

TABC DOCKET NO. 593573

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION,	§	
Petitioner	§	
	§	
PICKTON AREA CONCERNED CITIZENS	§	
and COMMISSIONER BURKE BULLOCK,	§	
Protestants	§	
	§	
V.	§	ALCOHOLIC
	§	
ORIGINAL APPLICATION OF	§	
FOSTER'S PRIVATE CLUB D/B/A	§	
FOSTER'S PRIVATE CLUB	§	
Respondent	§	
	§	
HOPKINS COUNTY, TEXAS	§	
(SOAH CASE NO. 458-10-4621)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 29<sup>th</sup> day of October, 2010, the above-styled and numbered cause.

The hearing in the above matter was conducted by the State Office of Administrative Hearings, with Administrative Law Judge Brenda Coleman presiding. The hearing convened on July 28, 2010 and the record was closed on the same date. The Administrative Law Judge made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on September 23, 2010. The time for filing Exceptions to the PFD has passed and no Exceptions were filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission reviewed and considered the Proposal for Decision. After such review, the Assistant Administrator adopts the Findings of Fact and Conclusions of Law made and entered into the PFD by the Administrative Law Judge. The adopted Findings of Fact and Conclusions of Law are incorporated into this Order as if such were fully set out and separately stated herein. All requests for action not specifically addressed in this Order are denied.

**IT IS THEREFORE ORDERED** that the Original Application of Foster's Private Club d/b/a Foster's Private Club for the issuance of a Private Club Permit, a Food and Beverage Certificate, and a Beverage Cartage Permit be **GRANTED**.

This Order will become final and enforceable on the 29<sup>th</sup> day of November, 2010, unless a Motion for Rehearing is filed **before** that date.

**SIGNED** this the 29<sup>th</sup> day of October, 2010 at Austin, Texas.



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Sherry K-Cook, Assistant Administrator  
Texas Alcoholic Beverage Commission

### CERTIFICATE OF SERVICE

I certify that service has been made upon all parties in the manner indicated below on this the 4<sup>th</sup> day of November, 2010.



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Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Brenda Coleman  
Administrative Law Judge  
State Office of Administrative Hearings  
Dallas, Texas  
**VIA FACSIMILE: (214) 956-8611**

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**ATTORNEY FOR RESPONDENT**  
101 East Park Blvd., Suite 600  
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**VIA FIRST CLASS MAIL**  
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Foster's Private Club, Inc.  
d/b/a Foster's Private Club, Inc.  
**RESPONDENT**  
15244 Hwy 11 East  
Pickton, TX 75471-4511  
**VIA FIRST CLASS MAIL**

David T. Duncan, TABC Legal Division

**TEXAS ALCOHOLIC BEVERAGE  
COMMISSION,**

**Petitioner**

**PICKTON AREA CONCERNED CITIZENS  
and COMMISSIONER BURKE BULLOCK,**

**Protestants**

**v.**

**ORIGINAL APPLICATION OF  
FOSTER'S PRIVATE CLUB D/B/A  
FOSTER'S PRIVATE CLUB,**

**Respondent**

**HOPKINS COUNTY, TEXAS  
(TABC CASE NO. 593573)**

**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

Foster's Private Club (Respondent or Foster's) is the applicant for a Private Club Permit, a Food and Beverage Certificate, and a Beverage Cartage Permit to be issued by the Texas Alcoholic Beverage Commission (Commission) for the premises known as Foster's Private Club, located at 15244 Highway 11 East, Hopkins County, Texas 75471-4511.

Residents living in the community protested the application, asserting that Respondent's original application should be denied based on the general welfare, health, peace, morals, and safety of the people, and on the public sense of decency. The Commission's staff (Staff) had no independent evidence to protest the issuance of the permits. The Administrative Law Judge (ALJ) recommends that the original application for permits be granted by the Commission.

