

DOCKET NO. 458-04-1076

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

VS.

OF

PREGO PIZZA EXPRESS PRIVATE
CLUB, INC. D/B/A PREGO PIZZA
EXPRESS; COLLIN COUNTY, TEXAS
(TABC CASE NO. 606915)

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Prego Pizza Express Private Club, Inc., d/b/a Prego Pizza Express (Applicant), filed an original application with the Texas Alcoholic Beverage Commission (Commission) for a Private Club Registration Permit, a Beverage Cartage Permit, and a Food and Beverage Certificate for a premises known as Prego Pizza Express, located at 3400 Preston Road, No. 225, Plano, Collin County, Texas. The City of Plano protests the issuance of the permits based on general welfare, health, peace, moral, and safety concerns because of the proximity of the premises to the Grace Community Outreach Church. The Commission's staff (Staff) remained neutral on the application, having determined that Applicant met all of the technical requirements to obtain the permits.

After considering the arguments and evidence presented by the parties, the Administrative Law Judge (ALJ) finds that there is an insufficient basis for denying the application and recommends that the permits be issued.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There were no contested issues of jurisdiction, notice, or venue in this proceeding. Therefore, those matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

On December 10, 2003, a hearing convened in Dallas, Texas, before ALJ Brenda Coleman, State Office of Administrative Hearings (SOAH). The Applicant was represented by William C. Dufour and Barry R. Knight, attorneys. Staff was represented at the hearing by Tim Griffith.



Protestant City of Plano was represented by Kent McIlyar, attorney. After presentation of evidence and argument, the hearing concluded; however, the parties requested that the record remain open for receipt of additional evidence and post-hearing briefs. The record remained open until January 9, 2004. The Applicant filed additional evidence on December 19, 2003. Neither party submitted post-hearing briefs.

II. LEGAL STANDARDS AND APPLICABLE LAW

Protestant challenges the application on the basis of § 11.46(a)(8) of the Texas Alcoholic Beverage Code (Code). Section 11.46(a)(8) provides that a permit may be denied if the Commission 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, peace, morals, and safety of the people and on the public sense of decency.”

III. EVIDENCE

A. Background

Applicant seeks permits from the Commission to operate a private club in Plano, Texas. Applicant stated in its original application, filed with the Commission on June 11, 2003, that its business is not located within 300 feet of a church, measured from front door to front door, along the property lines of the street fronts and in a direct line across intersections.¹ At the hearing, the parties agreed to stipulate to the fact that Applicant’s premises, currently a family, Italian restaurant located at 3400 Preston Road, No. 225, Plano, Collin County, Texas, is located 521.95 feet from Grace Community Outreach Church, measured from the front door of Applicant’s premises to the nearest property line of the church.²

B. Protestant’s Evidence and Contentions

Protestant opposes issuance of the permits because, pursuant to the City of Plano’s zoning ordinance enacted on March 13, 1986, a private club which allows alcoholic beverage consumption is required to obtain a specific use permit (SUP) from the City; however, private clubs are prohibited

¹ TABC (Staff) Exhibit Three, Certified Copy of Original Application.

² Protestant Exhibit Three, Survey of Property.

within 1,000 feet of the property line of any church.³ Protestant contends that the law is fairly clear on the City of Plano's right to have these types of zoning regulations and separation requirements. Protestant further contends that the City's right is especially supported by § 109.57(c) of the Code, which states, "Neither this section nor § 1.06 of this code affects the validity of a zoning regulation that was formerly enacted before June 11, 1987, and that is otherwise valid."

According to city records, Applicant's premises are less than 1,000 feet from the property line of Grace Community Outreach Church. Therefore, issuance of a private club permit would be in violation of the city's zoning requirements. Protestant presented the testimony of Christina Day in support of its position. Her testimony is summarized below.

Christina Day

Ms. Day has been employed as a Senior Planner with the City of Plano for three years. Her responsibilities include investigation into whether an establishment has been granted an SUP to operate as a private club. In June, 2003, Ms. Day confirmed that Applicant has not been issued an SUP by the City of Plano. She then requested that a survey of Applicant's premises be completed, measuring from the front door of Applicant's premises to the nearest property line of the church. Accordingly, Applicant's premises are shown to be located 521.95 feet from the church, well within the required 1,000 feet separation requirement of the City's zoning ordinance.

Ms. Day stated that the City's current zoning ordinance requires a private club to obtain an SUP and also requires a 1,000 feet separation between private clubs and churches.⁴ According to Ms. Day, the intention of the City's zoning ordinance is to promote the general welfare, health, peace and safety of the citizens of Plano. Ms. Day also stated that there is no way to obtain a private club permit in the City of Plano without first obtaining an SUP.

³ Protestant Exhibit Two, Certified Copy of Subsection 3.105 (Private Clubs) of Section 3.100 (Supplementary Regulations for Principal Permitted Uses and Specific Uses) of the Zoning Ordinance.

⁴ Protestant Exhibit Five, Certified Copy of Section 3.105, Private Clubs of the Comprehensive Zoning Ordinance 86-3-14, adopted March 13, 1986.

Ms. Day stated on cross-examination that a planned development district (PD) is a zoning regulation, approved by the Plano City Council, which allows amendments to established zoning districts within a certain geographic area and customizes the regulations for a particular property. She also stated that if one wanted to look at the zoning regulations for a particular piece of property which is zoned a PD, one would look at the PD stipulations, as well as the underlying zoning districts. In the instant case, Applicants' premises are located in Tract Two of PD-184, in the Retail/Office-2 zoning districts (PD-184-R/O-2). According to Ms. Day, everything within Tract Two is within the 1,000 feet buffer for Grace Community Outreach Church. Ms. Day also confirmed that PD-184 states that private club applications may be filed for the Tract Two area. She did state, however, that she was not sure why that particular section would be included in the PD. Ms. Day agreed that nothing in the PD-184 regulations states that a private club SUP is required in the PD.

C. Applicant's Evidence and Contentions

Applicant acknowledges the existence of zoning regulations for the City of Plano which provide for a distance of 1,000 feet between private clubs and churches, as well as the requirement of an SUP to operate a private club. However, Applicant contends that the City of Plano's zoning regulations also allow for planned development districts (PD) which create specialized zoning for particular sites within the city. According to Applicant, the particular PD adopted by the Plano City Council for the instant location (PD-184-R/O-2) amended the City's zoning regulations (the Comprehensive Zoning Ordinance No. 86-3-14) in 1992⁵ and 1994.⁶

Applicant argues that neither the 1992 amendment nor the 1994 amendment adopted the 1,000 feet separation requirement. Instead, both provide that private club applications may be filed

⁵ Respondent (Applicant) Exhibit 2, Certified Copy of Ordinance No. 92-11-49 [filed after the hearing on December 19, 2003], adopted November 23, 1992 by the Plano City Council. Said ordinance provides, in part, "Whereas the City Council is of the opinion and finds that such change would not be detrimental to the public health, safety, or general welfare, and will promote the best and most orderly development of the properties affected thereby, and to be affected thereby, in the City of Plano, and as well, the owners and occupants thereof, and the City generally[.]"

⁶ Respondent (Applicant) Exhibit 3, Certified Copy of Ordinance No. 94-3-34 [filed after the hearing on December 19, 2003], adopted March 28, 1994 by the Plano City Council. Said ordinance provides, in part, "Whereas the City Council is of the opinion and finds that such change would not be detrimental to the public health, safety, or general welfare, and will promote the best and most orderly development of the properties affected thereby, and to be affected thereby, in the City of Plano, and as well, the owners and occupants thereof, and the City generally[.]"

for the instant property without the necessity of an SUP. Therefore, the specialized zoning for Applicant's property entails only the 300 feet separation requirement as provided by state law. Applicant asserts that the location of the establishment is properly zoned for the requested permits; it is in compliance with the City of Plano regulations; and Applicant has the ability to apply for a private club permit issued by the Commission and has properly done so.

Secondly, Applicant contends that a subsequent provision of § 159.57 of the Code preempts the City of Plano's ordinances with regard to the specific fact situation in the instant case. Applicant presented a copy of the 2002 Total Population Estimates for Texas Counties and requested that official notice be taken of the 2000 Census count showing a population of 491,675 in Collin County, and 2,218,899 in Dallas County.⁷ In support of its contention, Applicant offered the testimony of Tony Barraco, which is summarized below.

Tony Barraco

Mr. Barraco is the owner of Prego Pizza Express, a family restaurant which has been in operation in the Dallas and Plano areas for over 25 years, and which, in fact, has been in business at 3400 Preston Road, No. 225, since 1994. According to Mr. Barraco, he currently does not possess a food and beverage certificate; there is no intention to turn the family restaurant into a night club or bar. The consumption of alcoholic beverages would be solely at the dining tables inside the restaurant, which seat approximately 45 people for lunch and dinner. According to Mr. Barraco, the establishment is located in a dry area. He anticipates the establishment will derive no more than 20 percent of its gross revenue from the on-premise service of alcoholic beverages. Therefore, Applicant argues, pursuant to § 159.57(e) of the Code, that state law, rather than the City's regulations, controls in this case.

Mr. Barraco (as well as Ms. Day) testified that Kirby's Steakhouse, a restaurant and bar

⁷ TEX. ALCO. BEV. CODE ANN. § 159.57(e). ... [A] municipality located in a county with a population of 400,000 or more and that is adjacent to a county with a population of 2.2 million or more may regulate, in a manner not otherwise prohibited by law, the location of an establishment issued a permit under Chapter 32 or 33 if: (1) the establishment derives 35 percent or more of the establishment's gross revenue from the on-premises sale or service of alcoholic beverages and the premises of the establishment are located in a dry area; and (2) the permit is not issued to a fraternal or veterans organization or the holder of a food and beverage certificate.

which sells alcoholic beverages, is located directly between Prego Pizza Express and the Grace Community Outreach Church. Mr. Barraco stated that he has no personal knowledge of what process Kirby's Steakhouse went through to obtain its private club permit or whether the restaurant has been issued an SUP by the City of Plano to operate a private club. According to Mr. Barraco, Prego Pizza Express has been at this location for approximately nine and-a-half years. Grace Community Outreach Church was built around 1998; Kirby's Steakhouse was built in either 1998 or 1999.

Mr. Barraco stated that he personally has observed nothing which would lead anyone to believe that Kirby's Steakhouse is violating the general welfare, peace, morals, safety or public sense of decency of the people in the area. Furthermore, he stated that, if issued the requested permits, he would conduct business no differently than does Kirby's Steakhouse. Mr. Barraco added that no one from the church has complained or voiced any opposition to the application of the permits.

III. DISCUSSION

As noted above, it is uncontroverted that Applicant's premises, located more than 300 feet but less than 1,000 feet from Grace Community Outreach Church, meets the statutory requirements for issuance of the requested permits from the Commission. The issue in this case is whether Protestant has proved that issuance of the requested permits would be in violation of the City of Plano's zoning ordinance. After considering the evidence, the ALJ concludes that Protestant has not met that burden.

During the hearing, Ms. Day stated that she did not believe that the PD regulations amend or supercede Section 3.105 of the City of Plano's zoning regulations, which requires an SUP for private clubs and 1,000 feet separation requirement for private clubs and churches. However, Applicant presented evidence of the current PD regulations for the zoning district in which Applicant's premises are located. As far as private clubs are concerned, the regulations specifically state, "Tract 2 shall be regulated in accordance with the O-2 district with the following additions and/or restrictions: ... Private club applications may be filed for the Tract 2 area."

During the hearing, the parties requested that official notice be taken of the City of Plano's zoning ordinance, pursuant to TEX. GOVT. CODE ANN. § 2001.090(a)(1). The City's zoning ordinance states that planned development districts may be used to modify and supplement the regulations contained within the zoning ordinance."⁸ The ordinance provides the following with regard to planned development districts:

Planned development zoning may be used to define and condition land uses permitted within each district, including expanding or restricting uses permitted by right or by specific use permit within a base zoning district. ... Planned development zoning may modify, delete or add to those standards provided in a base zoning district. The standards may be more or less restrictive than those in a base zoning district.⁹

The ordinance also states, "Where regulations set forth within a planned development district directly and specifically conflict with those of another ordinance, the regulations of the planned development district shall prevail."¹⁰

The main evidentiary issue was based on the location of Applicant's premises. Based on the foregoing, the ALJ concludes that Applicant's filing of a private club request is not in violation of the City of Plano's zoning ordinance. Evidence concerning the manner in which Applicant may conduct business was only briefly raised through the testimony of Mr. Barraco. Applicant asserts that the private club will be operated in the same manner as Kirby's Steakhouse, another licensed private club in the area, and will not negatively impact the community. Applicant's qualifications or character were not in issue.

Based on the evidence presented, Applicant's establishment is not inconsistent with the existing area. Ultimately, Protestant simply has not presented any credible evidence why the

⁸ Subsection 4.108 (Regulations Affected) of Section 4.100 (Planned Development District (PD)) of the Zoning Ordinance.

⁹ Subsection 4.106 (Permitted Areas of Regulation) of Section 4.100 (Planned Development District (PD)) of the Zoning Ordinance.

¹⁰ Subsection 4.115 (Administration) of Section 4.100 (Planned Development District (PD)) of the Zoning Ordinance.

establishment proposed by Applicant will present any harm or is somehow incompatible with the community's morals and general welfare. The ALJ cannot conclude that the evidence supports a finding that the place or manner in which Applicant may conduct business warrants the refusal of a permit. There is no legitimate basis for denying the permits. For this reason, the ALJ recommends that the requested permits be issued.

IV. PROPOSED FINDINGS OF FACT

1. On June 11, 2003, Prego Pizza Express Private Club, Inc. d/b/a Prego Pizza Express (Applicant) filed an original application with the Texas Alcoholic Beverage Commission (Commission) for a Private Club Registration Permit, a Beverage Cartage Permit, and a Food and Beverage Certificate for a premises known as Prego Pizza Express, located at 3400 Preston Road, No. 225, Plano, Collin County, Texas.
2. Prego Pizza Express is located across the street and 521.95 feet from Grace Community Outreach Church, measured from the front door of Applicant's premises to the nearest property line of the church.
3. Applicant's business is not located within 300 feet of the church, measured from front door to front door, along the property lines of the street fronts and in a direct line across intersections.
4. Commission Staff determined that Applicant met all of the technical requirements to obtain the permits.
5. The City of Plano (Protestant) protests the issuance of the permits on the basis that it is in violation of the city's zoning ordinance, which requires private clubs to first obtain specific use permits (SUP) from the city and which prohibits private clubs within 1,000 feet of the property line of any church, measured in a straight line from the front door of the premises to the nearest boundary line of the church.
6. The Plano City Council approved planned development district (PD) regulations for the area in which Applicant's premises are located. The regulations specifically state that private club applications may be filed in the area.
7. On November 7, 2003, Commission Staff issued a notice of hearing notifying all parties that a hearing would be held on the permit requests.
8. The notice of hearing included a statement regarding the time, place, and nature of the hearing; referenced the legal authority upon which the hearing would be held; cited the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.

9. The hearing was held on December 10, 2003, in Dallas, Dallas County, Texas, before ALJ Brenda Coleman, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings. The hearing concluded that same day. The record closed on January 9, 2004, after the receipt of additional evidence.
10. There is insufficient evidence to show that the place or manner in which Applicant intends to conduct business is incompatible with the general welfare, peace, morals, safety of the people, and the public sense of decency.

V. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Chapters 1 and 5 and §§ 6.01 and 11.46 (the Code).
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting 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. §2003.
3. The parties received proper and timely notice of the proceedings and hearing, pursuant to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the foregoing findings, a preponderance of the evidence does not show that issuance of the requested permits will not adversely affect the safety of the public, the general welfare, peace, or morals of the people, nor violate the public sense of decency, as prohibited by TEX. ALCO. BEV. CODE ANN. §11.46(a)(8).
5. Based on the foregoing findings and conclusions, the preponderance of the evidence shows this application meets all requirement for issuance by the Commission. TEX. ALCO. BEV. CODE chs. 11, 28, 32 and 44.
6. The application of Prego Pizza Express Private Club, Inc. for a Private Club Registration Permit, a Beverage Cartage Permit, and a Food and Beverage Certificate for a premises known as Prego Pizza Express should be granted.

ISSUED March 8, 2004.



BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 606915

IN RE PREGO PIZZA EXPRESS PRIVATE §
CLUB INC. §
D/B/A PREGO PIZZA EXPRESS §
ORIGINAL APPLICATION N, PE & FB §
§
§
COLLIN COUNTY, TEXAS §
(SOAH DOCKET NO. 458-04-1076) §

BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 5th day of April 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Brenda Coleman. The hearing convened on December 10, 2003, and adjourned on December 10, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 8, 2004. This Proposal For Decision (attached hereto as Exhibit "A"), was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. 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.

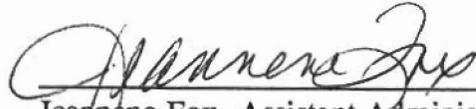
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the original application for an N, PE and FB is hereby **GRANTED**.

This Order will become final and enforceable on April 26, 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 or through the U.S. Mail, as indicated below.

SIGNED this 5th day of April, 2004.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Brenda Coleman
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (214) 956-8611

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