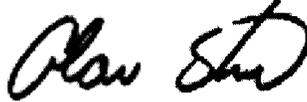


By copy of this Order, service shall be made upon all parties in the manner indicated below.

SIGNED this the 8th day of June, 2009,
at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

Hon. Jerry Van Hamme
Administrative Law Judge
State Office of Administrative Hearings
6333 Forest Park Road, Suite 150-A
Dallas, Texas 75235
VIA FACSIMILE (214) 956-8611

Dale Long
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P.O. Box 401
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The Pirates Club
d/b/a The Pirates Club
RESPONDENT
P.O. Box 795
Hawkins, TX 75765
VIA REGULAR MAIL

Bill Wansley
Wood County Sheriff
PROTESTANT
C/O Jim Wheeler
Criminal District Attorney
P.O. Box 689
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DATE: 05/13/2009
NUMBER OF PAGES INCLUDING THIS COVER SHEET: 13
REGARDING: PROPOSAL FOR DECISION
DOCKET NUMBER: 458-09-2530
JUDGE JERRY VAN HAMME

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State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

May 13, 2009

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA FACSIMILE 512/206-3203

**RE: TEXAS ALCOHOLIC BEVERAGE COMMISSION VS.
ORIGINAL APPLICATION OF THE PIRATES CLUB
SOAH DOCKET NO. 458-09-2530**

Dear Mr. Steen

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,


Jerry Van Hamme
Administrative Law Judge

JVH/ln
Enclosure

Xc: Sandra Patton, Staff Attorney, Texas Alcoholic Beverage Commission, **VIA FACSIMILE 713/426/7965**
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, **VIA FACSIMILE 512/206-3498**
Jim Wheeler, Wood County District Attorney, **VIA FACSIMILE 903/763-5105**
Dale Long, Attorney for Respondent, **VIA FACSIMILE 903/592-8043**

Therefore these matters set the finding of fact and conclusion of law without further discussion here.

On March 11, 2009, a public hearing was held before Jerry V. Ham, ALJ at the State Office Administrative Hearings, Smith County Courthouse Annex Building, 600 East Ferguson, First Floor, Dallas, Texas. Staff was represented by Sandra Patton, attorney. Protestants were represented by Jim Wheeler, Criminal District Attorney, Wood County, Texas. Respondent was represented by Dal Long, attorney. The record was closed on that date.

II. LEGAL STANDARDS AND APPLICABLE LAW

The Commission may refuse to issue a license if it has reasonable grounds to believe that the place or manner in which Respondent may conduct its business warrants the refusal based on the general welfare, health, peace, morals, and safety of the people and the public sense of decency. ALCOA ANN. § 6(a)(3).

III. EVIDENCE

A. Public Comments

Public comment supporting Respondent's application characterized Respondent's business as a congenial, social, and pleasant place where patrons hear good music, meet friends, and have a good time.

Public comment opposing the application characterized Respondent's premises as a noisy and unsafe place. Granting Respondent's application, these speakers' opinion would multiply the number of intoxicated drivers on the local roads, the noise, the traffic, and the number of people who would be in the area, and elevate the danger for

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children playing in the Lake Hawkins RV Park, located across the street from Respondent's location.

B. Staff's Evidence and Contentions

Staff offered Respondent's Private Club Registration and Beverage Cartage permit application into evidence, along with documents received from the public. Documents in support of the application entailed 68 letters filed by individuals requesting that the application be granted. Documents in opposition included one letter of protest and a one-page petition signed by 12 people opposed to the application. Staff took the position that Respondent had met all Commission requirements for the permit.

C. Protestant's Evidence and Contentions

1 Photographs

Protestants offered into evidence 67 photographs of Respondent's premises and the surrounding area, including photos of the nearby Lake Hawkins RV Park.

2. Wood County Commissioner Roger Pace

Wood County Commissioner Roger Pace testified that Wood County owns Lake Hawkins and the Lake Hawkins RV Park. The Lake Hawkins RV Park is located approximately 60 feet from Respondent's property line. Private home sites are located within approximately 600-700 feet of Respondent's location.

He testified Wood County is a "dry" county and that no alcoholic beverages are sold on the lake or on any County-owned property near the lake. He opined that the prevailing public sentiment in the area is opposed to the sale of alcoholic beverages in the county, as evidenced by the fact that

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the citizens of Wood County have never voted to become a "wet" county, despite the ability to hold such an election at any time.

He further testified he has been told that Respondent's loud music has caused campers at the nearby Lake Hawkins RV Park to leave the park, and that he has personally received complaints from three or four residents over the course of approximately one or two years concerning the noise from Respondent's premises.

In addition, he testified that Respondent's establishment is located approximately four miles from Hawkins Hospital and 18 miles from the Wood County Sheriff's office, which has primary obligation for policing the area. In his opinion, Respondent's establishment is easily accessible to EMT providers.

3. Sheriff Bill Wansley

Bill Wansley, Wood County Sheriff, testified that no one has ever attempted to sell alcoholic beverages in this area the way Respondent is now proposing. Granting this permit, in his opinion, would change the nature of the lake. It would increase the number of intoxicated drivers on the roads, increase the number of intoxicated boaters on the lake, and generally make the area more dangerous for residents. He testified his agency is responsible for protecting the 45,000 residents of Wood County and is already stretched thinly over the more than 700-square-miles of this county. An increase in alcohol sales, with its anticipated rise in alcohol-fueled problems, would, in his opinion, multiply the demand for law enforcement activity in the area. Given the proximity of Respondent's premises to existing home sites and to the Lake Hawkins RV Park, granting this permit, he believes, would not be in the best interests of the county.

He did, however, testify that Respondent has been operating the premises as a "BYOB" establishment for approximately one year and that, so far as he knows, no disturbance has occurred at

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the location and no 911 calls have been received. He also testified that 17 private clubs already exist in Wood County, although these came into existence prior to his becoming Sheriff.

D. Respondent's Evidence and Contentions

1. Photographs

Respondent offered into evidence 35 photographs showing the area around Respondent's location and the construction and interior of Respondent's establishment. Photos were also presented of a charity event hosted by Respondent at Respondent's premises.

2. Mike Thomas

Mike Thomas is the owner and operator of The Pirates Club. He testified that The Pirates Club has been a "BYOB" private club for approximately 16 – 17 months and is intended as a music club for showcasing bands. He testified that the front door of his establishment is approximately 2,449 feet from the beach at the Lake Hawkins RV Park, and 1,883 feet from the Lake Hawkins RV Park playground. The exterior of the building is intended to look like a hundred-year-old barn and is not actually dilapidated. He further testified his establishment does not cater to undesirable groups such as biker gangs, and that he is active in the community and conducts fundraising events for local charities.

3. Lydia Quintenella

Lydia Quintenella testified she is a member of the Tyler and Longview Boards of Realtors, lives approximately 7/10ths of a mile from Respondent's location, and supports Respondent's application. She has never experienced a problem associated with loud music coming from Respondent's premises, believes Respondent's establishment meets a need in the community, and

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knows of no reason why the permits should not be granted.

4. Sherry Campbell

Sherry Campbell testified she lives approximately 7/10ths of a mile from Respondent's location. She likewise believes Respondent's establishment serves as a social club for the local area and knows of no reason why the permits should not be granted.

5. Judi Wright

Judi Wright testified she provides transportation services for Medicaid patients in Tyler, Texas, has known Mr. Thomas for many years and is aware of his fund raising activities and events, including one at which her 13-year-old granddaughter sang, and knows of no reason why the permits should not be granted.

