

**DOCKET NO. 595497**

<b>TEXAS ALCOHOLIC BEVERAGE</b>	§	
<b>COMMISSION, Petitioner</b>	§	
	§	
<b>CITY OF HOUSTON, HADI ELHAGE, and</b>	§	
<b>BRIARGROVE PROPERTY OWNERS, INC.,</b>	§	
<b>Protestants</b>	§	<b>BEFORE THE TEXAS</b>
	§	
<b>VS.</b>	§	<b>ALCOHOLIC BEVERAGE</b>
	§	
<b>HOUSTON KP LLC. D/B/A</b>	§	<b>COMMISSION</b>
<b>POLEKATZ HOUSTON, Applicant</b>	§	
	§	
<b>ORIGINAL APPLICATION: MB, LB &amp; PE</b>	§	
<b>HARRIS COUNTY, TEXAS</b>	§	
<b>(SOAH DOCKET NO. 458-10-6020)</b>	§	

**ORDER**

**CAME ON FOR CONSIDERATION** this 24<sup>th</sup> day of May, 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 (ALJ) Lindy Hendricks presiding. The hearing convened on November 5, 2010 and the SOAH record was closed the same day. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on December 16, 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. Exceptions were filed by the City of Houston, and a Reply was filed by the Applicant. The ALJ filed a Response to the Exceptions and Reply, recommending that no changes be made to the Proposal for Decision.

After review and due consideration of the Proposal for Decision, Exceptions and Reply, and the ALJ's Response, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, 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 other motions, requests for entry of Proposed Findings of Fact and Conclusions of Law, and any other requests for general or specific relief submitted by any party that are not specifically adopted herein, are denied.

**IT IS THEREFORE ORDERED** that the Original Application of Houston KP LLC. d/b/a Polekatz Houston for the issuance of a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit be **GRANTED**.

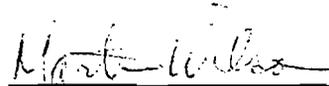
This Order will become final and enforceable on the 17<sup>th</sup> day of JUNE, 2011 unless a Motion for Rehearing is filed **before** that date.

**SIGNED** this the 24<sup>th</sup> day of May, 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 24<sup>th</sup> day of May, 2011.

  
\_\_\_\_\_  
Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Lindy Hendricks  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
2020 North Loop West, Suite 111  
Houston, Texas 77018  
**VIA FACSIMILE: (512) 322-0474**

Sean Greenwood  
**ATTORNEY FOR RESPONDENT**  
2323 S. Sheperd Drive, Suite 1002  
Houston, Texas 77019  
**VIA FACSIMILE: (713) 630-8074 AND**  
**VIA REGULAR MAIL**

Houston KP LLC  
d/b/a Polekatz Houston  
**RESPONDENT**  
6340 Westheimer  
Houston, Texas 77057  
**VIA REGULAR MAIL**

City of Houston  
c/o Yolanda Woods/Nirja Aiyer  
Senior Assistant City Attorneys  
**PROTESTANT**  
900 Bagby, 3<sup>rd</sup> Floor  
Houston, Texas 77002  
**VIA REGULAR MAIL**

Hadi Elhage  
**PROTESTANT**  
6255 Locke Lane  
Houston, Texas 77057  
**VIA REGULAR MAIL**

Briargrove Property Owners, Inc.  
c/o Shelton Vaughan  
**PROTESANT**  
1800 Augusta, Suite 200  
Houston, TX 77057  
**VIA REGULAR MAIL**

Lisa D. Crissman  
**ATTORNEY FOR PETITIONER**  
TABC Legal Division

TABC Licensing Division

Lt. Marc Decatur  
Houston Enforcement District Office

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# State Office of Administrative Hearings



DJ. 575497

Cathleen Parsley  
Chief Administrative Law Judge

December 16, 2010

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

VIA REGULAR MAIL

**RE: Docket No. 458-10-6020; Texas Alcoholic Beverage Commission vs. Houston  
KP LLC d/b/a Polekatz Houston**

Dear Mr. Steen:

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

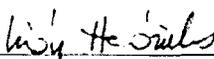
Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at [www.soah.state.tx.us](http://www.soah.state.tx.us).

Sincerely,

RECEIVED

DEC 20 2010

HOUSTON  
LEGAL

  
LINDY HENDRICKS  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

LH/mr  
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- VIA REGULAR MAIL  
Lisa Crissman, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W 20<sup>th</sup> Street, Suite 600, Houston, TX  
77008- VIA REGULAR MAIL (with Certified Evidentiary Record and 1 hearing CD)  
Emily Helm, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX  
78731- VIA REGULAR MAIL  
Sean Greenwood, Gauthier, Houghtaling & Williams, Attorney at Law, 2323 S. Shepherd Drive, Suite 1002,  
Houston, TX 77019 -VIA REGULAR MAIL

2020 North Loop West Suite 111 Houston, Texas 77018  
713.957.0010 (Telephone) 713.812.1001 (Fax)  
[www.soah.state.tx.us](http://www.soah.state.tx.us)

Yolanda Woods/Nirja Aiyer, City of Houston, Senior Assistant City Attorneys, 900 Bagby, 3<sup>rd</sup> Floor, Houston, TX 77002, **-VIA REGULAR MAIL**

Shelton Vaughan, Briargrove Property Owners, Inc., Protestant, 1800 Augusta, Suite 200, Houston, TX 77057 **-VIA REGULAR MAIL**

**DOCKET NO. 458-10-6020**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
	§	
	§	
<b>CITY OF HOUSTON, HADI ELHAGE, and BRIARGROVE PROPERTY OWNERS, INC., Protestants</b>	§	
	§	
	§	
	§	<b>OF</b>
<b>VS.</b>	§	
	§	
	§	
<b>ORIGINAL APPLICATION OF HOUSTON KP LLC. D/B/A POLEKATZ HOUSTON PERMIT NOS. MB, LB, and PE, Applicant</b>	§	
	§	
	§	
	§	<b>ADMINISTRATIVE HEARING</b>

**PROPOSAL FOR DECISION**

Houston KP LLC. d/b/a Polekatz Houston (Applicant) seeks a mixed beverage permit, mixed beverage late hours permit, and beverage cartage permit from the Texas Alcoholic Beverage Commission (TABC) for the premises located at 6340 Westheimer, Houston, Harris County, Texas. The City of Houston (the City) and Briargrove Property Owners, Inc. (Briargrove) protested the application based on the general welfare, peace, morals, and safety of the people. After considering the arguments and evidence presented by the parties, the Administrative Law Judge (ALJ) finds there is an insufficient basis for denying the issuance of the permits and, therefore, recommends that the permits be issued.

**I. PROCEDURAL HISTORY**

On November 5, 2010, a public hearing was convened in this matter in Houston, Texas, before ALJ Lindy Hendricks. TABC appeared and was represented by Lisa D. Crissman, staff attorney. Applicant appeared and was represented by attorneys Michael Hawash and Shawn Green. The City appeared and was represented by attorney Nirja Aiyer. Briargrove Property Owners, Inc.,

appeared. There were no contested issues of notice, jurisdiction, or venue in this proceeding. Therefore, those matters are set out in the proposed Findings of Fact and Conclusions of Law without further discussion here. The hearing concluded on November 5, 2010, and the record closed the same day.

## II. DISCUSSION

### A. Applicable Law

The statutory foundation for the protest to this application is § 11.46(a) of the Texas Alcoholic Beverage Code (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.

The TABC's staff remained neutral on the protest of the application (Application), having determined that Applicant met all the technical requirements to obtain the permits. 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.<sup>1</sup>

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<sup>1</sup> *TABC v. Twenty Wings, LTD. et al*, 112 S.W.3d 647, 650 (Tex. App. - Ft. Worth 2003); *TABC v. Mikulenska*, 510 S.W.2d 616, 619 (Tex. Civ. App. - San Antonio 1974, no writ); and *Bavarian Properties, Inc. v. TABC*, 870 S.W.2d 686, 689 (Tex. App. - Ft. Worth 1994, reh'g overruled).

**B. Public Comment**

Houston City Councilmember Oliver Pennington and Briargrove residents Scott Sullivan, John Lilly, and Ellecia Knolle oppose the Application.

**C. Evidence**

Mark Harrington is a resident of Briargrove. He opposes the Application because he believes the proposed business, located near the neighborhood pool and playground (pool/playground), will operate as a gentlemen's club. Mr. Harrington believes that the nuisance that goes with this type of business will spill over into the neighborhood. He is concerned that children can see the establishment and its signage from the pool/ playground. He testified that Baby Dolls, a sexually oriented business, opened at that location in 1984, followed by Baby Dolls 2 in 2006, and then Allstar Men's Club in 2007. Mr. Harrington is concerned that if Applicant is approved to be a "bikini bar," it would then open as a gentlemen's club.

Anthony Quaranta is the manager of Houston KP, LLC. Mr. Quaranta also owns and manages two sexually oriented businesses named Polekatz in Indiana and Illinois. He is aware of the City's sexually oriented business (SOB) ordinance and recognizes that his proposed location is enjoined from operating as a SOB. The City's injunction<sup>2</sup> which prohibits nudity, simulated sexual act, and sexual contact, is attached to his lease. He testified that he will not operate a SOB at the location. The City stipulated that Mr. Quaranta did not apply for a SOB permit.

Mr. Quaranta testified that his dancers will wear bikinis. The dancers will charge patrons for dances, and Polekatz will charge patrons a cover charge. Mr. Quaranta testified that the dances will not be for sexual gratification, and there will be rules, training, and monitoring to ensure compliance with the injunction. There will be 44 cameras monitoring the business, including 7 outside. He will

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<sup>2</sup> City Exh. 3 – Agreed Declaratory Judgment and Permanent Injunction enjoins the location from being operated as a "Sexually Oriented Business" as that term is defined in Chapter 243 of the Texas Local Government Code and Chapter 28 of the Code of Ordinances of the City of Houston.

also have seven floor employees and a manager Sunday through Thursday, and eight floor employees and two managers on Friday and Saturday. Off-duty peace officers will provide security seven days a week. Mr. Quaranta believes his business will be different from other bikini bars in that it will also be a nightclub and sports bar and will attract middle to upper-class clientele and couples.

Mr. Quaranta testified that other businesses located across from the pool/playground include an alcohol-permitted sports bar, massage parlor, methadone clinic, and modeling studio. He described his business as having no windows. Its entrance faces Westheimer, and the side and back of the building face the pool/playground. A wall, ditch, and fence separate the business from the pool/playground. To address Briargrove's concern that children could see the establishment, Mr. Quaranta testified he could install a taller privacy wall. Mr. Quaranta testified he will sign a 10-year lease and intends to comply with the law, be a good neighbor, and sponsor community groups and activities.

Sergeant Janice Tandry has been with the Houston Police Department for 28 years and with the Vice Division the last five years, working with permitting and regulating sexually oriented businesses. She testified that Allstar Men's Club did not have a SOB permit, but operated as a SOB. Sgt. Tandry believes that Applicant's business plan is consistent with a SOB.

TABC Agent Wendy Shield testified that she conducted a protest investigation and that TABC did not join the protest.

### III. ANALYSIS

In this instance, Applicant is fully qualified to obtain its requested TABC-issued permits. The Houston City Secretary and Harris County Clerk certified Applicant's location as being within a "wet area" for a mixed beverage permit, with a late hours permit, in Houston, Harris County, Texas. The Comptroller of Public Accounts certified Applicant meets all the requirements for a Sales Tax

Permit.<sup>3</sup> Since Applicant has met these general criteria for securing a TABC-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 finding that the place or manner in which Applicant may conduct its business warrants 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 the City's and Briargrove's objections is that Applicant may operate as a sexually oriented business.

Briargrove believes that, because previous businesses at that location operated as a SOB, Polekatz will also be a SOB. Similarly, the City believes that because Mr. Quaranta operates a SOB in other states that Polekatz in Houston will also be a SOB. Mr. Quaranta testified that he operates a SOB in Illinois and Indiana where state laws permit SOB. He intends to keep the name Polekatz as part of a brand, but will not operate Polekatz Houston as a SOB. The City argues that Mr. Quaranta provided a business plan to operate as a "cabaret" and that, by definition, this was sufficient to show Applicant will be operating a sexually oriented business. However, Chapter 28 of the Code of Ordinances of the City of Houston includes in its definition of cabaret "entertainment which is intended to provide sexual stimulation or sexual gratification."<sup>4</sup> There is no evidence to show the entertainment to be provided by Applicant will meet that definition. Further, there is no evidence that Applicant is in violation of any local ordinance or that Applicant will operate a SOB. The Application indicates the primary business at the location will be a bar. Mr. Quaranta did not apply for a SOB permit with the City. Mr. Quaranta testified he will not be operating as a SOB. The evidence shows an injunction prohibits the operation of a SOB at 6340 Westheimer. Mr. Quaranta testified that he intends to operate in compliance with the injunction and the City's SOB Ordinance. Should Mr. Quaranta open his business and operate in violation of the ordinance and injunction, there are safeguards in place. The City could enforce its injunction, show Mr. Quaranta to be in

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<sup>3</sup> TABC Ex. 1. The Amended Notice of Hearing states, "Applicant has met all Commission requirements to hold the permits at the location and has complied with all Texas Alcoholic Beverage Code requirements...."

<sup>4</sup> Code of Ordinances of the City of Houston, Section 28-121. Definition "adult cabaret."

contempt, and seek relief through district court. Further, criminal citations and convictions could result against those who violate the ordinance. At the time of this hearing, the evidence is insufficient to establish Applicant will operate in violation of any law or ordinance.

Protestants are concerned that children could see the business from the playground or, conversely, patrons of the business could see the children on the playground. The photographs show that only the side and back of the business are visible from the playground. The walls of the business are indistinguishable from any other business. It is possible that children can be seen if they are standing on top of the safety rails on the playground structure as depicted in the photographs. The main sign for the business faces Westheimer on the west side of the building and is not visible from the playground/pool. There is a blank sign that sits on a blue pole that may be visible from the playground/pool, however, there is nothing unusual about its placement nor does it not violate any TABC statute, rule, or local ordinance.

As a result, Protestant's evidence was insufficient to establish that the manner in which Applicant will conduct his business warrants denial of Applicant's permit requests. The ALJ recommends that Applicant be granted the permits sought in this Application.

#### IV. FINDINGS OF FACT

1. Houston KP, LLC. d/b/a Polekatz Houston (Applicant) has filed an application with the Texas Alcoholic Beverage Commission (TABC) for a mixed beverage permit, mixed beverage late hours permit, and beverage cartage permit for a premises located at 6340 Westheimer, Houston, Harris County, Texas.
2. Protests to the application were filed by the City of Houston and Briargrove Property Owners, Inc. based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency.
3. An Amended Notice of Hearing dated October 15, 2010, was issued by TABC 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 November 5, 2010, a hearing began before ALJ Lindy Hendricks in Houston, Texas. TABC Staff appeared at the hearing through its Staff Attorney Lisa D. Crissman. Applicant

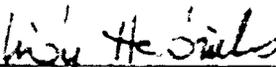
appeared and was represented by its attorneys, Michael Hawash and Shawn Green. The City appeared and was represented by attorney Nirja Aiyer. Briargrove Property Owners, Inc. appeared. The record closed on November 5, 2010.

5. Applicant has met all TABC requirements for holding the permits requested for the proposed licensed premises at this location.
6. There was no evidence that the manner of operation is in violation of local ordinance or creates any unusual conditions or situations that would warrant refusal of the permits.
7. There was no evidence that the location of the business or its signage is unusual or violates any TABC statute, rule, or local ordinance that would warrant refusal of the permits.

#### V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5, 11, 28, and 29, 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 § 155.401.
4. Issuance of the requested permits does not adversely affect the general welfare, health, peace, morals or safety of the people or violate the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).
5. Applicant's application for a mixed beverage permit, mixed beverage late hours permit, and beverage cartage permit, for the premises located at 6340 Westheimer, Houston, Harris County, Texas, should be granted.

**SIGNED December 16, 2010.**

  
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**LINDY HENDRICKS**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**