicant that the Texas Alcoholic Beverage Commission (TABC) had received protests against issuing the permits. The matter was referred to the State Office of Administrative Hearings (SOAH). On January 21, 2004, a public hearing was convened before ALJ Robert F. Jones Jr., in the Ector County Commissioners' Courtroom, Ector County Administration Building, 1010 E. 8th Street, Room 500, Odessa, Ector County, Texas. Staff was represented by Gayle Gordon, an attorney with the TABC Legal Division. Protestants appeared through their counsel, Jay K. Weatherby. Applicant appeared through its President Tommy W. Van Arsdale, its Secretary Gregory P. Tatro, and its Trustee Corky Johnson. The hearing ended on January 21, 2004. The record was closed on February 24, 2004, after written arguments were filed.

Notice and jurisdiction were not contested issues, and those matters are addressed only in the Findings of Fact and Conclusions of Law.

III. BACKGROUND

SCFOE's proposed premise is located at 702 4th Street, Sterling City, Sterling County, Texas. This is a two-story, brick building located at the intersection of Elm Street and State Highway 87 (SH 87 or 4th Street).¹ The premise is located in the first floor of the two-story building. The building has contained a variety of businesses, most recently the Ole Landmark restaurant. The building and land are owned by Gregory Tatro, SCFOE's secretary. Mr. Tatro, and Bridgette Tatro his wife, reside in the upper floor. The Tatro's and SCFOE entered into a lease of the first floor of the building (including fixtures and furniture) and the exterior land on April 1, 2003. The lease term is for one year and obligated SCFOE to pay the Tatro's \$500.00 per month.

SH 87 is the main thoroughfare of Sterling City, running east-west. Elm Street runs north-south from SH 87. The intersection of Elm Street and SH 87 (the Intersection) is the location of the only red lights controlling north-south or east-west traffic in Sterling City. The Texas Department of Transportation (TxDOT) has designated the Intersection as a school zone. The speed limit on SH 87 is 35 miles per hour in Sterling City, reduced to 20 miles per hour during school zone hours. The school zone operates three times a day: in the morning (approximately 7:30 to 8:30 a.m.); at noon (approximately 11:45 a.m. to 1:15

¹ State Highway 87 is named 4th Street in Sterling City.

p.m.); and, after school (approximately 3:30 to 4:30 p.m.). There are two north-south crosswalks at the Intersection, the only two in town protected by red lights and school zones.

The proposed premise is located on the northwest corner of the Intersection. A vacant building is located on the northeast corner, the county courthouse and public library are on the southeast corner, and a hardware and furniture store occupies the southwest corner. Sterling City's only grocery store, the Hitchin' Post, is in the same block as the proposed premises, just west on SH 87. The town's post office is one block north of the premises on the east side of Elm. The school is on 7th Street and Elm, two blocks north of the premises.²

IV. DISCUSSION AND ANALYSIS

A. The Staff's Complaints

The Staff's case against SCFOE revolves around the concept of a subterfuge benefitting an individual. Two other complaints were raised in the testimony that were not addressed in the Notice of Hearing (NOH) or the Staff's final argument. The Staff did not give SCFOE notice of those complaints, concerning the "one-year rule"³ and the "membership" rule,⁴ or that they could be a basis for denying the

² Pupils from across the county attend the school. The school services all grades, from kindergarten to high school.

³ TABC Agent James White testified on behalf of the Staff. He asserted that the SCFOE had not complied with what he called the "one-year rule." The basis of the agent's assertion rests upon the meaning of the definition of a fraternal organization as an association that "as the owner, lessee, or occupant, has operated an establishment for

Application. SCFOE did not receive notice of these bases ten days prior to the hearing, nor did the NOH direct SCFOE's attention to the applicable law.⁵ The ALJ concludes that the "one-year rule" and the "membership" rule cannot be a basis for denial of the issuance of the permits.

1. The Governing Law

The Staff alleged that SCFOE has consented to an unauthorized person, Mr. Tatro, using or displaying the permits.⁶ The Code declares that

It is the intent of the legislature to prevent subterfuge ownership of or unlawful use of a permit or the premises covered by such permit; and all provisions of this code shall be liberally construed to carry out this intent, and it shall be the duty of the commission or the administrator to provide strict adherence to the general policy of preventing subterfuge ownership and related practices hereinafter declared to constitute unlawful trade practices.

Every permittee shall have and maintain exclusive occupancy and control of the entire

fraternal purposes for at least one year." TEX. ALCO. BEV. CODE ANN. (the Code) § 32.11(a)(1)(A) (Vernon 2004). As the ALJ understands Agent White's point, since SCFOE has not operated at the 702 4th Street address for more than a year it is not a fraternal organization. The ALJ does not read the Code as restrictively. An "establishment" is "a place of business with its possessions and staff." *The American Heritage Dictionary of the English Language*, (4th Ed. 2000). Since the Code does not define "establishment" in any contrary way, the ALJ must construe it according to common usage. TEX. GOV'T CODE ANN. § 311.011 (Vernon 2004). Section 32.11(a)(1)(A) merely requires that a fraternal organization operate "fraternal purposes for at least one year." The SCFOE has been in operation for "fraternal purposes" more than one year. SCFOE has not violated the "one-year rule."

⁴ SCFOE has fewer than 50 active members who reside in Sterling County, Texas. Agent White opined that this automatically canceled the Application. 16 TEX. ADMIN. CODE (TAC) § 41.52(c)(1)(3). The Code and the TABC rules require 50 members in residing in Sterling County at all times. § 32.03(e) of the Code, 16 TAC § 41.52(c)(1)(A). The ALJ believes that SCFOE may have violated this rule.

⁵ TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052

⁶ § 11.05 of the Code.

licensed premises in every phase of the storage, distribution, possession, and transportation and sale of all alcoholic beverages purchased, stored or sold on the licensed premises. Any device, scheme or plan which surrenders control of the employees, premises or business of the permittee to persons other than the permittee shall be unlawful.⁷

For example, the Commission has determined that payment of the premises' water, electric, and telephone bills by a person other than the permittee constituted an unlawful practice under § 109.53 of the Code, and supported a finding that the permittee did not exercise exclusive control of the premises.⁸ "Premises" means "the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person."⁹

SCFOE may be issued the permits only if it meets the provisions of Chapter 32 of the Texas Alcoholic Beverage Code.¹⁰ In particular, Section 32.03 states:

(a) A private club registration permit may only be issued to a club which meets the requirements of this section.

(b) The club must be an association of persons, whether unincorporated or incorporated under the laws of this state, for the promotion of some common object.¹¹

⁷ § 109.53 of the Code.

⁸ *Comm'n Order, In re Shelly Lea Joyner d/b/a Swan Club Permit No. BG471043* (March 4, 2002)(adopting Proposal for Decision in SOAH Docket No. 458-02-0355, February 8, 2002).

⁹ § 11.49(b) of the Code.

¹⁰ § 32.03(a) of the Code.

¹¹ SCFOE is a "fraternal organization" as defined by the Code. Mr. Tatro testified that the Fraternity of Eagles (FOE) is a national fraternal organization. The national FOE actively operates in all 50 states and some foreign countries. It has thousands of local units, and was established in 1898. A copy of the SCFOE By-Laws and a "Certification of Fraternal or Veteran Organization" signed by the Grand Secretary of the FOE attesting that SCFOE was a bona fide

(c) Members of the club must be passed on and elected by a committee or board made up of members of the club, and no employee of the club shall be eligible to serve on the membership committee or board.¹²

2. Evidence

a. Designation of Premises

SCFOE, in answering Question 10 A of the Application, stated that the permit was intended to “embrace the entire building, grounds, and appurtenances” at 702 4th Street. Accordingly, no diagram designating the premises was included with the Application. On March 13, 2003, TABC Agent James White was assigned to inspect the proposed premises. Agent White made an inspection that day, and filed a written report. Agent White learned that the upstairs living quarters of the Tatros was not intended to be included in the proposed premises. At his suggestion, and to segregate the premises from the Tatro’s residence, the lease between the Tatros and SCFOE was executed. Agent White noted that the upstairs living quarters would need to be physically segregated (“walled-off” in the words of the report) from the downstairs club, and that a separate address should be obtained for the residence. Mr. Tatro confirmed that Agent White’s had communicated these requirements to SCFOE. On January 20, 2004, Agent White returned to the proposed premises. He noted that the upstairs had not been completely walled off from

member of the FOE since December 29, 2001, were filed with the Application. See § 32.11(a)(1) (A) of the Code.

