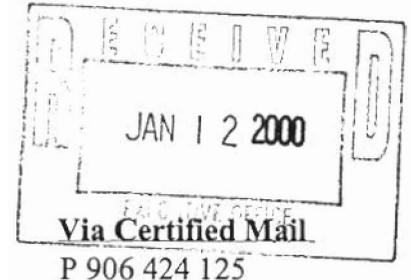


# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

January 10, 2000



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

RE: Docket No. 458-99-1979; Texas Alcoholic Beverage Commission vs. N.D.N.Y. ENTERPRISES, INC. d/b/a CHANCES NIGHT CLUB (TABC Case No. 585345)

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 Gayle Gordon, attorney for Texas Alcoholic Beverage Commission, and to Wade Bingaman, attorney for N.D.N.Y. Enterprises d/b/a Chances Night Club. For reasons discussed in the proposal, I recommend that the Commission approve Applicant's application.

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 black ink, appearing to read "Edel P. Ruiseco".

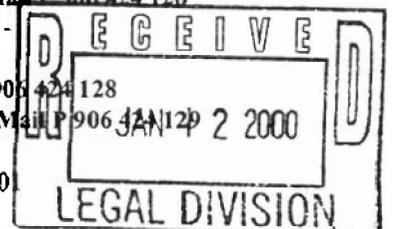
Edel P. Ruiseco  
Administrative Law Judge

EPR:mar

Enclosure

xc: Shanee Woodbridge, Docket Clerk, State Office of Administrative Hearing - Facsimile  
Gayle Gordon, Staff Attorney, Texas Alcoholic Beverage Commission - Certified Mail P 906 424 126  
Wade Bingaman, Attorney at Law, 409 West Fourteenth Street Austin, Texas 78701 -  
Certified Mail No. P 906 424 127.  
Sheriff David Perrusaitis, 301 N. Live Oak, Rockport Tx. 78382- Certified Mail P 906 424 128  
County Judge William Adams, 301 North Live Oak, Rockport Tx. 78382- Certified Mail P 906 424 128

1225 Agnes Street, Suite 102 ♦ Corpus Christi, Texas 78401  
(512) 884-5023 Fax (512) 884-5427



**DOCKET NO. 458-99-1979**

**IN RE:** § **BEFORE THE STATE OFFICE**  
§  
**APPLICATION FOR ALCOHOLIC** §  
**BEVERAGE PERMITS BY N.D.N.Y.** § **OF**  
**ENTERPRISES, INC., D/B/A CHANCES** §  
**ARANSAS COUNTY, TEXAS** §  
**(TABC DOCKET NO. 585345)** § **ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

The Petitioner, Texas Alcoholic Beverage Commission (TABC), through its Staff, has received an application for permits from N.D.N.Y. Enterprises, Inc., d/b/a as Chances Night Club (Respondent or Applicant). The application is for a mixed beverage permit, mixed beverage late hours permit, and a beverage cartage permit. The Staff takes no position regarding such application. Aransas County Judge, the Honorable William Adams, and Aransas County Sheriff David Petrusaitis (Protestants) filed a protest to the issuance of the above permits, alleging that the place 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, in that the road is dangerous and the additional increase in traffic and the likelihood that some drivers may be impaired, will pose an unnecessary risk to their safety and general welfare, in violation of §11.46(a)(8) of the Texas Alcoholic Beverage Code.

Protestants contend the location is unique and will increase dangers to the public along U.S. 35 Bypass (Bypass), while Applicant contends it will not, and that U.S. 35 Business (Business) is a more dangerous road. Finding that the Applicant's business poses no greater threat to the public's safety than any other business, the ALJ recommends that the Commission approve Applicant's application.

**REASONS FOR RECOMMENDATION**

The hearing for this case was convened before Administrative Law Judge Edel P. Ruisecco (ALJ) on October 26, 1999. Gayle Gordon, staff attorney of TABC's Legal Division, represented Staff. Aransas County Attorney James Anderson represented the Protestants. Applicant was represented by counsel, J. Wade Bingaman. The hearing was conducted in the Aransas County Commissioner's Court in Rockport, Texas. The hearing was completed that day and the record closed November 1, 1999.

The State Office of Administrative Hearings (SOAH) has jurisdiction to conduct the hearing; the parties agreed that venue was proper in Rockport, Aransas County, Texas; and that all parties received notice of the allegations and hearing date.

The dispute involves how the parties interpret the effect that the granting of the application would have on the safety of the general public.

Petitioner:

Petitioner contends that the "sole disputed issue" is the claim that "Respondent's premises is located adjacent to a dangerous highway and for that reason, the application for a permit should be denied."

