

DOCKET NO. 595628

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, PETITIONER	§	
BERTHA FOSTER, et al., PROTESTANTS	§	
v.	§	
UNICORN-I ENTERPRISES, INC.	§	ALCOHOLIC
D/B/A UNICORNIO NITE CLUB, (MB & LB)	§	
APPLICANT	§	
HARRIS COUNTY, TEXAS	§	
(SOAH Docket No. 458-02-0096)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 22nd day of February, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Sherry R. Wetsch. The hearing convened on October 19, 2001 and the record was closed on October 28, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on January 2, 2002. 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 to the proposal have been filed by the Applicant.

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 Original Application of Unicorn 1-Enterprises, Inc., d/b/a Unicornio Nite Club for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit be **DENIED**.

This Order will become final and enforceable on March 15, 2002, 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 22nd day of February, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

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Texas Alcoholic Beverage Commission

Houston District Office
Licensing Division

DOCKET NO. 458-02-0096

TEXAS ALCOHOLIC BEVERAGE	*	BEFORE THE STATE OFFICE
COMMISSION, PETITIONER	*	
BERTHA FOSTER, et al, PROTESTANT	*	
	*	
VS.	*	OF
	*	
UNICORN 1-ENTERPRISES, INC	*	ADMINISTRATIVE HEARINGS
D/B/A/ UNICORNIO NITE CLUB, (MB & LB)	*	
APPLICANT	*	
HARRIS COUNTY, TEXAS	*	
(TABC DOCKET NO. 595628)	*	

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) brought this action against Unicorn-1 Enterprises, Inc. (Respondent), alleging that the place or manner in which the Respondent may conduct business warrants the denial of the original application of Respondent, for a Mixed Beverage Permit and Mixed Beverage Late Hours Permit, for the premises known as Unicorn Nite Club, to be located at 3301 Tidwell, Houston, Harris County, Texas 77093 (premises).

The Administrative Law Judge (ALJ) finds that the place or manner in which the Respondent may conduct business warrants the denial of the application based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency, in violation of Section 11.46 (a)(8) of the Texas Alcoholic Beverage Code, due to the premises' proximity to a residential area, excessive trash, loud noise at the premises, as well as traffic and parking congestion. The ALJ recommends Respondent's application be denied.

I. PROCEDURAL HISTORY, JURISDICTION AND NOTICE

The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this proceeding pursuant to the Texas Alcoholic Beverage Code (Code) §§ 6.01, 11.46 and Subchapter B of Chapter 5. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating 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 the Texas Government Code ch. 2003.

Notice of hearing was served on the Respondent on September 19, 2001. There are no contested issues of notice or jurisdiction in this proceeding.

A hearing was held before ALJ Sherry R. Wetsch on October 19, 2001, at SOAH's Houston Office, 2020 North Loop West, Suite 111, Houston, Texas. Petitioner was represented by attorney Dewey Brackin. Respondent was represented by attorney Ronald Monshaugen. The hearing concluded the same day and the record closed on October 28, 2001, after the parties were given time to submit proposed findings of fact and conclusions of law.

II. SUMMARY OF ALLEGATIONS AND APPLICABLE STATUTORY PROVISION

The Petitioner alleges that Respondent's original application for a Mixed Beverage Permit and Mixed Beverage Late Hours Permit for the premises known as Unicorn Nite Club, to be located at 3301 Tidwell, Houston, Texas 77093 (premises), be denied as the manner or place in which the applicant may conduct business warrants the denial of the application based on the general welfare, health, peace, morals and safety of the people and the public sense of decency, in violation of Section 11.46 (a)(8) of the Texas Alcoholic Beverage Code.

III. DISCUSSION

Witnesses for the Petitioner in this hearing were Agent Wayne Pool, Charles Sanchez, Betha Foster and Jose Sanchez. Witnesses for the Respondent were Roy Kirkpatrick, Faisal Hussein, Kamlesh Hariyahl, Joel Gonzales, Vera Gillespie.

Agent Pool testified about the history of the Applicant as pertains to TABC. He also testified regarding the previous criminal and TABC administrative history of the subject premises. He was of the opinion that the application should be denied.

Ms. Foster testified that she lives 176 feet from the 3301 Tidwell premises. She said problems have occurred as a result of other permittees that have previously occupied the premises. Her complaints included traffic problems, noise, trash and patrons coming near her home. Jose and Charles Sanchez also testified regarding problems that have occurred at or near their residences, related to the permittees that have previously occupied the premises. These problems included people urinating in public, trash, noise, vandalism, drunk driving and traffic problems. Bertha Foster, Jose Sanchez and Charles Sanchez live on Turner Street. Turner Street is located across from the premises strip center. Residential dwellings exist on Turner Street. Their testimony focused on the public nuisance issues that occurred in their neighborhood as a result of activity stemming from the premises. A concern of these witnesses was the close proximity of the premises to their homes and neighborhood.

