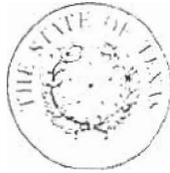
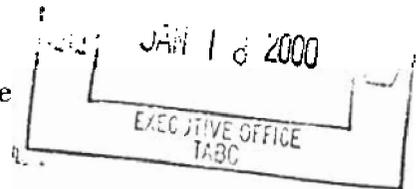


State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

January 14, 2000



Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

VIA CERTIFIED MAIL Z 283 051 885
Return Receipt Requested

RE: Docket No. 458-99-0384; Texas Alcoholic Beverage Commission vs. Guys Gamble,
(TABC Case No. 581036)

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Timothy Griffith, attorney for Texas Alcoholic Beverage Commission, and to E. Eugene Palmer, Attorney for Respondent. For reasons discussed in the proposal, I recommend that Respondent's application for a private club registration permit and a beverage cartage permit be granted.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

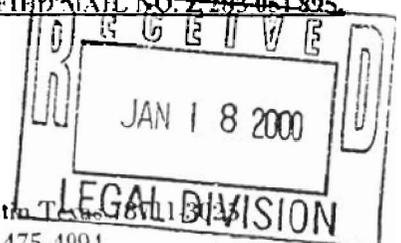
A handwritten signature in cursive script that reads "Tanya A. Cooper".

Tanya A. Cooper
Administrative Law Judge

TC:ds
Enclosure

xc: Shanee Woodbridge, State Office of Administrative Hearings, Austin, Texas - **Regular Mail**
Timothy Griffith, Staff Attorney, Texas Alcoholic Beverage Commission - **Regular Mail**; E. Eugene Palmer,
Attorney for Respondent, P. O. Box 1057, Austin, Texas 78767-1057 - **CERTIFIED MAIL NO. Z 283 051 885**
RETURN RECEIPT REQUESTED

Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin, Texas 78711-13025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994



DOCKET NO. 458-99-0384

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE
	§	
	§	
V.	§	STATE OFFICE OF
	§	
GUYS GAMBLE (TABC CASE NO. 581036)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Guys Gamble ("Applicant" or "Guys"), located at 7497 FM 730 South, near Boyd in Wise County, Texas, seeks private club registration and beverage cartage permits from the Texas Alcoholic Beverage Commission ("the Commission"). The protestants, consisting of Wise County officials, a citizens' group, and individual residents, asserted that the permits should be denied for safety, public welfare, and health concerns. The Commission's staff ("Staff") was also opposed to the application for the same reasons as the other protestants. This proposal for decision recommends the permits be issued.

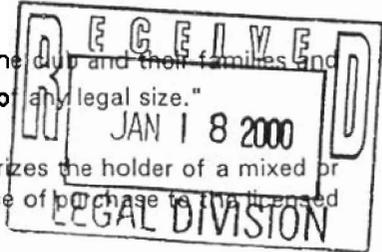
I. PROCEDURAL HISTORY

Applicant filed an original application for a private club registration permit¹ and a beverage cartage permit.² Applicant is located on FM 730 South in an unincorporated area near the town of Boyd in Wise County, Texas. Protests to the application were filed by Phil Ryan, Sheriff of Wise County, Gerald L. Hartley, Assistant County Attorney on behalf of the Wise County Commissioners Court, the Edwards Lane Crime Watch Association, an interested citizens' group, and by other residents of Wise County. The protestants asserted the application should be denied due to the dangerous nature of FM 730 South, which has resulted in a number of traffic accidents, the high number of driving while intoxicated arrests occurring on this roadway which would be increased by the availability of alcoholic beverages in that area, inadequate septic facilities available to meet the needs of a private club, and the

¹ Pursuant to §32.01(a) of the Code, "[a] private club registration permit authorizes alcoholic beverages belonging to members of the club to be:

- (1) stored, possessed, and mixed on the club premises; and
- (2) served for on-premises consumption only to members of the club and their families and guests, by drink or in sealed, unsealed, or broken containers of any legal size."

² Pursuant to §44.01 of the Code, "[a] beverage cartage permit authorizes the holder of a mixed or private registration permit to transfer alcoholic beverages from the place of purchase to the licensed premises as provided in this code."



general undesirable atmosphere that might attract minors to the establishment, such as pool tournaments.

