DOCKET NO. 496333

IN RE DOLCE OLIVA CLUB INC.	§	**BEFORE THE TEXAS**
d/b/a DOLCE OLIVA	§	
PERMIT NOS. N-543777, PE-543778	§	
& FB-543779	§	
	§	**ALCOHOLIC**
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-1432)	§	**BEVERAGE COMMISSION**

PROPOSAL FOR DECISION O R D E R

CAME ON FOR CONSIDERATION this 20th day of June, 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Jerry Van Hamme. The hearing convened on March 27, 2006, and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 25, 2006. This Proposal For Decision **(attached hereto as Exhibit "A")**, was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. **As of this date no exceptions have been filed.**

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that **Respondent's permits and certificates be cancelled for cause, pursuant to 16 TAC § 41.52(c)(1)(E), § 41.52(c)(1)(B), § 41.52(c)(1)(C), § 41.42(c)(1)(D) and TABC § 32.03(d), §32.06(a), § 109.53 of the Code.**

This Order will become final and enforceable on July 11, 2006, unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

SIGNED on this 20th day of June, 2006, at Austin, Texas.

On Behalf of the Administrator,

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

JF/dn

The Honorable Jerry Van Hamme
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE 214-956-8611

S. George Alfonso
ATTORNEY FOR RESPONDENT
VIA FACSIMILE 972-458-6801
Ph.: 972-458-6800

Dolce Olivia Club Inc.
d/b/a Dolce Olivia
RESPONDENT
5956 Royal Lane
Dallas, Texas 75230-3913
CERTIFIED MAIL NO. _____
RETURN RECEIPT REQUESTED

Tim Griffith
ATTORNEY FOR PETITIONER
VIA FACSIMILE 214-678-4001
Ph.: 214-678-4043
TABC Legal Section

Licensing Division
Dallas District Office

State Office of Administrative Hearings

T6+

Shelia Bailey Taylor
Chief Administrative Law Judge

May 25, 2006

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

RE: Docket # 458-06-1432
TABC VS. DOLCE OLIVA CLUB, INC.,
D/B/A DOLCE OLIVA

Dear Ms. Fox:

Please find enclosed a PROPOSAL FOR DECISION in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Jerry Van Hamme
Administrative Law Judge

JVH/sr
Enclosure

cc: Timothy Griffith, Agency Council for Texas Alcoholic Beverage Commission, **Via Fax**,
S. George Alfonso, Attorney for Respondent, **Via Fax**

RECEIVED
MAY 3 X 2006
LEGAL DIVISION

6333 Forest Park Road, Suite 150A ◆ Dallas, Texas 75235
(214) 956-8616 Fax (214) 956-8611
http://www.soah.state.tx.us

SOAH DOCKET NO. 458-06-1432

TEXAS ALCOHOLIC BEVERAGE COMMISSION,	§	**BEFORE THE STATE OFFICE**
Protestant	§	
	§	
V.	§	
	§	
DOLCE OLIVA CLUB INC.	§	
d/b/a DOLCE OLIVA,	§	**OF**
Respondent	§	
	§	
DALLAS COUNTY, TEXAS	§	
(TABC CASE NO. 496333)	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission Staff (Staff) brought this action against Dolce Oliva Club Inc., d/b/a Dolce Oliva (Respondent), 5956 Royal Lane, Dallas, Dallas County, Texas, alleging that Respondent's Private Club Permit, Beverage Cartage Permit, and Food and Beverage Certificate should be cancelled because Respondent failed to operate its private club in accordance with the Texas Alcoholic Beverage Commission Code (Code) and regulations. The Administrative Law Judge (ALJ) finds that Staff has proven the allegations and recommends that Respondent's permits and certificate be cancelled.

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 in the findings of fact and conclusions of law without further discussion here.

On March 27, 2006, a public hearing was held before Jerry Van Hamme, ALJ, at the offices

of the State Office of Administrative Hearings, Dallas, Dallas County, Texas. Staff was represented by Timothy Griffith, attorney. Respondent was represented by S. George Alfonso, attorney. The record was closed on that date.

II. LEGAL STANDARDS AND APPLICABLE LAW

The Texas Alcoholic Beverage Commission (Commission) may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that the permittee violated a provision of the Code or a rule of the Commission. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2).

After notice and hearing the Administrator may suspend for a period not exceeding 60 days, or cancel a private club registration permit if he finds that the holder of the permit, its governing body, or any of its committees, officers, directors, members, agents, servants, or employees has failed to comply with any requirement set forth in section 41 of 16 TEX. ADMIN. CODE. 16 TEX. ADMIN. CODE § 41.52(c)(4).

A private club shall keep all required books, records, and minutes on the premises of the club and make them available to any representative of the Commission. 16 TEX. ADMIN. CODE § 41.52 (c)(1)(E).

A private club's membership committee shall keep written minutes showing the meeting date, the names of all committee members present, the name of any person admitted to membership, and the name of any person whose membership was terminated. 16 TEX. ADMIN. CODE § 41.52 (c)(1)(B).

Other than charter members, a private club's membership shall have no members except those approved by at least three members of the membership committee at a meeting of the committee. 16 TEX. ADMIN. CODE § 41.52 (c)(1)(C).

A private club shall maintain its membership records in well bound books or in a business machine if the business machine is approved in writing by the Administrator. 16 TEX. ADMIN. CODE § 41.52 (c)(1)(D).

No application for membership of a private club may be approved until the application has been filed with the chairman of the membership committee or board and approved by the chairman. TEX. ALCO. BEV. CODE ANN. § 32.03(d).

In a pool system of storage all members of a pool participate equally in the original purchase of all alcoholic beverages. If the replacement of alcoholic beverages is paid for by the establishment of an alcoholic beverages replacement account, a designated percentage of each charge for the service of alcoholic beverages, as determined by the club's governing body, is deposited into the account. TEX. ALCO. BEV. CODE ANN. § 32.06(a).

Any device, scheme, or plan which surrenders control of the employees, premises, or business of the permittee to persons other than the permittee is unlawful. It is the intent of the legislature to prevent subterfuge ownership of, or unlawful use of, a permit or the premises covered by such permit; and all provisions of the Texas Alcoholic Beverage Code shall be liberally construed to carry out this intent. It is the duty of the Commission to provide strict adherence to the general policy of preventing subterfuge ownership. TEX. ALCO. BEV. CODE ANN. § 109.53.

III. EVIDENCE

A. Staff's Evidence and Contentions

Cynthia Fernandez, a Staff auditor, testified that on March 25, 2005, she conducted a compliance audit of Respondent. Her audit results noted the following violations:

1. Minutes from Respondent's membership committee meetings were missing and were not on Respondent's premises or made available to the auditor during the audit;
2. Respondent had members whose applications for membership were not present in the written minutes of the membership committee and for whom no written minutes of the membership committee existed showing the meeting date, names of the committee members present, and names of the persons admitted to membership;
3. Respondent had members for whom there was no record showing that those members had been approved by at least three members of the membership committee at a meeting of such a committee;
4. Respondent used a business machine for maintaining minutes of its membership committee meetings that was not approved in writing by the Commission Administrator;
5. Respondent used a pool system for the purchase of alcoholic beverages and established an alcoholic beverages replacement account for replacing alcoholic beverages. Respondent's governing body designated 30 percent of each charge for the service of alcoholic beverages to be deposited into the account, but Respondent failed to deposit the appropriate amount into the alcoholic beverages replacement account; and
6. In 2003, Carlos Akins and Sandro Tamburin were officers of Respondent. Mr. Akins

was the President and Mr. Tamburin the Secretary. They were also co-owners of Santos LLC (Santos), a management company with which Respondent had a sublease and management agreement. The Staff audit showed that Respondent paid $33,138 in management fees to Santos, although the actual amount owed, based on Respondent's gross receipts, was no greater than $15,576. Respondent also transferred all its profits to Santos at the year's end and deposited its gross receipts into Santos' accounts. Furthermore, funds for Respondent's alcoholic beverages replacement account were being transferred from Santos' accounts into Respondent's account on an as-needed basis, rather than funds being put into the account based on the percentage agreed upon by the club's governing body.

Based on her audit results, Ms. Fernandez' concluded Respondent was being operated for the benefit of Santos, a private for-profit organization. This, in Ms. Fernandez' opinion, constituted a subterfuge ownership of Respondent.

As a result of these, and other,[1] findings, Staff initiated this disciplinary proceeding against

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[1]Ms. Fernandez also noted a number of other perceived violations in her Compliance Incident Report (TABC EX. No. 3). These include:

1. Respondent's preliminary membership applications were not kept in chronological order;
2. The membership committee meetings minutes were not kept in chronological order;
3. Preliminary membership applications were missing;
4. No temporary membership cards had been purchased since the issuance of Respondent's permit;
5. The designated pool system percentage was not documented on the service checks or nightly cash register tapes;
6. Additional funds from the restaurant account were deposited [presumably in the replacement account] without consideration of gross receipts for the service charge of alcoholic beverages; and
7. Checks for alcoholic beverages purchases were dishonored resulting in non-sufficient funds in replacement account.

Staff, however, did not show that these alleged acts constituted a violation of either the Code or the Commission's regulations. For example, neither the Code nor the regulations specifically require that Respondent's preliminary membership applications or membership committee meetings minutes must be kept in chronological order. Although pursuant to TEX. ALCO. BEV. CODE ANN. § 32.03(d) Respondent is required to remit fees, keep records, and report preliminary memberships as the Commission or the Administrator prescribe, no evidence was presented showing that

Respondent and requested that Respondent's permits and certificate be canceled.

B. Respondent's Evidence and Contentions

Carlos Akins, Respondent's president, testified that Sandro Tamburin, as Respondent's Secretary, was the general manager in charge of bookkeeping for Respondent, which included maintaining compliance with Commission requirements. Mr. Akins, Mr. Tamburin, and a silent partner were also partners in Santos. Prior to the Staff audit, Mr. Akins and the silent partner discovered that receipts, records, and money were missing. They confronted Mr. Tamburin, with the result that Mr. Tamburin departed as both an officer of Respondent and a partner of Santos. Mr. Akins did not know if Mr. Tamburin took any documents with him when he left, or whether Mr. Tamburin's departure explained the absence of documents reported by the audit, but he did testify that Mr. Tamburin has not been associated with Respondent since that time. In Mr. Akins opinion, any problems uncovered by the audit were related to Mr. Tamburin. As such, he does not feel that Respondent's permits and certificate should be disciplined by the Commission for acts or omissions

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the Commission or Administrator had prescribed keeping these records in chronological order.

Staff likewise cited no statute or regulation mandating that the designated pool system percentage must be documented on the service checks or nightly cash register tapes, or that dishonored checks resulting in non-sufficient funds in the replacement account constituted an actionable violation.

In addition, some of the allegations constituted violations of Respondent's by-laws – for example, depositing additional funds from the restaurant account into Respondent's replacement account without consideration of gross receipts for the service charge of alcoholic beverages. However, Staff cited no Code or Commission regulation that makes a violation of Respondent's by-laws a violation of a statute or regulation.

Furthermore, some of the alleged allegations where not shown to have occurred. For example, it is alleged that Respondent had not purchased any temporary membership cards since the issuance of Respondent's permit. However, even assuming this to be a violation, no evidence was presented showing that Respondent had issued any temporary memberships and therefore needed to purchase any temporary membership cards. It was also alleged that preliminary membership applications were missing. This allegation, however, is based on the assumption that preliminary membership applications were received by Respondent and therefore should have been present. No evidence was presented showing that such preliminary membership applications were, in fact, received by Respondent .

committed by a person no longer associated with Respondent.

IV. ANALYSIS

Respondent's evidence does not refute, rebut, contradict, or any way challenge the findings of the Staff audit. It merely attempts to identify the person ultimately responsible for the violations. However, even assuming Respondent is correct in its assignment of blame, the fact that a particular officer may have been responsible for the bulk of the violations, and that the remaining officers may not have been directly responsible for the violations, does not exempt Respondent's permits and certificate from discipline. 16 TEX. ADMIN. CODE § 41.52(c)(4).

The evidence shows that Respondent violated a number of Commission rules and Code requirements. In addition, the financial arrangement between Respondent and Santos, whereby Respondent paid $33,138 in management fees to Santos although Respondent owed no more than $15,576; Respondent transferred all its profits to Santos at the year's end; Respondent deposited its gross receipts into Santos' accounts; and funds for Respondent's alcoholic beverages replacement account were transferred from Santos' accounts into Respondent's account on an as-needed basis rather than as agreed upon by the club's governing body constitutes a subterfuge ownership.

Accordingly, the unrebutted evidence on the record shows, by a preponderance of the evidence, that Respondent violated the Commission rules and statutes set forth herein and that Respondent's permits and certificate are subject to discipline.

V. RECOMMENDATION

The ALJ recommends that Respondent's Private Club Permit, Beverage Cartage Permit, and

Food and Beverage Certificate be cancelled.