Protestants:

The Honorable William Adams, County Judge of Aransas County, wrote, "I feel the proposed business location is in a dangerous traffic area. . . Having people pull onto this highway after drinking alcohol is just asking to compound the situation."

David Petrusaitis, Sheriff of Aransas County, stated his complaint as, "This highway has seen numerous major and fatality accidents since it has opened. While I can not place a specific blame, I do know that the majority of the fatality accidents were alcohol related. Couple this with an establishment that serves alcohol, and it's physical placement so close to the highway, and it has the potential to be a serious problem."

Applicable Law: The law the basis for the Protestant's request for denial is as follows:

*Sec. 11.46. GENERAL GROUNDS FOR REFUSAL. (a) The commission or administrator may refuse to issue an original . . . permit . . . if it has reasonable grounds to believe and finds that any of the following circumstances exist:*

*(8) the place . . . in which the applicant may conduct his business warrants the refusal of a permit based on the . . . safety of the people. . ."*

**Position of the Parties**

Commission: The Texas Alcoholic Beverage Commission takes no position regarding Applicant's application.

Protestants: Protestants allege that the location of the business is so unique that it creates a danger to the safety of the public. This allegation is based on:

- 1) the location exits only onto Bypass;
- 2) the location has limited access to Bypass;
- 3) the business sells alcoholic beverages; therefore it would lead to more alcohol-related accidents;
- 4) and the totality of the circumstances would make driving on the Bypass more dangerous to other drivers.

Applicant's business is located on the west side of the Bypass, about one-half mile north of the intersection with Texas Highway 188. The business' two entrances /exits are directly onto the Bypass, which, while having heavy traffic, is a well-maintained two-lane highway, with wide and paved shoulders, and has flashing caution lights at major intersections. It is clearly marked with center lines and shoulder stripes.

Applicant: Applicant's position is that the location of the business would not increase the danger to citizens more than any other business along the Bypass. Applicant contends that the location has a clear view of at least ½ to 1 mile in each direction when entering or exiting the location, and that the alternate entrance suggested by Protestants would actually be more dangerous to drivers entering the Bypass. Applicant maintains that a comparison of the accidents along the Bypass (132) and Business (474), showed the Business road was more dangerous, yet Protestants did not oppose applications or renewals of alcoholic beverage licenses along Business or other roads which feed traffic onto the Bypass.

### Evidence

Witnesses: A total of seventeen witnesses appeared - Protestant offered twelve; TABC one; and Applicant had four. No one contested the obvious - that more traffic means more accidents. Witnesses compared the road to a gun - it's only an inanimate object and, therefore, not dangerous if not used; and the people using it make it dangerous. However, the mere fact that more traffic equals more accidents did not prove that the location would increase the danger.

a) Protestant's expert witness, Ms. Roxana Lecoche, gave evidence that consumption of alcoholic beverages impairs the driving of people who consume the equivalent of more than four beers; specifying that one drink affects the judgment, two drinks affects perception and judgment, and three and four drinks affect balance and muscle control.

b) Protestant's witness, Mr. Brundrett, testified to the accuracy of the Bypass map admitted as Exhibit X-1.

c) Protestant, Sheriff Petrusaitis, testified that in his opinion the road was now dangerous and that he felt it necessary to escort school buses along the road; that the granting of the application would add to the danger to the public; and that the dots on Exhibit X-1 were verified by his office and related to accidents along the Bypass. The Sheriff also verified that patrons of other businesses which sold alcoholic beverages used the Bypass, and also confirmed that he did not protest the businesses which applied for or renewed liquor licenses. The Sheriff admitted that gas stations and convenience stores sold alcoholic beverages and were located along the Bypass.

d) Protestant's witness, Chief Tim Jayroe of the Rockport Police Department, testified that the Bypass is extremely dangerous when used by persons who are impaired by alcoholic beverages but admitted that he was not protesting the issuance of the permit. The Chief acknowledged the existence of other businesses that sold alcoholic beverages and whose patrons use the Bypass and did not dispute that 474 accidents were reported along Business during the prior 5 years.

e) Protestant's witness, Ms. Sharron Loflin, of the Texas Department of Public Safety (DPS), identified the accident reports that were admitted into evidence and testified they were true and correct copies of those on file with DPS.

f) Protestant's witness, Mr. Mike Probst, identified the photographs admitted into evidence as X-147 to X-166, and testified they were used in his newspaper, the Rockport Pilot, but admitted that he did not personally take the photographs.

g) Protestant's witness, Mr. Dave Wheeler, identified photographs marked as exhibits X-172 to X-207, as being ones which he took and which actually depicted the scene at the time the photographs were taken.

h) Protestant's witness, Mr. Riley, of the Herald, a newspaper in Rockport, identified exhibits X-167 to X-171, as photographs of accidents occurring on the Bypass. He also testified his daughter was shaken up in an accident on the Bypass.

i) Protestant's witness, Trooper Heath Harkins, testified that the speed limit had increased and was 65 mph at night and 70 mph during the daytime, and he believed that the Bypass is a dangerous road. He admitted that while he stopped people speeding on the Bypass that he stopped others in other areas as well; that he actually worked more accidents on Business than on the Bypass; and that in his opinion the DPS would not have constructed a weight station (located a half mile north of the premises) if it would be dangerous to citizens. The Trooper described the weight station as requiring northbound tractor-trailer vehicles to cross traffic to enter and return to the Bypass, which he conceded was dangerous.

j) Protestant's witness, Trooper Steve Miller, testified that in his opinion there were lots of accidents along the Bypass, and a majority of those were alcohol-related; and that a patron under the influence, exiting from Applicant's premises onto the Bypass, would pose a danger. The Trooper admitted that the area immediately around the premises was flat and had good visibility; that the State of Texas increased the speed limit from 55 to 70 mph; and that it is really drivers who cause problems and not the road - that both Bypass and Business are the same as any road. Also, he verified that any intersection is dangerous and there is nothing special about the premises.

k) Protestant's witness, Mr. Lloyd de la Rosa, Investigator for the County Attorney's office, identified exhibits X-208 to X-228, and verified that he placed the dots representing accidents on the map. He also testified that the Bypass was opened in December, 1994.

l) The Honorable William Adams, County Judge, admitted that he refused to approve Applicant's application, but that he had signed every other application presented to him, which included bars, restaurants and convenience stores. He is protesting the application, even though he is not a traffic engineer, and in spite of the fact that Applicant's application conforms with all zoning laws and regulations. He further offered to pave a dirt road which would lead from Applicant's premises to the west where it could connect with TX 188, and where he perceives Applicant's patrons could exit onto the Bypass more safely. He indicated that his office was not inclined to create zoning ordinances to control the growth along the Bypass. He further admitted that he did not know that 474 accidents occurred along Business during the same period that he was complaining of 132 along Bypass, but did admit that most alcohol-related businesses were located in the City of Rockport, and that it would be better if the state had not increased the speed limit on the Bypass.

m) Applicant, Mr. J. Frank Corry, Jr., testified that Applicant has complied with all federal, state, local laws and rules; has spent \$326,000 to build a building; and, has released 16 employees, pending approval of the application. He testified that as manager of a Rockport nightclub for three years he never had a TABC violation; had called police to prevent intoxicated persons from entering; and has not had to eject anyone for being intoxicated. As far as the Bypass, he testified that he drives it daily and has had no problems, and that the visibility southward is for more than a mile and northward about one-half mile.

n) Applicant's representative Steve Bodak, Jr., testified that in a previous nightclub, if anyone became intoxicated, a taxi was provided; that no TABC violations occurred; and that he also provided a community service by holding (non-alcoholic) teen dances. He explained the waitresses are trained that they are to closely watch customers who order over two drinks, to ensure that they do not become intoxicated. The premises for which the permits are sought will be a restaurant-bar combination, and not merely a place to serve alcoholic beverages.

o) Applicant's witness, Jerry G. Lawing, the Criminal Investigator for the Rockport Police Department, confirmed that there was little trouble with the other lounge managed by Applicant; that teen nights were held and well-accepted by the community; and that Applicant contributed to local charities. He did agree that the Bypass was a dangerous road, and clarified that any road would be dangerous if an intoxicated person were driving.

p) Applicant's expert witness, Mr. Rick Harris, a traffic engineer, testified that he was hired to conduct a traffic study regarding the premises of the proposed business. He found that the traffic count on the Bypass of 8300 vehicles per day did not reflect any increases during the times Applicant's business was open. He indicated that Protestants' suggestion of re-routing Applicant's patrons to TX 188 was not only a bad solution, but would be more dangerous. The expert, using the accident map (Exhibit X-1), which contains dots indicating specific accidents on the Bypass, explained why the dots were bunched at roads intersecting the Bypass. The map reflected that of 132 accidents, 127 took place at intersections, and three intersections accounted for almost half of the accidents, i.e., 48.6%, TX 188 -18.0%; FM 1265-15.7%; and Corpus Christi Road - 14.9%. The increased danger was explained as a visibility factor. A person exiting onto the Bypass from Applicant's premises have to look in two directions, right and left, whereas a person at the Bypass intersections would have to look three ways (right, left and forward). Also, the traffic count would not materially increase an adverse effect on the citizens of the community because the Bypass serves a wide area, not only Rockport; and is a main route between Corpus Christi and Victoria and Houston.

Generally, the testimony of the witnesses imply that the addition of any facility, whether residential, commercial, industrial or governmental along the 9-mile stretch of the Bypass will result in increased traffic, which will result in an increased number of accidents. There was no evidence to support that approving Applicant's application would result in more danger to the general public than would allowing any other business, or residence, constructed along the Bypass.

Effects of Drinking: Protestant alleged that Applicant's sale of alcohol would also increase the danger on the Bypass, because Applicant's patrons would drive while impaired or intoxicated. Ms. Lecoche, a Breath Test Technical Supervisor for DPS, testified regarding the effect of driving with fewer than 4 drinks and with more than 4 drinks. In countering her testimony, summarized as an inescapable conclusion that the more one drinks, the more one becomes intoxicated, Mr. Bodak testified that its policy is that a patron can order two drinks before employees become concerned. After a patron has two drinks employees are required to check to ensure that the patron is not intoxicated. In the event that a patron does become intoxicated, the patron is provided with a means of transportation to his residence. Local police officers confirmed that Applicant acted very responsibly when they managed a local lounge,

and noted that they received more calls from Applicant involving preventing impaired persons from entering the premises, rather than seeking to eject patrons.

To support Protestant's position regarding how Applicant would operate its proposed business, it would be necessary to assume that Applicant would serve patrons, whether they came merely to dine or not, until they became intoxicated, and would act irresponsibly by sending impaired patrons home without transportation. There was no evidence to support this assumption. On the contrary, the evidence reflected that the Applicant would not act in such a manner, as indicated by past experience.

Witnesses testified that Applicant was an active member of the community, who provided facilities for the benefit of local school children, and who has a good reputation in the community. Police officers testified that Applicant, when managing another lounge in Rockport, provided rides to those customers who became too intoxicated to drive. It was further shown that Applicant called the Rockport Police Department more often to keep intoxicated persons from entering than due to problems which occurred inside the premises. No evidence was presented that Applicant would act irresponsibly in operating its business at this location.

Exhibits: Protestant offered over 100 exhibits consisting of photographs, newspaper articles, and videotapes, in support of the contention that the Bypass is a dangerous road. However, most exhibits proved only that accidents, some fatal, had occurred. No exhibit supported Protestant's allegation that Applicant's location was unique to the extent that it would directly result in a more dangerous driving condition.

Other Liquor Applications: The County Judge testified that he did not turn down other applications for businesses that sold alcoholic beverages in the Rockport area - all of which have customers who could or do use the Bypass. He indicated that he was not aware that he could contest liquor license renewals, and vowed to do so in the future, but it was shown that other liquor license applications have been approved. Although the businesses were not on the bypass, the evidence was undisputed that these businesses affected the Bypass.

Accidents: Protestants alleged that the 132 accidents on the Bypass proved the Bypass was dangerous. Applicant showed Business, the road which the Bypass was to relieve, had 640 accidents (although only 474 accident reports were in evidence) during the same period. This confirmed that increased traffic leads to increased accidents, but not that Applicant's location was the cause.

### Summary

Case Law: The parties referred to case law, therefore, pertinent cases are described and considered in view of the facts presented:

- 1) Bavarian Properties, Inc. v. Texas Alcoholic Beverage Commission, 870 S.W.2d 686 (Ft. Worth, 1994): The court held that the location of the property was unique and did effect public safety because it had only one entrance/exit, and that it exited directly onto a frontage road which intersected with an exit ramp of a state highway. Applicant's property has two entrance/exits, and its location is not near any exit or entrance ramps.

2) Texas Alcoholic Beverage Commission v. Shirley Lee Sierra, 784 S.W.2d 359 (Tex. 1990): The Supreme Court overruled lower courts by finding that the location of the property was on a dangerous curve in the road, and denial was appropriate. Applicant's property is level, with excellent visibility, and with wide shoulders allowing drivers to speed up before integrating into traffic.

3) Vance P. Danced v. Texas Alcoholic Beverage Commission, 536 S.W.2d 667, (Corpus Christi, 1976): The Court held that the license should be denied because the location would be danger to the safety of citizens because it was at the intersection of a commercial area which had heavy traffic; was close to schools and community recreational facilities; and would create unusual conditions with the traffic resulting in a safety problem to the citizens who live in the particular area. Applicant's location would not cause the congestion, is not located near to community facilities, and is not in a business area frequented by young people.

