

DOCKET NO. 608841

IN RE STUBB'S CLUB INC.	§	BEFORE THE
D/B/A DELIMAN'S GRILL CLUB	§	
ORIGINAL APPLICATION N, PE & FB	§	
	§	
	§	TEXAS ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-4189)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 6th day of July, 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge. The hearing convened on April 15, 2004, and adjourned on April 15, 2004. The Administrative Law Judge Jerry Van Hamme made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 11, 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. Exceptions were filed on June 21, 2004.

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.

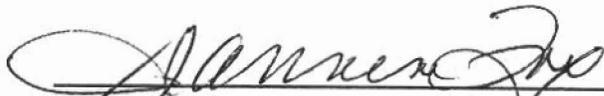
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the above described permits and/or licenses are hereby **GRANTED**.

This Order will become final and enforceable on July 27, 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 6th day of July, 2004, at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Jerry Van Hamme
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX NO. (214) 956-8611

STUBB'S CLUB INC.
D/B/A DELIMAN'S GRILL CLUB
RESPONDENT
605 N. Denton Tap Rd.
Coppell, TX 75019
CERTIFIED MAIL/RRR NO. 7000 1530 0003 1903 4668
and VIA FAX NO. (972) 899-1305

PROTESTANTS:

Murray Gross
127 Natches Tr.
Coppell, TX 75019

John and Patty Gary
118 Natches Tr.
Coppell, TX 75019

Jim Hancock
119 Natches Tr.
Coppell, TX 75019

Steve Swander
ATTORNEY FOR PROTESTANT Kris & Rita Howerton
505 Main St., Ste. #250
Ft. Worth, Texas 76102
VIA FAX NO. (817) 338-0249

Bryan Thompson, Magnolia Park Homeowner's Association did not provide an address or any other means of communication.

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Dallas District Office

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TEXAS ALCOHOLIC BEVERAGE COMMISSION

v.

STUBB'S CLUB INC. D/B/A DELIMAN'S GRILL CLUB DALLAS COUNTY, TEXAS TABC NO. 608841

§ § § § § § § §

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

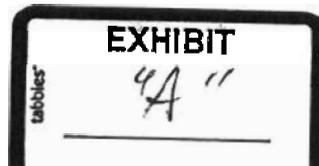
PROPOSAL FOR DECISION

Stubb's Club Inc. d/b/a Deliman's Grill Club (Respondent) filed an application with the Texas Alcoholic Beverage Commission (Commission) for a Private Club Registration Permit, a Beverage Cartage Permit, and a Food and Beverage Certificate for the Deliman's Grill Club, 605 North Denton Tap Road, Coppell, Dallas County, Texas. Individual residents of the neighborhood where Respondent's premises is located (Protestants) protested the application and asserted that the permits should be denied based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. The Commission's staff (Staff) took no formal position on the allegation. The Administrative Law Judge (ALJ) recommends that the Commission grant Respondent the requested permits and certificate.

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 April 15, 2004, 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 E. Griffith, attorney. Protestant Kris Howerton was represented by Steve Swander, attorney.



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Jalal "Jay" Khorrami appeared *pro se* for Respondent. The record was closed on that date

II. LEGAL STANDARDS AND APPLICABLE LAW

The Commission or Administrator may refuse to issue an original permit if it has reasonable grounds to believe that the place or manner in which the applicant may conduct his business warrants the refusal based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).

III. EVIDENCE

A. Staff's Evidence and Contentions

Staff presented no evidence to protest the issuance of the permits and certificate and took no formal position on this matter. Staff contended in its Amended Notice of Hearing that Respondent met all Commission requirements for holding the permits at the premises location, that Respondent properly posted or published all required notices, and that Respondent complied with all applicable Texas Alcoholic Beverage Code requirements.

B. Protestant's Evidence and Contentions

1. Jonathan Gage

Jonathan Gage, an agent for the Commission, testified that a middle school is located approximately 400 – 450 feet directly across Denton Tap Road from Respondent's premises, but that he had no independent knowledge of the distance from Respondent's premises to the school. He testified that the Commission's Compliance Division was responsible for measuring such distances, not he, and that he was unaware of any concerns the Compliance Division had with the distance between Respondent's premises and the school. He also testified that in his opinion Respondent

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Alcoholic Beverage Commission v. Jack E. Mikulanka d/b/a Frigate Club, 510 S.W.2d 616, 619 (Tex.App.-- San Antonio 1974).