Faisal Hussein testified regarding the plans Respondents have for the premise. These plans include security for the parking lot and a cleaning company for the trash. The Applicant has invested money in this project. Kamlesh Hariyani testified about his interest in the Applicant. Vera Gillespie works for Hudson Licensing Services. Joel Gonzalez used to work for Mr. Hussein. Roy Kirkpatrick testified as an expert witness for Respondent. Mr. Kirkpatrick was of the opinion that application should be granted.

The evidence revealed that the Respondent has filed an original application for a Mixed Beverage Permit and Mixed Beverage Late Hours permit to be issued by the Texas Alcoholic Beverage Commission for the premises known as Unicorn Nite Club, to be located at 3301 Tidwell, Houston, Harris County, Texas 77093. The proposed location (premises) is in a strip center on a commercial street. The premises has had a license to sell alcoholic beverages by at least two other owners over the past fourteen (14) years. The applicants and their shareholders and officers have not had a license to sell alcoholic beverages at the premises previously. The proposed business will occupy approximately thirty percent (30%) of the space of the strip center.

Two of the three shareholders and officers of applicant have over the past ten years, held an interest in nine separate permits and locations which have had a total of seven administrative cases, none of which resulted in a suspension greater than seven days. These two shareholders now have an interest in five (5) active permits. A third officer and shareholder has never had an interest in a permit to sell alcoholic beverages.

Another Permittee held a license at the proposed location during a period of approximately 1986 through 1993. The business was called Unicorn Ballroom. Another permit, Teazers, was on the premises until January 1, 2001. Teazers was a sexually oriented business.

The ALJ is of the opinion that in view of the problems articulated by Bertha Foster, Jose Sanchez and Charles Sanchez during their testimony, Staff has proved its case by a preponderance of the evidence.

IV. RECOMMENDATIONS

In this case, Staff recommended that the original application be denied in order to protect the public's health, safety, peace and welfare. The ALJ agrees with the Staff's recommendation.

V. PROPOSED FINDINGS OF FACT

1. The Respondent has filed an original application for a Mixed Beverage Permit and Mixed Beverage Late Hours Permit to be issued by the Texas Alcoholic Beverage Commission for the premises known as Unicorn Nite Club, to be located at 3301 Tidwell, Houston, Harris County, Texas 77093. The proposed location (premises) is in a strip center.
2. The Applicant's proposed location, 3301 Tidwell, has had a license to sell alcoholic beverages by at least two different owners over the past fourteen (14) years.
3. The applicants and their shareholders and officers have not had a license to sell alcoholic beverages at the proposed location previously.
4. Another Permittee held a license at the proposed location during a period of approximately 1986 through 1993. The business was called Unicorn Ballroom.

5. After the Unicorn Ballroom, another permit, (Teazers), was on the premises until approximately January 1, 2001. Teazers was a sexually oriented business.
6. Applicants proposed location will occupy approximately thirty percent (30%) of the space of the strip center.
7. Two of the three shareholders and officers of applicant have over the past ten years, held an interest in nine separate permits and locations which have had a total of seven administrative cases, none of which have resulted in a suspension greater than seven days.
8. The two shareholders now have interests in five (5) active permits.
9. The third officer and shareholder has never had an interest in a permit to sell alcoholic beverages.
10. Applicants proposed location is on a commercial street, Tidwell.
11. Turner Street is located across from the premises strip center. Residential dwellings exist on Turner Street.
12. Three residents of Turner Street, provided straightforward and credible testimony regarding the public nuisances that occurred from the prior permits at the premise, including trash, drunk driving and noise. Their testimony verified the negative impact on the quality of life of the residents on Turner Street, that occurs when a permittee occupies the premises.
13. The permittees that occupied the premises from 1986 through January 2001, had a negative impact on the neighborhood, specifically the residents on Turner Street, such that the general welfare, health, peace, morals, and safety of the people was affected.

VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to the Texas Alcoholic Beverage Code (the Code), sections 6.01, 11.46 and Subchapter B of Chapter 5.
2. The State Office of Administrative Hearings has jurisdiction over matters related to conducting the hearing in this docket number, including authority to issue proposed findings of fact and conclusions of law pursuant to Texas Government Code ch. 2003.

3. The notice of hearing was properly and timely served on Respondent pursuant to the Administrative Procedure Act in §§ 2001.051 and 2001.052 of the Texas Government Code.
4. Based upon the findings of fact, the place or manner in which the Respondent may conduct business at 3301 Tidwell, warrants the denial of the original application based on the general, welfare, health, morals and safety of the people and on the public sense of decency, pursuant to Section 11.46 (a) (8) of the Texas Alcoholic Beverage Code.

Signed this 2 day of January, 2002.



Sherry R. Wetsch
Administrative Law Judge
State Office of Administrative Hearings