4) Kermit Concerned Citizens Committee v. Colonial Food Stores, Inc., 650 S.W.2d, (El Paso, 1983): The objection to the application was that it would create a safety issue because its location at a major intersection, with other businesses at each corner, would increase the traffic. The Court held that the trial court was correct in approving the application because no unusual condition or situation was shown to exist to justify a refusal. The ruling supports the application because the evidence shows that any business would create traffic problems, and Applicant's location was not unique.

In summary, the ALJ finds the Protestants did not prove that approving the application would cause circumstances to exist which warrant the refusal based on safeguarding the safety of the people. Simply, the Bypass is a dangerous road and the adding of any business would lead to increased traffic and the possibility of increased number of accidents. However, nothing about the location of Applicant's premises would result in more accidents along the Bypass, or would be detrimental to the safety of the people.

### **PROPOSED FINDINGS OF FACT**

1. N.D.N.Y. Enterprises, Inc., doing business as Chances Night Club, at 201-299 Hwy. 35 Bypass, Rockport, Aransas County, Texas 78381-0495, filed an application for a Mixed Beverage Permit, Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit in May, 1999.
2. In June, 1999, the Aransas County Judge and Aransas County Sheriff filed a protest with the TABC, alleging the place in which the applicant would conduct his business warrants refusal of the permit because it would pose a danger to the health, safety and general welfare of the public.

3. On October 1, 1999, TABC's Staff sent notice of the hearing to Applicant and Protestant at their address of record.
4. The hearing convened on October 26, 1999. All parties were present. Petitioner appeared by counsel, Protestants appeared by James Anderson, Aransas County Attorney, and Applicant appeared by counsel, Wade Bingaman.
5. Applicant's proposed business would be located on the northwest side of the Bypass, a road that was created to relieve traffic on Business.
6. The Bypass is a heavily traveled highway, accommodating traffic in and around Rockport, Texas and also between Rockport and Corpus Christi, Victoria and Houston.
7. Because of heavy traffic, the Bypass and Business have experienced numerous traffic accidents, some of which have been fatal.
  - a) during the past five years, there have been 474 traffic accidents reported along Business;
  - b) during the same period, there have been 132 traffic accidents reported along the Bypass.
8. 127 of the 132 accidents along the Bypass occurred at the following intersections: Bypass and Texas 188; Bypass and FM 1265 and Bypass and Corpus Christi Road.
9. Visibility was the greatest factor that led to the accidents indicated immediately above. At those intersections, drivers are required to look in three directions, to the right, left and forward.
10. Applicant's proposed business location has two entrances and exits from and onto the Bypass; the entrances and exits have good visibility, i.e., drivers would have a clear view of half a mile or a mile in either direction.
11. Applicant has managed a business in Rockport in the past and has done so responsibly, having trained bar servers to monitor the number of drinks ordered by customers and trained employees to provide transportation to any customers who had become intoxicated.
12. There were few complaints to local police agencies about Applicant's prior business related to intoxicated persons within the establishment; whatever calls were made from the business involved keeping unruly or intoxicated persons or out of the establishment.
13. Applicant has a good record of responsibly managing businesses that sell alcoholic beverages and has a good reputation in the community.

14. Applicant's prior record and experience indicates Applicant will conduct the proposed business in a similar fashion, specifically ensuring that intoxicated patrons do not get behind the wheel when leaving its premises.
15. Protestants did not present evidence that locating Applicant's business in the proposed location would endanger the health, safety or general welfare of the public.

### PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §11.01 (Vernon 1999), hereafter the Code.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative 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 (Vernon 1999).
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 1999).
4. Applicant's proposed business premises located along the Bypass will not adversely affect the general welfare, health and safety of the people of Aransas County.
5. Applicant has complied with the licensing requirements of the TABC and its proposed business location does not violate §11.46(a)(8) of the ALCO. BEV. CODE ANN (Vernon 1999).
6. Applicant's application does not violate §§11.41, 11.46(a)(8) or 11.61, TEX. ALCO. BEV. CODE ANN. (Vernon 1999), and thus does not warrant refusal based on either the location of the business or of the applicant's conduct.
7. Based on the foregoing Findings of Fact and Conclusions of Law, Applicant's permits should be approved.

SIGNED this 7th day of January, 2000.



---

Edel P. Ruiseco  
Administrative Law Judge, Corpus Christi  
State Office of Administrative Hearings