

**DOCKET NO. 587920**

IN RE THE RENEWAL APPLICATIONS	§	BEFORE THE
BIRDLAND SOUTH	§	
PERMIT NOS. N-157683 & NL-194203	§	
	§	TEXAS ALCOHOLIC
	§	
WICHITA COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-1913)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 21st day of November, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Monica Branch. The hearing convened on September 21, 2000, and adjourned September 21, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 17, 2000. This 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. 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.

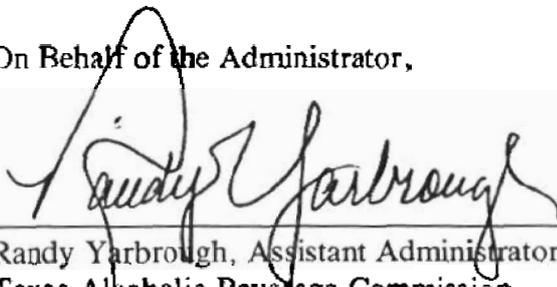
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the renewal applications are hereby **REFUSED AND DENIED**.

This Order will become final and enforceable on December 12, 2000 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.

**WITNESS MY HAND AND SEAL OF OFFICE** on this the 21st day of November, 2000.

On Behalf of the Administrator,

A handwritten signature in black ink, appearing to read "Randy Yarbrough", is written over a horizontal line. The signature is fluid and cursive.

Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Monica Branch  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FACSIMILE (817) 626-7448**

Michael F. Payne  
**ATTORNEY FOR RESPONDENT**  
4600 Belair Blvd.  
Wichita Falls, Texas 76310  
**CERTIFIED MAIL NO. Z 473 042 625**

Dewey A. Brackin  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
Wichita Falls District Office

**DOCKET NO. 458-00-1913**

**IN RE:  
THE RENEWAL APPLICATION OF  
BIRDLAND SOUTH**

**PERMIT NOS. N-157683 AND NL-194203**

**WICHITA COUNTY, TEXAS  
(TABC CASE NO. 587920)**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

Birdland South (Applicant), located at 2402 Sheppard Access Road, Wichita Falls, Wichita County, Texas, is the holder of a Private Club Registration Permit and a Private Club Late Hours Permit issued by the Texas Alcoholic Beverage Commission (TABC or Commission). Applicant filed an application for renewal of the permits, and the Commission's staff (Staff) received a protest regarding renewal of these permits. This proposal for decision recommends that the Commission refuse issuance of the renewal permits.

**JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

The Texas Alcoholic Beverage Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5, §§ 11.41 and 11.46(a) (Vernon 2000). The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2000).

On August 9, 2000, Staff issued its notice of hearing, directed to Birdland South, 2402 Sheppard Access Road, Wichita Falls, Texas, 76304-1402, via certified mail, return receipt requested. As evidenced by TABC Exhibit One, this notice was received by the Applicant on August 12, 2000. The notice of hearing contained a statement of the time, place and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted. The notice of hearing also contained the following language in at least 10-point or larger boldface type: If you fail to appear ... at the hearing, the allegations in this notice will be deemed admitted as true, and the relief sought may be granted by default.

On September 21, 2000, a hearing convened before ALJ Monica Branch (State Office of Administrative Hearings) at the County Judge's Courtroom, Wichita County Courthouse, 900 7th Street, Wichita Falls, Wichita County, Texas. Staff was represented at the hearing by Timothy E. Griffith, Commission Staff Attorney. The City of Wichita Falls, Texas Police Department (Protestant) was represented by its attorney, Mark Price, Assistant City Attorney for the City of Wichita Falls, Texas. The Applicant did not appear and was not represented at the hearing. After presentation of evidence, the record was closed on September 21, 2000.

### LEGAL STANDARDS AND APPLICABLE LAW

The Commission is authorized to refuse issuance of a renewal permit, pursuant to § 11.46(a)(8) of the Texas Alcoholic Beverage Code (Code), if it has reasonable grounds to believe and finds as follows:

[T]he place or manner in which the applicant may conduct his business warrants the refusal of a permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency...

### DISCUSSION

Both the Commission and the Protestant presented evidence relating to the factual allegation contained in the notice of hearing. The evidence established that Birdland South has been the site of numerous acts of violence, including aggravated assaults and shootings, involving large numbers of patrons. Emergency personnel responding to incidents at this private club have been harassed and attacked by patrons. These attacks have consisted of glass bottles and rocks thrown at police officers and vandalism to emergency vehicles. During one such incident, a law enforcement officer was run over by a patron's vehicle. Fights and shootings originating at Birdland South have historically traveled to neighboring businesses, including a fast food restaurant and a hotel, and through residential streets. Calls for police assistance arising from incidents at Birdland South have, at times, resulted in all police units responding to the Applicant's premises, leaving the rest of the city with little or no police protection. Finally, Birdland South has failed to take reasonable steps to hinder violent criminal activity originating on its premises. This is of special concern due to Birdland South's status as a private club.

After presentation of evidence, both Staff and the Protestant moved for entry of a default judgment pursuant to 1 TEX. ADMIN. CODE § 155.55 (1999). The ALJ finds that Staff issued notice in compliance with 1 TEX. ADMIN. CODE §§ 155.27 and 155.55 (1999) and § 11.63 of the Code. Therefore, Staff's motion for default judgment should be granted. Pursuant to 1 TEX. ADMIN. CODE § 155.55 (1999), the allegation presented in the notice of hearing is deemed admitted as true. Accordingly, the ALJ has incorporated this allegation into the Findings of Fact below.

## FINDINGS OF FACT

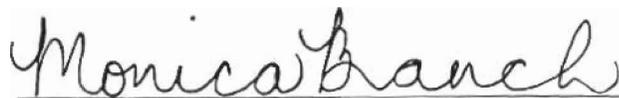
1. Applicant, Birdland South, holds a Private Club Registration Permit, N-157683, and a Private Club Late Hours Permit, NL-194203, for the premises located at 2402 Sheppard Access Road, Wichita Falls, Wichita County, Texas.
2. On August 9, 2000, Staff issued its notice of hearing to the Applicant, via certified mail, return receipt requested, addressed to Birdland South, 2402 Sheppard Access Road, Wichita Falls, Texas, 76304-1402. The notice was received by the Applicant on August 12, 2000.
3. The notice of hearing contained a statement of the time, place and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
4. The notice of hearing also contained the following language in at least 10-point or larger boldface type: If you fail to appear ... at the hearing, the allegations in this notice will be deemed admitted as true, and the relief sought may be granted by default.
5. A hearing was convened before Monica Branch, an Administrative Law Judge with the State Office of Administrative Hearings, on September 21, 2000. The Applicant did not appear and was not represented at the hearing.
6. Evidence was presented at the hearing and the record was closed on September 21, 2000.
7. Both Staff and the Protestant moved for entry of a default judgment.
8. The notice of hearing contained the following allegation:

The place or manner [in] which the applicant plans to conduct business warrants refusal of the applications based on the general welfare, health, peace, morals, safety, and/or on the sense of public decency...Specifically, the location is too proximate to residences which have been and would be adversely affected by loud noise, lack of parking, excessive traffic, urination, and litter. Additionally, the premises has a record of inordinate calls for service from the Wichita Falls Police Department.

## CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5, §§ 11.41 and 11.46(a) (Vernon 2000).
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2000).
3. Based upon Findings of Fact Nos. 2-4, Staff issued its notice of hearing in compliance with 1 TEX. ADMIN. CODE §§ 155.27 and 155.55 (1999) and TEX. ALCO. BEV. CODE ANN. § 11.63.
4. Based on Findings of Fact Nos. 2-5, the hearing proceeded on a default basis as authorized by 1 TEX. ADMIN. CODE § 155.55 (1999).
5. The allegation contained in the notice of hearing, set out in Finding of Fact No. 8, is deemed admitted as true pursuant to 1 TEX. ADMIN. CODE § 155.55 (1999) and constitutes a circumstance under which the Commission is authorized to refuse issuance of a renewal permit.
6. Based on Finding of Fact No. 8 and Conclusion of Law No. 5, the Commission should refuse issuance of renewal permits to the Applicant.

SIGNED on this the 17<sup>th</sup> day of October, 2000.



MONICA BRANCH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

# STATE OFFICE OF ADMINISTRATIVE HEARINGS

The Vinnedge Building  
2100 N. Main Street  
Suite 10

Ft. Worth, Texas 76106

Phone (817) 626-0003

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## SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION

CASE: Birdland South

DOCKET NUMBER: 458-00-1913

AGENCY CASE NO: 587920

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Fax No: (512) 475-4994

**SOAH**

BY FAX

**WORK ORDER**

Docket # 458-00-1913

From: Monica Branch Date: October 17, 2000

**PFD INFORMATION FOR MEASURES REPORT**

Notice of Hearing Date 08/09/2000

Date of Hearing 09/21/2000

Date Record Closed 09/21/2000

Date PFD Issued 10/17/2000

Administrative Fine Recommended/Ordered:  Yes  No

(If yes, amount of fine)

Major Hearing:  Yes  No

DISTRIBUTION DATE: October 17, 2000

**DOCUMENT DESCRIPTION**

XXXPFD (Document Name: birdland.pfd)

Order (Document Name: )

Has docket change form been completed (if applicable)?

No.

\_\_\_\_\_ Memo (Document Name: \_\_\_\_\_)

\_\_\_\_\_ Letter (Document Name: \_\_\_\_\_)

INCLUDE EXHIBITS \_\_\_\_\_ Yes  No

UPDATE:  Index \_\_\_\_\_ Service List

**SPECIAL INSTRUCTIONS**

Distribute pfd to parties. Update index.

\_\_\_\_\_ Make Extra Copy

Return file to:  ALJ  Central Filing Closed

Sec'y  Central Filing Pending

Other \_\_\_\_\_

Completion Date: \_\_\_\_\_ Sec'y \_\_\_\_\_



# TEXAS ALCOHOLIC BEVERAGE COMMISSION

Post Office Box 13127, Austin, Texas 78711-3127 (512) 206-3333  
http://www.tabc.state.tx.us

Fax: (512) 206-3498

Doyme Bailey, Administrator

November 17, 2000

Mr. Randy Yarbrough  
Assistant Administrator  
Texas Alcoholic Beverage Commission  
P. O. Box 13127  
Austin, Texas 78711-3127

Re: Docket No. 587920  
TABC v. Birdland South

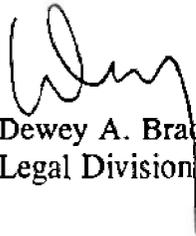
Dear Mr. Yarbrough:

Please find enclosed a Proposal for Decision and exhibits in the above-referenced cause. No exceptions to the Proposal have been filed.

After your review, please inform this office of your decision. We will then draft an Order conforming with your judgment.

Thank you for your attention to this matter.

Yours truly,



Dewey A. Brackin  
Legal Division

DAB/yt

Adopt PFD  
Deny Permit  
Randy Yarbrough  
An Equal Opportunity Employer  
11/17/2000 Gail Madden, Member Dallas

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