¹² The SCFOE By-Laws provide that “all candidates for membership shall be elected by majority vote of those members present and by secret ballot.”

the first floor. SCFOE officers testified that a separate address for the upper and lower floors at 702 4th Street had not been obtained.

b. Payment of Rent

SCFOE's lease term was for one year, beginning April 1, 2003. SCFOE was to pay the Tatros \$500.00 rent monthly. Mr. Tatro testified that the rent had not been paid for any month since the lease was executed. Mr. Tatro stated that he had agreed with SCFOE that no rent would be collected until the premises were permitted and open on a daily basis.

c. Payment of Utilities

The premises' lease requires SCFOE to pay its own gas, electric, telephone, and water charges. The evidence disclosed that while the building has separate electric meters (but not separate accounts) for the residence and the proposed premises, there are only single meters for the whole building for water services. Angela Davidson, the Sterling City Secretary, testified that Sterling City collects fees for water, sewage, and garbage services. She noted that with respect to 702 4th Street, Sterling City has collected for services only from the Tatros, and never from SCFOE. She further stated that if SCFOE had its own accounts for water, sewage, and garbage services it would be charged a business rate instead of the residential rate the Tatros are currently charged.

Mr. Van Arsdale, corroborated by other SCFOE officials, testified that SCFOE agreed to pay \$100.00 per month plus its share of the electricity bill to the Tatros. The \$100.00 was an interim payment, to represent SCFOE's "share" of the other utilities, apparently until SCFOE set up its own accounts. Mr. Tatro and Mr. Van Arsdale testified that this arrangement was made sometime during 2003, payments on the electricity bill were brought to the SCFOE member's attention at regular meetings, and payments were authorized by a member vote. Mr. Tatro and Mr. Van Arsdale identified a payment of \$55.24 on August 22, 2003, as an electricity payment to the Tatros, and a \$300.00 check issued in October 2003, as a quarterly payment of the \$100.00 owed for June, July, and August. SCFOE could not offer any accounting of, or any canceled checks for, any other payments made to the Tatros and could not document membership votes approving payments to the Tatros in the organization's minutes.

3. Arguments and Analysis

a. TABC

The Staff argues that the Application is not made for the benefit of SCFOE but Mr. Tatro because he leased the premises to SCFOE; the building is his residence; no business utility meters have been installed; he has direct access to the premises from his residence; the lease of the premises is only for one year; and no rent has been paid. Staff further notes that the only "income" that SCFOE would derive would be from charges for serving alcohol. The Staff concludes that although the SCFOE is a fraternal organization, the Application appears to be for the sole benefit of Mr. Tatro. The Staff condemns the

Application as overall a subterfuge to operate a bar in a dry area, using SCFOE as a front.

The Staff offered a prior administrative decision as illuminating. In *Texas Alcoholic Beverage Commission v. Michael J. Greene d/b/a 8 Seconds*, Applicant sought issuance of a private club registration permit.¹³ Protestants claimed 8 Seconds was a subterfuge to permit the sale and service of alcoholic beverages in a dry area.¹⁴ The purpose of the 8 Seconds association was for recreation, to sell alcoholic beverages (unlike the local country club and VFW where the sale of alcohol was secondary to the purpose of the association) and to make money. The proposed activities were designed to be attractive to the public at large. The Applicant had not collected membership fees.¹⁵ The association only had one documented meeting, to organize the association just prior to the application's filing.¹⁶ The organization's documents were contradictory, and let the individual applicant "have the freedom to change the bylaws at will and appear to have unfettered control of the association."¹⁷ The club's membership committee was a sham.¹⁸

The ALJ put the question as follows: "is the applicant a club within the meaning of the statute or a

¹³ *Texas Alcoholic Beverage Commission v. Michael J. Greene d/b/a 8 Seconds, Proposal for Decision in SOAH Docket No. 458-96-2236*, p. 1 (May 28, 1997).

¹⁴ *Id.*, p. 5.

¹⁵ *Id.*, pp. 5-6.

¹⁶ *Id.*, p. 7.

¹⁷ *Id.*, p. 8.

¹⁸ *Id.*, p. 9.

front to sell liquor in a dry area for profit?"¹⁹ The ALJ concluded that "Protestants' evidence showing subterfuge ownership is more convincing than the evidence presented by Applicant. Although the application documents indicate the association is the applicant, the association appears to be a mere sham designed to conceal the true applicant is a businessman applying for a permit to operate a bar in a dry county."²⁰

b. Protestants

The Protestants did not file an independent argument with respect to this issue; instead they adopted the Staff's argument.

c. Applicant²¹

SCFOE denies that the application was made for the benefit of Mr. Tatro. It argues that the fraternity is operated and controlled by its members, as set out in its bylaws. It acknowledges that Mr. Tatro owns the building in which the premises would be located. SCFOE assumes that a member of a

¹⁹ *Id.*

²⁰ *Id.*

²¹ As a preliminary argument, SCFOE complained that it was surprised that the Staff took a position adversary to the issuance of the permits. The crux of its complaint was the tardy filing of Staff's First Amended Prehearing Statement on January 20, 2004, which (SCFOE said) was the first intimation it had that Staff would oppose it at the hearing. The NOH, issued and filed on October 17, 2003, contains an allegation *by the Staff* that the SCFOE would allow or consent to the use or display of the permits by an unauthorized person. The Staff's original Prehearing Statement, filed on October 27, 2003, specifically states that "Petitioner [Staff] will prove by a preponderance of the evidence the charges set out in the Notice of Hearing and will request the Respondent's permits be denied." SCFOE's claim of surprise is unfounded.

fraternity can own the building in which the premises are to be located and lease the premises to the organization, since it could find nothing to the contrary in the Code. SCFOE states that it is ready to “wall-off” the premises from the Tatro residence, but is waiting for Agent White to approve their planned construction. SCFOE acknowledges that the service fees from the sale of alcohol will be used to pay some of its rent and expenses, but asserts that it will derive some income from its charity fund-raisers. SCFOE asserts that the evidence shows it to be a *bona fide* fraternal organization and not a “front” for the operation of a bar in a dry area. SCFOE distinguished itself from the applicant in *8 Seconds*. The applicant in *8 Seconds* sought to open a private, for-profit club; SCFOE is a nonprofit fraternity. Applicant objected to Staff’s assertion that the citizenry of Sterling County has “consistently rejected attempts to bring in alcohol over the last four to five decades.” SCFOE points out that even though Sterling County is dry, alcohol is consumed there. A private club registration permit will not change Sterling County’s dry status.

d. Analysis

SCFOE, since it is renting its premises, is required to lease space in a building of such a “character as in the judgment of the commission is suitable.”²² Agent White, as the representative of the Commission, told the SCFOE officers what the space had to entail. Consistent with the Code, Agent White informed SCFOE that its premises had to be exclusive. The Code requires “exclusive occupancy and control of the

²² § 32.03(f) of the Code.

entire licensed premises.”²³ If the occupancy is not “exclusive” the permittee has surrendered control of the premises.²⁴ Agent White viewed the proposed premises the day before the hearing and determined that the upper and lower floors had not been completely and permanently segregated. In Agent White’s analysis, since the Tatros had unimpeded access to the proposed premises, they had not been excluded. Agent White’s interpretation is entitled to deference, and is consistent with the plain language of the Code.²⁵

The ALJ concludes that, while the Application and the Lease considered together designate it, the premises are not suitable in character because SCFOE would not have “exclusive occupancy and control of the entire licensed premises.”²⁶ In argument, SCFOE stated it was ready to wall-off the proposed premises, subject to Agent White’s approval (and receipt of the permit). This is insufficient. The premises must be exclusive before the permit is issued.

SCFOE has not paid any rent for the premises at 702 4th Street. The Applicant’s officers

²³ § 109.53 of the Code. “Premises,” as defined by the Code, means “the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person.” § 11.49(a) of the Code.

²⁴ Thus, the authority of the applicant to “designate a portion of the grounds, buildings, vehicles, and appurtenances to be excluded from the licensed premises.” § 11.49(b)(1) of the Code. The Code states that if “such a designation has been made and approved as to the holder of . . . a private club registration permit, the sharing of space, employees, business facilities, and services with another business entity (including the permittee’s lessor, . . .), does not constitute a subterfuge or surrender of exclusive control in violation of Section 109.53 of this code” § 11.49(b)(2) of the Code (emphasis supplied). Since the Tatros’ residence is not “another business entity” it could be argued that SCFOE sharing of space with the Tatros is a *per se* surrender of exclusive control. The ALJ, however, considers this section to authorize a liquor store or wine shop to operate inside a grocery store, or to allow a restaurant to sell alcoholic drinks to its food clientele. It does not appear to be intended to apply to the facts presented here.

²⁵ See TEX. GOV’T CODE ANN. § 311.023(6).

²⁶ §§ 32.03(f), 109.53 of the Code.

explained this as a manner of affording SCFOE premises which it apparently could not afford, until SCFOE had a permit and could generate income to pay the rent. In essence, the lease was a sham. The “service charges” SCFOE plans to collect as its income will be used to pay what remains Mr. Tartro’s bills.²⁷ The Tatros retained occupancy and control over the premises. Since SCFOE paid no rent, it had no recourse to assert a greater right to occupancy and control over the premises against the Tatros. Therefore, the ALJ concludes that the lease was a “device, scheme or plan which surrenders control of the employees, premises or business of the permittee to persons other than the permittee.”²⁸

With respect to the *8 Seconds* matter, the ALJ in that case found the following facts in support of a subterfuge under § 109.53:

- Applicant’s association held only one (organizational) meeting.
- Applicant (and his fiancée) was the sole organizers, directors, and officers of the association.
- Applicant could operate the association at his discretion.
- Applicant could only be removed at an annual meeting, for which the association’s articles and bylaws did not provide.

²⁷ By way of illustration, the lease of the premises represents a \$6,000 expense (\$500/month for 12 months). Assume all of the 113 original members each paid a \$10.00 initiation fee, and a \$30.00 yearly dues, as set out in the SCFOE By-Laws. SCFOE would have \$1,130 (initiation fees) + \$3,390 (dues) = \$4,520 to defray its lease expense. “The club’s total annual membership fees, dues, or other income, excluding proceeds from the disposition of alcoholic beverages but including service charges, must be sufficient to defray the annual rental of its leased or rented premises” § 32.03(h) of the Code. SCFOE would have to collect an additional \$1,480 in service charges or other income to pay its rent and additional funds to pay for utilities and other expenses.

²⁸ § 109.53 of the Code.

- Applicant was to derive an income from the club, but participated in membership committee meetings (a violation of the Code).
- Applicant had unfettered control of the association.²⁹

The ALJ concludes that the *8 Seconds* case differs insignificant ways from this matter. SCFOE is a *bona fide* fraternity, as recognized by its national office. Control of the organization does not rest with a single person, and replacement of officers is clearly set out in SCFOE's bylaws. SCFOE's officers serve without compensation. Mr. Tatro is not a member of the membership committee. Although Mr. Tatro is an officer of SCFOE, he does not have unfettered control of the organization. Based on these facts, the ALJ concludes that SCFOE itself is not a "device, scheme or plan which surrenders control of the employees, premises or business of the permittee to persons other than the permittee."

The evidence clearly discloses that SCFOE has not paid all of the gas, electric, telephone, and water charges attributable to the premises. The accounts, as the testimony discloses, remain in the Tatros' name, and are charged at residential, rather than business, rates. SCFOE's officers could only document two payments that they alleged were reimbursements for SCFOE's debts, but they could not identify organizational minutes acknowledging the debt and its purpose, and authorizing payment.³⁰ At any time the Tatros could shut off power and water to the proposed premises, rendering the building useless to SCFOE.

²⁹ Findings of Fact 12 - 20, Conclusion of Law 7, *Texas Alcoholic Beverage Commission v. Michael J. Greene d/b/a 8 Seconds*, Proposal for Decision in SOAH Docket No. 458-96-2236, pp. 15-16 (May 28, 1997).

³⁰ See Comm'n Order, *In re Shelly Lea Joyner d/b/a Swan Club Permit No. BG471043* (March 4, 2002)(adopting Proposal for Decision in SOAH Docket No. 458-02-0355, February 8, 2002).

The ALJ concludes that payment of the premises' bills by the Tatros constituted "a device, scheme or plan which surrenders control of the employees, premises or business of the permittee to persons other than the permittee," and finds that SCFOE does not exercise "exclusive . . . control of the entire licensed premises in every phase of the storage, distribution, possession, and transportation and sale of all alcoholic beverages purchased, stored or sold on the licensed premises."

Considering as a whole that the premises are not in the exclusive control of SCFOE, the sham nature of the lease, and the payment of SCFOE's utilities by the Tatros, the Commission would be justified in concluding that the Application constitutes an attempt to run a bar in a dry area. Consequently, the ALJ recommends that the Commission refuse to issue the permits to SCFOE.

B. The Protestants' Complaints

The Protestants urge that the proposed private club exemption certificate permit not be issued. They raise public safety issues and quality of life concerns in asserting that the place or manner in which SCFOE might operate justifies refusing the fraternity its requested permit.

1. The Governing Law

The TABC may refuse to issue an original permit if it has "reasonable grounds to believe" and finds that "the place or manner in which the applicant may conduct his business warrants the refusal of a permit

based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.”³¹

Generally, to deny a permit to a qualified applicant some “unusual condition or situation must be shown so as to justify a finding that the place or manner in which the applicant may conduct his business warrants a refusal of a permit.”³² The evidence concerning the unusual condition or situation must be more than mere conclusions.³³ The Code does not define how the place or manner in which a business might be operated to justify a denial of a permit, giving the TABC discretion in making this decision; there is no set formula.³⁴ For example, the location and surroundings of the proposed premises can be grounds for refusal of a license based on the general welfare.³⁵ Traffic conditions around the proposed premises can constitute an unusual condition or situation.³⁶ Noise may, or may not, be an unusual condition or situation.³⁷

³¹ § 11.46(a)(8) of the Code.

³² *Texas Alcoholic Beverage Com'n v. Mikulenka*, 510 S.W.2d 616, 619 (Tex.Civ.App.--San Antonio 1974, no writ); *Elliott v. Dawson*, 473 S.W.2d 668, 670 (Tex.Civ.App.--Houston [1st Dist.] 1971, no writ).

³³ *In re Simonton Gin, Inc.*, 616 S.W.2d 274, 276 (Tex.Civ.App.-Houston [1st Dist.] 1981, no writ).

³⁴ *Brantley v. Texas Alcoholic Beverage Com'n*, 1 S.W.3d 343, 347 (Tex.App.--Texarkana 1999, no writ); *see, e.g., Helms v. Texas Alcoholic Beverage Com'n*, 700 S.W.2d 607, 611 (Tex.App.--Corpus Christi 1985, no writ); *Ex parte Velasco*, 225 S.W.2d 921, 923 (Tex.Civ.App.-Eastland 1949, no writ).

³⁵ *Brantley v. Texas Alcoholic Beverage Com'n*, 1 S.W.3d 343, 347 (Tex.App.--Texarkana 1999); *see, e.g., Helms v. Texas Alcoholic Beverage Com'n*, 700 S.W.2d 607, 611 (Tex.App.--Corpus Christi 1985); *Ex parte Velasco*, 225 S.W.2d 921, 923 (Tex.Civ.App.-Eastland 1949) (location and surroundings of proposed premises and number of such licensed establishments in community are proper considerations and may be basis for refusal of license); *but see Carson v. State*, 216 S.W.2d 836, 836-37 (Tex.Civ.App.--Fort Worth 1949)(*to the contrary*).

³⁶ *Bavarian Properties, Inc. v. Texas Alcoholic Beverage Com'n*, 870 S.W.2d 686, 688-90 (Tex.App.--Fort Worth 1994, writ denied); *Dienst v. Texas Alcoholic Beverage Com'n*, 536 S.W.2d 667, 670-71 (Tex.Civ.App.--Corpus Christi 1976, no writ); *but see, Concerned Citizens Committee v. Colonial Food Stores, Inc.*, 650 S.W.2d 208, 210 (Tex.App.--El Paso 1983, no writ)(*to the contrary*).

³⁷ *In re Simonton Gin, Inc.*, 616 S.W.2d 274, 276 (Tex.Civ.App.-Houston [1st Dist.] 1981, no writ).

