

**DOCKET NO. 596744**

IN RE COWPOKE INC.	§	BEFORE THE
D/B/A DALLAS	§	
PERMIT NOS. MB121093; LB121094	§	
	§	TEXAS ALCOHOLIC
	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-02-1275)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 24th day of June, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Catherine C. Egan. The hearing convened on January 30, 2002, and adjourned March 2, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 3, 2002. 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. Petitioner filed Petitioner's Exceptions on May 23, 2002. Respondent filed Respondent's Reply To Exceptions on June 7, 2002. After reviewing the exceptions and reply to exceptions, Administrative Law Judge Egan found no reason to recommend any changes to the Proposal for Decision, and all of the exceptions were overruled.

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 allegations regarding Permit Nos. MB121093 and LB121094 are hereby **DISMISSED** with prejudice. The possession of a controlled substance "on the licensed premises" by a manager would be a violation and cause for suspension or cancellation, however, the burden of proof was not met to show that this illegal activity occurred on the licensed premises.

**This Order will become final and enforceable on JULY 16, 2002**, 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.

**WITNESS MY HAND AND SEAL OF OFFICE** on this the 24th day of June, 2002.

On Behalf of the Administrator,



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Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

The Honorable Catherine C. Egan  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FACSIMILE (512) 475-4994**

Don E. Walden  
**ATTORNEY FOR RESPONDENT**  
4408 Spicewood Springs Rd.  
Suite 304  
Austin, Texas 78759  
**VIA FAX (512) 795-8079**

Dewey A. Brackin  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

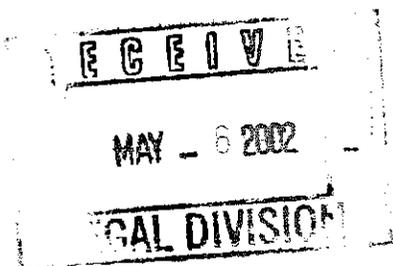
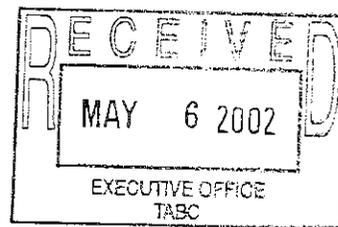
Licensing Division  
Austin District Office

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

May 3, 2002



Mr. Rolando Garza, Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa, Suite 160  
Austin, Texas 78711

VIA INTERAGENCY MAIL

**RE: Docket No. 458-02-1275; Texas Alcoholic Beverage Commission v. Cowpoke, Inc., d/b/a Dallas, Permit Nos. MB-121093 & LB-121094 - Travis County, Texas (TABC Case No. 596744)**

Dear Mr. Garza:

Please find enclosed a Proposal for Decision that has been prepared for your consideration in the above referenced case. Copies of the Proposal for Decision are being sent to Dewey A. Brackin, Staff Attorney representing the Texas Alcoholic Beverage Commission, and to Don Walden, attorney for Cowpoke, Inc., d/b/a Dallas, (Respondent). For reasons discussed in the Proposal for Decision, I recommend that Petitioner's request to suspend Respondent's permits be denied.

Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon 2000), each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed according to the time limits specified in TABC rules. A copy of any exceptions, briefs on exceptions, or reply must also be filed with the State Office of Administrative Hearings and served on the other party in this case.

Sincerely,

A handwritten signature in cursive script that reads "Catherine C. Egan".

