

**DOCKET NO. 458-03-4304**

<b>TEXAS ALCOHOLIC BEVERAGE</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>COMMISSION</b>	§	
	§	
<b>VS.</b>	§	
	§	<b>OF</b>
<b>AIKMAN REALTY, INC.</b>	§	
<b>D/B/A KING'S X</b>	§	
<b>PERMIT NOS. MB-188001 &amp; LB-188002</b>	§	
<b>EL PASO COUNTY, TEXAS</b>	§	
<b>(TABC CASE NO. 604388)</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

The staff of the Texas Alcoholic Beverage Commission (TABC) brought this enforcement action against Aikman Realty, Inc. d/b/a King's X (Respondent) alleging that Respondent sold or delivered an alcoholic beverage to an intoxicated person in violation of the Texas Alcoholic Beverage Code §11.61(b)(14). The undersigned Administrative Law Judge recommends a ten day suspension of the license or, in lieu of suspension, that Respondent pay an administrative penalty of \$150.00 per day for a total civil penalty of \$1,500.00.

**I. PROCEDURAL HISTORY, NOTICE & JURISDICTION**

The hearing was convened on October 9, 2003, at 9:30 a.m. at the Office of Administrative Hearings, 401 East Franklin Avenue, Suite 580, El Paso, Texas. Staff attorney Dewey A. Brackin appeared on behalf of TABC. Respondent was represented by Michael Gibson, Attorney at Law. Respondent's motion to dismiss for lack of due diligence was denied. The hearing concluded that same day. The closing of the record was extended to November 28, 2003, to allow the procurement of the testimony of the alleged intoxicated person who was incarcerated at the time of the hearing.

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, those matters are addressed in the Findings of Fact and Conclusions of Law sections without further discussion.

## II. DISCUSSION

### A. Background.

Respondent currently operates under authority of a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit issued to Respondent for the premises known as King's X, located at 4119 North Mesa, El Paso, El Paso County, Texas 79902. Respondent has been operated by the same owner, and at the same location, for 40 years. Respondent's administrative history does not show any prior violations.

### B. Evidence.

TABC offered two exhibits: an inmate information sheet from the Texas Department of Criminal Justice (Exhibit #1); a certified copy of the permits at issue and administrative history (Exhibit #2). Respondent offered three exhibits: a letter from TABC dated May 6, 2003 (Exhibit #1); and a sketch drawing of premises at issue (Exhibit #3); and a letter dated October 9, 2003 (Exhibit #3). All exhibits were entered into the record.

Deputy Sheriff Federico Castillo testified for TABC. Elizabeth Lowe and Charlene Moser were called by Respondent. Theodore Gilbert Aikman, owner and manager, testified.

## III. ARGUMENT

### 1.) Background

On September 8, 2002, TABC participated in a joint undercover investigation with the El Paso Police Department known as the "Stop Sales to Intoxicated Persons" program. Undercover agents, posing as regular costumers, entered the King's X establishment and observed the activities about the bar which resulted in the allegation of the sale or delivery of an alcoholic beverage to an intoxicated person, which is the subject of this cause.

## **2.) TABC's case**

Deputy Sheriff Federico Castillo testified that he participated in a joint investigation with the El Paso Police Department resulting in the sale or delivery of an alcoholic beverage to an intoxicated person, Freddy Egure at the King's X bar on September 8, 2002, in the evening. He entered the bar with Deputy Escandon and Sargent Morales at approximately 11:30 p.m. in plain clothes and observed Egure at the bar. Deputy Castillo followed Egure to the restroom. As Egure made his way to the restroom, he staggered and stumbled. Egure used the wall to balance while he urinated and almost bumped into Deputy Castillo in the restroom as he walked, at which point Deputy Castillo noticed that he had blood shot eyes. Egure had to hold on to the wall of the restroom to prevent from falling. Upon his return to the bar area, he almost fell on the barstool and was slumped over the bar with his arms on the table and his head down. Thereafter, Deputy Castillo testified that he saw a female waitress serve four shots. Deputy Castillo specifically saw four clear shot glasses. The waitress used a clear bottle with a long neck and spout to serve the liquor. There were four men around the bar. They drank, shook hands, three men left and Egure remained. Egure was thereafter detained by the undercover team as he walked toward the exit door.

## **3.) Respondent's case**

Respondent argues that Egure was cut off from being served before the four shots, that Deputy Castillo observed, were served. In support of this contention, Elizabeth Lowe, who worked as a bartender/waitress, testified that she served Egure twice that evening. She said Egure did appear to be drunk so she "cut him off." She said she served him two glasses of club soda. She said Egure was a regular at the bar. She said "Adrian" was buying the shots for "Ted, Jaime and a fourth person." Ms. Lowe could not remember who the fourth person was, but she said it was not Egure. She said Egure was cut off about twenty minutes before she served the last drink to the other three persons.

Charlene Moser, also a bartender on September 8, 2002, said that Ms. Lowe told her to "cut Freddy off."

Theodore Aikman, manager and owner of King's X, testified that the four persons around the bar with Egure were himself, Adrian, and Jaime (Adrian's brother). He said that Egure was cut off around 10:00 p.m. and that he was drinking water and club soda.

#### IV. STATUTORY AUTHORITY

The applicable legal statute in this cause is Section 11.61 (b)(14) of the Alcoholic Beverage Code which allows for the suspension or cancellation of a permit if the Permittee sold or delivered an alcoholic beverage to an intoxicated person.<sup>1</sup> And under TABC administrative rules, an "intoxicated person" is defined as a person "not having the normal use of mental or physical faculties by reason of the introduction of alcohol, or controlled substance, a drug, or a combination of two or more of those substances into the body."<sup>2</sup>

#### V. ANALYSIS

The negligence standard to which TABC referred requires a determination of whether a reasonable prudent person would have observed that Egure was intoxicated. Both waitresses testified that Egure was "cut off" after he was observed to be intoxicated. Therefore, intoxication is not *the* issue since it was established that Egure had too much to drink that night. The question becomes whether Egure was served when he was in an intoxicated state?

Common sense dictates that club soda is not served in shot glasses out of a distinctive liquor bottle. Deputy Castillo clearly testified about the physical indicators of intoxication that he observed in Egure as he made his way to the restroom, and that after his return, Egure and three other men were served shots at the bar. His testimony is credible. How much time went by and how long Egure sat at the bar is irrelevant. The facts indicate that Permittee served Egure when he was intoxicated. In addition, the second witness for Respondent testified that Egure was served a shot before he was cut off.

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<sup>1</sup> TEX. ALCO. BEV. CODE §11.61(b)(14)(V.T.C.A. 2001).

<sup>2</sup> Texas Alcoholic Beverage Commission Rules, Chapter 50.2(2)(A).

## VI. CONCLUSION

On September 8, 2002, Permittee sold or delivered an alcoholic beverage to an intoxicated person.

**THEREFORE**, having considered the evidence and arguments presented, the undersigned ALJ recommends that a license suspension of ten days be imposed on Respondent. The ALJ further recommends and agrees with TABC that respondent be given the opportunity to pay a civil penalty in the amount of \$1,500.00 in lieu of suspension in consideration that the cause at issue is Respondent's first violation.

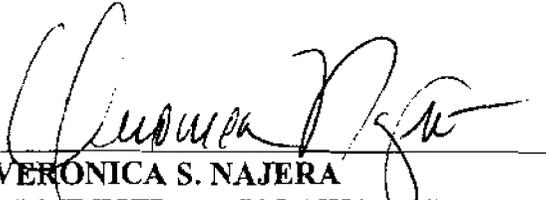
## VII. FINDINGS OF FACT

1. Aikman Realty, Inc. d/b/a King's X (Respondent), holds a Mixed Beverage Permit MB-188001 and a late Hours Permit LB-188002, for the premises located in El Paso, Texas.
2. On August 25, 2003, TABC issued a notice of hearing asserting one allegation of a sale or delivery of an alcoholic beverage to an intoxicated person. The notice also stated the time and location of the hearing; the legal authority and jurisdiction under which the hearing was to be held; and the particular sections of the statutes and rules involved.
3. On September 8, 2002, an undercover operation was conducted by the Texas Alcoholic Beverage Commission and the El Paso Police Department at King's X, located at 4119 N. Mesa, El Paso, El Paso County, Texas 79902.
4. On September 8, 2002, Deputy Castillo observed Freddy Egure at the bar at King's X and observed various clues of intoxication.
5. Deputy Castillo observed four shot glasses placed where Egure and three other men were situated and observed alcohol being poured from a distinctive liquor bottle.
6. The incident which Deputy Castillo observed occurred after Egure returned from the restroom.
7. On September 8, 2002, Egure was intoxicated and did not have the normal use of his mental or physical faculties by reason of the introduction of alcohol into his body.
8. On September 8, 2002, Respondent's employees sold or delivered an alcoholic beverage to Freddy Egure, an intoxicated person.

### VIII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (the Code) §§6.01 and 11.61.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T. CODE ANN. §§ 2003.021(b) and 2003.042(5).
3. Respondent received proper and timely notice of the hearing pursuant to TEX. GOV'T. CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the above Findings of Fact and pursuant to § 11.61(b)(14) and §104.01(9) of the Code, Respondent's permits are subject cancellation, or in lieu, subject to a monetary penalty.
5. Based on the above findings of fact and conclusions of law, Respondent's permits should be suspended for ten days, or in lieu of suspension, pay a \$1,500.00 penalty (\$150.00 per day).

**SIGNED** this 27th day of January, 2004.

  
VERÓNICA S. NAJERA  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**DOCKET NO. 604388**

IN RE AIKMAN REALTY INC.	§	BEFORE THE
D/B/A KING'S X	§	
PERMIT NO. MB-188001 & LB-188002	§	
	§	TEXAS ALCOHOLIC
	§	
EL PASO COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-4304)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 8th day of March, 2004 , the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Veronica S. Najera. The hearing convened on October 9, 2003, and adjourned November 28, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on January 27, 2004. 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. Exceptions were filed by Respondent. No replies were filed by the Petitioner. The Administrative Law Judge by letter rejected Respondent's Exceptions.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision 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 Mixed Beverage Permit No. MB-188001 and Mixed Beverage Late Hours Permit No. LB-188002 are hereby **SUSPENDED**.

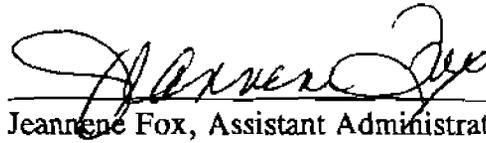
**IT IS FURTHER ORDERED** that unless the Respondent pays a civil penalty in the amount of **\$1,500.00** on or before the **19th** day of **May, 2004**, all rights and privileges under the above described permits will be **SUSPENDED** for a period of **ten (10) days**, beginning at 12:01 A.M. on the **26th** day of **May, 2004**.

**This Order will become final and enforceable on March 29, 2004**, 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 the 8th day of March, 2004.

On Behalf of the Administrator,



Jeanrene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Veronica S. Najera  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FACSIMILE (915) 834-5657**

Michael R. Gibson  
**ATTORNEY FOR RESPONDENT**  
521 Texas Avenue  
El Paso, Texas 79901  
**VIA FACSIMILE: (915) 533-4645**

Aikman Realty, Inc.  
d/b/a King's X  
**RESPONDENT**  
4119 N. Mesa  
El Paso, Texas 79902  
**CERTIFIED MAIL NO. 7001 2510 0007 0098 7643**  
**RETURN RECEIPT REQUESTED**

Dewey A. Brackin  
**ATTORNEY FOR PETITIONER**  
Texas Alcoholic Beverage Commission  
Legal Division

El Paso District Office  
Licensing Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 604388

REGISTER NUMBER:

NAME: Aikman Realty Inc.

TRADENAME: King's X

ADDRESS: 4119 N. Mesa, El Paso, Texas 79902

DATE DUE: March 19, 2004

PERMITS OR LICENSES: MB-188001 & LB-188002

AMOUNT OF PENALTY: \$1,500.00

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Amount remitted \$ \_\_\_\_\_ Date remitted \_\_\_\_\_

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 19TH DAY OF MARCH, 2004, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below.  
**MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

TEXAS ALCOHOLIC BEVERAGE COMMISSION

P.O. Box 13127

Austin, Texas 78711

**For Overnight Delivery: 5806 Mesa Drive, Austin, Texas, 78731**

**WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.**

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

\_\_\_\_\_  
Signature of Responsible Party

\_\_\_\_\_  
Street Address

\_\_\_\_\_  
P.O. Box No.

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip Code

\_\_\_\_\_  
Area Code/Telephone No.