

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 Respondent's application for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit be **DENIED**.

This Order will become final and enforceable on the 13th day of January, 2015, unless a Motion for Rehearing is filed by the 12th day of January, 2015.

SIGNED this the 18th day of December, 2014, at Austin, Texas.



Sherry K-Cook, Executive Director
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 18th day of December, 2014.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

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SOAH DOCKET NO. 458-14-3898

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|--------------------------------|---|-------------------------|
| TEXAS ALCOHOLIC BEVERAGE | § | BEFORE THE STATE OFFICE |
| COMMISSION, | § | |
| Petitioner | § | |
| & | § | |
| LT. JOYCE PENA AND THE CITY OF | § | |
| BALCONES HEIGHTS, | § | |
| Protestants | § | OF |
| | § | |
| v. | § | |
| | § | |
| BREWSKI PUB LLC D/B/A BREWSKI | § | |
| PUB, Applicant | § | ADMINISTRATIVE HEARINGS |

PROPOSAL FOR DECISION

Brewski Pub LLC d/b/a Brewski Pub (Applicant) has applied to the Texas Alcoholic Beverage Commission (Petitioner or Commission) for a mixed beverage permit and a mixed beverage late hours permit for premises to be known as Brewski Pub, located at 4515 Fredericksburg Road, Suite 4, Balcones Heights, Bexar County, Texas 78201.

Lt. Joyce Pena and the City of Balcones Heights (Protestants) and Commission staff (Staff) protest the issuance alleging Applicant failed to answer or falsely or incorrectly answered a question in its application in violation of Texas Alcoholic Beverage Code (the Code) § 11.46(a)(4), and the place or manner in which the applicant may conduct its business warrants the refusal of a permit based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency in violation of Code §§ 11.46(a)(8) and 11.61(b)(7).

After considering the arguments and evidence presented by the parties, the Administrative Law Judge (ALJ) finds that there is a sufficient basis for denying the application and recommends that the permits be denied.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There were no contested issues of jurisdiction, notice, 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.

On July 16, 2014, a hearing convened at the State Office of Administrative Hearings in San Antonio, Texas, before ALJ Holly Vandrovec. The Applicant appeared and was represented by Ricardo Garza, the owner. Petitioner was represented by attorney John Sedberry. Protestants were represented by attorney William "Cody" Faulk, III. The record closed that same day.

II. APPLICABLE LAW

Pursuant to Code §§ 11.46(a)(8) and 11.61(b)(7), the Commission may refuse to issue an original application for a permit or license if it finds that the place or manner in which the applicant may conduct business is contrary to the general welfare, health, peace, morals, and the safety of the people and on the public sense of decency. Pursuant to Code § 11.46(a)(4), the Commission may also refuse to issue an original application for a permit or license if it finds that the applicant failed to answer or falsely or incorrectly answered a question in an original or renewal application. Protestants and Staff have the burden of proof by a preponderance of the evidence.¹

III. EVIDENCE

This hearing pertains to the original application filed by Ricardo Garza, owner and manager of Applicant, on behalf of Applicant for an establishment to be known as the Brewski Pub.

Staff presented the testimony of Petitioner's Agent Jason Winter. Mr. Winter testified that the Applicant is the owner of an existing bar in the vicinity called Barton's Boozery that currently

¹ 1 Tex. Admin. Code § 155.427.

holds a mixed beverage license issued by Petitioner. Staff contends that Mr. Garza's operation of Barton's Boozery is indicative of how Mr. Garza will operate the new establishment, Brewski Pub, which is the subject of this proceeding. Mr. Winter investigated Barton's Boozery and found an ongoing aggravated breach of peace complaint as well as violations of the Code. An administrative notice was issued for the violation of aggravated breach of peace at Barton's Boozery which stemmed from an incident on December 26, 2013, in which the general manager of Barton's Boozery shot and killed a patron inside the bar. The investigation concluded that there was improper supervision not beyond the control of permittee Barton's Boozery with respect to the December 2013 shooting. Another alleged aggravated breach of the peace violation is currently being investigated involving a patron who was stabbed on the premises of Barton's Boozery.

