

**DOCKET NO. 622049**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION, Jurisdictional Petitioner</b>	§	<b>BEFORE THE TEXAS</b>
	§	
	§	
<b>WESTWOOD GROVE CIVIC ASSOCIATION, Protestant</b>	§	
	§	
	§	
<b>VS.</b>	§	
	§	
	§	
<b>5110 WASHINGTON LLC, D/B/A HOUSTON BRIXX BAR, Respondent/Applicant</b>	§	<b>ALCOHOLIC</b>
	§	
	§	
<b>PERMITS MB734512, LB</b>	§	
	§	
	§	
<b>HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-14-1934)</b>	§	
	§	
	§	<b>BEVERAGE COMMISSION</b>

**ORDER**

**CAME ON FOR CONSIDERATION** this 18th day of December, 2014, 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 Rex A. Shaver presiding. The hearing convened on April 25, 2014 and the SOAH record closed on that same day. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on June 16, 2014. 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. No exceptions were filed.

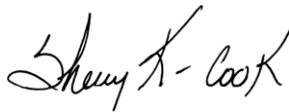
After review and due consideration of the Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order as if such were fully set out and separately stated herein.

All 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 are denied unless specifically adopted herein.

**IT IS THEREFORE ORDERED** that Respondent's application for renewal of the above permits be **GRANTED**.

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.



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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.



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Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Rex A. Shaver  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
2020 North Loop West, Suite 111  
Houston, TX 77018  
**VIA FACSIMILE: (512) 322-2061**

5110 Washington LLC  
d/b/a Houston Brixx Bar  
**RESPONDENT/APPLICANT**  
5110 Washington Ave.  
Houston, TX 77007-7000  
**VIA FIRST CLASS MAIL, CMRRR #70050390000575497216**

Clyde W. Burleson  
**ATTORNEY FOR RESPONDENT/APPLICANT**  
1533 W. Alabama, Suite 100  
Houston, TX 77006-4105  
**VIA FIRST CLASS MAIL, CMRRR # 70050390000575497223**

Donna Shepherd  
Westwood Grove Civic Association  
**PROTESTANT**  
5119 Nett Street  
Houston, TX 77007  
**VIA FIRST CLASS MAIL, CMRRR #70050390000575497230**

Sandra K. Patton  
**ATTORNEY FOR JURISDICTIONAL PETITIONER**  
TABC Legal Division  
**VIA E-MAIL: [Sandra.patton@tabc.texas.gov](mailto:Sandra.patton@tabc.texas.gov)**

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

June 16, 2014

RECEIVED  
JUN 18 2014  
TABC HOUSTON  
LEGAL

Sherry Cook  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive  
Austin, Texas 78731

VIA REGULAR MAIL

**RE: SOAH Docket No. 458-14-1934; Texas Alcoholic Beverage Commission vs. 5110 Washington LLC d/b/a Houston Brixx Bar (TABC Case No. 622049)**

Dear Ms. Cook:

Please find enclosed a Proposal for Decision in this case. It contains my recommendations 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](http://www.soah.state.tx.us).

Sincerely,

A handwritten signature in black ink that reads "Rex A. Shaver".

Rex A. Shaver  
Administrative Law Judge

RAS/cj  
Enclosure

xc Sandra K. Patton, Texas Alcoholic Beverage Commission, 427 W. 20<sup>th</sup> Street, Suite 600, Houston, TX 77008 - VIA REGULAR MAIL  
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA REGULAR MAIL  
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA REGULAR MAIL  
Clyde W. Burlison, Burlison & Craig, P.L.L.C., 1533 W. Alabama, Suite 100, Houston, TX 77006-4105 - VIA REGULAR MAIL  
Donna Shepherd & Margaret Poissant, Westwood Grove Civic Association, 5119 Nett Street, Houston, TX 77007 - VIA REGULAR MAIL



TABC (Staff) was represented by Staff Attorney, Sandra Patton. However, Staff took no position regarding the renewal application. 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 April 25, 2014, and the record was closed on that same day.

