

DOCKET NO. 458-04-7276

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION, Petitioner, and	§	
VARIOUS CITIZEN PROTESTANTS,	§	
Protestants	§	
	§	
V.	§	OF
	§	
	§	
TWENTY WINGS, LTD	§	
D/B/A HOOTERS,	§	
Respondent	§	ADMINISTRATIVE HEARING

PROPOSAL FOR DECISION

Twenty Wings, LTD d/b/a Hooters (Hooters/Applicant), seeks a mixed beverage permit, a mixed beverage late hours permit, a beverage cartage permit, a caterer's permit, and a food and beverage certificate for a premises located at 5821 West Interstate 20, Arlington, Tarrant County, Texas, from the Texas Alcoholic Beverage Commission (the Commission). The Protestants, consisting of local area residents and elected officials, assert that the permits and certificate should be denied based upon the general welfare, peace, morals, and safety of the people.¹ The Commission's staff (Staff) did not take a position concerning the application. This proposal for

¹ The notice of hearing in this matter specifically alleges that the permits for this business should be denied for the following reasons:

- a. It (Applicant's business) is located in a heavily residential area with a high concentration of schools, churches and civic organizations;
- b. The sexually suggestive business violates the community standards of decency that the residents seek to uphold;
- c. This type of business, which blends sex appeal and alcohol in a neighborhood with so many schools nearby, will endanger the welfare of the students.
- d. The awarding of the permits will endanger the safety and security of many families who live in this area as a result of an increase in drinking and driving.

decision recommends that the permits and certificate be issued.

I. PROCEDURAL HISTORY

Commission Staff issued a notice of hearing on July 7, 2004, informing all parties that a hearing would be held on the application, as required by § 2001.052 of the Administrative Procedure Act, TEX. GOV'T CODE ANN. Chapter 2001. The hearing was held on June 1, 2007, in Fort Worth, Texas, before Tanya Cooper, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

Commission Staff appeared and was represented by Danielle Boazeman-Schick, a Commission Staff Attorney. Applicant appeared and was represented by Steve Swander and Wade Bingham, attorneys at law. Protestants appeared and were represented by Dan Altman, attorney at law. There were no challenges to the notice of hearing or venue for the hearing. The hearing concluded on June 1, 2007, and the record closed on July 20, 2007.

II. JURISDICTION

Prior to the hearing on the merits in this matter, a challenge to the ALJ's jurisdiction was made by Commission Staff and Protestants in a Motion to Dismiss based on the legal theory of res judicata. The motion was denied by the ALJ in Prehearing Order No. 7, the substance of which is incorporated into this proposal for decision.

On appeal before the Court of Appeals, Second District of Texas - Fort Worth, the Court ruled that "the TABC and SOAH had exclusive jurisdiction to decide the merits of all substantive legal and factual issues involved in the contested hearing concerning Hooters' application for a mixed beverage permit."² The Court added that Section 5.43 of the Texas Alcoholic Beverage Code

² *Twenty Wings Ltd v. Alcoholic Beverage Commission* (Tex.App.)No. 02-05-00355-CV, 2006 Tex. App. LEXIS 5725 (Tex.App.–Fort Worth June 29, 2006, no pet.)(mem.op.).

(the Code) designated SOAH to conduct any hearing authorized by the Code. Consequently, the Court of Appeals vacated an earlier court's order granting mandamus relief against the ALJ requiring dismissal of this case; and the matter was docketed for hearing on its merits by the ALJ.

Accordingly, the Commission has jurisdiction and authority over this matter under chapters 5, 11, 28, 29, 31, and 44 and §§ 6.01 and 11.46 of the Code. SOAH 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, under TEX. GOV'T CODE ANN. chs. 2001 and 2003 and § 5.43 of the Code.

III. DISCUSSION

A. Applicable Law

The statutory foundation for the protest to this application is § 11.46(a)(8) of the Code, which provides:

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:

...

(8) 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.

...

Further, numerous case decisions, including prior litigation between these parties on a

separate matter involving a Commission-issued beer license,³ have held that in order to deny an alcoholic beverage permit to a fully qualified applicant who proposes to operate a lawful business in a wet area and in compliance with the zoning ordinances of the city, 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 its business warrants a refusal of a permit.⁴

B. Public Comment

On June 1, 2007, the ALJ convened a public hearing in this matter prior to taking evidence in this case. No one spoke either in favor of or against the issuance of the permits and certificate. The ALJ closed the public hearing on that same day.

C. Evidence

1. Physical Setting. As described in the application, the proposed location for the licensed premises, Hooters, is within in the City of Arlington, Tarrant County, Texas. It is alongside an Interstate highway in a commercial area. There are numerous businesses nearby, including Commission-licensed premises.

The City of Arlington's City Secretary certified Hooter's location as being within a "wet area" for a mixed beverage permit. Also, the location is in compliance with City of Arlington zoning and building occupancy regulations. From Commission Staff's review of this application, the proposed licensed premises is not within restricted areas surrounding a residence, school, church, day care or social service facility. Photographs of the proposed licensed premises do not depict any residential development in the immediate area. Commission Staff did not take a position concerning this application because based upon its review of the application, Applicant is a fully qualified

³ *TABC v. Twenty Wings, LTD. et al*, 112 S.W.3d 647.