**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 July 28, 2010, a public hearing was held before Brenda Coleman, ALJ, at the State Office of Administrative Hearings, 6333 Forest Park Road, Suite 150A, Dallas, Texas 78504. Staff was represented by Judith Kennison, attorney. Protestants, Commissioner Burke Bullock and Robert Rose, spokesperson for Pickton Area Concerned Citizens, appeared *pro se*. Respondant was represented by Timothy Griffith, attorney. The record was closed on the same date.

## 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. § 11.46(a)(8).

## III. EVIDENCE

### A. Background

Foster's is located at 15244 Highway 11 East, Pickton, Hopkins County, Texas. It is currently operated as a general store and restaurant, with a seating capacity for 22 people. Art Foster has operated the store and restaurant for the past six years at the same location. He and his family live behind the premises. Mr. Foster is the owner and president of Foster's.

Pickton is a small, unincorporated community with five churches and a nearby school. The population includes approximately 250 people. Highway 11 East passes through Pickton and runs eastbound and westbound from Sulphur Springs, Texas, into Winnsboro, Texas. It is a two-lane, paved road with paved shoulders. The posted speed limit on Highway 11 East is 55 mph. Foster's is situated on the south side of Highway 11 East at the intersection of FM 269. Foster's has two vehicle entrances which enter onto Highway 11 East.

The Como-Pickton ISD is located a little over two miles west of Foster's. The nearest restaurant is located approximately five miles away in Como, Texas. The nearest alcohol retailer is located approximately eight miles away in Winnsboro, Texas. The local sheriff's office (Hopkins County) is located twenty miles from Foster's.

#### **B. Staff's Evidence and Contentions**

Staff presented its amended notice of the hearing issued to Respondent.<sup>1</sup> The Staff's position was that Respondent has met all Commission requirements for issuance of the original permits.

#### **C. Protestants' Evidence and Contentions**

##### **1. Documents**

Protestants offered a 15-page petition signed by 171 people opposed to the application.<sup>2</sup> Residents who signed the petition opposing the application included the areas of Pickton, Sulphur Springs, Winnsboro, Mineola and Como, Texas.

##### **2. Robert Rose**

Mr. Rose, a Pickton resident and the spokesperson for Pickton Area Concerned Citizens, testified that the primary reasons stated on behalf of the 171 local residents who oppose the permits were traffic and public safety concerns because they felt those issues "might have more merit." He added, however, that most of the people who signed the petition oppose Respondent's application on moral grounds. According to Mr. Rose, most of the people in the community simply do not approve of the sale of alcohol in any form. Mr. Rose, a retired Master Sergeant from the U.S. Air Force with

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<sup>1</sup> Exhibit P-1.

<sup>2</sup> Exhibit Protestants-1.

21 years of service, opined that alcohol is the most addictive drug in our society today, and he stated that he has personally observed the effects of alcohol addiction.

Mr. Rose also expressed concern regarding the responsible consumption of alcoholic beverages on the premises by Respondent's clientele. He said the small community of Pickton has survived 150 years without the legal sale of alcohol, and the residents would like to keep it that way.

On cross-examination, Mr. Rose acknowledged that he is familiar with Respondent's owner, Art Foster, who has operated a restaurant at 15244 Highway 11 East in Pickton, Texas, for the past six years. Mr. Rose admitted that he is aware no complaints regarding Mr. Foster or the operation of his restaurant. However, the residents who signed the petition are just against the sale of alcohol on the premises. Mr. Rose also acknowledged that the on-premise sale of alcoholic beverages would be restricted to members of the private club. He admitted that he was not aware that, should the permits be granted, that the Commission could inspect Respondent's premises, audit Respondent's records and conduct sting operations.

### 3. Commissioner Burke Bullock

Commissioner Bullock testified that he has lived in Pickton for 69 years, and he is the Precinct 2 County Commissioner for Hopkins County, Texas, which includes the Pickton community. Commissioner Bullock estimates there to be approximately 35,000 residents in Hopkins County, including 8,000 residents in Precinct 2. According to Commissioner Bullock, the county budget is always very lean with a limited police force. He added that between Foster's and an existing establishment located in a "wet" city on the western extreme of the county, there would be approximately 40 miles between the two establishments for law enforcement to patrol. Commissioner Bullock testified that he represented Hopkins County Judge, Honorable Cletis Millsap, three other Hopkins County Commissioners, and Hopkins County Sheriff, Butch Adams, who all believe that it would be harder to maintain the current crime rate in Hopkins County if the sale of alcoholic beverages is permitted at an establishment that is located so far from the sheriff's

office. It is also believed, he added, that it would cost more to patrol the area and the response time for law enforcement would be slow.

Commissioner Bullock testified that he is strongly opposed to the issuance of the permits to Respondent. He shared the very personal and tragic incident surrounding the serious injury of his teenage daughter and the death of her young friend as the result of an alcohol related motor vehicle accident near Como, Texas, in 1987. According to Commissioner Bullock, on the afternoon of the accident, the intoxicated driver responsible for the accident was observed staggering to his vehicle after having consumed alcoholic beverages at a reputable establishment licensed by the Commission and located in Como, Texas, approximately five miles west of Pickton. Commission Bullock stated that it took 15 to 20 minutes for law enforcement to arrive at the scene, and longer for emergency personnel to arrive. He added that the driver responsible for the accident later committed suicide.

Commissioner Bullock stated that Pickton is located in a valley with three busy intersections within a one-half mile distance.<sup>3</sup> He said the westbound traffic comes over the hill at the posted speed of 55 mph, giving drivers only a second or two to make the decision to either stop or cross the intersections. He added that, while not directly in front of Foster's, there have been numerous traffic accidents at the three intersections. Therefore, according to Commissioner Bullock, there is a traffic concern, especially if a driver has consumed alcoholic beverages.

On cross-examination, Commissioner Bullock stated that he personally likes Mr. Foster and wishes him well in the food industry. However, he said he opposes the sale of alcoholic beverages by Mr. Foster or anyone else in the community. Commissioner Bullock acknowledged that Mr. Foster has operated the restaurant and general store at the same location for the past six years. And, he added, he often stopped by to visit with Mr. Foster. Commissioner Bullock also admitted that he is not familiar with Respondent's application filed with the Commission.

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<sup>3</sup> Although not specified, the ALJ presumes that Commissioner Bullock was referring to vehicles traveling westbound on Highway 11 East in Pickton, Hopkins County, Texas.

**D. Respondent's Evidence**

Respondent offered 12 exhibits, including the investigation report of Commission Agent Lindel Davis,<sup>4</sup> which was conducted as a result of the protest. Respondent also presented the testimony of two witnesses.

**1. Art Foster**

Mr. Foster testified that he has approximately 20 years of experience in the food and beverage industry. He served primarily in the food services area of the U.S. Air Force from 1996 to 2001, when he was honorably discharged. He received a Food and Management degree from Johnson and Wales University located in Providence, RI, in 2002. And he has had other restaurant experience as server, cook, bartender and manager prior to operating his store and restaurant. In addition, he has undergone training regarding Commission regulations for the sale and service of alcoholic beverages, and he is seller-server certified. He said he has never been arrested, or had any type of health and safety or Commission violations.

Mr. Foster stated that he applied for a Food and Beverage Certificate because Foster's is a small business which will primarily be operated as a family-oriented restaurant in which food will account for over 51 percent of the sales. He said, because of its size, Foster's will have a limited number of members, with limited hours of operation. According to Mr. Foster, Foster's will be closed Tuesday and Wednesday. Hours of operation will be from 10:30 a.m. to 9:30 p.m. on Sunday, Monday, and Thursday for lunch and dinner. It will open for lunch and dinner on Friday and Saturday from 10:30 a.m. to 10:30 p.m. He emphasized that Foster's will not be a night club, and he did not apply for a late hours permit for extended hours of operation.

According to Mr. Foster, there is not an over concentration of alcohol retailers in the area. At

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<sup>4</sup> Exhibit R-8.

Foster's, he said, alcoholic beverages will be served only to members who are of legal age for alcohol consumption after a valid driver's license has been scanned and verified. Mr. Foster said all employees will be seller-server certified through the Commission, and employees will not be permitted to serve alcoholic beverages to minors, non-members, or intoxicated persons. Mr. Foster said he will properly post established policies regarding the service of alcoholic beverages within the premises. He also added that Foster's charter members all live in Hopkins County, and over half of Members are from Pickton.

As for traffic, Mr. Foster testified that he has never had any traffic congestion near the premises, and customers typically come and go throughout the day with no large crowd at a given time. Also, because Foster's will not be event driven, he said, there will be no need for police assistance to control the traffic. He said he does not anticipate any parking problems because he has expanded the parking lot to nearly double its initial size, so there is more than adequate parking. He stated that there are no obstructed areas on the roadway for motorists leaving or entering the premises, and he estimated visibility at the location to include approximately a quarter mile in one direction and one-half mile in the other direction. He said he could recall only one motor vehicle accident outside the premises. He added that it was a non-injury accident that occurred five years ago, and it resulted in minimal property damage to the two vehicles involved in the accident.

According to Mr. Foster, there is generally more traffic on the roadway in the mornings and afternoons when people are traveling to and from work. He added that law enforcement officers are always on Highway 11 East stopping motorists exceeding the posted 55 mph speed limit. He also said officers routinely patrol the area every night. Therefore, he opined that an additional police presence should not be required. Finally, he stated that in addition to the routine police patrol, he has an extensive security system installed which he can monitor from his home located behind the premises.

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## 2. John Busby

Mr. Busby testified that he was formerly employed with the Commission for 22 years, and he served 16 years as Sergeant. He said he is familiar with the Texas Alcoholic Beverage Code and Commission rules, and he currently works as a consultant on Commission related matters. Mr. Busby stated that a private club is an association of members who actually own the alcoholic beverages on the premises, and they are charged for the service of the alcoholic beverages. He explained that the application process for membership requires presentation of identification and a signed application which must be voted on by a membership committee and chairman within seven days. He added that a minor cannot become a member. A limited private club membership, he said, is generally associated with a small business for the purpose of restricting the number of members, versus unlimited membership.

Mr. Busby also said a private club permit is an on-premise permit which restricts the members' alcoholic beverage consumption to the licensed premises. He stated that the private club's management and employees are responsible for monitoring members' alcohol consumption. And, he said, the Commission requires that no more than 49 percent of a private club's revenue is from the sale or service of alcoholic beverages; 51 percent or more is required to be from the sale of food and beverages.

According to Mr. Busby, if the permits are issued, then Foster's would be subject to Commission regulation, including inspections of the premises, sting operations, and audits of its financial and membership records for compliance with all Commission rules and regulations. Violations, he stated, could result in criminal and/or administrative action, including cancellation of the permits.

## 3. Report of Agent Lindal Davis

During his investigation, Agent Davis personally observed the flow of traffic on Highway 11

East and nearby roadways, FM 269 and CR 2417 in Pickton. Agent Davis opined that some of the traffic was work traffic and would decrease in the evening hours. On March 31, 2010, Chief Deputy Rickey Morgan advised the agent that Highway 11 in the area of Foster's "has no higher rate of auto crashes than any other part of the county."<sup>5</sup>

On April 5, 2010, Sheriff Burch Adams advised the agent that "since the location is being classified as a restaurant and not a club, he has no problem with the permit being issued." Agent Davis' report further states, "Sheriff Adams believes that since the location will be a restaurant, the location will be able to control the patrons and consumption of alcoholic beverages, and should not cause major issues/problems for their department."<sup>6</sup> At the conclusion of his investigation, Agent Davis recommended that "the Commission has no legal grounds for protesting this application," and the permits be issued because "there does not appear to be evidence to support that a traffic problem/public safety issue would exist."<sup>7</sup>

#### IV. ANALYSIS

Respondent has applied for a Private Club Permit, a Food and Beverage Permit, and Beverage Cartage Permit to do business as Foster's Private Club at 15244 Highway 11 East, Pickton, Hopkins 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.

Protestants challenged Respondent's original application, alleging that they should be denied on the basis that the way Respondent may conduct business warrants refusal based on 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). During the hearing, the parties presented conflicting statements regarding the stated position of Hopkins County Sheriff Burch Adams on the issuance of the permits.

<sup>5</sup> Exhibit R-8, page 2 of 4.

<sup>6</sup> *Id.*

According to Commissioner Bullock, Sheriff Adams indicated that he opposes the application. However, Agent Davis asserts in his sworn report that on April 5, 2010, Sheriff Adams personally advised Agent Davis that "he has no problem with the permit being issued."

The ALJ respectfully submits that while Sheriff Adams' opinion is certainly important, it is not the sole factor for consideration in determining the issue in this case; it is, rather, one of several factors to be considered. Because Sheriff Adams was not present at the hearing, and the ALJ finds the statements presented by Commissioner Bullock and Agent Davis to be credible, the ALJ gives no weight to the statements of either party concerning Sheriff Adams' position on the issuance of the permits.

Texas courts have held that in order 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). *See also:* Texas Alcoholic Beverage Commission v. Jack E. Mikulanka d/b/a Frigate Club, 510 S.W.2d 616, 619 (Tex.App. — San Antonio 1974); 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).

The evidence in the instant case does not show that issuing the requested permits would increase traffic congestion or negatively impact the existing nature of the local community. The ALJ, while considerate of the personal experiences and concerns expressed by the witnesses at the hearing, and the issues presented on behalf of the community, does not believe that the evidence rises to the level of "unusual conditions or situations" that justify a finding that the manner in which Respondent may conduct his business warrants a refusal of the permit.

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<sup>7</sup> Exhibit R-8, page 4 of 4.

**V. RECOMMENDATION**

Accordingly, the ALJ recommends that Respondent's original application for a Private Club Permit, a Food and Beverage Certificate, and Beverage Cartage Permit to do business as Foster's Private Club at 15244 Highway 11 East, Pickton, Hopkins County, Texas, be granted.

**VI. FINDINGS OF FACT**

1. Foster's Private Club, Respondent, filed an original application for a Private Club Permit, a Food and Beverage Certificate, and a Beverage Cartage Permit to be issued by the Texas Alcoholic Beverage Commission (Commission) for the premises known as Foster's Private Club, located at 15244 Highway 11 East, Pickton, Hopkins County, Texas.
2. Respondent has met all Commission requirements for issuance of the permits.
3. The Commission received a protest from local residents requesting that the original application be denied on grounds that the manner in which applicant may conduct business warrants refusal based on the general welfare, health, peace, morals and safety and on the public sense of decency.
4. The Commission's Staff issued an amended Notice of Hearing on June 15, 2010, and July 14, 2010, 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.
5. On July 28, 2010, a public hearing was held before Brenda Coleman, ALJ, at the State Office of Administrative Hearings, 6333 Forest Park Road, Suite 150A, Dallas, Texas 75235. Staff was represented by Judith Kennison, attorney. Protestants Commissioner Burke Bullock and Robert Rose, spokesperson for Pickton Area Concerned Citizens, appeared *pro se*. Respondent was represented by Timothy Griffith, attorney. The record was closed on the same date.
6. Respondent has operated a general store and restaurant at 15244 Highway 11 East, Pickton, Hopkins County, Texas, for the past six years with no complaints.
7. Insufficient evidence was presented to prove that granting Respondent's permits would cause traffic hazards or unreasonable traffic congestion on roadways in the area.

8. ~~Insufficient evidence was presented to prove that granting Respondent's permit would negatively change or affect the existing community.~~
9. No unusual condition or situation exists to warrant refusing Respondent's 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.
3. The parties received proper and timely notice of the hearing pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE § 155.55.
4. Granting Respondent's original application for permits 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).
5. Respondent's original application for a Private Club Permit, a Food and Beverage Certificate, and a Beverage Cartage Permit to do business as Foster's Private Club at 15244 Highway 11 East, Pickton, Hopkins County, Texas, should be granted.

SIGNED September 23, 2010.



**BRENDA COLEMAN**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**