## II. DISCUSSION

### A. Applicable Law

Protestants have alleged the following grounds for the protest, as set out in Texas Alcoholic Beverage Code § 11.46(a)(8)

The place or manner in which Respondent or Respondent's agent, servant, or employee, conducts his business warrants the refusal and/or cancellation or suspension of Respondent's permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

### B. Summary of Public Comment and Testimony

Donna J. Shepherd gave public comment concerning her opposition to the renewal application. Ms. Shepherd stated that her home is located in the 5100 block of Nett Street which is a block away from Brixx in the 5100 block of Washington Ave. Ms. Shepherd related that she frequently hears loud noise from Brixx even though she has double pane insulated windows. In April 2013, a truck drove through her fence and struck an air conditioning unit. In May 2013, a car drove onto her yard. She has heard gun shots in the neighborhood. Ms. Shepherd has observed persons urinating in her front yard. When people gather on the sidewalk in front of her home, she is afraid to ask them to move along as some of her neighbors do. She is anxious and fearful in the neighborhood and is reluctant to visit local stores because of the many strangers in the neighborhood. Ms. Shepherd gave testimony that she did not know if the persons involved in the incidents at her home had been drinking at Brixx. The noise from Brixx comes from loudspeakers located on the

patio. On occasion the noise starts as early as 3:00 p.m. and continues until 2:00 a.m.

Margaret Poissant gave public comment and testimony concerning her opposition to the renewal application. Ms. Poissant related that since 1993 she has resided at 5102 Center Street which is directly behind Brixx. She commented that she has experienced loud noise, trash in her yard, and traffic problems similar to those related by Ms. Shepherd. Ms. Poissant testified that Brixx is one of nine licensed premises within a two block area. She has made frequent complaints to the management and to the Houston Police Department (HPD). In her opinion, the off-duty HPD officers working at Brixx as security have a conflict of interest because Brixx pays them for security. Ms. Poissant testified that on one occasion she requested officers on the scene to have Brixx turn down the music, and the officers laughed at her. During her testimony Ms. Poissant introduced 3 exhibits documenting calls for service and 911 transcripts for some of the calls. Ms. Poissant confirmed that many of the calls for service were in response to calls she made to the police. She stated that she has also brought her concerns about Brixx to the attention of the TABC. She spoke with TABC Agent Richard Wills. She believed that he appeared helpful at first but not so much later.

Michael Donato, an HPD officer, testified that the area in which Brixx is located is commonly called the "Washington Ave. Strip." He is familiar with that neighborhood as a result of patrolling the area while on duty and working an approved extra job at licensed premises in the area. In his opinion, there has been a decline in criminal activity in the area around Brixx. He stated that he was not aware of any current investigation of Brixx by any law enforcement agency. He explained that before officers can take an extra job the employer must demonstrate compliance with rules established by the HPD. Employers who fail to meet the requirements of the HPD are placed on a list of unapproved employers. He was aware of complaints from Ms. Poissant about traffic in the area, noise from both unamplified speech and amplified music.

Officer Donato explained that not all calls for service result in action by the HPD. When no action is taken the officer will report "cleared for information." Officer Donato testified that he knew of nothing indicating that the place or manner of operations at Brixx posed a threat to the

general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

Agent H. Wills testified that he is the Supervisor for the Coastal Bend Region of the TABC. This region includes 36 counties and includes the location of Brixx. He is the author of the "Good Neighbor Policy" by which the TABC attempts to reduce friction between licensed premises and their neighbors. His duties include reviewing any protests to the issuance or renewal of licenses by TABC. He instituted an investigation in this case and found no grounds to deny the renewal application of Brixx.

Michael Lovullo testified that he is the owner of the renewal applicant Houston Brixx Bar. He related that in order to curtail noise complaints from Ms. Poissant he has raised the fence on the property from 8 feet to 12 feet in height and planted bamboo. He has also removed the subwoofer and bass speakers from the outside area of the property. Mr. Lovullo related that the use of the rear exit to the parking lot is restricted to employees only.

### III. ANALYSIS

The Code provides that a Respondent may not operate in a place or manner that warrants refusal of a permit based on the general welfare, health, peace, morals, and safety of the people. The protest to the renewal application was made by Ms. Poissant and Ms. Shepherd individually and as representatives of the Westwood Grove Civic Association. Both Ms. Shepherd and Ms. Poissant gave public comment and testimony alleging an increase in criminal activity, intoxicated persons, loud amplified music, pedestrian traffic congregating on the sidewalks, trespass, trash, public urination, and an increase in vehicular traffic in the neighborhood. However, with the exception of the complaint about amplified music, there was no evidence that the problems were the result of the manner in which Respondent conducts its business. ALJ does not believe the situation in this case rises to a level that warrants denial of the renewal application for several reasons.