On March 5, 1999, Staff issued a first amended notice of hearing informing all parties a hearing would be held on the application, as required by §2001.052 of the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 (Vernon 2000) The hearing was held on November 4, 1999, in Decatur, Texas, before Tanya Cooper, an administrative law judge ("ALJ") with the State Office of Administrative Hearings ("SOAH") . Staff appeared and was represented by Timothy E. Griffith, Commission Staff Attorney. Applicant appeared and was represented by E. Eugene Palmer, Attorney at Law. The hearing was concluded on November 4, 1999, and record closed on December 16, 1999, after the parties were provided with an opportunity to submit proposed findings of fact and conclusions of law and other materials in support of their positions.

II. JURISDICTION

The Commission has jurisdiction and authority over this matter pursuant to Chapter 5 and §§ 6.01, 11.61, and 32.01 of the Texas Alcoholic Beverage Code (the Code). TEX. ALCO. BEV. CODE ANN. § 1.01 *et seq.* (Vernon 2000). The State Office of Administrative Hearings has authority to conduct a hearing in this matter and make recommendations to the Commission, including the issuance of a proposal for decision containing findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2000) and TEX. ALCO. BEV. CODE ANN. §5.43 (Vernon 2000).

III. DISCUSSION

A. Applicable Law

The statutory foundation for the protest to this application is §11.46(a)(8) of the Texas Alcoholic Beverage Code, TEX. ALCO. BEV. CODE ANN. (Vernon 2000), 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.

B. Public Comment

Several members of the public attended the hearing and two individuals offered their comments regarding the application. Neither person expressed support for the application citing both moral and safety-related opposition to the application.

C. Evidence

1. **Physical Setting.** Guys Gamble is located in an unincorporated area of Wise County on FM 730, south of Boyd, Texas. The business is currently operated as a game arcade, with pinball machines, fooze ball and video games, and pool tables. Music is played inside the building, which is 30' x 40' in dimension. Patrons are allowed to bring their own alcoholic beverages into the business (commonly referred to as "BYOB") with ice and mixers ("set ups", such as non-alcoholic, carbonated beverages) available. Off-road parking is provided for customers. FM 730 is a paved, two-lane farm-to-market road with gravel shoulders connecting Tarrant and Wise Counties. The area in the immediate vicinity of Guys Gamble is comprised of undeveloped acreage, scattered residences, and other businesses, including The Moose Lodge, which is licensed by the Commission to sell alcoholic beverages and is operated pursuant to a permit similar to the permit sought by Applicant.

2. **The Protestants.** The protestants consisted of several Wise County officials, a local citizens group, Edwards Lane Crime Watch Association (ELCWA), as well as some individuals not affiliated with the group, and Commission Staff. Two major areas of concern were demonstrated throughout the evidence presented by protestants. Although some protestants expressed moral opposition to alcohol consumption, particularly in combination with games creating an atmosphere potentially more attractive to youthful patrons, the primary concern raised by most of the protestants was the danger created by persons who might consume alcohol at Guys Gamble and drive on what was described as a dangerous road. A second concern was demonstrated regarding the adequacy of business' water and septic facilities. Protestants contended that the location's facilities were insufficient for the proposed use of this location as a private club and created a public health hazard.

a. **Witness Testimony.** The protestants presented seven witnesses at the hearing. One of the witnesses, Patricia Goolsby, is the president of the ELCWA, and lives near Guys Gamble. She expressed concerns regarding an increased potential for traffic accidents describing that the roadway's posted speed limit was 65 miles per hour; and this factor, combined with the proximity of a hill near the business' driveway, created a dangerous situation particularly at night. Ms. Goolsby stated that Moose Lodge was approximately 2 miles from Guys Gamble on the same side of the roadway further increasing the potential that intoxicated drivers would be traveling on this roadway and raising the risk for the occurrence of serious accidents. She also discussed efforts that the ELCWA had made in reversing a publicized problem with crime in their neighborhood opining that another business licensed to sell alcoholic beverages would only exacerbate crime and traffic safety problems the ELCWA was working to address.