Counsel for Protestants presented the testimony of Lt. Joyce Pena, who is the interim Chief of the Balcones Heights Police Department. Lt. Pena oversees investigations, including review of applications for licenses to operate businesses within Balcones Heights, and is the person responsible for corroborating statements made in applications. She also conducts criminal history checks for all applicants. Lt. Pena performed the criminal history check of Mr. Garza upon receiving the completed application for the license (City Application) submitted on behalf of Applicant to operate the Brewski Pub. One of the questions on the City Application asks: "Have you ever been charged with or convicted of any felony or misdemeanor . . . ?" The Applicant answered this question "No." Lt. Pena testified that upon performing a criminal background check on Mr. Garza, she found that he had been arrested and charged with the following offenses carrying the noted classifications: driving while intoxicated (Class B misdemeanor), possession of dangerous drugs (Class A misdemeanor), and possession of controlled substances in penalty group 3 of less than 28 grams (Class A misdemeanor). Lt. Pena sent Mr. Garza a letter notifying Mr. Garza of his failure to disclose these charges on the City Application and testified that Mr. Garza did not submit a corrected City Application after receiving the letter.

Mr. Garza testified on behalf of the Applicant and admitted that his name and signature are on the City Application and he did sign it. Mr. Garza testified that he did not fill out the City Application, but that his manager filled it out and Mr. Garza then signed it. Mr. Garza testified that

he thought the question asked if he had been *convicted* of a misdemeanor, as the question is phrased on the Commission application, rather than whether he had been *charged*. Mr. Garza testified that he had a meeting with Balcones Heights city officials upon learning of his mistake. At this meeting, Mr. Garza spoke to the officials regarding his charges and the discrepancy on his City Application and testified that the city officials never asked him to re-submit the City Application with corrections. Mr. Garza admitted to being pulled over and charged for driving while intoxicated and with the enumerated offenses, but pointed out that he has not been convicted.

Mr. Garza testified that he purchased Barton's Boozery on September 28, 2012, and that his general manager was the person who shot and killed a patron in December 2013. He also acknowledged that a patron was stabbed on the premises of Barton's Boozery. Other than the violation arising from the December 2013 fatal shooting and investigation of the alleged violation arising from the more recent stabbing incident, Mr. Garza pointed out that there have been no violations since Mr. Garza purchased Barton's Boozery. Mr. Garza testified that Barton's Boozery is in a rough part of town, but that he has "cleaned the place up."

IV. DISCUSSION

Staff alleges in its Notice of Hearing that the Applicant failed to answer or falsely or incorrectly answered a question in its original application to the Commission pursuant to Code § 11.46(a)(4). Although it is undisputed that Mr. Garza falsely answered a question in the City Application, the information on the Commission application appears to be correct. Therefore, the ALJ concludes that the Applicant did not violate § 11.46(a)(4) of the Code.

Staff and Protestants also argue that the applications should be denied because the place or manner that the proposed establishment would be operated would be contrary to the general welfare, health, peace, morals, and safety of the people and the public sense of decency pursuant to Code §§ 11.46(a)(8) and 11.61(b)(7). Staff and Protestants contend that the manner in which Mr. Garza operates his nearby existing establishment, Barton's Boozery, Mr. Garza's recent arrest and charges for driving while intoxicated and drug-related crimes, and Mr. Garza's false statements on the City

Application are evidence that the proposed establishment Brewski Pub will be operated contrary to the general welfare, health, peace, morals, and safety of the people and the public sense of decency. Because Mr. Garza has only been charged and not convicted of the offenses of driving while intoxicated and the drug-related offenses, the ALJ will not consider these charges. In addition, Code § 11.61(b)(7) does not apply in this case because it concerns cancellation or suspension of a permit that has already been granted.

The preponderance of the evidence supports the Staff and Protestants' position with respect to Code § 11.46(a)(8). The fatal shooting perpetrated by the manager and resulting in a Commission violation and the stabbing currently being investigated by the Commission, both occurred at Barton's Boozery, which is owned and operated by Mr. Garza. These incidents, which both occurred within the past 8 months, cause serious concerns regarding Mr. Garza's ability to operate a safe establishment and are reasonable grounds to find that the manner in which the new establishment will be operated will be contrary to the general welfare, health, peace, morals, and safety of the people and the public sense of decency pursuant to Code § 11.46(a)(8). This concern is even greater given that Mr. Garza's time and attention would be divided between the two establishments, rather than the one establishment currently in operation.