Catherine C. Egan  
Administrative Law Judge

CCE/lao  
Enclosure

xc: Dewey A. Brackin, Attorney, TABC, 5806 Mesa, Suite 160, Austin, TX - VIA INTERAGENCY MAIL  
Don E. Walden, 4408 Spicewood Springs Rd. Suite 304, Austin, TX - VIA REGULAR U.S. MAIL  
Rommel Corro, Docket Clerk, State Office of Administrative Hearings- VIA HAND DELIVERY

**DOCKET NO. 458-02-1275**

**TEXAS ALCOHOLIC  
BEVERAGE COMMISSION  
Petitioner**

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**BEFORE THE STATE OFFICE**

**V.**

**COWPOKE, INC.  
D/B/A DALLAS  
PERMIT NOS. MB-121093 & LB-121094  
TRAVIS COUNTY, TEXAS  
(TABC CASE NO. 596744)  
Respondent**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

The Staff for the Texas Alcoholic Beverage Commission (Petitioner), brought this enforcement action against Cowpoke, Inc., d/b/a Dallas, (Respondent), alleging that on August 9, 2001, Respondent's employee possessed a narcotic on the licensed premises, in violation of Texas Alcoholic Beverage Code (the Code) § 104.01(9) and 16 TEX. ADMIN. CODE (TAC) § 35.31 (b).

The parties stipulated to the facts, but disagreed on the legal interpretation of a licensed "premises." After considering the evidence and the law, the Administrative Law Judge (ALJ) finds insufficient evidence to find that Respondent's employee possessed a narcotic on the licensed premises in violation of Section 104.01(9) of the Code, and recommends that Petitioner's request to suspend Respondent's permits be denied.

**I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY**

There are no contested issues of jurisdiction or notice. Therefore, the ALJ addresses those matters in the findings of fact and conclusions of law.

On January 30, 2002, ALJ Catherine C. Egan convened the hearing. Dewey Brackin, Staff Attorney, represented Petitioner. Don Walden, attorney, represented Respondent. The parties requested that the record remain open to file briefs. Both parties filed briefs, the last being filed on March 1, 2002. The record closed March 2, 2002.

**II. BACKGROUND**

The parties entered into several stipulations, which are attached as Appendix A. It is undisputed that on the evening of August 9, 2001, Texas Alcoholic Beverage Commission (TABC) enforcement agents, Jimmy Zuehlke and Brent Roberts, went to Respondent's licensed premises because Petitioner had received a complaint that Respondent's employee, Jenifer Klump, was

allegedly selling or dispensing marijuana from Respondent's licensed premises. Agents Zuehlke and Roberts informed Respondent's management that they intended to search the premises. Ms. Klump was the manager on duty. After searching the building and Ms. Klump's purse, the agents found neither marijuana nor any other illegal substance. The agents asked to search Ms. Klump's car. The car was in the alley behind Respondent's building, about 20 feet from the back door. Agent Zuehlke reported that on the way to the car, Ms. Klump admitted she had marijuana in the car. The agents found a film container with a tenth of an ounce of marijuana in Ms. Klump's car.

Petitioner agrees that Ms. Klump's car was not used for any purpose related to, or within the scope of, Respondent's business, except to transport Ms. Klump to and from work. However, Agent Zuehlke noted in his report that the alley "is under control by Dallas [sic] defined by Section 11.49(a). This area where the vehicle was parked is only used primarily by employees."<sup>1</sup> Petitioner maintains that Ms. Klump, as Respondent's manager, is the permittee; that her car qualifies as part of the licensed premises as defined by the Code; and that Respondent has violated the Code. Petitioner reasoned that Section 11.49(9) of the Code includes "all vehicles" under the control of the same person, hence all employees. Petitioner opined that if the employees' personal vehicles are not part of the licensed premises "then bar employees could deal drugs out of their cars on premises, store illicit or unstamped beverages in their cars, or otherwise violate the law with impunity from sanction just because the violation took place off the premises."<sup>2</sup> Petitioner seeks to have Respondent's permits suspended for 21 days, or in lieu of the suspension, to have Respondent pay a fine.

Petitioner concedes that there are no reported cases that address whether a vehicle is part of the licensed premises. However, Petitioner cited two cases where the Court held that the parking lot was part of the licensed premises for the purpose of determining if someone was unlawfully possessing a weapon on a licensed premises.<sup>3</sup> In another case,<sup>4</sup> the Court held that the sidewalk in front of a club was part of the licensed premises for purposes of determining that the delivery of cocaine was on the licensed premises. According to Petitioner, it logically flows that any vehicle driven by an employee becomes part of the licensed premises.

Respondent disagrees, and argues that Ms. Klump's car is not part of the licensed premises, was not under Respondent's control, directly or indirectly, and that Respondent has not violated the Code.

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<sup>1</sup>Exh. 2 at 3.

<sup>2</sup>Petitioner's Post-Hearing Brief at 3.

<sup>3</sup>*Richardson v. State*, 823 S.W.2d 773 (Tex. App.—Fort Worth 1992, no writ) and *Terry v. State*, 877 S.W.2d 68 (Tex. App.—Houston[1st Dist] 1994, no writ).

<sup>4</sup>*Wishnow v. State*, 757 S.W.2d 404 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1988, writ denied).

### III. LICENSED PREMISES

#### A. Applicable Statutes and Rules

The term "licensed premises" is defined in Section 11.49(a) of the Code as:

(a) In this code, "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.

Section 104.01 of the Code provides:

No person authorized to sell beer at retail, nor his agent, servant, or employee, may engage in or permit *conduct on the premises of the retailer* which is lewd, immoral or offensive to public decency, including, but not limited to , any of the following acts:

(9) possession of a narcotic or any equipment used or designated for the administering of a narcotic or permitting a person on the licensed premises to do so.  
(Emphasis Added)

A permittee is " a person who is the holder of a permit provided for in this code, or an agent, servant or employee of that person."<sup>5</sup> Person includes "a natural person or association of natural person, trustee, receiver, partnership, corporation, organization, or the manager, agent, servant or employee of any of them."<sup>6</sup>

#### B. ALJ Analysis

Other than the Stipulations, Agent Zuehlke's report, and the permits, no other evidence was offered by either party. The parties agreed that the sole issue in dispute was the legal interpretation of the "licensed premises." Both submitted short briefs, noting that there is little case authority on this subject.

Section 104.01 of the Code prohibits the permittee or the employees from engaging in or permitting lewd, immoral or offensive conduct on the premises of the retailer. Petitioner offered no evidence to show that Ms. Klump used, distributed, or sold marijuana herself. The evidence did establish that she possessed marijuana in her car. The marijuana found in Ms. Klump's car was of an insufficient quantity to support the allegation that Ms. Klump was selling or distributing marijuana, or any other illegal substance, on the licensed premises. Instead, it suggests personal use. Petitioner offered no evidence to prove that Ms. Klump used the marijuana herself or gave it to another employee or patron. The ALJ finds no credible evidence to support the allegation that Ms. Klump possessed or permitted other to possess a narcotic, i.e. marijuana, within the night club.

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<sup>5</sup>Section 1.04(11) of the Code.

<sup>6</sup>Section 1.04(6) of the Code.

By Stipulation, Petitioner agreed that Ms. Klump's car was parked in an alley behind Respondent's building. The diagram attached to the Stipulations shows that the alley is directly behind Respondent's building. The parking lot is on the side and in front of Respondent's building. Pivotal in each of the cases cited by Petitioner was the determination from the evidence that the area included within the "licensed premises" was under the control of the permittee, either directly or indirectly. In *Wishnow v. TABC*, the Court found the club's parking lot and the sidewalk just outside the club's front door where a doorman was stationed to monitor the area was part of the licensed premises. The Court in *Richardson v. State* also found the parking lot to be part of the licensed premises where a patron carried a gun into a convenience store selling alcohol and was stopped by the police in the convenience store's parking lot. Likewise in *Terry v. State*, the court found the licensed premises include the parking lot where a patron was standing with a gun in the night club's parking lot next to a dumpster owned by the night club. According to the evidence, the night club used and maintained the parking lot and owned and used the dumpster.<sup>7</sup>

In this case, the evidence did not show who owns or maintains the alley, whether Respondent limits access to the alley to the public so his employees can park behind the club, or whether Respondent exercises any control over this property. Despite Agent's Zuehlke's report concluding that this area was under Respondent's control because employees parked there, the ALJ is not persuaded. Employees frequently park on city curbs, along the sides of state and county roadways, and in alleys beyond the control of employers. Without evidence to show that Respondent owned the alley, or directly or indirectly had control over the alley, there is too little evidence for the ALJ to find that the alley is part of Respondent's licensed premises as defined by Section 11.49 (a).

The question then is whether Ms. Klump's car, parked behind Respondent's premises, was part of the licensed premises. Petitioner argues that employees' vehicles are part of the licensed premises. Respondent challenges this broad interpretation of "licensed premises".

Respondent asserts that the term "premises" as defined in Section 11.49(a) of the Code is restricted to those vehicles that pertain to the grounds of the licensed premises. Therefore, an employee's personal vehicle that is not used for any business purpose related to the permittee's business is not part of the licensed premises. Referring to numerous provisions of the Code and TABC rules that specifically regulate business vehicles used by a permittee or licensee,<sup>8</sup> Respondent asserts that the Legislature did not intend to regulate personal vehicles. Respondent maintains that if a beverage cartage permittee may transport beverages from the place of purchase to the licensed premises as allowed in Section 44.01 of the Code, then the licensed premises cannot be the vehicle or the Code would make no sense. Section 44.01 of the Code states:

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<sup>7</sup>Petitioner also cited a SOAH PFD, *TABC v. Emma Toucet dba Emma's Mexican Food*, SOAH Docket No. 458-01-0501. The ALJ found that the vehicle was in permittee's parking lot and contained a methamphetamine lab, presumably used to supply the drugs used by employees within the building, and was therefore part of the licensed premises.

<sup>8</sup>Respondent specifically referred to Sections 41.05, 42.04, 43.05, 44.01, 62.08, 64.07, 65.06, 66.09, 68.06; Chapter 35 of the TABC rules, 16 TAC § 35.3

A beverage cartage permit authorized the holder of a mixed beverage or private club registration permit to transfer alcoholic beverages from the place of purchase *to the licensed premises* as provided in this code. (Emphasis Added).

Respondent further argues that if an employee's vehicle is part of the licensed premises, Respondent and other business owners with permits will have conflicting legal obligations between the Code and the employee's right to privacy. In *K-Mart Corporation Store No. 7441 v. Trotti*,<sup>9</sup> the court recognized an employee's right to privacy in her employee locker and purse over an employer's right to search the locker and purse. Clearly, reasons Respondent, an employee has a greater expectation of privacy in their own vehicles. If Respondent is responsible for what is within an employee's vehicle, how can Respondent ensure the content of an employee's vehicles without violating the employee's right to privacy? Equally compelling is the question of when the employee's vehicle becomes a part of the licensed premises — when the employee arrives at work or all the time? What if the employee borrows a car from a friend? What if the employee does not park on the licensed premises? Respondent asserts that Petitioner's interpretation of the term "premises" is too broad and leaves too many unanswered questions.

The ALJ agrees with Respondent. Ms. Klump's car was not used by Respondent to conduct any business; did not transport alcoholic beverages for Respondent; was not in Respondent's parking lot; and was not being used to sell or distribute narcotic's to Respondent's customers. To suggest that Section 11.49 (a) of the Code applies to any employee's personal vehicle, no matter where it is located or whether it is used by the retailer in its business, is too broad a reading of this provision.

For the above stated reasons, the ALJ recommends that the adverse action filed by Petitioner against Respondent be dismissed.

#### IV. FINDINGS OF FACT

1. Cowpoke, Inc. d/b/a Dallas, (Respondent) holds a mixed beverage permit (Permit Nos. MB-121093) and a mixed beverage late hours permit (Permit No. LB-121094), issued by the Texas Alcoholic Beverage Commission (TABC) for use at 7113 Burnet Road #101, Austin, Travis County, Texas (the licensed premises).
2. On August 9, 2001, TABC enforcement agents Jimmy Zuehlke and Brent Roberts went to Respondent's licensed premises to investigate a complaint that Respondent's employee, Jenifer Klump, was selling or dispensing marijuana from Respondent's licensed premises and was in possession of marijuana on Respondent's licensed premises.
3. Agents Zuehlke and Roberts searched the inside of Respondent's building and Ms. Klump's purse and did not find marijuana or any other illegal substance.
4. Ms. Klump used her own vehicle to travel to and from work.

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<sup>9</sup>677 S.W. 2d 632 (Tex. App — Houston [1st dist] 1984, writ ref'd n.r.e).

5. Ms. Klump's vehicle was parked in an alley behind Respondent's building.
6. Agents Zuehlke and Roberts searched Ms. Klump's vehicle and discovered a tenth of an ounce of marijuana in an ordinary film container.
7. Ms. Klump did not use her car for any purpose related to, or within the scope of, Respondent's business.
8. Respondent did not own or directly or indirectly control the alley behind its building.
9. Respondent did not own or directly or indirectly control Ms. Klump's vehicle.

### **V. CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN.(the Code) §§6.01, 61.71, and 61.73.
2. SOAH has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Notice of the hearing was provided as required by the TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. Based on the Findings of Fact, Ms. Klump's vehicle was not part of Respondent's licensed premises as defined by Section 11.49(a) of the Code.
5. Based on the Findings of Fact, the alley was not part of Respondent's licensed premises as defined by Section 11.49(a) of the Code.
6. Based upon the Finding of Fact, Respondent did not violate TEX. ALCO. BEV. CODE ANN. § 104.01 (9), and 16 TEX. ADMIN. CODE § 35.41(b).
7. Based on the foregoing findings and conclusions, the suspension of Permits Nos. MB-121093 and LB-121094, or alternatively pursuant to Code §11.64, the imposition of a civil penalty in lieu of suspension of Respondent's permits, is not warranted.