Randall Joy, a lieutenant with the Wise County Sheriff's Office, testified at the hearing regarding the location of Guys Gamble and previous service calls on FM 730. Lt. Joy estimated that he had not been in this particular area of Wise County for approximately one year, but recalled that FM 730 is on hilly terrain and has numerous side roads extending from it. Records maintained by the Sheriff's Office indicate numerous calls for service relating to traffic accidents and incidents of driving while intoxicated had been received on this roadway. Lt. Joy stated that this area probably had the highest number of calls of these type in the county; but no evidence was presented to show how the calls for service on FM 730, at or near the location of Guys Gamble, compared to other areas of Wise County or adjacent areas in Tarrant County. Lt. Joy was familiar with the nearby licensed premises, The Moose Lodge, indicating that the Sheriff's Office had responded to calls for service at that location for fights and disturbances; however he conceded that no presumption existed that Guys Gamble would be operated in a manner so as to be in violation of any laws or contrary to regulations associated with alcoholic beverage sales.

Another witness, Fraley Bridges, the County Commissioner for Wise County Precinct 3 where Guys Gamble is located, testified at the hearing that no need existed for the establishment. He indicated that he was opposed to any permits for alcoholic beverage sales being issued within Wise County, a "dry" county, when licensed premises for sales of these products were close by in Tarrant County and mentioned another private club in Wise County, Cactus Jack's, that is located in Boyd only a few miles from Applicant's location. Commissioner Bridges specifically opposed permit issuance for any activity that could increase the workload for the Sheriff's Office and result in increased costs to the citizens of Wise County.

Russell Martin, is an adjacent property owner. He testified to numerous problems he had encountered with Guy Ebner, the present operator of Guys Gamble. He described damages to his property, fences run through, mail boxes run over, trash blowing onto his property from Guys Gamble, loud music playing outside frequently, reckless driving by customers at Guys that prevented children from riding their bicycles in the road, people present at Guys until 3:00 a.m., and a verbal confrontation that he was involved in with patrons of Guys. Further, Mr. Martin's septic system had required upgrading because of the usage being made on Guys' property. Mr. Martin described Guys' water well as a "trash" well that had ultimately been unusable and resulted in the business having to discontinue its operations.

Tommy Stevens, Mr. Martin's relative by marriage, testified that he accompanied Mr. Martin to Guys Gamble on one occasion. Games of darts and pool were ongoing. He described the crowd present as "everyday folks", but loud and rowdy. Alcoholic beverages were present, however, they were not being sold or served by employees of Guys Gamble. Mr. Stevens stated that he was not much of a drinker and did not remain at Guys long because a fight broke out. Mr. Stevens was involved in this altercation. He described striking a woman in self-defense after she

had hit him in the side of his face with a beer can. Mr. Stevens left Guys and went to Mr. Martin's home after this incident. He related that once the Sheriff's Department officers came to Mr. Martin's residence to investigate this event, he had apologized for his actions while at Guys.

Tim Bradberry, owner of a public water-well system and licensed water well driller, testified regarding the quality of the water supply available on Guys' property. He had originally drilled the water well on this property in 1989 as a supply well for fire trucks. Mr. Bradberry stated that the well was sufficient to meet needs for residential use, but that it was not appropriate to use for commercial purposes. At approximately six months prior to the hearing, Mr. Bradberry had accompanied Tom Goode, director of Wise County Department of Public Works, and Dan Long, Texas Natural Resource Conservation Commission (TNRCC), to inspect the well for contamination from nearby septic systems on the property, as well as the adjoining property. No septic system problems were found existing on Guys' property relating to the well, but violations were found attributable to the adjoining property's septic system owned by Mr. Martin.

The last witness appearing for the protestants, Dan Long, is an inspector of public water supplies employed by the TNRCC. Mr. Long, a civil engineer, discussed the requirements for public water supply usage, the standards that must be met for Guys Gamble to utilize the existing well's water on the premises. At Mr. Long's last visit to the property, he stated that the water supply needed to have several problems addressed (i.e. submission of engineering plans, sanitary control easement, water samples, and installation of various pieces of equipment) before it would be able to meet compliance standards for a public water supply; but Mr. Long indicated the problems were correctable in their nature. Mr. Long further discussed alternative measures to meet the premises' water supply needs, either for the short-term as the water well was being upgraded or for a long term solution. Importing water held within a storage facility for the business' usage needs (i.e. restrooms, cleaning purpose, etc.) was deemed as a viable alternative to using the water well.

b. Documentary Evidence. In addition to witness testimony, the protestants presented documentary evidence, including records of the Wise County Sheriff's Department relating to service calls to traffic accidents and driving while intoxicated (DWI) offenses, and a petition of ELCWA residents.

3. Applicant

a. Witness Testimony. Royce Ebner testified in support of the permit application on behalf of Guys Gamble. Mr. Ebner is the proposed manager of the premises and would be assisted in this role by his son, Guy Ebner. Royce Ebner described his background, having served 20 years in the U.S. Marine Corp., retiring at the rank of master sergeant. After retiring from military service, he worked in private

businesses, before becoming employed by the U.S. Postal Service. Mr. Ebner worked for the Postal Service for a total of 23 years prior to retirement.

Mr. Ebner described the present operation of Guys Gamble testifying that because it was operated "BYOB", the Commission's rules for licensees and permittees had not been applicable. In the event this application was granted, Mr. Ebner stated that new rules for operation of the business would be implemented. He planned to establish hours of operation as permitted for private clubs. Although pool tables and other games were planned for the premises, no eight-liner devices or other forms of gambling was to be permitted on the premises. No minors without a parent would be allowed on the premises. Non-members of the private club would not be allowed on the premises without a club member.

Mr. Ebner stated that the building to be used was sufficient, 30' x 40' in dimension, and that the business had off-road parking for 25 vehicles. He planned to import all water for use on the premises to meet TNRCC standards as described by Mr. Long, using none of the existing well's water. Lastly, Mr. Ebner testified that he possessed the financial means to fund the start-up of this establishment as a licensed premises meeting the Commission's standards.

b. **Documentary Evidence.** Applicant offered several exhibits, including a number of photographs depicting both the interior and exterior of Guy's Gamble. Applicant also presented a letter from the Wise County Department of Public Works, addressing the septic system on the property as sufficient to meet standards for usage of the premises as a private club.

D. Analysis, Conclusion, and Recommendation

All of the witnesses showed sincerity and conviction in the way they expressed their opinions. It is admirable that so many members of a community would take an active role in seeking to safeguard the public welfare; applications for alcoholic beverage permits certainly merit such intense scrutiny. Based on the evidence, however, the ALJ concludes the protestants failed to demonstrate the issuance of the requested permits would be inconsistent with the public's safety or contrary to the public's general welfare, peace, morals, and public sense of decency.

The ALJ recognizes there have been accidents, some major and several minor, along with reports of driving while intoxicated (DWI) offenses occurring in the recent past on on FM 730. Nevertheless, the ALJ was not persuaded by the evidence presented that the accident rate or number of DWI offenses was disproportionately high in comparison with other roadways similarly situated. Although the occurrence of even a single collision or incidence of DWI on public roadways is not acceptable, the ALJ was not persuaded that the sale and consumption of alcohol subject to the provisions of the Texas Alcoholic Beverage Code and Commission's regulatory

authority on the premises of Guys Gamble would be inconsistent with the public's safety.

Based on the following facts together with the findings of fact set forth below, issuance of the permits would not be inconsistent with either the public's safety or any of the other considerations set forth in §11.46(a)(8) of the Code:

1. The permit application of Guys Gamble meets the Commission's requirements.
2. Guy Gamble has adequate facilities at its proposed location, (i.e. building, off-road parking, imported water for all water usage on the premises, and septic system) to be in compliance with state standards for a private club.
3. FM 730 is a paved, two-lane farm-to-market roadway with shoulders designed and maintained by the Texas Department of Transportation.
4. Although FM 730 may be heavily traveled, no evidence was produced to establish that the highway is more dangerous than any other highway of its type.
5. There are residences and other businesses in the area, but no evidence was produced to show that any schools or churches are located in the immediate vicinity of Guys Gamble.

Accordingly, the application should be granted in its entirety. Any other requests for entry of specific findings of fact and conclusions of law, or any other requests for general or specific relief, if not expressly set forth below, should be and are denied.

IV. FINDINGS OF FACT

1. On August 24, 1998, Guys Gamble ("Applicant" or "Guys") filed an original application with the Texas Alcoholic Beverage Commission ("the Commission") for a private club registration permit and a beverage cartage permit for a premises located at 7497 FM 730 South, Boyd, Wise County, Texas.
2. Protests to the application were filed by Wise County officials, a citizens' group, the Edwards Lane Crime Watch Association, other citizens of Wise County, and the Commission's Staff. The protestants asserted that the application should be denied due to traffic safety issues, public health reasons, and the general concern that Applicant's business, combining alcoholic beverage sales and games, would create an attractive, but unwholesome environment to younger persons.

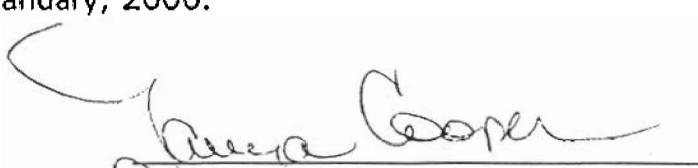
3. On March 5, 1999, Commission's Staff issued a first amended notice of hearing notifying all parties that a hearing would be held on the application and informing the parties of the time, place, and nature of the hearing.
4. The hearing was held on November 4, 1999, in Decatur, Wise County, Texas, before Tanya Cooper, an administrative law judge with the State Office of Administrative Hearings ("SOAH"). Commission's Staff appeared and was represented by Timothy E. Griffith, Staff Attorney. Applicant appeared and was represented by E. Eugene Palmer, Attorney at Law. The hearing concluded on November 4, 1999; the record was to close on December 15, 1999, but this time was extended until December 16, 1999, to allow the parties to submit written proposed findings of fact and conclusions of law. The record closed on December 16, 1999.
5. Applicant's premises is located in an unincorporated area of Wise County, on FM 730 South near the Wise/Tarrant County line.
6. Guys Gamble has been open for business as a game arcade with patrons allowed to bring their own alcoholic beverages ("BYOB") inside the business.
7. The business is situated in an 1,200 square-foot building with off-road parking sufficient for approximately 25 vehicles.
8. Guys Gamble has pool tables and other types of video games, but will not allow devices commonly known as "eight-liners" or other illegal gambling devices on the premises, nor will any unlawful gambling activity be condoned or conducted on the premises.
9. In the event the application is granted, Applicant plans to establish procedures for operating the premises including, but not limited to, establishing hours of operation and serving alcoholic beverages to minors and non-members, which are consistent with statutory provisions or Commission's rules for operation of the business, Guys Gamble, as a private club.
10. The area in the immediate vicinity of Guys Gamble is comprised of both businesses, residences, and undeveloped acreage.
11. There are no schools or churches within 1000 feet of Guys Gamble.
12. The septic system on the premises is adequate for operation of a private club.
13. The water well on Applicant's premises does not presently meet state standards for use by a private club; but water will be imported for use by the business, as permitted by state standards, until such time as the well can be improved to comply with these standards.

14. FM 730 is a paved, two-lane farm-to-market road designed and maintained by the Texas Department of Transportation; and although traffic accidents or incidents involving DWI offenses may have occurred on this roadway, no evidence was produced to establish that this area was more dangerous than any other similar roadway.
15. One other licensed premises, The Moose Lodge is located on FM 730 in the same vicinity as Applicant's premises, while the only other private club within Wise County is located in Boyd, Texas.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code), TEX. ALCO. BEV. CODE ANN. §1.01 et seq. (Vernon 2000).
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of 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 (Vernon 2000).
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 2000).
4. Based on the foregoing findings, a preponderance of the evidence shows that issuance of the requested permits will not adversely affect the safety of the public, nor will it adversely affect the general welfare, peace, or morals of the people or violate the public sense of decency, pursuant to §11.46(a)(8) of the Code.
5. Based on the foregoing findings and conclusions, the application of Guys Gamble for a private club registration permit and a beverage cartage permit should be granted.

Signed this 14th day of January, 2000.



TANYA COOPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS