

Propose  
file

protest  
JK -

**DOCKET NO. 505427**

IN RE ORIGINAL APPLICATION OF	§	BEFORE THE
RAILROAD PRIVATE CLUB	§	
ORIGINAL APPLICATION: N, PE & FB	§	
	§	TEXAS ALCOHOLIC
	§	
SAN PATRICIO COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-0205)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 31st day of January, 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Melissa M. Ricard. The hearing convened on November 3, 2005 and adjourned on the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on January 2, 2006. 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 Railroad Private Club for a Private Club Registration Permit, Beverage Cartage Permit and a Food and Beverage Certificate be **GRANTED**.

**This Order will become final and enforceable on February 22, 2006**, 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 *31st* day of January, 2006.

On Behalf of the Administrator,

  
Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

JLK/yt

The Honorable Melissa Ricard  
Administrative Law Judge  
SOAH - Corpus Christi  
*VIA FACSIMILE: (361) 884-5427*

Railroad Private Club  
**RESPONDENT**  
P. O. Box 1851  
Odem, Texas 78370  
*CERTIFIED MAIL NO. 7005 0390 0005 7550 4280*  
*RETURN RECEIPT REQUESTED*

Virgil C. Burton  
**PROTESTANT**  
P. O. Box 1231  
Odem, Texas 78370  
*CERTIFIED MAIL NO. 7005 0390 0005 7550 4297*  
*RETURN RECEIPT REQUESTED*

Michael and Rita Janow  
**PROTESTANTS**  
P. O. Box 606  
Odem, Texas 78370  
*CERTIFIED MAIL NO. 7005 0390 0005 7550 4303*  
*RETURN RECEIPT REQUESTED*

Judith L. Kennison  
**ATTORNEY FOR PETITIONER**  
Texas Alcoholic Beverage Commission

Corpus Christi District Office  
Licensing Division

DOCKET NO. 458-06-0205

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
V.	§	
	§	
RAILROAD PRIVATE CLUB	§	OF
D/B/A RAILROAD PRIVATE	§	
CLUB ORIGINAL APPLICATION	§	
SAN PATRICIO COUNTY, TEXAS	§	
(TABC CASE NO. 505427)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Railroad Private Club, d/b/a Railroad Private Club (Applicant) has applied to the Texas Alcoholic Beverage Commission (Commission) for a Private Club Registration Permit, Beverage Cartage Permit, and a Food and Beverage Certificate for a premises located at 1507 Voss Avenue, Odem, San Patricio County, Texas (Establishment). Virgil Burton and other concerned citizens of San Patricio County filed a protest to the issuance of the permits based on general welfare, health, peace, moral, and safety concerns. The Commission's staff (Staff) remained neutral on the application.

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. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

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

On November 3, 2005, a public hearing was convened on this matter in Corpus Christi, Nueces County, Texas, before Administrative Law Judge Melissa M. Ricard. The Applicant was represented by Alex Hinojosa. Staff was represented by TABC attorney Judith Kennison. Virgil Burton, Michael Janow and Rita Janow appeared as protesting citizens (Protestants). The hearing concluded and the record closed the same day.

## II. DISCUSSION AND ANALYSIS

### A. Applicable Law

Protestants challenge the Applicant's application on the basis of §§ 11.46(a) (8) and (10) of the Texas Alcoholic Beverage Code (Code), which provides that the commission or administrator may refuse to issue an original or renewal permit with or without a hearing if it has reasonable grounds to believe and finds that any of the following circumstances exist:

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; and

- the applicant will sell liquor unlawfully in a dry area or in a manner contrary to law or will knowingly permit an agent, servant, or employee to do so;...

## **B. Arguments and Evidence**

### **1. Commission's position**

The Staff took no position on the Application and deemed that the Applicant had met all the requirements for the permits. The Staff added a copy of the notice of hearing, the application, the protest letter, and twelve accident reports to the record.

### **2. Protestants' Case**

The Protestants, who have the burden of proof, oppose issuance of the permits on the basis that dangerous traffic poses a threat to the health, safety, and welfare of the neighborhood. The Protestants also believe the citizens of the county voted to ensure that the community would be dry, therefore, the granting of a permit to sell alcohol to the Applicants is against the wishes of the citizens.

The Protestants called themselves as witnesses and provided some documentary evidence. Their comments are summarized below.

#### Virgil Burton

Mr. Burton has been a resident of Odem for 32 years and is a former deputy sheriff. Odem is a small community with a population of 2400. U.S. Hwy. 77 is the main thoroughfare through Odem and traffic flows from 80 mph to 45 mph, with several lights and a railroad crossing. The Establishment is on the south side of Odem, where Hwy. 77 is a four lane highway divided by a large

grassy median, with two lanes in each direction and wide shoulders. The traffic is heavy, and often consists of 18 wheel commercial vehicles. Traffic flowing from Houston, Victoria, and other northern areas of Texas travel through Odem on the way to Corpus Christi, the Rio Grande Valley and Mexico. There is an increase in traffic on weekends and holidays. There is a school crossing six or seven blocks from the Establishment. Mr. Burton believes that the traffic flows 65 mph in front of the Day's Inn, which is next to the Establishment. Mr. Burton believes that since the Establishment is at the southern end of town, where wouthbound traffic is through the red lights and the road opens up, that traffic starts to flow very fast in front of that location. With this speed, Mr. Burton believes that it would be extremely difficult for any driver to stop, or merge appropriately, if they have alcohol in their system. Mr. Burton lost his mother to a drunk driver and believes that more care should be taken to prevent such tragedies. Mr. Burton believes that one serving of alcohol can impair someone enough to become a problem on the road.

Mr. Burton stated that the voters of San Patricio County have voted three separate times to prohibit the sale of beer and wine in stores. The communities of Edroy and Odem include a five to ten mile area of San Patricio County that are dry. The last vote was ten years ago. Mr. Burton did not have any other details of the ballot initiatives.

The record shows that a protest letter dated August 25, 2005, and signed by 17 residents of Odem, was sent to the Commission. The letter objects to the granting of the permits on the basis that the community is dry and the signatories would like to keep it that way. An additional protest letter signed by a small business owner located in the icinity of the Establishment is also a part of the record.

Odem does not have its own police department and pays the nearby city of Sinton \$75,000 a year for 25 hours of police patrol each week. Mr. Burton believes that the traffic situation is exacerbated by the lack of police patrol and that increased traffic and alcohol-related accidents will cause added expense to the citizens of San Patricio County.

Michael Janow

Mr. Janow has been a resident of Odem for one and a half years. Mr. Janow presented information from the internet which shows that the number of alcohol-related accidents in Texas exceed the number for most other states.

Mr. Janow also presented the zoning code for Sinton, a nearby community. Mr. Janow stated that in the main area of Sinton, zone variances required to establish a tavern are not currently being granted by the city of Sinton. There is no similar information for the city of Odem.

There is a new subdivision and a growing subdivision located just south of the Establishment, which will increase traffic and school buses in the area.

Mr. Janow believes that the Establishment currently is a nice restaurant that he is proud to have in the community. It is not his practice to patronize businesses that sell alcohol and he believes that Establishment should remain as it is.

Mrs. Rita Janow did not testify.

**3. Applicant's Case**

The Applicant testified and provided some documentary evidence.

Alex Hinojosa

Mr. Hinojosa is a life long resident of Odem, and the president of the Applicant. Mr. Hinojosa presented 2003 statistics from the Texas Department of Transportation that show the rate of 25,000 vehicles traveling on Hwy. 77 through Odem everyday. Mr. Hinojosa referred to the

twelve accident reports submitted by the Commission, which consisted of all such reports within a one mile radius of the Establishment over the last three years. Given the amount of traffic, and the low number of accidents reported, Mr. Hinojosa believes that the traffic is not a problem. Taking this amount of traffic and the number of accidents, the rate is a mere .002%. The accidents reflected in the accident reports mostly occurred at the traffic lights and the railroad crossing in Odem. The Establishment is about a mile and a half away from the nearest traffic light.

There are two entrances and two exits to the Establishment. He has not experienced any problems with patrons leaving the Establishment, and that the wide shoulder (8 to 10 feet) that runs 100 to 150 feet in front of the Establishment helps vehicles safely merge onto the highway. While exiting the Establishment onto Hwy. 77, the traffic can only travel southbound, further reducing the risk of an accident. A utility easement allows patrons to travel behind the Day's Inn, located next to the Establishment, to access a side road for exiting as well.

Mr. Hinojosa does not intend to change the atmosphere of the Establishment, which is a family restaurant. Most of his family, including his mother, father, sisters, and brothers, work at the Establishment. The focus of the Establishment is on food, and they do not intend to change this focus. The Establishment has the reputation for excellent seafood and steaks. The Applicant intends to limit the alcohol consumption of members and to have all wait staff attend training and be certified by the Commission to serve alcohol. For patrons in need, Mr. Hinojosa intends to call cabs or to escort them home himself or have someone in the family help. The Application is being sought because customers of the Establishment have indicated a desire to purchase alcohol with their meals. The Establishment would like to compete with the eating establishments on Hwy 624 , 8 miles away, which sell alcohol.

Mr. Hinojosa obtained 50 signatures from Odem, and 50 more from elsewhere in San Patricio County in support of the application for beverage permits. The Establishment generates tax revenue for the city of Odem and the business' financial success is beneficial to the city.

The record shows that the Establishment specializes in seafood with dinner entrees ranging from \$8.25 to \$24.95.