2. The Evidence

a. Lack of Law Enforcement Manpower

Sterling County Sheriff Don Howard testified concerning law enforcement in the county and the effect that a grant of the permits to SCFOE would have on his work. The sheriff's office provides the only law enforcement in the county. The sheriff has two deputies.³⁸ Sterling County is 900 square miles in area, and, according to Sheriff Howard's recall of the last census, has a population of 1,400.³⁹ Alcohol cannot be sold in Sterling County, the closest place to obtain it is the Corner Post Grocery Store 25 miles distant, or further off in Big Springs or San Angelo. Sheriff Howard acknowledged that it is legal to consume alcohol in Sterling County in one's residence. He also testified that there are celebrations in which alcohol is consumed (but not sold) publicly. On those occasions, the participants have to pay for a police presence. Sheriff Howard estimated that 20 to 25 DWI cases were filed by the sheriff's office and the Texas Highway Patrol in Sterling County in 2003. Some of the arrestees were local residents and some were transient to the county.

Sheriff Howard stated that he had a concern for the introduction of the sale of alcohol into Sterling

³⁸ Sheriff Howard has applied for a federal grant, which would allow him to hire an additional deputy for three years, but the funds have not been authorized.

³⁹ According to the U. S. Census Bureau, Sterling County had a population of 1,393 in 2000, and Sterling City had a population of 1,081. Information from the U. S. Census Bureau can be viewed at <http://www.census.gov>.

County. In his opinion, the introduction of alcohol would increase accidents in the county, and possibly lead to increased domestic violence complaints. The sheriff reported that domestic violence incidents are down in Sterling County at the present time, and noted that in his experience domestic violence is linked to alcohol abuse. The sheriff also stated that granting the permits to SCFOE would increase crime "some," that it would put "a little more burden on us," and that "it would stretch us out a little more." He stated law enforcement would not be halted but response time but might slow down on some occasions. It would increase the sheriff's office's case load.

b. Traffic Safety

Sheriff Howard was concerned about the premises' proximity to the Sterling City schools. US 87 is the main route from Lubbock to Fredericksburg. The crosswalks at the Intersection are provided with a button for pedestrians to press and obtain a crossing. The sheriff was uncertain as to the accuracy of his memory, but recalled that the last yearly traffic count at the Intersection was 7,500 vehicles per day.⁴⁰ Sheriff Howard stated that he was concerned that some children are escorted by teachers to the courthouse, and pass by the premises.⁴¹ He stated that Sterling City's children walk or ride bicycles around the town, and he was concerned with them passing by SCFOE while there is drinking. He opined that people leaving SCFOE after drinking would avoid US 87 because of its heavier traffic and possible

⁴⁰ Exhibit P1 is a copy of the TxDOT Annual Average Daily Traffic Count for 2002. It shows a traffic count of 5,300 to 5,500 vehicles per day at the Intersection.

⁴¹ According to the Application and Mr. Tatro's testimony, SCFOE's serving hours would be 5:00 p.m. to midnight Sunday through Thursday (except for Wednesday) and 5:00 p.m. to 1:00 a.m. on Friday and Saturday. SCFOE would be closed on Wednesdays in deference to evening church services.

police presence, and take Elm Street north toward the school and residential areas where children would be walking, biking, or playing.

Randy Hord, President of the Sterling County Independent School District, testified concerning traffic and student safety. Approximately 260 to 270 students attend the Sterling City school on 6th Street. The school is about 875 feet up Elm Street from the premises. Elm is used by parents and children to reach the school. No school buses run in Sterling County. In addition to the travel to and from the school during normal school hours, the students participate in a number of after school activities. Volleyball, football, and basketball games, open houses, shows, festivals, concerts, dances, tournaments, and stock shows occur on almost all weekday evenings, or during the day and evening on Saturdays.⁴² Mr. Hord testified that children congregate at or use the school facilities seven days a week. His concern is their safety in traffic near a source of alcohol.

Don Davis is the pastor at the Church of Christ and President of the Child Welfare Board. Kent Kinyard is the pastor at the First United Methodist Church. Their concerns echoed Mr. Hord's. Jere Thomas is a local resident. She has raised four children in Sterling City. She testified that she has required her children, whether walking, riding a bicycle, or driving, to cross US 87 only at Elm Street. According to Mrs. Thomas, many other parents share her concerns. Stanley Horwood, a 47-year resident of Sterling County, agreed, as did Rhonda Stewart. Mrs. Stewart is the spokesperson for the Concerned Citizens

⁴² Two school event calenders were admitted: Exhibit P3 is a copy of the general school calender from August 2003 to January 2004; Exhibit P4 is the boys and girls junior varsity and varsity basketball schedules.

of Sterling County (the Concerned Citizens). The Concerned Citizens collected 355 signatures on the petition admitted into evidence as Exhibit P5. The language of the petition includes an express worry over traffic safety.⁴³ Ms. Stewart also took photographs which depict the areas around the proposed premises.⁴⁴ Aside from children using the crosswalks at the Intersection, Ms. Stewart's photographs show the U. S. Post Office on Elm Street, one block north of the proposed premises. She related that Sterling County does not have mail delivery, and as a consequence, many citizens pass through the Intersection on a daily basis to retrieve or send mail.

Corky Johnson, one of SCFOE's Trustees, operated a business in what is now the vacant building across Elm from the proposed premises. He testified he observed vehicle and pedestrian traffic in the Intersection six days a week for years. He stated that children used the crosswalks in groups of two or three and occasionally in larger groups (usually under supervision). He acknowledged that children walk and ride bicycles around Sterling City. He agreed that the Intersection is an area of high traffic volume.

Greg Tatro stated that his observations of the Intersection led him to conclude that children seldom use the Intersection. He testified he had deliberately kept the Intersection under view for three days and did not see a single child using the crosswalks. He stated that he had children and grandchildren and did not believe that the premises would be a danger to the children of Sterling County. He pointed out that

⁴³ The petition states that "our concerns include . . . include . . . the safety of our citizens and the proximity of the establishment (at the busiest cross-street of Highway 87) to the Post Office, and especially for the safety of our youth, and the proximity of the establishment to the school."

⁴⁴ The photographs were admitted into evidence as Exhibits P6 - P18.

there were few reported accidents in or near the Intersection. During the time period 2001 to 2003, there were no accidents in the Intersection; there was one accident in 2000; three in 1999; none in 1998; and two in 1997.⁴⁵

c. Loss of Peace and Serenity

As set out in the NOH, the “loss of peace and serenity” complaint concerned potential adverse effect on the citizenry that could be caused “by the noise and by the disturbance created by people going to and from” the proposed premises. No evidence was introduced concerning the noise that might emanate from the premises, or, aside from the increase in overall daily traffic density, any other disturbance that might be caused by activities or persons at the proposed premises. Members of the SCFOE indicated that outdoor activities such as horseshoes, washer pitching, and barbeques might take place on occasion. They mentioned indoor activities such as darts. No evidence was admitted concerning the level of disturbance to be expected from these pedestrian pursuits.

d. Domestic Violence & Child Abuse Concerns

Sheriff Howard opined that a grant of the permits would lead to an increase in domestic violence calls, given the connection between alcohol abuse and family violence. Reverend Davis echoed that

⁴⁵ Exhibit App 1.

concern, based upon his experiences in presiding over the Child Welfare Board (CWB).⁴⁶ In general, the CWB helps care for neglected and abused children in the county. He indicated that several dozen children in the county are of particular concern to the CWB, apparently in the context of increased alcohol use in Sterling County. Reverend Davis, citing his CWB experience, stated that 50% of child abuse arises from or is associated with drug or alcohol abuse.

e. Lack of Control of the Proposed Premises

As set out in the NOH, the “lack of control of activities” complaint concerned an incident in which gunfire was directed from the northwest corner of the Intersection (the location of the proposed premises) to the vacant building on the northeast corner of the Intersection. This incident took place in the early morning of January 1, 2000.⁴⁷ Popular lore among the Protestants described the actor as a member of SCFOE, who attended a New Year’s Eve party at Mr. Tatro’s restaurant, became intoxicated, and shot up the vacant building across the street. Local legend further states that a teenager was driving through the area when the firing took place. The Applicants emphatically denied that the actor was a member of SCFOE, or that he had been invited to or attended any function at Mr. Tatro’s restaurant. The actor was not a member of SCFOE.⁴⁸

⁴⁶ Reverend Davis testified that the CWB is a volunteer agency operating under the authority of the Child Protective Services section of the Texas Department of Protective and Regulatory Services. The members of the CWB are appointed by the County Commissioners.

⁴⁷ Exhibit App 3, a Sterling County Sheriff’s Office offense report.

⁴⁸ The actor is named in Exhibit APP 3. His name does not appear on the SCFOE membership list included in Exhibit TABC 1. Since the ALJ does not know whether the actor has been convicted of any offense, the actor’s name

f. Setting an Example & Quality of Life

Protestants testified at length concerning the example that granting the permits to SCFOE would set for children in Sterling County. Ms. Stewart testified that since Sterling County's inception in 1898, the county had been dry except for the period from 1938 to 1944. The last wet-dry election in Sterling County was in 1944, and the county has been dry ever since. Stanley Horwood, a long time resident, described his efforts in leading the protest against an earlier private club permit approximately twenty years ago.⁴⁹ The Protestants uniformly expressed their desire to live in a dry county. Although the Protestants' witnesses acknowledged that alcohol is consumed in Sterling County, they believe that sale of an alcoholic beverage in a private club setting would set an inappropriate example for the children of the county. Pastor Kent Kinyard of the First United Methodist Church expressed his opinion that allowing a person to drink at an establishment and drive home,⁵⁰ would change how children perceive their public responsibilities. Mrs. Thomas echoed this, noting that all children in Sterling schools receive D.A.R.E. (Drug Abuse Resistance Education) classes in the fifth grade.

is withheld from this Proposal on privacy grounds.

⁴⁹ Mr. Horwood erroneously attributed that permit application to Mr. Tatro.

⁵⁰ Sterling County does not have buses or taxis.

3. Arguments and Analysis

a. Staff's Arguments

The Staff did not file an independent argument with respect to this issue and adopted the Protestants' argument.

b. Protestants' Arguments

Protestants stress Sheriff Howard's testimony that the overall crime rate in Sterling County will increase if the permits are issued, contrasted with the limited manpower at his disposal. They note that the sheriff fears his office will not be able to handle the increased workload and that the need to concentrate patrols around the proposed premises will reduce the availability and presence of his deputies elsewhere. Protestants invoke § 11.41 of the Code⁵¹ and request the Commission give due consideration to Sheriff Howard's recommendation that the permits not be granted.⁵² Protestants believe that the inability of Sterling County's law enforcement to police the community under these circumstances pose a "severe" threat the citizens' health, safety, and welfare.

⁵¹ When a person applies for a permit, the commission or administrator may give due consideration to the recommendations of the . . . sheriff . . . of the county in which the premises sought to be licensed are located. § 11.41(a) of the Code.

⁵² The ALJ has reviewed the record carefully, and Sheriff Howard did not make any recommendation on the permits.

Further, Protestants assert that the sheriff's, Mr. Hord's, Ms. Thomas', and Mr. Horwood's testimony establish granting the permits at the premises on the Intersection would threaten the health, safety, and general welfare of the persons using the Intersection. Protestants argue that granting the permits⁵³ will have a "detrimental effect on the ability of the citizens to provide for the health and safety of the children of the county." Rev. Davis and Pastor Kinard related their experiences and opinions that a new source of alcohol in the community would increase the need for child welfare and family services, while decreasing the available resources. Mr. Horwood Mrs. Thomas, and Mrs. Stewart related the difficulty of setting a proper example for children in the county "once alcohol becomes readily available in the community,"⁵⁴ and that "the ability to set a proper example for all the youth of the community is definitely a safety issue." Finally, the Protestants note that since 1898 Sterling County has been dry (except for a six-year period); that the Petition presented by the Concerned Citizens of Sterling County reflects a continuing allegiance to a dry community; and that twenty years earlier a similar private club registration was protested and defeated. Protestants urge that granting the permits to SCFOE would deny the citizens of Sterling County the right to set and enforce their community's standards.

c. Applicant's Arguments

Applicant objected to Protestants' statements that granting the permits in question would cause the

⁵³ Actually, Protestants usage is that "*the introduction of alcohol into the community will have a detrimental effect on the ability of the citizens to provide for the health and safety of the children of the county.*" *Protestants' Argument*, p. 7 (emphasis supplied). As such, Protestants statement is contrary to the facts: alcohol is used in Sterling County already.

⁵⁴ *Protestants' Argument*, p. 7.

“introduction of alcohol into the community.” SCFOE reiterates that even though Sterling County is dry, the evidence conclusively demonstrates that alcohol is already consumed there. It also objected to Protestants’ assertion that SCFOE sought “establishment of a bar in Sterling County,” arguing that its private club status would confer rights only with respect to its membership, not to the public at large.

Concerning the proximity of the proposed premises and the Sterling schools, SCFOE argues that the proposed premises are in compliance with the Code’s distance requirements,⁵⁵ being more than 300 feet, but less than 1,000 feet, from the school. It has posted a \$10,000 conduct surety bond as required by the Code.⁵⁶ SCFOE states that the evidence Protestants offered concerning children’s use of the Intersection is “simply not true,” and that Mr. Tatro’s and Mr. Johnson’s contrary opinions should be accepted as conclusive. SCFOE agrees that SH 80 is the main road through town, and that approximately 5,500 vehicles use the Intersection daily. As SCFOE analyzes the data, 5,500 vehicles/day, considering a “day” to be from 8:00 a.m. to 6:00 p.m., constitutes 550 vehicles an hour or nine or 10 vehicles a minute. SCFOE argues that in a larger town this would be considered “light.” It also notes that the evidence shows there have been no accidents at the Intersection in the last three and one-half years. The building has been a place of business and utilized the parking as it is for many years, as Mr. Tatro testified. Finally, SCFOE states that its operating hours, beginning after 5:00 p.m., were chosen to be outside school hours and at a

⁵⁵ § 109.33 of the Code allows the governing board of a city to enact regulations or ordinances “prohibiting the sale of alcoholic beverages by a dealer whose place of business is within 300 feet of a church, public or private school, or public hospital,” or 1,000 feet of a public or private school. However, no evidence of any regulation or ordinance passed by Sterling City was admitted into evidence.

⁵⁶ “[A]n applicant for a permit or a holder of a permit issued under . . . Chapter 32 and whose place of business is within 1,000 feet of the property line of a public school shall file with the commission a surety bond in the amount of \$10,000 conditioned on the applicant’s or holder’s conformance with alcoholic beverage law.” § 11.11(a)(2) of the Code.

time when “there would be no reason for young adults or very young school children to be in the area.”

SCFOE discounts Sheriff Howard’s status as a law enforcement expert and the opinions he offered: “experience gained in a serene county the size of Sterling hardly makes him an expert when compared” to officers in a larger, more populous area, with alcohol, drug, and crime problems. SCFOE doubts that the Sheriff’s office is “operating in excess of its capacity.” SCFOE agrees with the Protestants that Sterling County is a quiet, safe community with so little crime that children can roam the streets without fear. That being the case, SCFOE is at a loss to explain what keeps the Sheriff and his two deputies as busy as the Protestants claim in argument that they are. SCFOE denies that Sheriff Howard testified that if the permit was granted he would be unable to fulfill his duties, as claimed by the Protestants.

SCFOE insists that it is not composed of law breakers and that it intends to operate the private club in a legal manner. SCFOE says it works for the general welfare of the community as a charitable organization. It does not condone the abuse of alcohol. It intends to operate a peaceable premises. It denies it seeks to harm the morals of Sterling County, and considers its membership to be of high moral character. SCFOE’s members are parents and grandparents and share the Protestants’ concerns for the safety of the community’s children. SCFOE states it stands for public decency and denies that the grant of the permits will cause any more harm to public decency than any other sanctioned public consumption of alcohol in Sterling County.

d. Analysis

i. Police Manpower

Protestants argue that the proposed premises location in Sterling County is a “place” that “warrants the refusal of a permit based on the general welfare, health, peace, morals, and safety of the people,” because of the lack of manpower to police the anticipated increase in crime caused by the proposed premises. Sheriff Howard indicated that crime would increase “some,” but also stated that law enforcement would not halt; instead, the sheriff believed that response time by an officer might be slowed. Assuming that SCFOE is otherwise entitled to a permit, some “unusual condition or situation,” constituting more than “mere conclusions,” concerning the law enforcement resources must be proved.⁵⁷ That a lawful business might arguably increase the police needs of a community is not in itself an “unusual condition or situation.” Any new activity may require increased policing.

The ALJ acknowledges that the sheriff’s office appears to be shy on manpower; as the record demonstrates Sheriff Howard has attempted to find outside funding for an additional officer independent of any concerns over the police work the permits might add. The size of the sheriff’s office is within the jurisdiction of the county authorities, and does not constitute an “unusual condition or situation.” Further, Sheriff Howard described the change that would occur if the permits were granted in the most general

⁵⁷ *Texas Alcoholic Beverage Com’n v. Mikulenska*, 510 S.W.2d 616, 619 (Tex.Civ.App.—San Antonio 1974, no writ); *Elliot v. Dawson*, 473 S.W.2d 668, 670 (Tex.Civ.App.—Houston [1st Dist.] 1971, no writ); *In re Simonton Gin, Inc.*, 616 S.W.2d 274, 276 (Tex.Civ.App.—Houston [1st Dist.] 1981, no writ).

terms, *i.e.*, crime would increase “some,” it would put “a little more burden on us,” and “it would stretch us out a little more.” The ALJ appreciates that Sheriff Howard was subpoenaed to testify and that he was asked his opinions without time for reflection. Nevertheless, the ALJ deems his testimony merely conclusory. The ALJ concludes that the proposed premises are not located in a place which requires refusal of the permit based upon the “general welfare, health, peace, morals, and safety” due to a lack of police manpower. Further, the Sheriff did not recommend denial of the permits.

ii. Traffic Safety

On the other hand, the ALJ agrees with Protestants’ request for denial on the basis of traffic safety. Traffic conditions around the proposed premises can constitute an “unusual condition or situation.”⁵⁸ The case law demonstrates that the resolution of traffic safety issues rests on a case-by-case analysis, in which the Commission is afforded a great deal of discretion:

- In *Dienst Texas Alcoholic Beverage Com’n*,⁵⁹ a refusal to issue the permit was affirmed⁶⁰ where the applicant proposed to open a lounge on the corner of a busy, congested intersection. The immediate area was commercial in nature, with residential areas around the intersection. A school was located six blocks away. No on-premises consumption had ever been authorized at that intersection. The premises would be open between 3:00 p.m. and 2:00 a.m. There was evidence

⁵⁸ *Bavarian Properties, Inc. v. Texas Alcoholic Beverage Com’n*, 870 S.W.2d 686, 688-90 (Tex.App.—Fort Worth 1994, writ denied); *Dienst v. Texas Alcoholic Beverage Com’n*, 536 S.W.2d 667, 670-71 (Tex.Civ.App.—Corpus Christi 1976, no writ); *but see Kermit Concerned Citizens Committee v. Colonial Food Stores, Inc.*, 650 S.W.2d 208, 210 (Tex.App.—El Paso 1983, no writ)(*to the contrary*).

⁵⁹ 536 S.W.2d 667 (Tex.Civ.App.—Corpus Christi 1976, no writ).

⁶⁰ *Id.* at 670.

that traffic would increase in the area.⁶¹

- In *Kermit Concerned Citizens Committee v. Colonial Food Stores, Inc.*,⁶² a grant of the permit was affirmed,⁶³ where the applicant proposed to sell beer for off-premise consumption from premises to be located at the corner of an intersection also occupied by a junior high school, a private residence, and a Dairy Queen. Nothing in the record, aside from the Police Chief's opinion, indicated that traffic in the area, or any hazard, would increase.⁶⁴ The court noted that an applicant need not correct existing traffic conditions, or select a location virtually free of traffic hazards, as a condition for receiving a permit.⁶⁵
- In *Bavarian Properties, Inc. v. Texas Alcoholic Beverage Com'n*,⁶⁶ a proposed permit was denied because the proposed premises had only one entrance/exit from its parking lot, and vehicles leaving the premises would exit onto a one-way road into which a double exit ramp emptied vehicles moving at high speed in a short merge area.⁶⁷ Expert opinion stated that negotiating road at the premises as requiring a "complex decision making driving task," which was found to be an unusual condition.⁶⁸

⁶¹ A police officer stated that based upon his experience and knowledge of the area on-premises consumption would "create more hazard." The mayor testified that "in all reasonable probability" the lounge at the location in question and maintaining the proposed hours of operation would "create unusual conditions with the traffic resulting in a safety problem to the citizens who live in the particular area." *Dienst* at pp. 669-70.

⁶² 650 S.W.2d 208 (Tex.App.--El Paso 1983, no writ).

⁶³ *Kermit* at 209-10.

⁶⁴ *Kermit* cannot be easily reconciled with *Dienst*. The officer in *Kermit* "expressed his opinion that the business would generate more traffic around the intersection and make the situation more hazardous than it already was." In the *Kermit* Court's opinion "there was nothing in the record of the hearing before the county court which indicated that an increase in traffic would result from the issuance of the license requested," and "we fail to find any evidence showing that the granting of the requested license itself would have an effect on the safety conditions surrounding the intersection." *Kermit* at 210. The officer's opinion in *Kermit* was based upon his experience and observations. *Id.*

⁶⁵ *Id.* at 210.

⁶⁶ 870 S.W.2d 686 (Tex.App.--Fort Worth 1994, writ denied).

⁶⁷ *Bavarian Properties* at 688-89.

⁶⁸ "Allowing the sale of alcoholic beverages . . . would increase the risk of an accident to all drivers on this stretch of road. [D]ue to the complexity of the driving task at this particular merge area, alcohol-impaired individuals leaving [the premises] would create a greater potential for accidents than usual." *Id.* at 689.

- In the *8 Seconds* case, a threat to safety a “sufficient reason for denying the application,”⁶⁹ was created by a high volume of traffic (30,000 vehicles/day) on the interstate near the proposed premises; poorly lighted, two-way service roads whose intersections near the proposed location were controlled only by stop signs; and lack of interstate highway entrance and exit ramps near the proposed location.⁷⁰

The Intersection in question is the busiest in Sterling City. During the week day it is used by children going to and from school, and during the noon hour by high school students going to and from lunch. Elm Street is the main route to the post office. The city’s grocery store is next door to the proposed premises. There is some child traffic on Elm at nights and on weekends, and some children use the crosswalks at nights and on weekends.⁷¹ The premises parking is all on Elm Street. Granting the permits would increase traffic on Elm and at the Intersection. Considering this, Sheriff Howard concluded that there would be some increase in accidents on Elm, SH 87, and the residential streets to the north of SH 87.⁷² The potential for hazard to children or other traffic (moving toward the post office for example) is mitigated somewhat by SCFOE’s proposal to begin serving at 5:00 p.m. The record demonstrates, however, that the area streets (especially Elm) are used to reach and leave the school for a variety of after school activities that normally last into the night, when SCFOE would be serving alcohol. Traffic density at the intersection is at least 5,300 vehicles per day, and might be as high as 7,500 vehicles a day. The

⁶⁹ *Texas Alcoholic Beverage Commission v. Michael J. Greene d/b/a 8 Seconds, Proposal for Decision in SOAH Docket No. 458-96-2236*, p. 13 (May 28, 1997)

⁷⁰ Especially when combined with expert opinion that a person who has been drinking alcoholic beverages is 25 times more likely to be involved in an accident. *Id.*, Findings of Fact 22 - 29, Conclusion of Law 9, pp. 15-16.

⁷¹ The Applicant urged the ALJ to disbelieve the assertions that children use the Intersection as pedestrians. The evidence as a whole supports the conclusion that children have and will use the Intersection.

⁷² Sheriff Howard’s expertise was questioned by SCFOE in its final argument. The sheriff’s experience as a highway patrol trooper and law enforcement officer for over twenty years is a sufficient basis for the formulation of his non-controversial opinions.

daily total was not broken down by hour of the day, and a precise assessment of effect of the proposed premises is uncertain.⁷³

SH 87 has street lights at regular intervals on both sides of the road.⁷⁴ On the other hand, Elm Street and the streets to the north of and paralleling SH 87 do not have street lights.⁷⁵ Vehicles leaving the proposed premises and turning north to avoid SH 87 would be traveling on unlighted streets, controlled by street signs. Access to SH 87 from the proposed premises is direct, simply by making a right or left turn from Elm. Consequently, the ALJ concludes that the proposed premises are located in a place which requires refusal of the permit based upon the “general welfare, health, peace, morals, and safety” due to traffic hazards.

iii. Noise Issues

No evidence was introduced concerning the noise that might emanate from or be associated with the proposed premises. Accordingly, the ALJ concludes that the proposed premises are not located in a place or will be operated in a manner which requires refusal of the permit based upon the “general welfare, health, peace, morals, and safety” due to noise concerns.

⁷³ As an illustration, if on Monday night 15 cars drivers were attending the Aerie, what percent increase of vehicles would that be at 5:00 p.m., 9:00 p.m., and 1:00 a.m.? What about a Saturday night with an attendance of 40 drivers? The answer would vary depending on what activities were ongoing. Suppose the Saturday night involved a home football game?

⁷⁴ Exhibits P-6, P-7, P-8, P-9, P-15, P-16, & P-17.

⁷⁵ Exhibits P-10, P-11, P-12, P-13, & P-14.

iv. Domestic Abuse

Several witnesses opined that a grant of the permits would lead to an increase in domestic violence calls in Sterling County, given the connection between alcohol abuse and family violence. The ALJ is unable to determine how the method of operation or location of the proposed premises will cause the foreseen problem. The evidence did not disclose that the membership of the SCFOE abused alcohol, abused their children, or will be more likely to abuse alcohol or abuse their children if the permits were granted. Accordingly, the ALJ concludes that the proposed premises are not located in a place and will not be operated in a manner which requires refusal of the permit based upon the “general welfare, health, peace, morals, and safety” due an increase in domestic violence.

v. Lack of Control

The “lack of control of activities” complaint is unsupported by any evidence that the gunfire incident was connected to SCFOE or its officers. The ALJ cannot conclude that the proposed premises will be operated in a manner which requires refusal of the permit based upon the “general welfare, health, peace, morals, and safety” due a lack of control of SCFOE’s activities.

vi. Choice of Lifestyle & Setting an Example

Protestants expressed grave concerns for children in Sterling County, and affirmed their desire to live in a dry county. The decision “of whether the sale and purchase of alcohol should be permitted is a political one to be determined by the voters under the local option sections of the” Code.⁷⁶ The voters in Sterling County have determined that the county is dry. The voters of Texas, acting through the Legislature, have determined that private organizations may take advantage of Chapter 32 of the Code. A private club registration permit allows “alcoholic beverages belonging to members of the club to be stored, possessed, and mixed on the club premises; and served for on-premises consumption only to members of the club and their families and guests.”⁷⁷ In contrast, an “area is a ‘dry area’ as to an alcoholic beverage of a particular type and alcohol content if the *sale* of that beverage is unlawful in the area.”⁷⁸ Since the permits contemplated here do not involve sales of liquor by the drink, Sterling County’s dry status would not be changed.

The example that granting the permits might set for children in Sterling County is an issue beyond the ALJ’s jurisdiction. Sterling County is, and remains, a dry county. Liquor by the drink would not be permitted under the proposed permits, if granted. Therefore, it is unnecessary to address Protestants’s

⁷⁶ *Texas Alcoholic Beverage Com’n v. Mikulenska*, 510 S.W.2d 616, 619 (Tex.Civ.App.--San Antonio 1974, no writ); *Morgan v. Texas Alcoholic Beverage Com’n*, 519 S.W.2d 250, 253 (Tex.Civ.App. – Beaumont 1975); *Clark v. Liquor Control Board*, 357 S.W.2d 176, (Tex.Civ.App.--Beaumont 1962, no writ).

⁷⁷ § 32.01 of the Code.

⁷⁸ § 251.71(a) of the Code (emphasis supplied).

concerns based on this issue.

V. SUMMARY OF PROPOSAL

In summary, the ALJ recommends that the Commission deny the permits on the bases of the subterfuge issue raised by the Staff and the traffic complaints raised by the Protestants. The Commission should not deny the permits on the other bases urged by the Protestants.

VI. FINDINGS OF FACT

1. Sterling City Fraternal Order of Eagles Aerie #4447 (Applicant or SCFOE) is an accredited member of the Fraternal Order of Eagles, a national fraternal organization.
2. The national Fraternal Order of Eagles actively operates in all 50 states and some foreign countries. It has thousands of local units and was established in 1898.
3. SCFOE has been a member of the FOE since December 29, 2001.
4. On March 12, 2003, SCFOE filed an application for issuance of a Private Club Exemption Certificate Permit and a Beverage Cartage Permit (the permits).

Subterfuge

5. SCFOE's proposed premises are located at 702 4th Street, Sterling City, Sterling County, Texas.
6. The proposed premises are a two-story, brick building located at the intersection of Elm Street and State Highway 87.
7. The proposed premises are located in the first floor of the building.
8. The building and appurtenant land are owned by Gregory Tatro, SCFOE's secretary.
9. Mr. Tatro and Bridgette Tatro his wife reside in the upper floor of the building.

10. The requested permit is intended to “embrace the entire building, grounds, and appurtenances” at 702 4th Street.
11. No diagram designating the premises was included with the Application.
12. On March 13, 2003, TABC Agent James White inspected the proposed premises.
13. The upstairs living quarters of the Tatros was not intended to be included in the proposed premises.
14. The Tatro’s and SCFOE entered into a lease of the first floor of the building (including fixtures and furniture) and the exterior land on April 1, 2003.
15. The lease term was for one year and obligated SCFOE to pay the Tatros \$500.00 per month.
16. SCFOE has not paid rent to the Tatros for any month since the lease was executed.
17. On the day of his inspection, Agent White notified SCFOE that the upstairs living quarters would have to be physically segregated from the downstairs club and that a separate address would have to be obtained for the residence.
18. As of January 20, 2004, the upstairs had not been completely walled off from the first floor, and a separate address for the upper and lower floors at 702 4th Street had not been obtained.
19. The premises’ lease requires SCFOE to pay its own gas, electric, telephone, and water charges.
20. The building has separate electric meters for the residence and the proposed premises but only single meters for the whole building for electric and water services.
21. Sterling City collects fees for water, sewage, and garbage services.
22. With respect to the building, Sterling City has collected for services only from the Tatros and never from SCFOE.
23. If SCFOE had its own accounts for water, sewage, and garbage services, it would be charged a different, business rate that what the Tatros are currently charged for their residential services.
24. SCFOE agreed to pay \$100.00 per month plus its share of the electricity bill to the Tatros.
25. The \$100.00 was an interim payment, to represent SCFOE’s “share” of the other utilities, until SCFOE set up its own accounts.

26. SCFOE made a \$55.24 payment on August 22, 2003 for electricity to the Tatros.
27. SCFOE made a \$300.00 payment in October 2003 as a quarterly payment of SCFOE's "share" of utilities for June, July, and August.
28. SCFOE did not make any other payments to the Tatros, and did not document membership votes approving payments to the Tatros in the organization's minutes.

Traffic

29. SCFOE's proposed premises are located at 702 4th Street, Sterling City, Sterling County, Texas, the intersection of Elm Street and State Highway 87 (SH 87 or 4th Street).
30. SH 87 is the main thoroughfare of Sterling City, running east-west.
31. Elm Street runs north-south from SH 87.
32. The intersection of Elm Street and SH 87 (the Intersection) is the location of the only red lights controlling north-south or east-west traffic in Sterling City.
33. Access to SH 87 from the proposed premises is direct, simply by making a right or left turn from Elm.
34. The Texas Department of Transportation has designated the Intersection as a school zone.
35. The speed limit on SH 87 is 35 miles per hour in Sterling City, reduced to 20 miles per hour during school zone hours.
36. The school zone operates three times a day: in the morning (approximately 7:30 to 8:30 a.m.); at noon (approximately 11:45 a.m. to 1:15 p.m.); and, after school (approximately 3:30 to 4:30 p.m.).
37. There are two north-south crosswalks at the Intersection, the only two in town protected by red lights and school zones.
38. The proposed premises are located on the northwest corner of the Intersection. A vacant building is located on the northeast corner, the county courthouse and public library are on the southeast corner, and a hardware and furniture store occupies the southwest corner.
39. Sterling City's only grocery store, the Hitchin' Post, is in the same block as the proposed premises, just west on SH 87.

40. The town's post office is one block north of the premises on the east side of Elm.
41. The school is on 7th Street and Elm, two blocks north of the premises.
42. Approximately 260 to 270 students attend the Sterling City school on 6th Street.
43. The school is about 875 feet up Elm Street from the premises.
44. Elm is used by parents and children to reach the school.
45. No school buses run in Sterling County.
46. In addition to the travel to and from the school during normal school hours, the students participate in a number of after school activities.
47. Volleyball, football, and basketball games, open houses, shows, festivals, concerts, dances, tournaments, and stock shows, occur on almost all weekday evenings, or during the day and evening on Saturdays.
48. Children congregate at or use the school facilities seven days a week, outside of school.
49. SH 87 has street lights at regular intervals on both sides of the road.
50. Elm Street and the streets to the north of and paralleling SH 87 do not have street lights.
51. Members leaving SCFOE after drinking would avoid US 87, because of its heavier traffic and possible police presence, and take Elm Street north toward the school and residential areas where children would be walking, biking, or playing.
52. Vehicles leaving the proposed premises and turning north to avoid SH 87 would be traveling on unlighted streets, controlled by street signs.
53. There were no accidents in the Intersection during the period 2001 to 2003; there was one accident in 2000; three in 1999; none in 1998; and, two in 1997.
54. All of the proposed premises' parking is on Elm Street.
55. Granting the permits would increase traffic on Elm and at the Intersection.
56. Granting the permits would increase accidents on Elm, SH 87, and the residential streets to the north of SH 87.

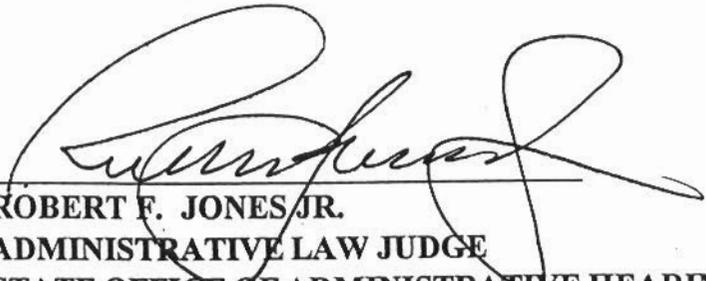
57. Traffic density at the intersection is at least 5,300 vehicles per day and might be as high as 7,500 vehicles a day, without considering the effect of the permits.
58. Staff informed Applicant that the Texas Alcoholic Beverage Commission (TABC) had received protests against issuing the permits.
59. The matter was referred to the State Office of Administrative Hearings (SOAH).
60. On October 17, 2003, Staff issued a notice of hearing notifying all parties that a hearing would be held on the application and informing the parties of the time, place, and nature of the hearing, of the legal authority and jurisdiction under which the hearing was to be held, giving reference to the particular sections of the statutes and rules involved, and including a short, plain statement of the matters asserted.
61. On January 21, 2004, a public hearing was convened before ALJ Robert F. Jones Jr., in the Ector County Commissioners' Courtroom Ector County Administration Building, 1010 E. 8th Street, Room 500, Odessa, Ector County, Texas. Staff was represented by Gayle Gordon, an attorney with the TABC Legal Division. Protestants appeared through their counsel, Jay K. Weatherby. Applicant appeared through its President Tommy W. Van Arsdale, its Secretary Gregory P. Tatro, and its Trustee Corky Johnson. The hearing ended on January 21, 2004. The record was closed on February 24, 2004, after written arguments were filed.

VII. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code).
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2004).
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052 (Vernon 2004).
4. Based on the foregoing findings, the lease of the proposed premises between SCFOE and the Tatro is a "device, scheme or plan which surrenders control of the employees, premises or business of the permittee to persons other than the permittee." § 109.53 of the Code.

5. Based on the foregoing findings, payment of the premises' bills by the Tatros constituted "a device, scheme or plan which surrenders control of the employees, premises or business of the permittee to persons other than the permittee." § 109.53 of the Code.
6. Based on the foregoing findings, SCFOE did not exercise exclusive control of the entire licensed premises. § 109.53 of the Code.
7. Based on the foregoing findings, the place and manner in which Applicant may conduct its business warrants the refusal of the application based upon traffic concerns. § 11.46(a)(8) of the Code.
8. Based on the foregoing findings and conclusions, the application Sterling City Fraternal Order of Eagles Aerie #4447 for issuance of a Private Club Exemption Certificate Permit and a Beverage Cartage Permit should be denied.

SIGNED March 19, 2004.



ROBERT F. JONES JR.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 605697

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION,	§	
PETITIONER	§	
&	§	
	§	
CONCERNED CITIZENS OF	§	
STERLING COUNTY,	§	
STERLING CITY I.S.D.,	§	
DON C. DAVIS AND NANCY	§	
DAVIS, STANLEY K. NORWOOD,	§	
AND REV. EVERETTE BOYCE OF FIRST	§	
UNITED METHODIST CHURCH	§	
PROTESTANTS	§	ALCOHOLIC
VS.	§	
	§	
STERLING CITY FRATERNAL ORDER	§	
OF EAGLES AERIE #4447,	§	
APPLICANT	§	
	§	
ORIGINAL APPLICATION FOR	§	
NE & PE	§	
	§	
STERLING COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-0448)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 7th day of May, 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Robert Jones. The hearing convened on January 21, 2004 and adjourned on January 21, 2004. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 19, 2004. This Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this

Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

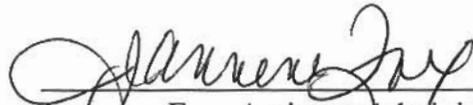
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the original application of the Sterling City Fraternal Order of Eagles Aerie #4447 is hereby **DENIED**.

This Order will become final and enforceable on May 28, 2004, unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

SIGNED on this the 7th day of May, 2004, at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

/vr

The Honorable Robert Jones
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (817) 377-3706

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Gayle Gordon
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TABC Legal Section

Licensing Division

Odessa District Office

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



March 19, 2004

Alan Steen, Administrator
Texas Alcoholic Beverage Commission
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VIA REGULAR MAIL

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Jay K. Weatherby
Attorney for Protestants
301 West Beauregard Avenue, Suite 200
San Angelo, Texas 76903

VIA REGULAR MAIL

RE: Docket No. 458-04-0448; Texas Alcoholic Beverage Commission vs Sterling City Fraternal Order of Eagles Aerie #4447 (TABC Case No. 605697)

Dear Mr. Steen:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Gayle Gordon, attorney for Texas Alcoholic Beverage Commission, Jay Weatherby, attorney for Protestants, and to Sterling City Fraternal Order of Eagles Aerie # 4447, Applicant.

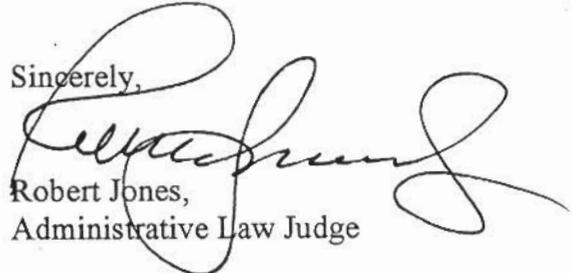
The Sterling City Fraternal Order of Eagles Aerie # 4447 (Applicant or SCFOE) filed an application for issuance of a private club exemption certificate permit and a beverage cartage permit (the permits). The Concern Citizens of Sterling County, the Sterling Independent School District, Don C. Davis and Nancy Davis, Stanley K. Horwood, and Reverend Everette Boyce of First United Methodist Church (collectively the Protestants) protested issuance of the permits. After an investigation, the Staff of the Texas Alcoholic Beverage Commission (Staff) joined in the protests.

Protestants objected to the issuance of the permits on the basis of lack of law enforcement manpower in Sterling County to police the premises, diminished traffic safety, a loss of peace and serenity, and lack of control of the proposed premises. The Staff alleged that the Application constituted a subterfuge, or a scheme, to allow the unauthorized use of the permits.

This proposal finds (1) the Application constitutes a subterfuge, and (2) that there are reasonable grounds to believe the place or manner in which Applicant will conduct its business warrants refusal of the permits based on traffic concerns. The Administrative Law Judge (ALJ) recommends the permits not be issued.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,



Robert Jones,
Administrative Law Judge

enclosure

STATE OFFICE OF ADMINISTRATIVE HEARINGS

6777 Camp Bowie Blvd.
Ft. Worth, Texas 76116
Phone (817) 731-1733
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SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION
CASE: Sterling City Fraternal Order of Eagles Aeire #4447
DOCKET NUMBER: 458-04-0448
AGENCY CASE NO: 605697

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ATTORNEY FOR PROTESTANTS

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