VI. FINDINGS OF FACT

1. On October 24, 2003, the Texas Alcoholic Beverage Commission Staff (Staff) issued a Private Club Registration Permit, N-543777, a Beverage Cartage Permit, PE-543778, and a Food and Beverage Certificate, FB-543779, to Dolce Oliva Club Inc., d/b/a Dolce Oliva (Respondent), 5956 Royal Lane, Dallas, Dallas County, Texas.

2. On March 25, 2005, Cynthia Fernandez, a Staff auditor, conducted a compliance audit of Respondent.

3. Minutes from Respondent's membership committee meetings were missing during the audit and were not on the premises or made available to the auditor.

4. Some of Respondent's members did not have applications for membership present in the written minutes of the membership committee. No written minutes of the membership committee existed showing the meeting date, names of the committee members present, and names of these members when they were admitted to membership.

5. Respondent had members for whom there was no record showing that those members had been approved by at least three members of the membership committee at a meeting of such a committee.

6. Respondent used a business machine for maintaining minutes of its membership committee meetings that was not approved in writing by the Commission Administrator.

7. Respondent used a pool system for the purchase of alcoholic beverages and established an alcoholic beverages replacement account for replacing alcoholic beverages. Respondent's governing body designated 30 percent of each charge for the service of alcoholic beverages to be deposited into the account.

8. Respondent failed to deposit 30 percent of each charge for the service of alcoholic beverages into the alcoholic beverages replacement account.

9. In 2003, Carlos Akins was the President and Sandro Tamburin the Secretary of Respondent. Both were also partners of Santos LLC (Santos), the management company with which Respondent had a management and sublease agreement.

10. Respondent paid $33,138 in management fees to Santos. The actual amount owed, based on Respondent's gross receipts, was no greater than $15,576.

11. Respondent transferred all its profits to Santos at the year's end.

12. Respondent deposited its gross receipts into Santos' accounts. Funds for Respondent's alcoholic beverages replacement account were transferred from Santos' accounts to Respondent's account on an as-needed basis.

13. On February 17, 2006, Staff sent a Notice of Hearing by certified mail, return receipt requested, to Respondent's mailing address as listed in the Commission's records, informing Respondent of the date, time, and place of the hearing, the statutes and rules involved, and the legal authorities under which the hearing was to be held.

14. On March 27, 2006, a public hearing was held before Jerry Van Hamme, ALJ, at the offices of the State Office of Administrative Hearings, Dallas, Dallas County, Texas. Staff was represented by Timothy Griffith, attorney. Respondent was represented by S. George Alfonso, attorney. The record was closed on that date.

VII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, §§ 6.01.

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. Proper and timely notice of the hearing was effected on all parties pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE § 155.55.

4. Respondent's failure to have minutes from its membership committee meetings on the premises and available to the Staff auditor violates 16 TEX. ADMIN. CODE § 41.52 (c)(1)(E).

5. Respondent's failure to have applications for membership in the written minutes of the membership committee for all or its members violates 16 TEX. ADMIN. CODE § 41.52(c)(1)(B) and TEX. ALCO. BEV. CODE ANN. § 32.03(d).

6. Respondent's failure to have records showing that all members had been approved by at least three members of the membership committee at a meeting of such a committee violates 16 TEX. ADMIN. CODE § 41.52 (c)(1)(C).

7. Respondent's use of a business machine for maintaining minutes of its membership committee meetings that was not approved in writing by the Commission Administrator violates 16 TEX. ADMIN. CODE § 41.42 (c)(1)(D).

8. Respondent's failure to deposit 30 percent of each charge for the service of alcoholic beverages into its alcoholic beverages replacement account violates TEX. ALCO. BEV. CODE ANN. § 32.06(a).

9. Respondent's overpayment of management fees to Santos, transfer of its profits to Santos at the year's end, deposit of gross receipts into Santos' accounts, and funding of the alcoholic beverages replacement account from Santos' accounts on an as-needed basis constitutes a subterfuge ownership and violates TEX. ALCO. BEV. CODE ANN. § 109.53.

10. Respondent's permits and certificate should be cancelled.

SIGNED May 25, 2006.

JERRY VAN HAMME
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION

CASE: TABC vs. Dolce Oliva Club Inc. d/b/a Dolce Oliva

DOCKET NUMBER: 458-06-1432

AGENCY CASE NO: 496333

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as of May 25, 2006