Nathan Hinojosa

Mr. Nathan Hinojosa is also a life long resident of Odem and an officer of the Applicant. He reiterated much of his brother's testimony. The Establishment opened in March 2004. The establishment paid almost \$5,000 in taxes in September of 2005. Mr. Hinojosa believes that the tax revenue generated by the Establishment offsets any expenses related to additional law enforcement responsibilities. The Applicant has applied for a private club permit, therefore there will be an application process and a nominal fee required for anyone to purchase alcohol. Mr. Hinojosa believes this policy will help to limit alcohol intake.

Currently, the Establishment allows patrons to bring beer and wine into the Establishment to have with their meals. Only a minor percentage, 5%, of customers take advantage of this opportunity. There have been no problems, traffic-related or otherwise, with the current policy. Currently, the city of Odem does not have alcohol available for purchase in any eating or retail establishments.

**3. Analysis**

Protestants challenged the application on the grounds that traffic and activity of the patrons of the club pose a threat to the general welfare, peace, morals, and safety of the community. After considering this evidence, the ALJ concludes that a legitimate basis for denying the permits was not established.

Protestants' witnesses failed to establish that the permits should be denied. While there may or may not be a traffic problem in the area, the Protestants did not establish how the granting of the

permits would increase the traffic flow and specify how the purchase of alcohol by the members would cause more accidents. Broad generalizations about alcohol-related accidents are not enough evidence to deny the permits sought by the Applicant. In this case, the Applicant seeks to offer alcohol to its established clientele, who patronize the establishment for the food. The record does not show that Establishment intends to add a bar, or provide entertainment which would encourage alcohol consumption. The ALJ sympathizes with the Protestants and understands that they do not want a business which provides alcohol on a busy highway. However, no legal basis was established at the hearing to merit denial of the permits.

While some evidence was provided that the voters of the community of Odem had voted to keep the area dry, the information is too sketchy to establish that the voters intended to prevent this kind of beverage permit and that the voters included where the Establishment is located in any vote. The Protesters provided 21 residents (signatories and witnesses) who protested the application on the basis of its location in a dry area. On the other hand, the Applicant provided the signature of 50 residents of Odem and 50 additional residents of the County who supported the application to the Commission.

The Commission specified that all requirements for the permit have been met by the Applicant, therefore, without more, the Protestants did not establish that the granting of the application would be unlawful or would allow the Applicant to sell alcohol in a dry area and that the granting of the permit would endanger the general health, safety, and welfare of the neighborhood.

## II. FINDINGS OF FACT

1. Railroad Private Club, d/b/a Railroad Private Club (Applicant) has applied to the Texas Alcoholic Beverage Commission (Commission) for a Private Club Registration Permit,

Beverage Cartage Permit and a Food and Beverage Certificate for a premises located at 1507 Voss Avenue, Odem San Patricio County, Texas (Establishment).

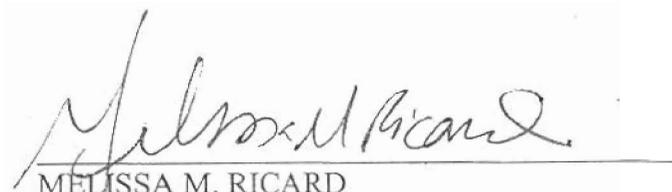
2. A protest to the application was filed by Virgil Burton and other citizens of Odem (Protestants).
3. Commission's Staff issued a notice of hearing notifying all parties that a hearing would be held on the application and informing the parties of the time, place, and nature of the hearing.
4. The hearing was held on November 3, 2005, public hearing was convened on this matter in Corpus Christi, Nueces County, Texas, before Administrative Law Judge Melissa M. Ricard. The Applicant was represented by Alex Hinojosa. Staff was represented by TABC attorney Judith Kennison. Virgil Burton, Michael Janow and Rita Janow appeared as protesting citizens (Protestants). The hearing concluded and the record closed the same day.
5. The Protestants did not establish by a preponderance of the evidence that the issuance of the permits would violate the general welfare, health, peace, morals, or safety of the people or the public sense of decency.
6. The Protestants did not establish by a preponderance of the evidence San Patricio County is dry or that the Establishment was located in a dry area of the county.

### III. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN., Chapters 1 and 5 and §§ 6.01, 11.41, 11.46, and 32.01.
2. The State Office of Administrative Hearings has jurisdiction over all matters related 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. Chapter 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the foregoing findings of fact, a preponderance of the evidence shows 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, or in a dry area in violation of TEX. ALCO. BEV. CODE ANN. § 11.46.

5. Based on the foregoing findings of fact, there is insufficient evidence to deny the permits on the basis of TEX. ALCO. BEV. CODE ANN. §§ 11.46(a) (8).
6. Based on the foregoing findings of fact, there is insufficient evidence to deny the permits on the basis of TEX. ALCO. BEV. CODE ANN. §§ 11.46(a) (10).
7. Based on the foregoing findings and conclusions, the application of the Railroad Private Club should be granted.

SIGNED on the 2<sup>nd</sup> day of January, 2005.



MELISSA M. RICARD  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS