DOCKET NO. 597898

IN RE HENRY TAN COMPANY	§	BEFORE THE
D/B/A SUPER DISCOUNT PACKAGE STORE	§	
PERMIT/LICENSE NOS. P-252464,	§	
BF304594	§	TEXAS ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-8279)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 3rd day of March, 2005, the above-styled and numbered cause.

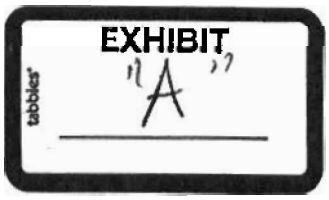
After proper notice was given, this case was heard by Administrative Law Judge Brenda Coleman. The hearing convened on December 6, 2004 and adjourned on December 6, 2004. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on February 4, 2005. 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. 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/licenses are hereby **GRANTED.**

This Order will become final and enforceable on **March 24, 2005** 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.



SOAH DOCKET NO. 458-04-8279

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
V.	§	OF
HENRY TAN COMPANY D/B/A SUPER DISCOUNT PACKAGE STORE, Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Henry Tan Company d/b/a Super Discount Package Store (Applicant) filed renewal applications with the Texas Alcoholic Beverage Commission (Commission) for a Beer Retailers Off-Premises License and a Package Store Permit for a premises located at 4915 Second Street, Dallas, Dallas County, Texas. The Commission's staff (Petitioner) protests the issuance of the permit and license. Petitioner alleges that the location of Applicant's place of business is within 300 feet of a public school and in an alcohol-free zone. Therefore, Applicant may not, by law, be granted a renewal of the permit and license. Petitioner also alleges that granting the license and permit to Applicant would constitute a threat to the general health, welfare, and safety of the school children in the area.

After considering the arguments and evidence presented by the parties, the Administrative Law Judge (ALJ) finds the evidence insufficient to prove that Applicant's business in located within 300 feet of a public school and in an alcohol-free zone, or that granting the license and permit to Applicant would constitute a threat to the general health, welfare, and safety of the school children in the area. The ALJ recommends that renewal of the permit and license be granted.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

On August 12, 2004, Petitioner issued its Notice of Hearing to Applicant. A hearing was scheduled for September 1, 2004. On August 26, 2004, Applicant filed a motion for continuance. The motion was granted and the hearing reset for November 10, 2004. On that date, Applicant filed its second motion for continuance. The motion was granted and the hearing reset for December 6, 2004.

On December 6, 2004, a hearing convened in Dallas, Texas, before ALJ Brenda Coleman, State Office of Administrative Hearings (SOAH). Applicant appeared and was represented by Jerry Goh, attorney. Petitioner was represented at the hearing by Timothy Griffith, Staff Attorney. After presentation of evidence and argument, the hearing concluded and the record closed on that date.

II. DISCUSSION AND ANALYSIS

A. Factual Background

The Commission issued Applicant a Beer Retailers Off-Premise License and a Package Store Permit on January 24, 1995, for a premises located at 4915 Second Street, Dallas, Dallas County, Texas. Applicant's business has been at the Second Avenue address continuously since before January 1995. The license and permit were renewed continuously until the 2001 renewal year. The Pearl C. Anderson Learning Center (the Learning Center) is located at Garden Lane's intersection with Second Street, in Dallas, Texas. The Learning Center opened some time in 1998 at the Garden Lane address, and is located in the Dallas Independent School District. There is a gas station located on the corner of the intersection between the two establishments.

B. Petitioner's Contentions and Evidence

Petitioner, who has the burden of proof, contends that Applicant is operating its business in

violation of § 109.33 of the Texas Alcoholic Beverage Code (the Code).[1] Petitioner contends that pursuant to this statutory authority, the Dallas City Council passed an ordinance on September 13, 1995, prohibiting the sale of alcoholic beverages within 300 feet of the Learning Center.[2] Petitioner also contends the Dallas City Council adopted an alcohol-free zone around the Learning Center pursuant to § 6-4(a)(2). Petitioner next contends that Applicant's renewal permit and license fall outside of the grandfather clause exception of the Code due to Applicant's 2001 sale to a minor violation. Therefore, Petitioner argues, Applicant is prohibited by law from being granted the requested license and permit.

As a final reason for refusing to renew the license and permit to Applicant, Petitioner contends that granting the applications would violate § 11.46(a)(8) of the Code, which prohibits issuing a permit that negatively affects the general health, welfare, and safety of the public.[3]

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1 § 109.33. SALES NEAR SCHOOL, CHURCH, OR HOSPITAL
(a) The Commissioners court of a county may enact regulations applicable in areas in the county outside an incorporated city or town, and the governing board of an incorporated city or town may enact regulations applicable in the city or town, prohibiting the sale of alcoholic beverages by a dealer whose place of business is within:
(1) 300 feet of a church, public school, or public hospital; or
(2) 1,000 feet of a public school, if the commissioners court or the governing body receives a request from the board of trustees of a school district under § 38.007, Education Code.

(b) The measurement of the distance between the place of business where alcoholic beverages are sold and the ... public school shall be in a direct line from the property line from the public school to the property line of the place of business, and in a direct line across intersections.

2 § 6-4. Dallas City Code, Ordinance No. 22537 (Petitioner's Exhibit Four)
(a) No person may sell alcoholic beverages if the place of business is within:
(1) 300 feet of a church, public hospital or public school; or
(2) 1,000 feet of a public school, if the city council by resolution adopts a request from the board of trustees of a school district under § 38.007 of the Texas Education Code,
. . .

(c) Except as otherwise provided ... the measurement of the distance between the place of business where alcoholic beverages are sold and a public school will be in a direct line from the property line of the public school to the property line of the place of business, and in a direct line across intersections.

3 § 11.46. GENERAL GROUNDS FOR REFUSAL
(a) 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 exists:
(8) the 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;
. . .

In support of its case, Petitioner presented five exhibits and the testimony of two Commission witnesses, Gene Anderson and Jerry Sweeney. The testimony of the witnesses is summarized below.

1. Gene Anderson

Agent Gene Anderson testified that he conducted the investigation of Applicant's premises and surrounding area, and concluded that the Petitioner's protest is warranted. The agent recommended that Applicant's renewal applications for the 2001 renewal year be denied.

The first basis for his conclusion was that the Learning Center is located in an alcohol-free school zone.[4] According to Agent Anderson, the Dallas City Council's enactment of Ordinance No. 22537 imposes a distance requirement for public schools, pursuant to § 109.33(a)(2), to promote the general health, welfare and safety of school children.

The second basis for Agent Anderson's conclusion that the protest is warranted was that there was a final disposition of an administrative case against Applicant on October 11, 2001, involving the sale of an alcoholic beverage to a minor on May 9, 2001, in violation of § 61.71(a)(5) of the Code. The agent also stated that this is Applicant's only sale to minor violation since the Commission issued the original permit and license for the Applicant's premises on January 24, 1995. Agent Anderson said he does not know when the Learning Center opened. However, he opined that it has been at the intersection of Garden Lane and Second Avenue since 1998 because the Commission has had protests of other establishments in the area since 1998.[5]

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4 § 109.33 (a)(2) of the Code authorizes the "governing board of an incorporated city" to enact regulations prohibiting the sale of alcoholic beverages by a dealer whose place of business is within 1,000 feet of a public school, if [emphasis added] the governing body receives a request from the board of trustees of a school district under § 38.007, Education Code.

5 Under the Code, businesses applying for permits only need to satisfy the distance requirements in existence at the time of their original application.

The final basis for Agent Anderson's conclusion that Petitioner's protest is warranted was that on two occasions in December 2001, Applicant's business was determined to be within 300 feet of the Learning Center. Agent Anderson stated the first measurement was performed on December 12, 2001, by Commission Compliance Officer Donald Hons.[6] The second measurement was made subsequent to that date by Commission Compliance Officer Jerry Sweeney.