⁴ *TABC v. Mikulienka*, 510 S.W.2d 616; *Bavarian Props., Inc. v. TABC*, 870 S.W.2d 686.

applicant who proposes to operate a lawful business in a wet area and in compliance with the ordinances of the City of Arlington.

2. Protestants' evidence.

Witnesses testifying on behalf of the Protestants included Ben Boaz, David George, Felix Gonzalez, Jr., Pat Hardy, David Penley, Bart McDonald, Kim Kurz, Ron Wright, Melba McDow, and Reland Gonzalez. Several exhibits were admitted into evidence, including, but not limited to, web site pages, Hooters' employee handbook, Tarrant County District Attorney's Office case file in *State of Texas v. Damien Darrell Brock*, Hooters' merchandise (playing cards, mouse pad, golf balls, golf tees, golf towel, magazine, and calendar), maps, and several protest letters. Protestants' evidence will be discussed as it relates to the issues set out in the case's notice of hearing and Footnote 1. The evidence concerning the first two issues is so closely related that it will be discussed together in the following section to avoid repetition.

a. Applicant's Sexually Suggestive Business is Incompatible with the Surrounding Neighborhood and Violates the Community Standards of Decency that the Residents Seek to Uphold.

The central theme of evidence presented by the Protestants is that Hooters uses a marketing and operational strategy that is based upon using feminine sex appeal to sell their products. Protestants assert that because of this business model, the manner which Applicant conducts its business is contrary to the community standards in that neighborhood.

Mr. Boaz, a sex-offender counselor, testified that he would not allow offenders in his program to enter a Hooters restaurant due to the attire of the female servers and their flirtatious manner of interaction with customers. He testified that Hooters' atmosphere, when combined with alcohol sales, could act to lower a sex offender's inhibitions and lead to reoffending. However, in Mr. Boaz's opinion, the greatest danger in a Hooters-type atmosphere was to younger males under

18 years old. Mr. Boaz stated that those persons, who are easily aroused and susceptible to peer pressure, could be led into crossing a moral boundary and engage in sex offender behavior.

Mr. Boaz agreed that society, in general, had become more open sexually and opined that today's children were being desensitized to inappropriate sexual content as a result. He cited the restaurant's name, Hooters, as an example since the word "hooters" is a slang terminology for a woman's breasts.

Mr. Boaz said that he had dined at this Hooters restaurant just prior to providing his testimony so that he could have a first-hand frame-of-reference. He testified that while there, he observed both male and female patrons at the restaurant, and conceded that if parents wanted to take their children into a Hooters' environment, it was the parent's choice to do so. Mr. Boaz also agreed that there were other Commission-licensed premises close to this restaurant featuring items that he would find objectionable for his sex offenders, such as the Minyards Grocery Store's sales of adult magazines and the Movie Tavern showing some "R" rated movies.

When asked to compare Hooters Girls with Dallas Cowboy Cheerleaders, Mr. Boaz said he did not find the Cowboys Cheerleaders as provocative, despite their more revealing attire, and that he did not preclude sex offenders in his program from attending or watching Cowboys' football games. He said that the Cowboys Cheerleaders were not as closely accessible as a Hooters Girl is while serving a customer, so the Cheerleaders did not evoke the same level of response.

David George, David Penley, and Bart McDonald, pastors at area churches, testified that Hooters' atmosphere of using female sex appeal to draw customers was objectionable. One characterized Hooters Girls, along with the Dallas Cowboys' Cheerleaders, as "evil."

All pastors had, to some degree, counseled both men and women with problems associated with or related to sexual issues. Their congregations had opposed Hooters' previous application to sell beer by soliciting signatures on a petition protesting the previous application, and the

congregations continued their opposition to the current mixed beverage permit application, as well.

When asked about his views on another Hooters restaurant in north Arlington, Mr. George said that he did not like it either, but he stated that the Hooters location in north Arlington was not as residential in nature as the I-20 location. He added that he personally was not concerned about the sale of alcohol at Hooters because there were already other licensed premises in that area. He said that he had decided to protest this application because of the manner in which Hooters conducted its business, namely its use of sex as the cornerstone of its operations. Mr. George was also asked about his attitude toward Southwest Airlines, as they had also marketed airline services using feminine sex appeal. He replied that he was opposed to Southwest's marketing strategy at the time, and noted that Southwest had found this type of marketing approach lacked widespread appeal and abandoned it some years ago.

Mr. McDonald also stated that Applicant's proposed liquor sales was not the primary issue, but, instead, felt that it was the combination of sex with alcohol that was a dangerous mix. Mr. McDonald said that he was aware that Hooters had been operating at this location for some time and giving beer away. He opined that free beer was not of any benefit to the community. In response to questioning about his position on the Dallas Cowboys relocation to Arlington, Mr. McDonald said he was in favor of it for its economic development impact. However, he maintained that any exploitation of a woman's sexuality to gain attention, and, consequently, sell a product, was not acceptable.

Dr. Penley echoed the testimony of Mr. McDonald and Mr. George. He said that he would generally prefer it if Arlington and Fort Worth were not "wet." However, he drew no distinction between Hooters selling alcohol or providing it to customers for free. Dr. Penley testified that Hooters' use of attractive females as servers was a draw to its business, and that practice was contrary to the values of the southwest Arlington neighborhood.

Ms. Kurz, a member of a community group, Arlington Partnership for Community Values,

testified that she and her three girls live just over two miles from the Hooters on I-20. She said that, for the past few years, it has been uncomfortable explaining to her daughters what goes on at Applicant's business.

