

DOCKET NO. 606749

IN RE HERB'S SPORTS CLUB INC. § BEFORE THE
ORIGINAL APPLICATION N,PE & FB §
TARRANT COUNTY, TEXAS § TEXAS ALCOHOLIC
(SOAH DOCKET NO.458-04-0762) § BEVERAGE COMMISSION

O R D E R

CAME ON FOR CONSIDERATION this 28th day of June, 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge. The hearing convened on February 20, 2004, and adjourned on February 20, 2004. The Administrative Law Judge Monica Garza made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 20, 2004. 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.

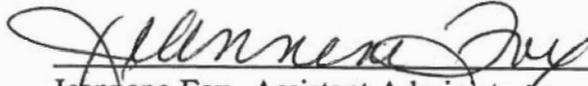
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the private club registration permits are hereby **DENIED**.

This Order will become final and enforceable on July 19, 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 28th day of June, 2004, at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Monica Garza
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (817) 377-3706

HERB'S SPORTS CLUB INC.
RESPONDENT
4518 Indian Oak Trail
Arlington, Texas 76017-3145
VIA CM/RRR NO. 7000 1530 0003 1903 4538

Steven H. Swander
ATTORNEY FOR RESPONDENT
VIA FAX (817) 338-0249

Andrew B. Piel
ATTORNEY FOR PROTESTANTS
VIA FAX (817) 348-0406

PROTESTANTS:

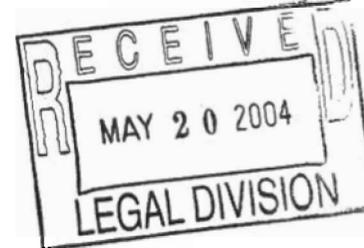
Hon. Bill Zedler
State Representative
PO Box 2910
Austin, Texas 78768-2910
Via Reg Mail

Hon. David Harry
Mayor, City of Mansfield
1200 E. Broad Street
Mansfield, Texas 76063
Via Reg Mail

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Fort Worth District Office



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TABC DOCKET NO. 606749

TEXAS ALCOHOLIC BEVERAGE
COMMISSION, Petitioner

HON. BILL ZEDLER, ET AL,
Protestants

V.

HERB'S SPORTS CLUB, INC.,
Respondent/Applicant

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) received protests regarding an original application by Herb's Sports Club, Inc. (Respondent) for a private club registration permit. The Honorable Bill Zedler, et al (Protestants) alleged that the place or manner in which Respondent may conduct its business warrants denial of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency, in violation of the Texas Alcoholic Beverage Code. Petitioner took no formal position in this matter. For reasons discussed in this proposal, the Administrative Law Judge (ALJ) recommends denial of Respondent's request for a private club registration permit

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and § 11.43. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related 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

On October 16, 2003, Petitioner issued its notice of hearing, directed to Respondent, via certified mail, return receipt requested. The notice 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



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reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted, as required by TEX. GOV'T CODE ANN. § 2001.052. The notice was successfully delivered to Respondent, as evidenced by the signature on the return receipt.

On February 20, 2004, a hearing convened before SOAH ALJ Monica Garza at the Tarrant County Sub-Courthouse, 1100 E. Broad Street, Suite 202, Mansfield, Tarrant County, Texas. Petitioner was represented at the hearing by Timothy Griffith, TABC Staff Attorney. Respondent appeared and was represented by its attorney, Steven H. Swander. Protestants appeared, and were represented by their attorney, Andrew B. Piel. Following presentation of evidence, the parties were given additional time to file written closing arguments. The record closed on March 22, 2004.

II. APPLICABLE LAW

Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8), TABC may refuse to issue an original permit if it has reasonable grounds to believe that the following circumstance exists:

[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.

III. EVIDENCE

A. Respondent's Application

On or about August 8, 2003, Respondent filed an original application with TABC for a private club registration permit, beverage cartage permit, and food and beverage certificate. TABC Agent Yvette Price processed Respondent's application. Following her review, Agent Price formed the opinion that

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Respondent had complied with all necessary requirements to hold the requested permits at the proposed location. Therefore, Petitioner takes no formal position in this matter.

B. Proposed Location

The proposed premises referenced in the application are located at 2271 Matlock Road, Mansfield, Tarrant County, Texas. The location is contained within a "C-2" commercial zone, which causes no zoning issues regarding the use of the property as a restaurant and private club. However, the location is in a "dry" area, necessitating a private club registration permit for the service of alcoholic beverages.

The neighborhood surrounding the proposed location is predominately single-family residential. There is a vacant "C-2" commercially zoned lot separating the proposed location from Primrose School, a child care facility. Another child care facility, Children's World, is situated across the road from the proposed location. Children's Academy, another child care facility, and a public elementary school are also in relatively close proximity to the proposed location. Also in close proximity to the proposed location is a retirement center for senior citizens. Some of these senior citizens operate motor vehicles to and from the retirement center.

Two private club registration permits have been granted for establishments in the general area. One establishment is the local country club. The other establishment is a restaurant located in a shopping center.

C. Proposed Premises

The proposed premises are currently in the construction phase. The construction plans, approved by the City of Mansfield, include a 10,251 square foot building with an outdoor dining area. The restaurant will include a kitchen, dining area for smokers, dining area for non-smokers, game room, banquet room,

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bar, office, waiting area, and two sets of men's and women's restroom facilities. While the occupancy load of the building will be 630, the restaurant will have a seating capacity of 250.

In reference to patron parking, 114 parking spaces are planned for the site, exceeding the City of Mansfield minimum requirement of 103 parking spaces. Access to the parking lot is limited to Matlock Road, which is a major thoroughfare. However, in the event that patrons need additional parking, they will be forced to park on residential streets, as no parking is allowed on Matlock Road.

In order to control disturbance to nearby residences, buffering will be provided by an eight-foot masonry wall and landscaping. Controlled lighting will also be used to alleviate disturbance to residents.

D. Management Structure and Operations

Respondent is a non-profit corporation which proposes to serve alcoholic beverages to its members on the premises of Herb's Sports Grill. Respondent's Board of Directors include Warren Harold McConathy, President, Jennie Marie McConathy, Vice-President, and Jennie Marie Rhodes, Secretary. Pursuant to a Management Agreement and Lease Agreement with Herb's Sports Grill, Inc., Respondent will share the premises, employees, and services at the restaurant. Respondent is to maintain direction and control over the service of alcoholic beverages on the premises.

Herbert Carter McConathy is the President of Herb's Sports Grill, Inc. As the restaurant's president, Herbert McConathy is ultimately responsible for ensuring that the restaurant's obligations as set forth in the Management Agreement are fulfilled. On May 30, 1990, Herbert McConathy was convicted of conspiracy to possess a controlled substance, cocaine, which is a second degree felony. He was sentenced to 10 years confinement in the Texas Department of Corrections. Herbert McConathy also has a separate conviction related to illegal drugs arising from an incident in Florida.

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Warren McConathy, Respondent's President and father of Herbert McConathy, indicates that he will maintain a presence on the premises and enforce the rules of the private club. He admits that his other son, Warren H. McConathy, a member of the private club, has also had contact with the criminal justice system. Court documents show that the younger Warren McConathy was convicted of Driving While Intoxicated on March 13, 2003, convicted of assault on August 15, 2001, and convicted of criminal mischief on August 15, 2001. Despite problems his sons have had with the criminal justice system, the elder Warren McConathy appears to have a clean criminal history. He previously earned a living as a truck driver, and he has indicated his desire to "get the drunks off the road."

The restaurant and private club propose the same hours of operation. Both food and alcoholic beverages are proposed to be served from 11:00 a.m. through midnight Sunday through Friday and 11:00 a.m. through 1:00 a.m. on Saturday.

According to Respondent's application, projected annual sales at the restaurant and private club are \$800,000 for food and \$650,000 for alcoholic beverages.

E. Local Officials

State Senator Kim Brimer and State Representative Bill Zedler represent the constituents in the area of the proposed private club. Senator Brimer and Representative Zedler are both Protestants in this matter. Representative Zedler testified that he received an abnormally high number of constituent inquiries regarding the proposed private club. After investigating the issue, he concluded that his constituents' concerns were justified. Representative Zedler cited safety and noise concerns regarding the close proximity of the proposed private club to residences and the likelihood of overflow parking on residential streets. Representative Zedler also expressed concern regarding the management relation between the private club and Herbert McConathy, citing Herbert McConathy's drug convictions.

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State Representative Toby Goodman represents the area across the street from the proposed private club. Representative Goodman also testified that he received numerous contacts from his constituents regarding Respondent's application. Representative Goodman is opposed to TABC granting the private club registration permit.

Finally, the Mansfield City Council unanimously passed a resolution on May 27, 2003, which reads as follows:

WHEREAS, the City of Mansfield is a Home Rule Municipal Corporation operating pursuant to the laws of the state of Texas; and
WHEREAS, the City of Mansfield has and continues to engage in comprehensive land use planning activities for the purpose of preserving and protecting the neighborhoods of the community; and
WHEREAS, the City seeks to provide economic opportunity without degrading the quality of life for its citizens; and
WHEREAS, the City has determined that certain types of land use activities can negatively impact adjoining properties due to the character of use involved; and
WHEREAS, the City believes that business establishments that permit the on premises consumption of alcoholic beverages have unique characteristics such as unusual hours of operation, the generation of volumes of traffic that may be incompatible with surrounding uses, noise, lights, and similar environmental attributes that frequently prove incompatible if located adjacent to single family residential units; and
WHEREAS, the City of Mansfield normally seeks to regulate and control incompatible land uses through its municipal zoning regulations; and
WHEREAS, the legislature of the state of Texas has preempted local governments from engaging in significant zoning regulation of business establishments if it relates to the sale of alcoholic beverages; and
WHEREAS, the City of Mansfield has been aware that an application for a private club permit and/or license has been submitted on behalf of a business that desires to locate at 2271 Matlock Road within the corporate limits of the City of Mansfield; and
WHEREAS, the business proposed for this location, "Herb's Sports

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Bar" would be located at a site contiguous to established single family residential developments that would not be compatible with this type of activity; and

WHEREAS, the City of Mansfield believes that the location of this type of facility at this site would be inconsistent with the goals and objectives of its comprehensive planning process; and

WHEREAS, the City of Mansfield finds that under the limitations currently imposed by Texas law the city lacks the ability to intervene in this matter through zoning regulations; and

WHEREAS, the city has determined that the Texas Alcoholic Beverage Commission is the governmental entity having issuance authority over the required permits and/or licenses; and

WHEREAS, the City of Mansfield desires to ensure that the Texas Alcoholic Beverage Commission be made aware that the city does not believe this is an appropriate location for this use and urges the commission to deny the permits and/or licenses requested.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MANSFIELD, TEXAS:

SECTION 1: The City Council of the City of Mansfield, after due and careful consideration, herewith advises the Texas Alcoholic Beverage Commission that it objects to the issuance of a private club permit and/or license for a facility to be located at 2271 Matlock Road because of the potential impact of this operation on the character of existing development in the immediate vicinity of this site.

SECTION 2: The City Council of the City of Mansfield herewith urges the Texas Alcoholic Beverage Commission to the maximum extent permitted by law, to deny the permits and/or licences sought for the development of a private club at this site.

IV. ANALYSIS

Considering all the evidence presented by the parties, the ALJ finds the requested private club registration permit would be detrimental to the general welfare, health, peace, morals, and safety of the

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people in the surrounding neighborhood, warranting denial of the permit under TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).

Respondent proposes to serve alcoholic beverages to its private club members within a 10,251 square foot restaurant with an additional outdoor dining area. Although the restaurant has a seating capacity of 250, the building has an occupancy load of 630. While Respondent has taken measures to alleviate problems caused by noise, lighting, parking, and traffic, the presence of such a large facility with a capacity for multitudes of patrons will, more likely than not, produce these burdens to the primarily residential neighborhood. This is especially true in light of the fact that the premises will operate until 12:00 a.m. Sunday through Friday and until 1:00 a.m. on Saturday.

Further, although the number of parking spaces provided by the restaurant and proposed private club is to exceed the amount required by the City of Mansfield, overflow parking will, more likely than not, result when the building is filled to near capacity. Because parking is not allowed on Matlock Road, a major thoroughfare, overflow parking will need to take place on residential streets.

Further, considering the traffic increase resulting from the presence of such a large facility, safety hazards will, more likely than not, pose a threat to the welfare of citizens in the surrounding residential neighborhood. These safety hazards are of special concern considering the presence of child care facilities and a retirement center where senior citizens are able to drive. The service of alcoholic beverages at the restaurant and private club will logically increase the presence of safety hazards.

Although the restaurant may still operate without the presence of the private club, the ALJ notes that projected sales for food are \$800,000, while the projected sales for alcoholic beverages are \$650,000. Without the service of alcoholic beverages, projected sales will be cut by approximately 45%. Without the permit, the facility will likely have fewer patrons, causing fewer problems with noise, traffic, parking, and safety.

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State Senator Kim Brimer, State Representative Bill Zedler, and State Representative Toby Goodman are opposed to TABC granting the requested permit. Although these state officials are not specifically listed in TEX. ALCO. BEV. CODE ANN. § 11.41(a) regarding recommendation by local officials, this section was not intended to exclude their recommendation from consideration. After investigating the request for a permit for the proposed location following complaints from their constituents, these officials concluded that the granting of the permit would be detrimental to the welfare of their constituents.

TEX. ALCO. BEV. CODE ANN. § 11.41(a) does specifically provide that TABC give due consideration to the recommendation of a city council member. The Mansfield City Council unanimously passed a resolution requesting that TABC deny Respondent's permit. As grounds, the city council cited unusual hours of operation, volumes of traffic, noise, and lighting, all of which the council concluded would be incompatible with the surrounding neighborhood.

Finally, although the management agreement between the restaurant and private club does not constitute a forbidden subterfuge under the Texas Alcoholic Beverage Code, the restaurant and private club are, by all appearances, a family operated business. The son manages the restaurant; the father operates the private club. Therefore, it is naive to ignore the criminal history associated with certain family members when determining the general welfare, health, peace, morals, and safety of the people in the neighborhood of the premises.

Although this proposed private club might be ideal for another location, the ALJ finds that granting the private club registration permit at this location would be detrimental to the general welfare, health, peace, morals, and safety of the people in the surrounding neighborhood. Therefore, Respondent's permit should be denied.

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V. PROPOSED FINDINGS OF FACT

1. On or about August 8, 2003, Herb's Sports Club, Inc. (Respondent) filed an original application with the Texas Alcoholic Beverage Commission (TABC) for a private club registration permit, beverage cartage permit, and food and beverage certificate.
2. Respondent is a non-profit corporation which proposes to serve alcoholic beverages to its members on the premises of a restaurant, Herb's Sports Grill.
3. TABC Agent Yvette Price reviewed Respondent's application and formed the opinion that Respondent had complied with all necessary requirements to hold the requested permits at the proposed location.
4. The Honorable Bill Zedler, et al (Protestants) filed a protest with TABC, alleging that the place or manner in which Respondent may conduct its business warrants denial of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.
5. The proposed premises are located at 2271 Matlock Road, Mansfield, Tarrant County, Texas
6. This location is in a "dry" area, necessitating a private club registration permit for the service of alcoholic beverages.
7. The neighborhood surrounding the location is predominately single-family residential.
8. There are three child care facilities, a public elementary school, and a retirement center for senior citizens in close proximity to the proposed location. Some of the senior citizens drive motor vehicles to and from the retirement facility.
9. The proposed premises for the restaurant and private club are currently in the construction phase. The construction plans, approved by the City of Mansfield, include a 10,251 square foot building with an outdoor dining area.
10. The restaurant and private club will have a seating capacity of 250, however, the building has an occupancy load of 630.
11. 114 parking spaces are planned for the premises.

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12. Access to the parking lot is limited to Matlock Road, a major thoroughfare.
13. In the event that patrons need additional parking, they will be forced to park on residential streets, as no parking is allowed on Matlock Road.
14. Both food and alcoholic beverages are proposed to be served from 11:00 a.m. through midnight Sunday through Friday and 11:00 a.m. through 1:00 a.m. on Saturday.
15. Projected annual sales at the restaurant and private club are \$800,000 for food and \$650,000 for alcoholic beverages.
16. Respondent's president is Warren Harold McConathy.
17. Pursuant to a Management Agreement and Lease Agreement with Herb's Sports Grill, Inc., Respondent will share the premises, employees, and services at the restaurant.
18. Herbert Carter McConathy is the President of Herb's Sports Grill, Inc. He is ultimately responsible for ensuring that the restaurant's obligations as set forth in the Management Agreement are fulfilled.
19. On May 30, 1990, Herbert McConathy was convicted of conspiracy to possess a controlled substance, cocaine, which is a second degree felony. He was sentenced to 10 years confinement in the Texas Department of Corrections.
20. Herbert McConathy also has a separate conviction related to illegal drugs arising from an incident in Florida.
21. State Senator Kim Brimer, State Representative Bill Zedler, and State Representative Toby Goodman represent the constituents in the area of the proposed private club. They are opposed to TABC granting Respondent's permit.
22. The Mansfield City Council unanimously passed a resolution urging TABC to deny the requested permit. The resolution cites the incompatibility of the business in an established single family residential development, specifically referencing unusual hours of operation, the generation of volumes of traffic, noise, lights, and similar environmental attributes.
23. The proposed private club will, more likely than not, produce undue noise, parking, and traffic

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burdens to the surrounding neighborhood.

24. Safety hazards will, more likely than not, result from the traffic burden, and these hazards will be further increased by the service of alcoholic beverages at the restaurant.
25. The requested private club registration permit would be detrimental to the general welfare, health, peace, morals, and safety of the people in the surrounding neighborhood.
26. On October 16, 2003, TABC staff (Petitioner) issued its notice of hearing, directed to Respondent, via certified mail, return receipt requested.
27. The notice 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.
28. The notice was successfully delivered to Respondent, as evidenced by the signature on the return receipt.
29. On February 20, 2004, a hearing convened before State Office of Administrative Hearings (SOAH) Administrative Law Judge Monica Garza at the Tarrant County Sub-Courthouse, 1100 E. Broad Street, Suite 202, Mansfield, Tarrant County, Texas.
30. Petitioner was represented at the hearing by Timothy Griffith, TABC Staff Attorney. Respondent appeared and was represented by its attorney, Steven H. Swander. Protestants appeared, and were represented by their attorney, Andrew B. Piel.
31. Following presentation of evidence, the parties were given additional time to file written closing arguments. The record closed on March 22, 2004.

VI. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter. TEX. ALCO. BEV. CODE ANN. ch. 5 and § 11.43.
2. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law.

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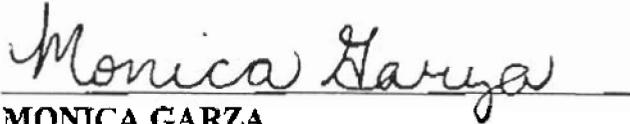
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TEX. GOV'T CODE ANN. ch. 2003.

3. Respondent received proper notice of the hearing. TEX. GOV'T CODE ANN. § 2001.052.

4. Respondent's request for a private club registration permit should be denied. TEX. ALCO. BEV CODE ANN. § 11.46(a)(8).

SIGNED May 20, 2004



MONICA GARZA

ADMINISTRATIVE LAW JUDGE

STATE OFFICE OF ADMINISTRATIVE HEARINGS