V. FINDINGS OF FACT

1. Brewski Pub LLC d/b/a Brewski Pub (Applicant) filed an original application with the Texas Alcoholic Beverage Commission (Commission) for a mixed beverage permit and a mixed beverage late hours permit (together, the Permits) for premises to be known as Brewski Pub, located at 4515 Fredericksburg Road, Suite 4, Balcones Heights, Bexar County, Texas 78201.
2. Ricardo Garza is the sole manager/member of Applicant Brewski Pub LLC.
3. Lt. Joyce Pena and the City of Balcones Heights (Protestants) as well as the Commission staff (Staff) protested the issuance of the Permits on the basis that: (1) Applicant or Applicant's agent, servant, or employee may conduct Applicant's business in a manner contrary to the general welfare, health, peace, morals, and safety of the people and on the public sense of decency in violation of Texas Alcoholic Beverage Code (Code) §§ 11.46(a)(8) and/or 11.61(b)(7), and (2) Applicant, or Applicant's agent, servant, or

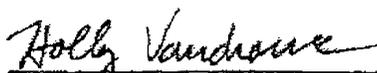
employee failed to answer or falsely or incorrectly answered a question in an original or renewal application in violation of Code § 11.46(a)(4).

4. On June 2, 2014, Staff referred the matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.
 5. On June 27, 2014, Staff issued a notice of hearing that included a statement regarding the time, place, and nature of the hearing; referenced the legal authority upon which the hearing would be held; cited the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.
 6. The hearing was held on July 16, 2014, before Administrative Law Judge Holly Vandrovec at the SOAH offices in San Antonio, Texas. Staff was represented by attorney John Sedberry. Protestants were represented by attorney William "Cody" Faulk, III. The record closed on July 16, 2014.
 7. On December 23, 2012, Mr. Garza was arrested and charged with driving while intoxicated, a Class B misdemeanor; possession of dangerous drugs, a Class A misdemeanor; and possession of controlled substances in penalty group 3 in an amount of less than 28 grams, a Class A misdemeanor. Mr. Garza has not been convicted of any of these charges.
 8. Applicant did not fail to answer or incorrectly answer a question in its original application to the Commission for the Permits.
 9. Applicant did fail to correctly answer a question on its application for the license to operate in the City of Balcones Heights. The question asked whether the applicant had "ever been charged with or convicted of any felony or misdemeanor . . . ?" Applicant answered this question "No."
 10. Mr. Garza owns and operates a nearby establishment called Barton's Boozery, which holds permits from the Commission. Mr. Garza purchased Barton's Boozery in September 2012.
 11. On December 26, 2013, the general manager of Barton's Boozery shot and killed a patron inside the bar. The Commission issued an administrative notice for the violation of aggravated breach of peace in relation to the shooting. The Commission's investigation concluded that there was improper supervision not beyond the control of the permittee.
 12. After the December 2013 shooting, a patron was stabbed at Barton's Boozery and the Commission is investigating the incident.
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VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to chapters 1 and 5 and § 11.46 of the Code.
2. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Texas Government Code chapter 2003.
3. Notice of the hearing was provided in accordance with Texas Government Code §§ 2001.051 and 2001.052.
4. The hearing was conducted in accordance with Texas Government Code chapter 2001.
5. Protestants and Staff have the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.
6. The evidence shows that Applicant did not fail to answer or falsely or incorrectly answer a question in an original or renewal application in violation of Code § 11.46(a)(4).
7. Code § 11.61(b)(7) does not apply in this case.
8. A preponderance of the evidence shows that there are reasonable grounds to believe and find that the place or manner in which Applicant may conduct its business warrants the refusal of the permits based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. Tex. Alco. Bev. Code § 11.46(a)(8).
9. Based on the foregoing Findings of Fact and Conclusions of Law, Applicant's Permits should be denied.

SIGNED August 8, 2014.



**HOLLY VANDROVEC
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**