She stated she was suspicious of the purported poll of neighborhood residents that Applicant said supported the issuance of the permits and certificate at issue in this hearing. She said that she "Googled" some of the telephone numbers she had obtained from Applicant's attorney, and found that 51 names from the list were as much as three miles from the Hooters on I-20. She conceded that she did not call any of the numbers to verify that a survey of their attitudes had been conducted, nor had she taken any protest petitions door-to-door in her neighborhood to obtain signatures against this application. She had, however, solicited petition signatures at her church concerning the previous beer license application. Ms. Kurz noted that the Arlington Partnership for Community Values was not as well-funded as Applicant and did not have \$33,000 to hire someone to do their polling.

Mr. Gonzales brought several examples of Hooters merchandise (a magazine, a calendar, golf items, and mouse pad), which are offered for sale in Hooters restaurants. He testified that he had not been to the Hooters on I-20 until he went to purchase these items, but said that he had been to other licensed premises in the area, such as the Movie Tavern. Mr. Gonzales agreed that some convenience stores in the area that were Commission-licensed premises also sold similar items as those he had purchased at Hooters.

Mr. Gonzales lives near the Hooters I-20 location and is generally home during the day. However, he was not contacted during any polling conducted by Applicant concerning its present application. When asked what he thought the neighborhood's general attitude was toward Applicant obtaining a Commission-issued permit to sell alcoholic beverages, Mr. Gonzales said that in his conversations with people about this application's protest, most people said to "keep it up," because they wanted free beer to continue being served at the restaurant.

Mr. Wright, an Arlington City Council member at-large, testified that he lives less than a

mile from the I-20 Hooters. He said that this area of Arlington is known for its stable neighborhoods, churches, and schools; however, the actual location of the restaurant is zoned for commercial services and sales of alcoholic beverages are permissible under the applicable zoning. However, land uses, such as light industrial or sexually-oriented businesses, are not allowed within the area.

Mr. Wright conceded that Hooters restaurants did not meet the precise definition of a sexually-oriented business, but drawing on his only experience at a Hooters restaurant in North Richland Hills (also in Tarrant County), he said that he was stunned at the attire of the waitresses and their manner of serving food (i.e., bending over tables so that cleavage was exposed). In his opinion, Hooters restaurants were not like other restaurants because they combined alcoholic beverage with a sexual manner of servicing their customers. In Mr. Wright's opinion, Hooters is not a family-oriented business, as suggested by Applicant.

When asked specifically about his opinion concerning the north Arlington Hooters, Mr. Wright said that he had not received any specific complaints from constituents about its operations. He added that the north Arlington location is a better fit with its surroundings because it is in the "festival" zoning district for the city, which is not as residential in nature as the location under consideration in this proceeding. In summary, Mr. Wright said that the community should be able to define standards for activities that take place within the area, and in his experience, the community was overwhelmingly opposed to the I-20 Hooters.

b. Blend of Sex Appeal and Alcohol's Impact on School Children in the Area.

Ms. Hardy is an administrator with the Weatherford Independent School District and a district member of the State Board of Education. She testified that young people are bombarded with sexual content daily, and this can occur even during school hours. It is particularly true if a school has an open campus where students may leave school property for lunch and are not then typically supervised by school staff or parents.

Ms. Hardy said that some schools are combating the problem of sexual dress and media messages with dress codes to regulate students' attire while on campus. She stated that the Hooters' Girl attire would not be permissible at most high schools because the attire would be a distraction to boys in class and an object of emulation to girls. She recognized, however, the many girls dressed in similar attire while in public areas, such as the mall, but she did not think that was necessarily a good thing opining that this type of "attire was both common and common."

According to Ms. Hardy, there seemed to be a general malaise in society with people becoming jaded from the promotion of open sexuality, and Ms. Hardy further opined that people then wonder why the teen pregnancy rate is high. She admitted that she had never protested any of the other Hooters restaurants in the area. In her opinion, whether this Hooters restaurant sells or gives away alcoholic beverages to customers is not the point, but, instead, the restaurant should not have been located in this area once Applicant's management became aware of the neighborhood's opposition to it.

When asked about Hooters' record of providing donations to nearby schools, Ms. Hardy said that local merchant donations to schools are common. She added, however, that she would not accept donations from businesses, such as Hooters, in her school's activities.

Mr. George, when asked about the N. Collins Street Hooters, stated that he felt the north Arlington Hooters had less impact on children than the I-20 Hooters, despite its close proximity to Six Flags and other amusement and entertainment venues frequented by children and young adults. He added that Hooters' general atmosphere had a particular impact on high school boys due to the sexual titillation interaction with Hooters Girls. He expressed specific concerns about Martin High School students after having learned that boys on the Martin High School football team had, on at least one occasion, held an unsanctioned pre-game meeting at the restaurant.

Mr. Wright also said that sexual stimulation and alcoholic beverage sales affected adolescents negatively. However, he conceded that the Arlington City Council had not passed any resolutions

to oppose the I-20 Hooters and was taking no formal position concerning this application because the restaurant met all applicable ordinances. He also knew of no increase in sex-related offenses in the area surrounding the I-20 Hooters. Nevertheless, Mr. Wright maintained that the neighborhood did not want this Hooters selling merchandise, including alcoholic beverages, because it would adversely effect younger members of the community.