**SIGNED this 3<sup>rd</sup> day of May, 2002.**



**CATHERINE C. EGAN**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

## APPENDIX A

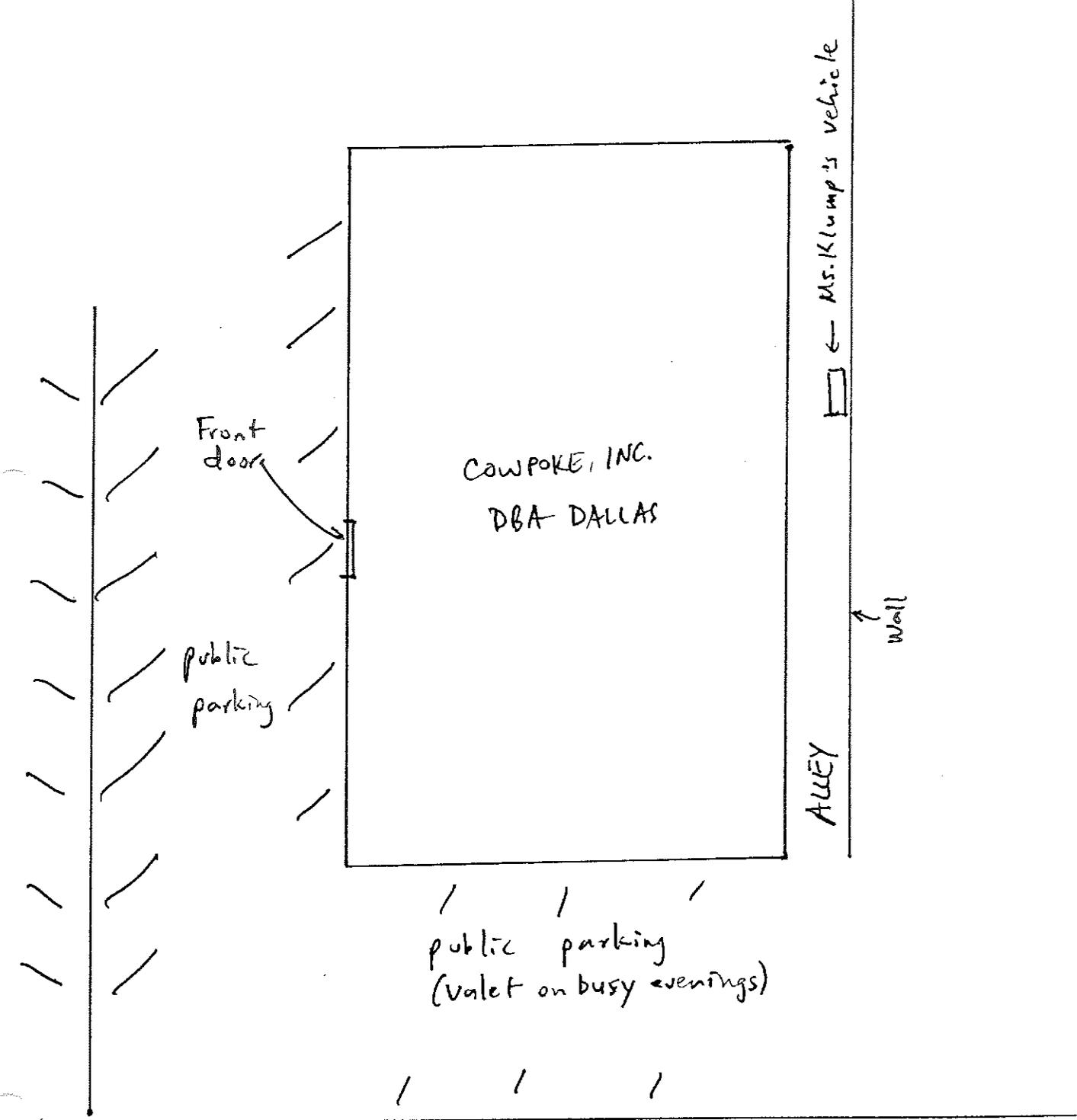
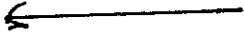
### STIPULATIONS OF FACTS

The Texas Alcoholic Beverage Commission (TABC) and Cowpoke, Inc., d/b/a. Dallas (Respondent) stipulated to the following facts:

1. Respondent is the holder of mixed beverage permit no MB-121093 and Mixed Beverage late Hours Permit No. LB-121094 issued by Petitioner for use at 7113 Burnet Road #101, Austin, Travis County, Texas 78759-2216.
2. Jimmy Zuehlke and Brent Roberts are enforcement agents with the Texas Alcoholic Beverage Commission.
3. On the evening of August 9, 2001, Agents Zuehlke and Roberts entered Respondent's premises, and informed Respondent's management that the TABC received a complaint that Jenifer Klump, an employee of Respondent, had allegedly sold or dispensed marijuana from Respondent's premises. Agents Zuehlke and Roberts informed Respondent's management that they intended to search Respondent's premises for evidence of such transactions.
4. After searching the interior of Respondent's building, and searching Ms. Klump's purse and finding no illegal substance, Agents Zuehlke and Roberts informed Ms. Klump that they intended to search her vehicle. Ms. Klump's vehicle was parked in an alley immediately behind Respondent's building, as indicated on the diagram attached hereto as Exhibit 1 and made a part of this Stipulation.
5. An ordinary film container containing a substance that TABC alleges was marijuana was found in Ms. Klump's vehicle.
6. Respondent possesses no information which would indicate that Ms. Klump's vehicle has ever been used for any purpose related to, or within the scope of, the business of Respondent, except for transportation to and from work by Ms. Klump.

Exhibit 1

North



COWPOKE, INC.  
DBA DALLAS

Front door

public parking

Ms. Klump's vehicle

Wall

ALLEY

public parking  
(valet on busy evenings)

BURNET ROAD