Brixx is located in a part of Washington Avenue with a high concentration of TABC licensed premises. Testimony established that within a two to three block area there are nine licensed

premises including Brixx. While testimony established that on some occasions the noise complained of was coming from Brixx no proof was given of any noise citation resulting in a fine against Brixx or its management. Protestants submitted HPD records of calls for service, offense reports and Houston Emergency Center records for the address at which Brixx conducts its business. Their view of these documents discloses that between September 12, 2012 and August 7, 2013, there were 19 calls for service on 17 separate dates. Calls for loud noise or music accounted for 14 calls for service. Twelve (12) of these calls were initiated by Ms. Poissant. One of the calls failed to list the name of the caller and one call came from "Michael" and one call from "Charles." On two occasions, the responding officer found the noise was not from Brixx and on one occasion that the noise was not excessive. The paucity of calls from other residents indicates that noise level is not a problem for those residents.

Protestants complained of an increase in automobile and pedestrian traffic, trash being thrown onto lawns, and an increase of criminal activity in the neighborhood. No evidence was presented that the problems complained of were the result of the manner in which Brixx conducts its business. No testimony linked a Brixx patron or employee with the trash, traffic or criminal activity in the neighborhood. There is no proof of a final adjudication of a city code violation that would by itself warrant a suspension or civil penalty under the Code.

Since beginning operations on October 16, 2009, Brixx has been cited for three administrative violations. TABC did not consider these administrative violations to be sufficient cause to deny the renewal application. The evidence is insufficient to show that the place or manner in which Respondent operates warrants refusal of the renewal application. Therefore, the ALJ recommends this renewal application be granted.

#### IV. FINDINGS OF FACT

1. 5110 Washington LLC, d/b/a Houston Brixx Bar (Respondent/Brixx) has filed a renewal application with the Texas Alcoholic Beverage Commission (TABC) for its mixed beverage permit and mixed beverage late hours permit MB 734512, LB for a premises located at 5110 Washington Avenue, Houston, Harris County, Texas.

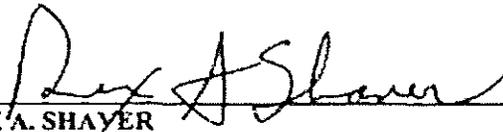
2. Protest to the application was filed alleging that the place or manner in which the applicant may conduct his business warrants a refusal of a permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.
3. A Notice of Hearing dated February 26, 2014, 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 April 25, 2014, a hearing began before ALJ Rex Shaver in Houston, Texas. TABC Staff appeared as a jurisdictional petitioner and was represented by Staff Attorney Sandra Patton. Respondent appeared and was represented by Attorneys Clyde Burleson and Michael Craig. Westwood Grove Civic Association appeared and was represented by Attorney and Protestant Margaret Poissant. Protestant Donna Shepherd appeared. The record closed that same day.
5. Respondent has had three administrative violation citations from TABC since the initial license was issued October 16, 2009.
6. Respondent has allowed amplified music and voice at a volume that disturbed at least two nearby residents.
7. No proof of noise or music at a decibel level in excess of that allowed by law was presented.
8. None of the non-noise related allegations were proven to be the result of the manner in which the Respondent conducts its business.

## V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under Tex. Alco. Bev. Code Ann. Chs. 5, 11, and 28, 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. There was insufficient evidence to demonstrate that the place or manner in which Respondent conducts its business warrants the refusal of a permit based on the general welfare, health, peace, morals, or safety of the people or on the public sense of decency. Tex. Alco. Bev. Code Ann. § 11.46(a)(8).

5. Respondent's renewal application for its Mixed Beverage Permit MB 734512 which includes the Mixed Beverage Late Hours Permit for the premises located at 5110 Washington Ave., Houston, Harris County, Texas, should be granted.

**SIGNED June 16, 2014.**

  
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**REX A. SHAYER**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**