Such unusual conditions include, for example, a "sexually-themed" business located in a primarily residential neighborhood, Texas Alcoholic Beverage Commission v. Twenty Wings, LTD and TWLXXV, Inc., Judy Hall, Director, as Partners d/b/a Hooters, 112 S.W.3d 647 (Tex.App.-- Ft Worth, 2003); a previously licensed applicant with a history of disciplinary problems, RRZ, Inc. d/b/a Club R & R, v. Texas Alcoholic Beverage Commission, 510 S.W.2d 616 (Tex.App.--San Antonio, 2001); a history of an unacceptable and pervasive amount of criminal activity in the location for which the permit had been requested, Texas Alcoholic Beverage Commission v. Carlos Sanchez, d/b/a Tierra Caliente Bar and Grill, 96 S.W.3d 489 (Tex.App.--Austin, 2002); a location where the only exit from the premises was onto a frontage road at the "gore area," the triangular section between a freeway exit ramp and the service road striped with white paint and designed to keep cars from moving off the exit ramp too soon or from moving from the service road into the exit lane too quickly, Bavarian Properties, Inc. v. Texas Alcoholic Beverage Commission, 870 S.W.2d 686 (Tex.App.-- Fort Worth, 1994); where the Mayor, Chief of Police, Sheriff, and property owners from three subdivisions opposed the permits, Dienst v. Texas Alcoholic Beverage Commission, 536 S.W.2d 667 (Tex.Civ.App.13 Dist., 1976); and where the Mayor, Chief of Police, Sheriff, members of the Board of a nearby public school, and nearby property owners and church members opposed the permits, Helms d/b/a The Thirsty Turtle v. Texas Alcoholic Beverage Commission, 700 S.W.2d 607 (Tex.App.--Corpus Christi 1985).

In a case where, as here, an application was challenged because of traffic congestion and nearby schools, the appellate court stated that there is no requirement that the applicant select a location virtually free of traffic hazards in order to qualify for a permit. Kermit Concerned Citizens Committee v. Colonial Food Stores, Inc., 650 S.W.2d 208 (Tex.App.--El Paso, 1983)

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In the instant case, the evidence presented by the Protestants does not rise to the level of showing an unusual condition or situation that warrants the denial of the permits. The Protestants raised the issue that Respondent may not have properly posted the required notices on its construction site during the construction of its building. However, Protestants presented no evidence as to what the requirements were; cited no statute, state regulation, or city ordinance setting forth such requirements; and failed to present any evidence showing that Respondent was in violation of such requirements.

The Protestants implied that Respondent's business was located too close to a school for Respondent's application to be granted. However, the Protestants failed to show the actual distance between Respondent's business and the schools, relying instead upon estimates, and failed to show that the estimated distance between the locations was measured in the manner required under the appropriate statutes, Commission rules, or City ordinances.

The Protestants also relied heavily upon their belief that increased traffic caused by Respondent's business will necessarily translate into an increased threat to school children and increased traffic accidents. As stated above, however, potential traffic congestion and the presence of nearby schools, where the applicant has met all the necessary legal requirements, do not, alone, constitute an unusual condition or situation warranting the denial of the permits.

Accordingly, based on the evidence on the record, the Protestants have failed to show, by a preponderance of the evidence, that Respondent's application should be denied based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

V. RECOMMENDATION

The ALJ recommends that Respondent's application for a Private Club Registration Permit,

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a Beverage Cartage Permit, and a Food and Beverage Certificate for the Deliman's Grill Club, 605 North Denton Tap Road, Coppell, Dallas County, Texas, be granted

VI. FINDINGS OF FACT

1. Stubb's Club Inc. d/b/a Deliman's Grill Club filed an application with the Texas Alcoholic Beverage Commission for a Private Club Registration Permit, a Beverage Cartage Permit, and a Food and Beverage Certificate for the Deliman's Grill Club, 605 North Denton Tap Road, Coppell, Dallas County, Texas
2. Protests to the application were filed by residents of the neighborhood and other interested citizens asserting that the application should be denied based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency.
3. By letter dated February 24, 2004, Staff notified Respondent of the protests received against Respondent's application
4. An Amended Notice of Hearing dated March 30, 2004, was issued by Staff notifying all parties that a hearing would be held on the application and informing the parties of the time, place, and nature of the hearing.
5. On April 15, 2004, a public hearing was held before Jerry Van Hanum, ALJ, at the offices of the State Office of Administrative Hearings, Dallas, Dallas County, Texas. Staff was represented by Timothy E. Griffith, attorney. Protestant Kris Howerton was represented by Steve Swander, attorney. Jalal "Jay" Khorrami appeared *pro se* for Respondent. The record was closed on that date.
6. Respondent's location is zoned for commercial development
7. Respondent plans to operate its premises as a family restaurant
8. Respondent has met all Commission requirements for holding the permits and certificate at the premises location.
9. Respondent has met all requirements of the City of Coppell for holding the permits and certificate at the premises location.
10. Granting the requested permits and certificate does not represent a foreseeable threat to the welfare or safety of school children in the area, or a foreseeable threat to the welfare, safety, or well being of the immediate neighborhood.

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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 and 11.46(a)(8).
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. Issuance of the requested permits and certificate will not adversely affect the safety of the public, nor will it adversely affect the general welfare, peace, or morals of the people or violate the public sense of decency. TEX. ALCO. BEV. CODE ANN. §11.45(a)(8).
5. Respondent's application for a Private Club Registration Permit, a Beverage Cartage Permit, and a Food and Beverage Certificate for the Deliman's Grill Club, 605 North Denton Tap Road, Coppell, Dallas County, Texas, should be granted.

SIGNED June 11, 2004.


JERRY VAN HAMME
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS