

DOCKET NO. 582976

IN RE ZXUT, INC.	§	BEFORE THE
D/B/A BULLFROGS, SNEAKERS,	§	
THE BACK DOOR	§	
	§	
PERMIT NOS. N-420722 & PE-420723	§	TEXAS ALCOHOLIC
	§	
	§	
NACOGDOCHES COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-99-1234)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 4th day of May, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Richard Farrow. The hearing convened on August 31, 1999, and adjourned September 15, 1999. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 21, 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.

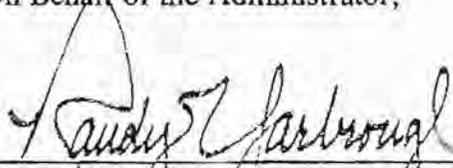
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. N-420722 & PE-420723 are herein **SUSPENDED** for a period of seven (7) days, beginning the 9th day of August, 2000, unless a civil penalty in the amount of \$1,050.00 is paid on or before the 2nd day of August, 2000.

This Order will become final and enforceable on May 25, 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 4th day of May, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Richard Farrow
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (903)534-7076

Holly Wise, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
VIA FACSIMILE (512) 475-4994

ZXUT Inc.
RESPONDENT
1507 North St.,
Nacogdoches TX 75961
CERTIFIED MAIL NO. 473 040 550

Beaumont District Office
Licensing Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	
	§	OF
ZXUT, INC., D/B/A BULLFROGS/ SNEAKERS/ THE BACK DOOR PERMIT NOS. N-420722 & PE-420723 NACOGDOCHES COUNTY, TEXAS (TABC CASE NO. 582976)	§ § § § § §	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) brought this action against the Respondent Permittee for serving alcoholic beverages to an intoxicated person at the permitted premises. The facts were disputed. This proposal finds that an agent servant or employee of Respondent did serve alcoholic beverage to an intoxicated person and recommends a seven (7) day suspension or a civil penalty of \$1,050.00 in lieu of suspension.

I. Procedural History

There were no objections or issues raised as to notice or jurisdiction; therefore, those matters are referred to in the findings of fact and conclusions of law without further discussion here.

A hearing was held on August 31, 1999, at the State Office of Administrative Hearings in Tyler, Texas, before Richard Farrow, Administrative Law Judge. Staff was present and represented by Dewey Brackin, attorney for the Texas Alcoholic Beverage Commission. Respondent, ZXUT, INC. appeared by and through its president and manager, Ricky Miller. The testimony and evidence was received on that date. The record was left open until September 15, 1999, at 5:00 p.m. for Respondent to provide documentary evidence as to its seller-server defense.

II. Discussion of the Evidence

On January 30, 1999, at approximately 11:00 p.m., TABC enforcement agent Warren Hearne, along with agents Parmlee and Tullos, went to the premises to perform a general inspection. There was some sort of party going on at the premises. Mr. Ricky Miller, president and manager, was familiar with Mr. Hearne and spoke with him in the club. A patron was in the club talking to everyone and leaning on everyone he talked to. The man leaned on Agent Hearne and spoke to him. Agent Hearne noted that the man had an odor of an alcoholic beverage on his breath, that his speech was slurred and that he had bloodshot eyes. The man made his way to the bar area at the brass railings at the bar and exchanged money for two drinks. Agent Hearne observed that the man then took the two drinks to a table where a young lady was sitting. She took one of the drinks and he the

other. Agent Tullos observed the exchange also and saw the drinks being made. The bartender making the drinks poured what appeared to be gin from what appeared to be a gin bottle.

The man and the lady were taken outside the club and the man was asked to perform a field sobriety task. However, when asked, he stated he could not recite the alphabet from F-J. Agent Tullos stated the man was clearly intoxicated and no other sobriety tests involving balance were given due to concern for the man's safety.

Ricky Miller brought out that he and Agent Hearne had been having a conversation in the club prior to the man's buying the drinks and he had remarked to Hearne that the man was drunk and needed to be taken home. Mr. Miller did not observe the drinks being served to the man after that conversation and stated that had he known he would not have allowed the man to be served at that point.

It was stressed at the hearing by the Respondent that their policy was a zero tolerance policy as to selling to intoxicated persons and minors. It was also Respondent's policy that all the employees be seller-server trained.

Mr. Miller was of the opinion that all of his employees were seller-server trained at the time of this incident. At the time of the hearing he did not have the documents to show that they were all trained and asked for time to gather those documents in order to show that the defense should apply to him. All parties agreed that if true, the defense would protect him from liability and it was agreed that he could gather those documents and present them to the ALJ and the TABC within 15 days. The ALJ left the record open for the requested 15 days. However, no documents were forthcoming and the record was closed on September 15, 1999.

The bartender that had been working at the railing at the bar that night did not recall selling any drinks to anyone that night. His job at the railing was to prepare drinks ordered by the waitresses and did not recall selling any drinks to any of the patrons directly. He did not deny that he could have sold the drinks but that it was very unlikely. He also stated that he was seller-server trained but did not produce a certificate.

III. Findings of Fact

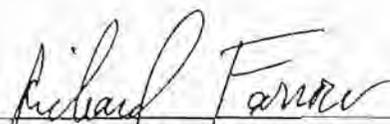
1. Respondent was at all times relevant and in particular on January 30, 1999, the holder of Permit N-420722 and PE-420723 issued by the Texas Alcoholic Beverage Commission and has held such permits continuously since issued.
2. Proper notice was sent to Respondent concerning the hearing scheduled on August 31, 1999, and no objection was made to such notice. Respondent appeared at the hearing by and through its President.
3. On January 30, 1999, agents for the Texas Alcoholic Beverage Commission were present on the premises of the Respondent conducting a general inspection.

4. A patron or customer of the Respondent on the premises was walking around talking to other people, putting his arm around strangers when talking to them, had an odor of alcoholic beverages on his breath, slurred speech, and bloodshot eyes.
5. Respondent's manager, Mr. Miller remarked to an agent that the man was drunk and should be taken home.
6. The customer later went to the bar and was served two drinks which were prepared with gin, an alcoholic beverage.
7. The drinks were prepared and served to the customer by the bartender, an agent, servant, or employee of the Permittee in exchange for money given to the bartender by the customer.
8. It was not established that the bartender was seller-server trained.
9. On January 30, 1999, an agent, servant, or employee of Respondent served an alcoholic beverage to an intoxicated person on the permitted premises.

IV. Conclusions of Law

1. Service of proper and timely notice of hearing was effected on the Respondent pursuant to TEX. GOV'T. CODE ANN. § 2001.
2. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 32.17 and 11.61.
3. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX GOV'T. CODE ANN. § 2003 and TEX. ALCO. BEV. CODE ANN. § 5.43.
4. Based on Findings of Fact Nos. 4-9, Respondent, or its agent, servant, or employee served an alcoholic beverage to an intoxicated person at the permitted premises which is a violation of TEX. ALCO. BEV. CODE § 11.61 (b)(14).
5. Based on Findings Nos. 4-9 and on Conclusion No. 4, suspension of Respondent's license or permit for a period of seven days or a payment of a civil penalty in lieu of suspension in the amount of \$1050.00 is warranted.

Signed this 21st day of March 2000.



Administrative Law Judge Presiding



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

Doyle Bailey, Administrator

May 1, 2000

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

Re: Docket No.: 582976
TABC v. ZXUT, Inc., d/b/a Bullfrogs/Sneakers/The Back Door

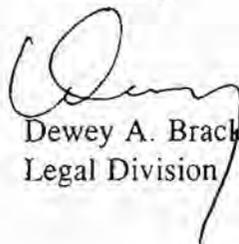
Dear Mr. Yarbrough:

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 Prop for Dec
7 days \$1,050
R. Yarbrough
5/1/2000*



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

Doyne Bailey, Administrator

FACSIMILE COVER SHEET

Date: May 3, 2000

To:	Fax No:
Richard Farrow, ALJ SOAH - Tyler	(903) 534-7076
Holly Wise, Docket Clerk SOAH	(512) 475-4994

From: Dewey A. Brackin, Legal Division

Comments: ORDER

SOAH Dkt. No. 458-99-1234

ZXUT, Inc., d/b/a Bullfrogs, Sneakers, The Back Door

NUMBER OF PAGES INCLUDING THIS COVER SHEET: _____

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