2. Jerry Sweeney

Commission Compliance Officer Jerry Sweeney testified that in December 2001, he measured the distance between the Learning Center and Applicant's place of business as 160 feet. Mr. Sweeney estimated the location of the respective property lines. He used the corner of the parking lot of the Learning Center as its estimated property line, and the nearest corner of the building in which Applicant's premises is located as its estimated property line. Petitioner made a diagram of the measurement with a red line to indicate the distance between the respective property lines.[7] He made the measurement by using a Keson measuring wheel and walking the distance between the two estimated property lines in a direct line and across the intersection of Garden Lane and Second Street.

Mr. Sweeney stated that at the time he made the measurement, he did not look at any site map, survey plat, architectural plan or city map. He stopped at the nearest corner of the building across the

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§ 109.59. Application of Distance Requirements

(a) If at the time an original alcoholic beverage permit or license is granted for a premises the premises satisfies the requirements regarding distance from schools, churches, and other types of premises established in this code and any other law or ordinance of the state or a political subdivision of the state in effect at the time, the premises shall be deemed to satisfy the distance requirements for all subsequent renewals of the license or permit.

(d) **Subsection (a)** does not apply to the satisfaction of the distance requirement prescribed by § 109.33(a)(2) for a public school if the holder's permit or license has been suspended for a violation occurring after September 1, 1995, for [a violation of § 61.71(a)(5) of the Code].

6 No evidence was presented at the hearing concerning how Mr. Hons made the measurement from the Learning Center to Applicant's place of business, or what the actual distance was.

7 Petitioner's Exhibit Six.

street from the Learning Center and determined that he was at Applicant's location of 4915 Second Street because he observed a sign across the front of the building identifying Applicant's business. He admitted that it is possible that when he measured the distance, he was not exactly on the property line for the Learning Center or Applicant's place of business.

Mr. Sweeney also stated that he did not notice any indication of a different business located inside the building with a separate address number or entrance door. He admitted that he did not look inside the building and verify that Applicant's premises occupied the entire building up to the point that he measured as the estimated property line.

According to Mr. Sweeney, he did not realize that 4915 Second Street and 4917 Second Street are located in the same building. On one hand, he stated that if 4917 Second Street is situated between the gas station on the corner and Applicant's premises, then his measurement would not be accurate. However, on the other hand, he stated that even if he did incorrectly measure the property line for 4917 Second Street instead of 4915 Second Street, he still believed that Applicant's business was within 300 feet of the Learning Center because he estimated that 4917 Second Street would not be in excess of 100 feet. Therefore, it would still be reasonable to rely upon his measurement.

C. Applicant's Contentions and Evidence

Henry Tan, Applicant's owner and president, testified on his own behalf. Mr. Tan stated this is his only source of income to support his family of five. He purchased an existing business at 4915 Second Street which Petitioner had already licensed for the location. He has operated the business at this location for almost 10 years, and did so a long time before the Learning Center opened on Garden Lane.

Applicant contends that the property line for his business is not within 300 feet of the Learning Center, and that Petitioner's measurements are incorrect because Mr. Sweeney measured from the public school to the property line of 4517 Second Street instead of to the property line of his business at 4915

Second Street

According to Mr. Tan, 4917 Second Street is an empty store which is adjacent to his business in the same building. It has a separate front door which faces onto Second Street. A brick wall separates the two spaces, which are situated on opposite ends of the building. The address is on file at the Dallas City Hall. The address numbers for 4917 Second Street used to hang over the door, but have fallen down since no one does business there anymore. The previous tenant attempted to use the space as a convenience store, but did not keep the lease, so the location was left in its current condition. 4917 Second Street is situated in the corner of the building nearest the Learning Center. Mr. Tan said that even with the street numbers missing from above the door, it still is not easy to confuse the separate locations as one store because of the different entrance doors. He stated that people sometimes enter his business to inquire about leasing the adjacent space.

After reviewing Mr. Sweeney's diagram, Mr. Tan stated that the diagram does not accurately show where his store ends. The diagram, as prepared by Mr. Sweeney, designated the end of the building as the property line for Applicant's premises. In actuality, that is the property line for 4917 Second Street. Mr. Tan indicated that the correct property line for his premises located at 4915 Second Street should be drawn from the middle of the building out to Second Street.

Mr. Tan admitted that one of his employees sold an alcoholic beverage to a minor back in 2001. He stated, however that the employee is no longer employed by him. He also stated that he has had only the one sale to minor violation since the license and permit were issued in 1995. Until this instance regarding the 2001 renewal applications, the Commission has not denied renewal of his permit and license on the basis of the 300-foot distance requirement of the Learning Center.

Applicant argued that Petitioner has not proved by a preponderance of evidence that Applicant's renewal permit and license should be denied because its business is within 300 feet of the Learning Center. Applicant contends, alternatively, that if its business was in violation of the city's distance requirements, its

premises would fall within the grandfather clause exception. Applicant argued that it is not in violation of the Code and should be permitted to stay in business. Lastly, Applicant argues, pursuant to § 109.33(e) of the Code, the Commission has the discretion and authority to relax it's enforcement of the regulation if an undue hardship on an application for a license or permit arises. Denial of the applications would create a financial hardship on Applicant.

D. Analysis

1. Applicant's Business Within 300 Feet of a Public School

The parties disagree as to whether the business is located within 300 feet of the Learning Center. Petitioner presented evidence at the hearing that the City of Dallas has adopted an ordinance prohibiting the sale of alcoholic beverages from businesses located less than 300 feet from a public school. The ordinance requires that the measurement between the business establishment and the school be made from property line to property line. This is not the distance Mr. Sweeney measured.

Applicant's business is located at 4915 Second Street. By measuring to the property line of 4917 Second Street instead, Mr. Sweeney did not measure the statutorily required distance. The ALJ cannot find that Applicant's business is located within 300 feet of the Learning Center. Petitioner, therefore, has not proved that Applicant's requested permit and license should be denied for this reason.

2. The Learning Center in an Alcohol-Free Zone

The only evidence presented at the hearing by Petitioner that the Learning Center is in an alcohol-free zone in which the sale of alcoholic beverages within 1,000 feet of the school is prohibited, was the affirmative statement of Agent Anderson. Petitioner presented no evidence that the Dallas City Council received or approved a request from the Board of Trustees of the Dallas Public Schools to adopt an alcohol-free school zone around the Learning Center. Section 109.33(a)(2) of the Code requires a

showing that the governing board of Dallas has prohibited sales of alcoholic beverages by enacting such a distance requirement. The ALJ cannot find that the Learning Center is located in an alcohol-free school zone. Petitioner, therefore, has not proved that Applicant's requested permit and license should be denied for this reason.

Similarly, the parties argued whether or not the Applicant's permit and license fall within the exception provided in the grandfather clause of § 109.59(d) of the Code as a result of Applicant's final disposition of the sale to minor violation which occurred on May 9, 2001. This subsection specifies that § 109.33(a)(2) of the Code and the 1,000 feet distance requirement is what was contemplated in such situations. The 300 feet distance requirement of § 109.33(a)(1) of the Code does not apply. The ALJ gives no weight to the argument of either party.

3. Whether Granting Applicant's Permit and License Would Threaten the General Health, Welfare and Safety of the Students

Staff also contends that granting the renewal of Applicant's permit and license would constitute a threat to the general health, welfare and safety of the students. Staff argued that Applicant's requests for a license and permit, therefore, may be denied pursuant to § 11.46(a)(8) of the Code. However, Petitioner did not prove that the Dallas City Council had issued an ordinance specifically prohibiting sales of alcohol from businesses located within 1,000 feet of the Learning Center. The only other evidence presented by Petitioner supporting this contention was Applicant's almost 10-year-old sale to minor violation. Both Applicant and Agent Anderson testified this was the only such violation committed by Applicant. The ALJ cannot find that granting the license and permit to Applicant would constitute a threat to the general health, welfare, and safety of the school children in the area. Petitioner has failed to show that renewal of Applicant's permit and license should denied.

III. RECOMMENDATION

This proposal recommends that the Commission grant the renewal of Applicant's Beer Retailers

Off-Premise License and a Package Store Permit

IV. FINDINGS OF FACT

1. Henry Tan Company d/b/a Super Discount Package Store (Applicant), filed a renewal application with the Texas Alcoholic Beverage Commission (Commission) for a Package Store Permit on December 31, 2001.

2. Applicant filed a renewal application with the Commission for a Beer Retailers Off-Premise License on January 1, 2002.

3. Applicant's business has been located at 4915 Second Street, Dallas, Dallas County, Texas, since before January 24, 1995.

4. The Pearl C. Anderson Learning Center (the Learning Center) is located on Garden Lane at the intersection of Garden Lane and Second Street, Dallas, Dallas County, Texas.

5. The Learning Center has been at the location since 1998

6. The Texas Alcoholic Beverage Code (Code) authorizes the governing board of an incorporated city or town to enact regulations prohibiting a licensed premise from operating within 300 feet of a public school.

7. On September 13, 1995, the Dallas City Council passed Ordinance No. 22537 prohibiting the sale of alcoholic beverages from businesses located less than 300 feet from a public school, measured in a direct line from the property line of the public school to the property line of the business, and in a direct line across intersections.

8. Petitioner protests renewal of Applicant's permit and license.

9. In December 2001, Jerry Sweeney, Compliance Officer for the Commission, was requested to measure the distance between the property line of the Learning Center and Applicant's business.

10. Mr. Sweeney only measured the distance from the property line of the Learning Center to the property line of the nearest corner of the building in which Applicant's business is located.

11. The nearest corner of the building is not the property line for Applicant's business located at 4915 Second Street.

12. The nearest corner of the building is the property line for an empty store located at 4917 Second Street.

13. Applicant's business is not within the prohibited distance of 300 feet.

14. The Dallas City Council has not received or approved a request from the Dallas Independent School District Board of Trustees to adopt an alcohol-free school zone within 1,000 feet of the Learning Center in Dallas.

15. On May 9, 2001, an employee of Applicant's sold an alcoholic beverage to a minor in violation of the Code.

16. The employee is no longer employed by Applicant.

17. This is the only sale to minor violation committed by Applicant in almost 10 years.

18. Granting the license and permit to Applicant would not constitute a threat to the general health, welfare, and safety of the school children in the area.

19. On August 11, 2004, Petitioner issued a notice of hearing notifying Applicant that a hearing would be held on the applications.

20. 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.

21. The hearing was held on December 6, 2004, in Dallas, Dallas County, Texas, before Brenda Coleman, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). The Applicant was represented by Jerry Goh, attorney. Petitioner appeared and was represented by Timothy Griffith, Staff Attorney. After presentation of evidence and argument, the hearing concluded and the record closed on that date.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV CODE ANN., Chapters 1 and 5 and §§ 6.01, 11.46 and 109.33.

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. Chapter 2003.

3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T

SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION

CASE: TABC vs. Henry Tan Company d/b/a Super Discount Package Store

DOCKET NUMBER: 458-04-8279

AGENCY CASE NO: 597898

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Henry Tan Company d/b/a
Super Discount Package Store
1310 Fairhaven Dr.
Garland, TX 75040

RESPONDENT
VIA REGULAR MAIL

as of February 04, 2005

CODE ANN. §§ 2001.051 and 2001.052.

4. Applicant's business is not located within 300 feet of a public school, or in an alcohol-free school zone in violation of TEX. ALCO. BEV. CODE ANN. § 109.33.

5. Issuance of the requested license and permit will adversely affect the safety of the public, the general welfare, peace, or morals of the people, nor violate the public sense of decency, in violation of TEX. ALCO. BEV. CODE ANN. § 11.46.

6. The renewal applications of Henry Tan Company d/b/a Super Discount Package Store should be granted.

SIGNED February 4, 2005.

Brenda Coleman

BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS