

DOCKET NO. 590407

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
SWAMI SHREEHARI LLC D/B/A JONATHAN'S SHOP & SAVE, Respondent	§	ALCOHOLIC
	§	
PERMIT/LICENSE NOS. Q635938,BF635939	§	
	§	
KAUFMAN COUNTY, TEXAS (SOAH DOCKET NO. 458-10-5657)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 17th day of June, 2011, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Brenda Coleman presiding. The hearing convened on September 8, 2010 and the SOAH record closed that same day. The Administrative Law Judge made and filed a *Proposal for Decision* containing Findings of Fact and Conclusions of Law on October 25, 2010. The Proposal for Decision was properly served on all parties, who were given an opportunity to file exceptions and replies as part of the record herein. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, makes the following corrections to the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision:

Finding of Fact No. 1 should be corrected, and by this Order does read:

On August 9, 2006, the Texas Alcoholic Beverage Commission (Commission) issued Wine Only Package Store Permit, Q635938, and Retail Dealer's Off-Premise License, BF635939, to Swami Shreehari LLC d/b/a Jonathan's Shop & Save (Respondent) for the premises located at 801 S. Washington Street, Kaufman, Kaufman County, Texas.

Conclusion of Law No. 8 should be corrected, and by this Order does read:

Based on the foregoing findings and conclusions, Respondent's renewal application for Wine Only Package Store Permit, Q635938, and Retail Dealer's Off-Premise License, BF635939, should be granted.

With these corrections to Finding of Fact No. 1 and Conclusion of Law No. 8, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

IT IS THEREFORE ORDERED that the application of Swami Shreehari LLC d/b/a Jonathan's Shop & Save for renewal of Wine Only Package Store Permit No. Q635938 and Retail Dealer's Off-Premise License No. BF635939 is **GRANTED**.

This Order will become final and enforceable on the 11th day of July, 2011, unless a Motion for Rehearing is filed before that date.

SIGNED this the 17th day of June, 2011, at Austin, Texas.



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 17th day of June, 2011.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Brenda Coleman
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings

6333 Forest Park Road, Suite 150A
Dallas, TX 75235
VIA FACSIMILE: (214) 956-8611

Steven H. Swander
ATTORNEY FOR RESPONDENT
505 Main Street, Suite 250
Fort Worth, TX 76102
VIA FACSIMILE: (817) 338-0249

Swami Shreehari Llc
d/b/a Jonathan's Shop & Save
RESPONDENT
5708 Sabetha Way
Plano, TX 75094
VIA REGULAR MAIL

Jenny Swanderlin
Kaufman ISD
PROTESTANT
905 S. Madison
Kaufman, TX 75142
VIA REGULAR MAIL

David Dodd
PROTESTANT
City Attorney-City of Kaufman
VIA FACSIMILE: (214) 965-0010

Joann Talbot
PROTESTANT
City of Kaufman
VIA FACSIMILE: (972) 932-0307

Matthew Clark
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission
VIA EMAIL: matthew.clark@tabc.state.tx.us

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I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No contested issues of notice, jurisdiction, or venue were raised in this proceeding. Therefore, these matters are set out only in the findings of fact and conclusions of law.

On September 8, 2010, a hearing convened at the State Office of Administrative Hearings in Dallas, Texas, before ALJ Brenda Coleman. Staff was represented by Matthew Duncan, attorney. Respondent was represented by Steven H. Swander. Protestants, David Dodd, Kaufman City Attorney, and Joann Talbot, Kaufman Assistant City Manager and City Secretary, appeared on behalf of the City of Kaufman.¹ Protestant, Jenny Sunderlin, Principal, Monday Primary School, Kaufman Independent School District, did not appear on behalf of Kaufman Independent School District.² The record closed that same day.

II. LEGAL STANDARDS AND APPLICABLE LAW

The Commission may refuse to issue an original or renewal permit 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 on the public sense of decency. TEX. ALCO. BEV. CODE ANN. (Code) § 11.46(a)(8).

¹ In a letter dated August 12, 2009, and addressed to the Commission, City of Kaufman City Manager, Curtis Snow stated, "[T]he regulation for school is that the place of business cannot be within 300 feet of a school from property line to property line. The City of Kaufman has misunderstood the rule and allowed the business to sell beer and wine by an honest error for years. The school was established before alcoholic sales were permitted. . . . The property located at 801 S. Washington Street, Kaufman, Texas, does not have a current City permit to sell beer and wine."

However, at the hearing, Mr. Dodd and Ms. Talbot withdrew their complaint of protest on behalf of the City of Kaufman. Mr. Dodd stated that the City of Kaufman is neutral regarding Respondent's application. He also presented documentary evidence, including written communications concerning Respondent's premises. See Exhibit City-1.

² In a letter dated July 13, 2009, and addressed to the Kaufman City Council Members, Ms. Sunderlin expressed her desire to file a protest to Respondent's renewal application if it was not in compliance with the City's code because Respondent's premises are "located around the corner from our campus," and "The measurement of property line is approximately 127 feet." The letter also stated, "I am very concerned about the nature of this establishment being close

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In a protest hearing, the burden is on the protestant to show by a preponderance of the evidence that the permits should not be issued.

Code § 109.59(a) and (b) address the application of distance requirements:

(a) If at the time an original alcoholic beverage permit or license is granted for a premises the premises satisfies the requirement regarding distance from schools, churches, and other types of premises established in this code and any other law or ordinance of the state or a political subdivision of the state in effect at that time, the premises shall be deemed to satisfy the distance requirements for all subsequent renewals of the license or permit.

(b) On the sale or transfer of the premises or the business on the premises in which a new original license or permit is required for the premises, the premises shall be deemed to satisfy any distance requirements as if the issuance of the new original permit or license were a renewal of a previously held permit or license.

III. EVIDENCE

A. Background Facts

Wine Only Package Store Permit, Q-635938, and Beer Retailer's Off-Premise License, BF-635939, were issued to Respondent on August 9, 2006, for the premises located at 801 S. Washington Street, Kaufman, Kaufman County, Texas. Respondent is a convenience store with gasoline. It is currently operated by Binakumari Amin, President. Respondent's previous directors, Dilipkumar K. Suhagiya and Rekhabeen Suhagiya, transferred their membership interest in the premises to Mrs. Amin on August 5, 2009. The permit and license were continuously renewed until the 2009 renewal year.

Mrs. Amin filed an application to renew the Commission-issued permits to sell alcoholic beverages at Respondent's location. The protest arises from the fact that a public school in the

to our campus and the pedestrians that walk to and from, passing by our playgrounds." *Id.*

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Kaufman Independent School District, Monday Primary School, is located at 905 S. Madison Street, Kaufman, Texas, in close proximity to Respondent.

The City of Kaufman, Texas, approved the sale of beer and wine on September 13, 1988, and it later passed an ordinance prohibiting the sale of alcoholic beverages within 300 feet of a public school.³ The 1988 ordinance required the distance from a public school and a business selling alcoholic beverages to be measured “along the property line of the street front and from front door of the school to the nearest doorway by which the public may enter the place of business along street lines and in direct line across intersection.”⁴

The City of Kaufman later amended the ordinance to require the distance from a public school and a business selling alcoholic beverages to be measured “in a direct line from the property line of the public school to the property line of the place of business, and in a direct line across intersections.”⁵ Various permittees who operated the convenience store at 801 S. Washington Street, Kaufman, Kaufman County, Texas, between November 1988, and August 2009, were granted Commission-issued permits and licenses to sell beer and wine.⁶

B. Staff's Evidence and Contentions

Staff had no independent evidence to protest the issuance of the permits. Staff's position was that Respondent has met all Commission requirements for issuance of the original permits. Staff presented its notice of the hearing issued to the parties, along with Respondent's permit history.⁷

³ Exhibit R-8, City of Kaufman Ordinance No. 0-10-88, § 3, 9-13-88.

⁴ *Id.*

⁵ Exhibit R-9 and Exhibit City-1, City of Kaufman Ordinance No. 0-31-00, § 10-34. The new ordinance became effective on December 11, 2000.

⁶ Exhibit R-5.

⁷ Exhibits P-1 and P-2.

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According to Commission records, Respondent's only administrative violation was an outdoor advertisement violation on September 15, 2007, for which Respondent received a written warning.

C. Protestant's Evidence and Contents

Protestant Jenny Sunderlin failed to appear for the hearing. Therefore, no evidence was presented on behalf of the Kaufman Independent School District regarding the allegation that Respondent's application should be denied based on Respondent's close proximity to a public school and the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

D. Respondent's Evidence and Contentions

First, Respondent asserted that the Kaufman Independent School District failed to appear for the hearing to formally protest the issuance of Respondent's permit and license. Second, Respondent argued, pursuant to the ordinance enacted by the City of Kaufman in 1988, prior permittees and licensees who operated the premises located at 801 S. Washington Street, Kaufman, Texas, lawfully engaged in the business of selling alcoholic beverages. Furthermore, argued Respondent, the licensed premises were deemed to satisfy the distance requirement for all subsequent renewals of the permits and licenses pursuant to the grandfather clause exception of Code § 109.59. Because the permit and license were in affect when Mr. and Mrs. Amin acquired the premises in August 2009, and they have not been suspended by the Commission, Respondent argued, the renewal application should be granted.

Respondent presented 20 exhibits, including photographs of its premises, the surrounding location and businesses, and the nearby public school. Respondent also presented the testimony of two witnesses.

1. Kaushikkumar Amin, Respondent's Secretary

Mr. Amin testified that he and his wife, Binakumari Amin, have operated the convenience store at 801 S. Washington Street in Kaufman since August 2009, however, it has been at that same location for decades. He said the convenience store is located on a commercial street, and customers include residents from the neighborhoods in the residential area behind Respondent's premises.⁶ Mr. Amin stated that the school is located on a different street in the neighborhood behind the premises, and he has observed buses and parents transporting or walking the children to the school. He added that during the period he and his wife have operated the premises, Respondent has had no complaints regarding the sale of alcoholic beverages to minors or the interaction of patrons with the school children.

Mr. Amin stated that there are three more convenience stores located on the south side of S. Washington Street, and beer and wine sales are very important to Respondent's business. He said he is aware of no reason as to why Respondent's renewal application should be denied.

2. Joanne Talbot, City of Kaufman Assistant City Manager and City Secretary

Ms. Talbot testified that she has worked for the City of Kaufman as the City Secretary since 1989, and she has been the Assistant City Manager since 1998. She said she is familiar with Respondent's business. According to Ms. Talbot, the convenience store located at 801 S. Washington Street, Kaufman, Texas, opened prior to 1988, and it began selling beer and wine after the City of Kaufman adopted an ordinance in 1988 approving the sale of beer and wine. She stated that the City of Kaufman has always had a 300 feet distance restriction between schools and places of business that sell beer and wine, however, in 1988, the method for measuring the distance was from front door to front door. In 1999, she said, the City of Kaufman amended its local ordinance

⁶ Respondent presented no evidence as to the actual distance from the school to Respondent's premises.

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and changed the method for measuring the distance, *i.e.*, from property line to property line.⁹ Ms. Talbot added that the change in ordinance occurred after the permit and license to sell beer and wine had been issued to the premises at 801 S. Washington Street in Kaufman.

IV. ANALYSIS

Respondent has applied for renewal of its Wine Only Package Store Permit and Beer Retailer's Off Premise License for the convenience store located at 801 S. Washington, Kaufman, Kaufman County, Texas. The Commission has determined that Respondent has met all Commission requirements for the issuance of the permits and does not join in the protest.

Protestant, Jenny Sunderlin, filed a protest to Respondent's renewal application, on behalf of the Kaufman Independent School District, alleging that the permit and license should be denied due to Respondent's proximity to a public school and based on the general welfare, health, peace, morals, safety of the people, and the public sense of decency. There was no evidence that Respondent is in violation of any local ordinance, or that it has been harmful to the community in any way. Respondent's permit history and the testimony of Mr. Amin indicate that there has not been any problem related to the sale of alcoholic beverages at Respondent's location. There is no legal basis for denying the permit and license. For this reason, the ALJ recommends that the requested permit and license be issued.

VI. FINDINGS OF FACT

1. On August 9, 2006, the Texas Alcoholic Beverage Commission (Commission) issued Wine Only Package Store Permit, Q-636938, and Beer Retailer's Off-Premises License, BF-635939, to Swami Shreehari LLC d/b/a Jonathan's Shop & Save (Respondent) for the premises located at 801 S. Washington Street, Kaufman, Kaufman County, Texas.
2. Between August 2006 and August 2009, former directors, Dilipkumar and Rekhaben Suhagiya, operated Respondent's premises at 801 S. Washington, Kaufman, Texas. The

⁹ Contrary to Ms. Talbot's testimony, the new ordinance was passed and approved on December 11, 2000, and it became effective on that same day. See Exhibit City-1.

permit and license were continuously renewed.

3. In August 2009, the Suhagiyas transferred their membership interest in the premises to Binakumari Amin, Respondent's president. Respondent's permit and license were still in effect.
4. Respondent filed a renewal application for the permit and license with the Commission.
5. A public school is located in the residential neighborhood behind Respondent's premises.
6. There have been no problems associated with the operation of Respondent's premises.
7. The City of Kaufman adopted an ordinance approving the sale of beer and wine in 1988, and it amended the ordinance in 2000.
8. Beginning in 1988, other permittees and licensees sold beer and wine on the premises located at 801 S. Washington Street, Kaufman, Texas.
9. Commission's staff (Staff) determined that Respondent met all of the technical requirements to obtain the permit and license.
10. The City of Kaufman, Texas, and the Kaufman Independent School District filed a protest to Respondent's renewal application based on general welfare, health, peace, moral, and safety concerns due to an alleged violation of the 300 feet distance restriction from a school.
11. The City of Kaufman withdrew its protest and took a neutral position regarding issuance of Respondent's permit and license.
12. There was no evidence that issuance of the permit and license would be detrimental to the general welfare, health, peace, morals, and safety of the people in the nearby neighborhood.

VII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (Code) 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.
3. The parties received proper and timely notice of the hearing pursuant to the Administrative

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Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

4. The burden of proof is upon the Protestant to show the permit and license should not be issued.
5. Respondent's location has been grandfathered relating to the granting of alcoholic beverage permits and licenses.
6. The sale of wine and beer at Respondent's location does not violate any City of Kaufman ordinance.
7. There was no evidence that the place or manner in which Respondent conducts its business warrants the refusal of the permit and license renewal based on the general welfare, health, peace, morals, safety of the people, and the public sense of decency. Code § 11.46(a)(8).
8. Based on the foregoing findings and conclusions, Respondent's renewal application for Wine Only Package Store Permit, Q-636938, and Beer Retailer's Off-Premises License, BF-635939, should be granted.

SIGNED October 25, 2010.



BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

October 25, 2010

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 SWAMI SHREEHARI LLC
D/B/A JONATHAN'S SHOP & SAVE
SOAH DOCKET NO. 458-10-5657**

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,

A handwritten signature in cursive script that reads "Brenda Coleman".

Brenda Coleman
Administrative Law Judge

BC/sp
Enclosure

Xc: Matthew Clark, Staff Attorney, Texas Alcoholic Beverage Commission, VIA FACSIMILE 512/206-3498
Steven Swander, Attorney for Respondent, VIA FACSIMILE 817/338-0249
Jenny Sunderlin, Protestant, VIA REGULAR MAIL
David Dodd, Attorney, City of Kaufman, VIA FACSIMILE 214/965-0010
Joann Talbot, Assistant Manager/Secretary, City of Kaufman, VIA FACSIMILE 972/932-0307
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, VIA FACSIMILE 512/206-3226