Ms. McDow testified that she lives within two miles of the I-20 Hooters, and when she and others persons active in their neighborhood found out that Hooters was coming to its present location, they organized and educated themselves on how to protest this Hooters locating in their neighborhood. In 2001, Ms. McDow and other members of Decency for Arlington/Partnership for Community Values obtained 1300 signatures opposing Applicant's beer license application. She, however, acknowledged that no verification of addresses was done at these church petition drives and that church congregations were not necessarily made up of nearby neighborhood residents. Church congregations from six or seven area churches participated in the petition drive. According to Ms. McDow, she and others decided to protest Hooters' sale of alcoholic beverages because the place and manner Hooters' management chose in their operations had a negative impact on young girls.

Ms. Gonzalez testified that she, Mr. Gonzales, and their children lived near the I-20 Hooters. She and Mr. Gonzales have five children and one grandchild. She stated it is difficult having a 15-year-old son and a Hooters restaurant nearby.

Ms. Gonzales said that she decided to protest Hooters operations because she did not like the way women employees are treated, with their worth being determined by their breasts. She stated that she had sent her husband to purchase the items previously discussed because she and others had been led to believe that Hooters had stopped selling that type of offensive merchandise.

Ms. Gonzalez said she had done some research initially when Hooters opened at the I-20 location in 2001. Going to the Texas Department of Public Safety's web-site for sex-offenders, she

found there were 42 registered offenders within approximately a two-mile radius of the restaurant at that time. She repeated her search in 2007 and found 70 registered offenders within the same area. In Ms. Gonzalez opinion, this indicated that the area was becoming less safe for everyone, but particularly for children.

c. Contrary to Public Safety That Would Lead to Increase in DWI Offenses.

As another illustration of the negative impact Hooters' alcohol sales would have on the public, the Protestants cite a case prosecuted by the Tarrant County District Attorney's Office, *State of Texas v. Damien Darrell Brock*. A review of the records from the District Attorney's Office reveals that Mr. Brock and friends had been drinking over the evening from September 13 until the early morning hours of September 14, 2002. One location where Mr. Brock and his friends were observed was at the Hooters' restaurant on I-20 in Arlington, Texas. At approximately midnight, Kimberly B. Conlon, a friend and co-worker, met Mr. Brock and Tim Berg, at Hooters and saw a pitcher of beer on their table. According to Ms. Conlon's statement in the case, Mr. Brock and Mr. Berg drank about half of the pitcher before the waitress cleared their table. Ms. Conlon left the I-20 Hooters following Mr. Brock and Mr. Berg in her vehicle to Mr. Brock's apartment. Mr. Brock drove his vehicle to his apartment. While at Mr. Brock's apartment, the three of them visited and drank more alcoholic beverages until approximately 4:00 a.m. on September 14, 2002, when Ms. Conlon left to go home. She was unsure how to get back to her route home, so she again followed Mr. Brock and Mr. Berg, with Mr. Brock driving his vehicle, to an area where she knew her way home. They parted company with Ms. Conlon going home and Mr. Brock and Mr. Berg going on their way. On both occasions while following Mr. Brock, Ms. Conlon said that she did not observe Mr. Brock drive unsafely or commit any traffic violations. However after parting company with Ms. Conlon, Mr. Brock continued driving his car and was involved in a motor vehicle crash. Mr. Berg sustained fatal injuries in the crash. An analysis of Mr. Brock's blood alcohol level showed he was over legal limits at that time.

3. Applicant's evidence.

Witnesses testifying on behalf of Applicant included, John Crowder, Jr., Cindy Skufca, Joe Morris, Richard Malec, and Mike Coker. Several exhibits were admitted into evidence, including Hooters' dress code, several photographs, City of Arlington web site pages with related Dallas Cowboy links, Hooters' charitable activities, expert witness' vitae, polling and survey data, and various maps of the Dallas-Fort Worth area, including Arlington, where Hooters restaurants are located.

a. Hooters' general background.

I. John Crowder, Jr.

Mr. Crowder, a Twenty Wings' shareholder and owner of the property where the I-20 Hooters restaurant is located, testified that there are 41 Hooters-franchised restaurants in Texas, all of which hold Commission-issued licenses or permits⁵ to sell alcoholic beverages, except for this location. Each location operates in the same or similar manner, selling merchandise including food and drinks and featuring a server staff in standardized attire (often referred to as "Hooters Girls"). Mr. Crowder said the Hooters' concept is well-known and emulated by a few other restaurants. According to Mr. Crowder, the Texas Hooters franchises have sold over a billion dollars in food and drink. The I-20 Hooters restaurant has been in operation for approximately five years and serves over 400,000 customers annually.

Mr. Crowder said that Hooters' goal is to establish locations within five miles of its customers. The criteria for any Hooters restaurant location is that it is zoned properly, near other restaurants in a "wet" area for alcoholic beverage sales, alongside an Interstate highway, and in a city with population of at least 100,000. Hooters' staff works with various cities' staff to find appropriate

⁵ Applicant holds 46 Commission-issued permits for its other Texas locations.

locations which are commonly referred to as “restaurant rows.” According to Mr. Crowder, the I-20 Hooters location met all these criteria.

When asked about the change from serving only beer to the current application, Mr. Crowder said that Hooters’ customer base is shifting from mostly younger males to include more females. According to Mr. Crowder, female customers want more drink options, including margaritas, and competitors make these options available. Mr. Crowder stated that all Texas Hooters would be making mixed beverage permit applications when existing beer licenses expire, but he said there are no plans to establish separate bar areas in any of these restaurants. He added that the focus at Hooters will remain on serving food to its clientele.

Mr. Crowder acknowledged that this location had been denied a Commission-issued on-premises beer license in the past; in order to comply with that decision and still honor its franchise agreement with Hooters America that requires beer to be offered as a beverage choice in any Hooters restaurant, the I-20 Hooters location has been giving beer away to its customers. The cost of beer provided to its customers totaled approximately \$150,000 annually. Mr. Crowder said that all Hooters’ wait staff are seller/server trained through Commission-approved courses and systems are in place that will not allow a server to place an alcoholic beverage drink order without having logged in with a verified current server training card on file.

ii. Cindy Skufca.

Ms. Skufca, Applicant’s regional marketing director, testified that she started working with Applicant as a Hooters Girl. She had worked her way up through the business organization, having been the I-20 Hooters’ manager when it was initially opened. In her current position, she is provided with customers’ comments, both positive and negative, and participates in staff training.

Ms. Skufca said that the attire of Hooters’ wait staff is governed by Applicant’s franchise agreement with Hooters America. Inside the restaurants, the wait staff wear white Hooters tank tops

and orange shorts, which are provided to each server by Applicant, with white slouch socks, and white tennis shoes. For promotional appearances away from the restaurant, khaki shorts and tee shirts or an orange jogging set are worn. Personal grooming is emphasized; and if appearance standards are not met by a server, the server is not allowed to work. She added that Hooters Girls' conduct and attire are closely monitored. Servers are not allowed to sit at tables with customers or encouraged to touch customers in any way. However, on occasion wait staff will pose for pictures with customers; and in such instances, an side hug or arm around a shoulder or waist is permitted. Ms. Skufca agreed that the sex appeal of Hooters Girls is an aspect of the franchise's marketing, not unlike many other successful businesses, but in her opinion, good food is the cornerstone of Hooters' operations.

The image sought to be portrayed by Hooters Girls is that of the all-American girl next door, not unlike the Dallas Cowboys Cheerleaders. In fact, Ms. Skufca testified that Applicant is linked to Cowboys games, both currently and at the new Arlington stadium under construction, because it provides food and drinks in an area adjacent to the stadium facility called "The Corral."

According to Ms. Skufca, Applicant's I-20 location is active in the community, and provides both monetary and food contributions to many organizations, including nearby schools. During the five years this restaurant has been open, Ms. Skufca said there had been no complaints concerning the restaurant's operations. She testified that she is not aware of any criminal conduct that had taken place inside the restaurant; however, there have been a few incidents in the parking lot that is shared by Applicant and other Commission-licensed or -permitted businesses. Ms. Skufca acknowledged that there have been a few instances where a customer may have been verbally out-of-line (or harassing) toward an employee; however, those situations were effectively handled by Applicant's management. When asked if Ms. Skufca felt that these instances were attributable to the Hooters Girls' attire, she said that she did not believe that was the case, noting that some people are jerks and will behave badly irrespective of where they are, be it in a restaurant, such as Hooters, or a gas station, convenience store, or gym.

b. Expert Testimony Concerning Applicant's Place and Manner of Operation.**I. Joe Morris.**

Mr. Morris, a crime analysis specialist,⁶ testified that he made an open records request to the Arlington Police Department for crime reports near the I-20 Hooters' location for the period from August 15, 2004, through August 31, 2006. After his review of the information provided to him, Mr. Morris concluded that incidents of criminal conduct were low in the area.⁷ According to Mr. Morris, the only particular standout in the data was a number of automobile burglaries in a multiple-tenant parking lot. There were no instances suggesting sexual-predator activity or public lewdness offenses in the information.

Mr. Morris opined that the I-20 Hooters restaurant had no impact on criminal activity as a result of its operations. Other Commission-licensed premises in Arlington, such as Escapade 2000, Cowboys, Sherlocks, and The Ballpark, were cited by Mr. Morris as examples of operations with a high incident for police service calls. When asked about the entries in his report for Hooters' requests for police assistance in issuance of criminal trespass warnings, Mr. Morris said those type of situations varied, but were most frequently associated with a difficult customer.

Mr. Morris said that he had personally visited the I-20 Hooters location to observe its surroundings and was also inside the business. He saw that there were no churches or schools visible in the area. Mr. Morris stated that he saw nothing objectionable ongoing while he was inside Applicant's restaurant.

⁶ Mr. Morris holds a Master of Arts degree in Urban Affairs from the University of Texas at Arlington and an advanced certification issued by the Texas Commission of Law Enforcement Officers Standards and Education. His employment history includes serving as a research analyst and police officer for the Dallas Police Department and as an instructor of criminal justice courses at area colleges. He currently operates a polygraph business and a hiring and loss prevention consulting business. (See Applicant's Exhibit #7).

⁷ All findings from Mr. Morris' analysis of data from the Arlington Police Department are contained in Applicant's Exhibit 8.

Mr. Morris also went to other Commission-licensed premises in the area.⁸ He stated that he observed objectionable materials in several of these businesses. The Minyard's grocery store displayed magazines with scantily-clad females on the covers. The Quick Mart convenience store also displayed similar magazines. The Texaco gas station, which is within 800 feet of Trinity Elementary School, displayed male enhancement products near the cash register.

Mr. Morris was asked if he was aware of the Damon Brock intoxication manslaughter case, in which Mr. Brock was said to have been drinking at the I-20 Hooters prior to becoming involved in a traffic accident that resulted in a fatality. Mr. Morris acknowledged that he was aware of Mr. Brock's case; but from his review of the situation, he found that Hooters was not linked to the accident's cause.

ii. Richard Malac.

Mr. Malac⁹ is the project director for Jus'Cause, a trust funded by donations and created to conduct polls and surveys of public opinion on subjects of public interest. He testified that Applicant employed him to coordinate designing a survey, which would poll residents near the Hooters' I-20 restaurant on their opinions concerning Applicant's current request for a Commission-issued permit to sell alcoholic beverages. The survey was conducted by Public Opinion Strategies (POS) on May 15 and May 16, 2007. Mr. Malac said that the ultimate finding from the survey's results was that over 50% of the persons questioned supported granting the requested application, between 20% and 25% of those polled opposed the application, while the balance of people questioned had no opinion one way or the other. He conceded that in designing the survey he had not sought input from the Protestants. However, Mr. Malac said he studied materials from the previous beer license

⁸ Other Commission-licensed premises selling alcoholic beverages near Applicant's restaurant include Colter's Bar-B-Q, Movie Tavern, Minyards', Steak & Ale, Quick Mart, and a Texaco gas station.

⁹ In addition to Mr. Malac's professional career, he has been involved in several other public service endeavors, including the following: Arlington City Councilman for three two-year terms; Tarrant County grand jury foreman for two terms; and guest lecturer for the University of Texas at Arlington, North Texas Council of Governments, and various other civic agencies and service clubs. (See Applicant's Exhibit #16).

application protest to gain an understanding of Protestants' concerns and used that information as a model for polling on those same concerns in this situation. He opined that the results from his poll were representative of the current opinions held by the persons living in the area of the I-20 Hooters.

Mr. Malac said that he had moved to Arlington in 1959 and lived approximately three miles from the Hooters' I-20 location, which is in a smaller shopping center. Consequently, he is familiar with the location. According to Mr. Malac, Martin High School and Tate Springs Baptist Church are 1.9 miles from the Hooters' restaurant. Mr. Malac was also aware of the recent bond election in Arlington that made it possible to relocate the Dallas Cowboys to Arlington due to the construction of a new stadium. He testified that it is well-known that the Cowboys organization utilizes the sex appeal of the Cowboys' Cheerleaders to market itself, and the majority of the community is not opposed to that approach, as demonstrated by the voters' approval of funding for the stadium project in that election.

iii. Mike Coker.

Mr. Coker's¹⁰ background is in planning and development; he has worked both with municipal staffs and business developers. Applicant asked him to perform a location comparison study for the I-20 Hooters in Arlington, the N. Collins Street Hooters in Arlington, and the nearby Hooters in Fort Worth. From this study, Mr. Coker determined there were virtually no differences between the business locations. All are in areas zoned for commercial activities, which includes restaurants with alcoholic beverage sales permitted by local residents' vote (i.e., "wet" areas), and along Interstate highways in regional activity centers, which drew customers from a five- to ten-mile surrounding radius.

¹⁰ Mr. Coker holds a Bachelor of Science degree in Law Enforcement and Criminology from Metropolitan State College and a Master of Public Administration degree from the University of Northern Colorado. He was formerly the Director of Planning and Development for the City of Dallas, and has a diverse knowledge of zoning, planning, and development ordinances and regulations. He further holds certifications from the following institutes: the American Institute of Certified Planners, National Academy of Code Administration; Council of American Building Officials, and International Conference of Building Officials. (See Applicant's Exhibit #19).

As to the I-20 Hooters location, Mr. Coker said that the Texas Department of Transportation had determined there had been a ten percent increase in traffic flow since 1999. This increase is further correlated with the North Texas Council of Governments' finding that documented a population increase within the five-mile radius of the location. Mr. Coker testified that he researched the number of other Commission-licensed or -permitted premises in the area and found there were 26 other licensed premises within 1,000 to 3,000 feet of Applicant's I-20 business location.

Mr. Coker opined that granting Applicant's requested permit would have no impact on schools, churches, or residents in the area. Further, he anticipated no negative impact on property values or to the community as a whole. In short, Mr. Coker said that he could not find any reason why Applicant should not be granted its requested permit; however, he did concede that he had not done any resident interviews or factored the attire of the Hooters Girls into his opinion.

III. ANALYSIS

In order to deny an alcoholic beverage permit to a fully qualified applicant who proposes to operate a lawful business in a wet area and in compliance with the zoning ordinances of the city, some unusual condition or situation must be shown to justify a finding that the place or manner in which Applicant may conduct its business warrants a refusal of a permit. The fact that a large number of the residents of an area protest the issuance of a permit is not, of itself, sufficient reason to deny the application. Voters in the area have already determined that sales and purchases of alcohol are permissible.¹¹

In this instance, Applicant is fully qualified.¹² The location where Applicant seeks a

¹¹ *TABC v. Jack E. Mikulenska d/b/a Frigate Club*, 510 S.W2d 6216.

¹² Commission Staff announced at the hearing that it took no position on the protest to this application. It found that Applicant met all criteria (distance requirements from churches, schools, etc.; business operated under an appropriate ownership structure; Applicant's principals passed criminal and general background checks; no fees, taxes, etc. were owed; Applicant posted a required surety bond; a premises suitable for conducting business as a licensed location is available; and Applicant has no history for engaging in violations of the Code) for securing a Commission-issued permit. See TEX. ALCO. BEV. CODE ANN. §§ 11.11, 11.46, and 11.49.

Commission-issued permit for the sale of alcoholic beverage has been designated as “wet” through an Arlington resident voter election. The Arlington City Council has zoned this location as an area for commercial activity, such as a restaurant in which alcoholic beverages may be sold and served; and Arlington’s City Secretary has certified this application as being for a permissible area within the City of Arlington. Since Applicant has met these general criteria for securing a Commission-issued permit for alcoholic beverage sales at this location, the ALJ next examines the evidence in this case to determine if there are unusual conditions or a situation established so as to justify a finding that the place or manner in which the applicant may conduct its business warrants a refusal of a permit.

Protestants bear the burden of proof in establishing that Applicant’s business operations create an unusual condition or situation that is contrary to the general welfare, peace, morals, and safety of the people and on the public sense of decency. The essence of Protestants’ objections to Applicant’s business is that Applicant markets its product, primarily food, via practices that Protestants characterize as exploitive of women and feminine sex appeal. Several of Protestants’ witnesses testified that they were not really concerned with whether Applicant sold or served alcoholic beverages, but they thought that Applicant’s business is generally unwanted in the area. Ancillary to this primary objection, Protestants alleged that Applicant’s operations are unwholesome for young people to be exposed to, could lure potential sexual predators to the area, and will add to the dangers associated with persons driving while intoxicated.

A. Sex Appeal Marketing Strategies.

Applicant’s wait staff (Hooters Girls) is a component of its marketing. Hooters Girls are attired in tank tops, shorts, and tennis shoes while serving food and beverages inside Applicant’s restaurant. Protestants find this business practice objectionable due to the outfits’ suggestiveness. However, this attire is standardized in every Hooters restaurant pursuant to franchising agreements, and there are 41 Hooters restaurants operating in Texas alone. Consequently, in the ALJ’s assessment, Applicant’s choice of attire for wait staff is not an unusual practice; nor are the outfits

worn by Hooters Girls any more sexually suggestive than the attire many young women might regularly wear on a variety of occasions, such as to the mall or gym, or that girls might wear if involved in activities associated with cheerleading squads or dance teams.

During the hearing, comparisons were drawn between the attire of Hooters Girls and the Dallas Cowboys Cheerleaders.¹³ Protestants sought to draw a distinction between the two marketing strategies utilizing sex appeal, favoring the Cowboys Cheerleaders' attire over Hooters Girls' clothing. However, the ALJ finds that position disingenuous. The Cowboys Cheerleader's outfit is far more revealing of the female anatomy with lower cut tops exposing more breast area and bare midriffs; it is worn by the Cheerleaders on public occasions apart from their employers workplace, which is not the practice of Applicant's wait staff; and it is far more sexually suggestive as the Cheerleaders perform dance routines, as opposed to simply taking and delivering food orders to customers. As a result, the ALJ does not find the evidence supports denial of Applicant's requested permits.

B. Unwholesome Atmosphere for Children.

Protestants opined that Applicant's business is harmful for children and younger adults to be exposed to. However, the ALJ finds the evidence was insufficient to support this contention. Applicant's proposed licensed premises is within the Arlington Independent School District, and the school district has not registered any opposition to granting this application. No evidence was produced to show that the school district has experienced any disruption to scheduled classes or extra-curricular activities due to Applicant's activities at this location over the past five years that Applicant's restaurant has been operating. To the contrary, the evidence shows that Applicant has frequently donated food in aid and support of various school and other charitable activities in the

¹³ As demonstrated in the City of Arlington's web site (Applicant's Exhibit #3), in November 2004, more than 62,000 residents of Arlington voted "yes" to authorizing the City of Arlington to provide the planning, acquisition, construction and financing for the Dallas Cowboy's complex development project. The Dallas Cowboys' Cheerleaders will also be featured entertainment at that complex. The Cheerleaders made appearances in Arlington prior to the election in support of securing the "yes" vote.

community. Accordingly, the ALJ believes that is not a viable basis for denying Applicant's requested permits.

C. Attraction to Criminal Conduct and Increase Incidence of Intoxicated Drivers.

Protestant's evidence was insufficient to establish that Applicant's operations are linked to any overall increase in criminal activity. Protestant's evidence concerning the rise of registered sex offenders living in the area showed no correlation to Applicant's activities.

With respect to Protestant's evidence of the *Damian Brock* case, the ALJ finds it lacks any causal relationship between Applicant and this tragic incident. While Mr. Brock likely consumed some alcoholic beverage at Applicant's business, he continued to consume alcoholic beverage for several hours after leaving Applicant's restaurant while at his home with friends. The evidence also showed that one of his friends, Ms. Conlon, followed Mr. Brock in her vehicle as Mr. Brock drove to his home from Applicant's business in his automobile. She reported to law enforcement authorities that she saw nothing unusual or unsafe in Mr. Brock's operation of his vehicle at that time.

Mr. Morris testified that he surveyed offense reports from the Arlington Police Department obtained through an open records request spanning a period of time from August 15, 2004, through August 31, 2006. After analyzing the calls for police service, Mr. Morris concluded that Applicant's business had virtually no impact on criminal conduct in the area surrounding it. Further, no representative of the Arlington Police Department or Tarrant County Sheriff's Office has entered into this proceeding to protest Applicant's request for a Commission-issued permit, which is specifically provided for pursuant to the Code¹⁴ when an official deems issuance of an alcoholic beverage permit to any applicant is contrary to the public's interests. Consequently, the ALJ believes that Applicant's request for Commission-issued permits should not be denied upon this basis.

¹⁴ TEX. ALCO. BEV. CODE ANN. § 11.41.

D. Applicant's Business Practices and Location.

Applicant operates 41 restaurants in Texas and hold 47 Commission-issued permits. All locations are operated in virtually the same manner pursuant to a franchise agreement with Hooters America. There was no evidence presented that Applicant has a history of operating this, or any of its restaurants, in violation of the Code.

This restaurant, as with Applicant's other restaurants, is located in a regional retail shopping center. There are several other Commission-authorized licensed premises nearby to the proposed premises. Applicant has met all zoning and building requirements imposed by the Arlington City Council. The area is designated "wet" for alcoholic beverage sales, pursuant to a vote of Arlington residents. The shopping center is along Interstate 20, with no residences, churches, or schools within the restricted area around this restaurant.

Applicant has operated this restaurant for approximately five years at this location, using the same methods of operation. During that time, Applicant has sold beer pursuant to a Commission-authorized license and given limited quantities of beer away without creating any negative impact. The restaurant has served over 400,000 patrons annually, which indicates to the ALJ that the restaurant has the support of many residents in the surrounding community.

Protestants' concerns, although understandable, do not rise to the level of an unusual condition or situation that justifies a finding that the place or manner in which the Applicant conducts business warrants a refusal of the permits and certificate sought based on the general welfare, health, peace morals, safety, and sense of decency of the people. Accordingly, based on the evidence in the record, the Protestants have failed to show, by a preponderance of the evidence, that Applicant's application should be denied.

IV. RECOMMENDATION

The ALJ recommends that Applicant be granted the permits and certificate sought in this application.

V. FINDINGS OF FACT

1. Twenty Wings, LTD., d/b/a Hooters (Applicant) has filed an application with the Texas Alcoholic Beverage Commission (*Commission*) for a mixed beverage permit, a mixed beverage late hours permit, a beverage cartage permit, a caterer's permit, and a food and beverage certificate for a premises located at 5821 West Interstate 20, Arlington, Tarrant County, Texas.
 2. Protests to the application were filed by concerned citizens and public officials based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency.
 3. A Notice of Hearing dated July 7, 2004, was issued by Commission Staff 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. On June, 1, 2007, a public hearing was held before Administrative Law Judge Tanya Cooper in Fort Worth, Texas. Commission Staff appeared at the hearing through its Staff Attorney Danielle Boazeman-Schick, and took no position on the application. Applicant appeared and was represented by Steven H. Swander and Wade Bingaman, attorneys at law. Protestants appeared and were represented by Daniel G. Altman, attorney at law. The record closed on July 20, 2007, after the parties filed written argument in this case.
 5. Applicant has met all Commission requirements for holding the permits and certificate requested for the premises at this location as demonstrated by the following:
 - Applicant's restaurant is located in a regional retail shopping center;
 - There are several other Commission-authorized licensed premises nearby to the proposed premises;
 - Applicant has met all zoning and building requirements imposed by the Arlington City Council;
 - The area is designated "wet" for alcoholic beverage sales, pursuant to a vote of
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Arlington residents;

- There are no residences, churches, or schools within the restricted area around the proposed licensed premises;
- Applicant's business is operated under an appropriate ownership structure;
- Applicant's principals have passed criminal and general background checks;
- Applicant owes no fees, taxes, or other monies to the State;
- Applicant has posted a required surety bond; and
- Applicant has no history for engaging in violations of the Texas Alcoholic Beverage Code.

6. No unusual conditions or situations exist that would warrant refusal of the permits as demonstrated by the following:
 - Insufficient evidence was presented to establish that Applicant's business practices, including the attire of its food servers, were any more exploitative of female sex appeal than other business organizations, such as the Dallas Cowboys;
 - Insufficient evidence was presented to show children or others have been negatively affected by the presence of Applicant's business or its serving beer over the past five years; and
 - Insufficient evidence was presented to show Applicant's business created any increase in criminal activity, including sex-related crimes, public lewdness, or alcohol-related crimes, such as driving while intoxicated.

VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (Commission) has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5, 11, 28, 29, 31, and 44, and §§ 6.01 and 11.46(a)(8). TEX. ALCO. BEV. CODE ANN. § 1.01 *et seq.*
 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. ch. 2003.
 3. Proper and timely notice of the hearing was provided to all parties pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE § 155.55.
 4. Issuance of the requested permits and certificate will not adversely affect the safety of the public, nor will it adversely affect the general welfare, peace, or morals of the people or violate the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).
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5. Applicant's application for a mixed beverage permit, a mixed beverage late hours permit, a beverage cartage permit, a caterer's permit, and a food and beverage certificate for the premises located at 5821 West Interstate 20, Arlington, Tarrant County, Texas, should be granted.

SIGNED August 10, 2007.

**TANYA COOPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**