IV. ANALYSIS

Protestants challenged Respondent's application arguing that it should be denied on the basis of the general welfare, health, peace, morals, safety of the people, and the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(6). To deny a permit on such basis "some unusual conditions or situations must be shown so as to justify a finding that the place or manner in which the applicant may conduct his business warrants a refusal of a permit." Dienst v. Texas Alcoholic Beverage Commission, 536 S.W.2d 667, 669 (Tex.Civ.App. — Corpus Christi 1976, no writ). See also: Texas Alcoholic Beverage Commission v. Jack E. Mikulenska d/b/a Frigate Club, 510 S.W.2d 616, 619 (Tex.App. — San Antonio 1974, no writ); 650 S.W.2d 208; Kermit Concerned Citizens Committee v. Colonial Food Stores, Inc., 650 S.W.2d 208, 210 (Tex. App.—El Paso 1983, no writ).

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Such unusual conditions include, for example, where the mayor, chief of police, sheriff, and property owners from three subdivisions opposed the permits on the grounds that granting the permits would create a probable traffic hazard, Dienst v. Texas Alcoholic Beverage Commission, 536 S.W.2d 667 (Tex.Civ.App. — Corpus Christi 1976, no writ); where the mayor, chief of police, sheriff, members of the board of a nearby public school, and nearby property owners and church members opposed the permits on the grounds that granting the permits would increase traffic congestion and negatively change the nature of the neighborhood, Helms d/b/a The Thirsty Turtle v. Texas Alcoholic Beverage Commission, 700 S.W.2d 607 (Tex. App. — Corpus Christi 1985, no writ); and where a potential traffic hazard existed because the establishment's premises exited onto a frontage road at the roadway's "gore area," Bavarian Properties, Inc. v. Texas Alcoholic Beverage Commission, 870 S.W.2d 686 (Tex.App. — Fort Worth 1994, writ denied).

The evidence in the instant case fails to show that granting Respondent's permit will create a traffic hazard or increase congestion on the roadways to an extent warranting denial of the application. No evidence was presented showing current traffic usage on the roadways near Respondent's location, maximum traffic capacity on these roadways, projected traffic increases reasonably attributable to granting Respondent's application, or that such projected traffic increases would overburden the existing roadways. Merely anticipating a traffic increase, absent a showing that such increase would result in either hazardous conditions or significant congestion, is not, alone, sufficient to deny a permit application.

The evidence further fails to show that granting this permit will negatively affect the existing nature of the neighborhood. Respondent has operated the premises as a "BYOB" establishment for approximately 16 months without incident, and does not, so far as the evidence shows, cater to either disreputable clientele or to criminally-oriented customers. (Respondent's Ex. No 7). The sixty-eight letters filed with the Commission supporting Respondent's permit application, along with the public comments and testimony of witnesses, show there is significant local support for Respondent's application. Based on the evidence in the record, Respondent's premises appear to be more a result

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of the neighborhood itself changing, than as a source of change in the neighborhood.

The evidence further fails to show that Respondent's premises will generate an unacceptable amount of noise. The public comments and testimony were mixed on this point, with residents on both sides of this issue. However, no evidence was presented showing what noise measurements, if any, were ever made; whether noise generated by Respondent's premises has in the past been, or may reasonably in the future be expected to be, excessive or inappropriate as determined by an objective measurable standard; whether Respondent has ever received or been informed of any noise-related complaints; or if the concern about the level of noise originating from Respondent's location is widespread among local residents. According to Commissioner Pace, only three or four noise-related complaints have been made to him by residents over the course of approximately one to two years.

Sheriff Wansley's concern that the introduction of a private club into Wood County will increase local alcohol consumption, and may thereby increase alcohol-related law enforcement contacts, is understandable. However, absent a showing that Respondent has conducted, or may reasonably be expected to conduct, its premises in a manner that is unhealthy, immoral, unsafe, indecent, or inimical to the general welfare of the population, the evidence fails to show that Respondent's permits in the instant case should be denied. A general misgiving regarding the desirability of alcohol consumption in a neighborhood, while certainly important, does not constitute an "unusual condition or situation" that justifies a finding that the place or manner in which the applicant may conduct his business warrants a refusal of a permit. *See Dienst v. Texas Alcoholic Beverage Commission*, at 669.

V. RECOMMENDATION

The ALJ recommends that Respondent's application for a Private Club Registration and Beverage Cartage Permit for The Pirates Club, 855 CR 3440, Hawkins, Wood County, Texas, be

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granted.

VI. FINDINGS OF FACT

1. The Pirates Club, 855 CR 3440, Hawkins, Wood County, Texas, filed an original application for a Private Club Registration Permit and Beverage Cartage Permit with the Texas Alcoholic Beverage Commission (Commission). The mailing address for Respondent is P.O. Box 795, Hawkins, Texas.
2. Respondent has met all Commission requirements to hold the permits at the premise location and has complied with all Commission requirements.
3. A protest to Respondent's application was filed by the Sheriff of Wood County and individual residents of the neighborhood of Respondent's premises. The protest was based on the general welfare, health, peace, morals, and safety of the people, and on the public sense of decency.
4. The Commission received 68 letters filed by individuals in support of Respondent's application being granted.
5. The Commission received one letter of protest and a one-page petition signed by 12 people opposed to Respondent's application.
6. A Notice of Hearing dated February 12, 2009, was issued by the Commission's Staff notifying Respondent of the protest and informing the parties of the nature of the hearing, the statutes and rules involved, and the legal authorities under which the hearing was to be held.
7. An Order Setting Hearing & Establishing Requirements for Participation was issued by SOAH on February 27, 2009, informing the parties of the time and place of the hearing.
8. By Order dated March 11, 2009, the hearing was continued to March 18, 2009.
9. On March 18, 2009, a public hearing was held before Jerry Van Hamme, ALJ, at the State Office of Administrative Hearings, Smith County Courthouse Annex Building, 200 East Ferguson, First Floor, Tyler, Texas. Staff was represented by Sandra Patton, attorney. Protestants were represented by Jim Wheeler, Criminal District Attorney, Wood County, Texas. Respondent was represented by Dale Long, attorney. The record was closed on that date.
10. Respondent's premises are located approximately 18 miles from the Wood County Sheriff's office and four miles from Hawkins Hospital, Hawkins, Texas. It is easily accessible to EMT

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providers.

- 11 Respondent has been operating the premises as a "BYOB" establishment for approximately 16 months. No disturbances have occurred at the location and no 911 calls have been received by the Wood County Sheriff's office in that time.
12. Only three or four complaints over approximately one or two years concerning noise originating from Respondent's premises have been received by Wood County Commissioner Roger Pace.
13. Respondent does not cater to criminal elements, biker gangs, or other illegal or disreputable organizations.
14. Insufficient evidence was presented to prove that granting Respondent's permits would cause traffic hazards or unreasonable traffic congestion on roadways in the area.
15. Insufficient evidence was presented to prove that granting Respondent's permit would negatively change or affect the existing neighborhood.
16. Insufficient evidence was presented to prove that Respondent's premises will generate an unacceptable amount of noise.
17. No unusual condition or situation exists to warrant refusing Respondent's request for these permits.

VII. CONCLUSIONS OF LAW

- 1 The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, §§ 6.01 and 11.46(a)(8).
2. The State Office of Administrative Hearings 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. Proper and timely notice of the hearing was effected on all parties pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE §155.55.
3. Granting Respondent's request for a Private Club Registration Permit and Beverage Cartage Permit will not adversely affect the general welfare, health, peace, morals, safety of the people, and the public sense of decency. TEX. ALCO. BEV. CODE ANN. §11.46(a)(8).
4. Respondent's application for a Private Club Registration and Beverage Cartage Permit for

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The Pirates Club should be granted.

SIGNED May 12, 2009.



JERRY VAN HAMME
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS