

DOCKET NO. 595630

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

VS.

ORIGINAL APPLICATION OF
OST SOCIAL CLUB, INC., NB, PE & FB
NACOGDOCHES COUNTY, TEXAS
(SOAH Docket No. 458-01-3969)

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BEFORE THE TEXAS

ALCOHOLIC

BEVERAGE COMMISSION

ORDER

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

After proper notice was given, this case was heard by Administrative Law Judge Kerry D. Sullivan. The hearing convened and adjourned on September 21, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on November 2, 2001. 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 for Decision were filed by the Applicant on November 13, 2001.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Exceptions to the Proposal, 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 OST Social Club, Inc. for a Private Club Beer and Wine Permit, Beverage Cartage Permit and a Food and Beverage Certificate be **DENIED**.

This Order will become final and enforceable on February 12, 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 January, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

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SOAH DOCKET NO. 458-01-3969

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

VS.

ORIGINAL APPLICATION OF OST
SOCIAL CLUB, INC.
(TABC CASE NO. 59630)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

OST Social Club, Inc., (the "Applicant") has applied to the Texas Alcoholic Beverage Commission (the "Commission") for a Private Club Beer and Wine Permit, Beverage Cartage Permit, and a Food and Beverages Certificate for a premises located on the north side of State Highway 21, 1.2 miles east of the intersection with FM 225, Douglass, Nacogdoches County, Texas. Tom Bush, County Commissioner, Precinct 1, Robert W. King, Homer Collier, and other citizens of Nacogdoches County filed a protest to the issuance of the permits based on safety, peace, and general public welfare concerns. The Commission's staff (Staff) remained neutral on the application. This proposal for decision recommends the permits be denied.

I. PROCEDURAL HISTORY, NOTICE & JURISDICTION

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

On September 21, 2001, a public hearing was convened on this matter in Nacogdoches Texas, before Administrative Law Judge Kerry D. Sullivan. The Applicant was represented by Clayton E. Dark, Jr., attorney. Staff was represented by Dewey Brackin, an attorney for the Legal Division. Commissioner Tom Bush appeared and represented himself. Robert W. King and Homer Collier appeared and were represented by Jack Sheridan, attorney. The hearing concluded on September 21, 2001. The record remained open until October 5, 2001, for the receipt of photographs taken during a site visit at the conclusion of the hearing.¹

¹ No party objected to admission of these photographs which are admitted into the record as Staff Exhibit No. 1.

II. DISCUSSION

A. Applicable Law

The primary foundation for the protest to this application is § 11.46(a)(8) of the Texas Alcoholic Beverage Code (Code), which provides:

The commission or administrator may refuse to issue an original or renewal permit with or without a hearing if it has reasonable grounds to believe and finds that any of the following circumstances exist:

...

(8) the place or manner in which the applicant may conduct his business warrants the refusal of a permit based on the general welfare, peace, morals, and safety of the people and on the public sense of decency.

Additionally, Section 11.41 of the Code provides that, in reaching its decision on this matter, the Commission may give "due consideration" to the recommendation of specified local officials, including the county commissioner who represents the area in question.

B. Evidence

1. **Physical Setting.** The Applicant seeks to license the premises of the Old Spanish Trail Restaurant. The restaurant has been open for several years. It is a substantial facility, with customer seating provided in a main dining room, a private dining room, and a banquet room. Because it is located in a "dry" precinct, the restaurant cannot sell alcoholic beverages. It is located in the community of Douglas several miles west of Nacogdoches along a curve on State Highway 21, in Nacogdoches County. Douglass is an unincorporated community comprised of about 200 to 300 area residents. The restaurant is surrounded by scattered residences and churches.

2. Summary of Testimony.

The Protestants, who bore the burden of proof, oppose issuance of the permits for several reasons. These include their concern that the permits would exacerbate traffic safety problems in the area; their belief that granting the requested permits would frustrate the will of the voters, who have voted to keep precinct 1 dry; their related belief that the permits would be inconsistent with the community's morals and public sense of decency; their concerns regarding litter and noise; and their concerns regarding the Applicant's character and reputation.

The Protestants called six witnesses. These included the Honorable Tom Bush, County Commissioner for Precinct 1, the precinct in which the restaurant is located; three Douglass-area residents, Reverend Horace King, Jr., Cathy Adams, and Rayford Butler; William Parmley, the

TABC investigator for this application; and Joe Bradley Bass, the Secretary-Treasurer of the Applicant. The Applicant also questioned these witnesses and also presented the testimony of George Peeples, the Applicant's president. TABC staff then recalled Agent Parmley for additional testimony. The testimony pertaining to the issues raised by these witnesses is summarized and evaluated below by subject matter.

Traffic Safety. Commissioner Bush testified that State Highway 21 is a "highly traveled" two lane road with no shoulder and no turn lane. He testified that the restaurant is situated on a "kind of a turn" as you come into the community. He characterized the road as dangerous now and expressed concern that it would become more so if the license were granted. Commissioner Bush also observed that school buses regularly pass the restaurant, and that it is near a church. Cathy Adams, a Douglass resident who lives six houses down from the Restaurant, described the Douglass curve as "severe" and testified that drivers cannot see around it. Ms. Adams also testified that people frequently speed in excess of the posted 55 mile per hour speed limit in this area and that there has recently been a head on collision between a 17 year old and a local college student at that location.

Mr. Peeples, however, testified on behalf of the Applicant that the restaurant is on a relatively straight stretch of road with curves on each side. He testified that drivers can see the road for a minimum of 0.2 mile in each direction from the restaurant exit.

TABC agent William Parmley also described the curve. He described it as a gentle sloping curve that does not impair the vision of drivers. Agent Parmley did note in his report, however, that State Highway 21 is a "winding and hilly roadway that is partially under construction between Nacogdoches, Texas and Douglass, Texas (and) is and can be a fairly dangerous roadway due to the conditions and the speed that persons using the road way travel."²

In addition to these varying descriptions, the parties agreed to a site visit at the conclusion of the hearing, at which a peace officer took twenty five photographs of the restaurant and surrounding area, with emphasis on the highway entrance. By agreement of the parties, these photographs were collectively admitted into the record as Staff Exhibit No. 1. These photographs tend to confirm Mr. Parmley's and Mr. Peeples' assessments that the curve in the road at the restaurant is fairly gentle and does not obstruct the view in either direction for approximately 0.2 mile.

In the ALJ's view, the physical characteristics of Highway 21 in this vicinity--i.e., a winding two lane road with no shoulder and no turn lanes partially under construction between Nacogdoches and Douglass--confirm the testimony of Agent Parmley and Commissioner Bush that the road is rather dangerous. The curve on which the restaurant is located, however, presents no special danger not common to the road in general. Accordingly, the ALJ would likely not recommend denial of the permits based on the danger of the highway standing alone. The highway danger does not, for

² Ex. P-1, p. 2.

example, appear to be as severe as in *Sierra v. Texas Alcoholic Beverage Commission*, 784 S.W.2d 359 (Tex. 1990), where the Supreme Court upheld the County Judge's finding that a permit should be denied based on a dangerous "round curve" in the road. Still, the somewhat dangerous nature of the road is a negative factor in the ALJ's view. Combined with the other, less tangible, factors addressed below, the ALJ concludes that the permits should be denied.

Frustrating the will of the voters; protection of the community's morals and public sense of decency. Commissioner Bush testified that one of the reasons he opposes the permit is that the restaurant is located in a dry precinct and his constituents desire to keep it dry. Mr. King testified similarly that he believed issuance of this permit would circumvent the will of the people. Mr. King also sponsored public petitions opposing the proposed permit signed by approximately 243 people. Noting his and the petitioner's moral opposition to the consumption of alcohol, Mr. King testified that these petitioners were standing against "wickedness" and in favor of "righteousness." The petitions state that they are signed by the "concerned citizens of Douglass, Texas." The addresses provided by the petitioners, however, indicate that a number of them reside in Nacogdoches or other areas outside of the community of Douglass. Mr. King testified that he understood the petitioners regularly visited or passed through Douglass, but he could not verify this.

Mr. Peeples testified for the Applicant that he reviewed the petitions and discussed them with area residents. He testified that six people told him their names were forged, that 18 names were illegible, and that 81 signatories provided an address outside Precinct 1. Of the 81 outside the precinct, 32 showed an address outside Nacogdoches County. In any event, in terms of morals and public decency, Mr. Peeples stated that he has no intention of transforming the restaurant into a "honky-tonk," and that, by becoming permitted, facility personnel would become more directly responsible for ensuring that customers do not drink excessively and that minors are not served.³

The ALJ accepts the petitions with the qualifications articulated by Mr. Peeples. But even with these qualifications, 153 of the 200-290 or so residents of the Douglass area have spoken against this application.⁴ Based on these numbers, the Applicant sees the glass as nearly half full—*i.e.*, a healthy minority of Douglass residents have chosen not to sign the petition. But with more than half the residents affirmatively against the application, and with Commissioner Bush testifying he received 25-30 phone calls opposing the application with only two for it, it seems clear that a solid majority of the residents in the Douglass community oppose the application.

The question, then, is what to do with this information. In *Texas Alcoholic Beverage Commission v. Mikulenska*, 510 S.W.2d 616 (Tex. Civ. App. - San Antonio 1974, no writ), the court

³ As it stands now, customers may bring alcohol to the restaurant, and the restaurant apparently charges its customers a fee for this privilege.

⁴ Mr. King estimated about 200 people live in the Douglass area; Mr. Peeples testified about 290 people live in the area.

held the fact that a large number of area residents protest the issuance of permits is not "of itself" sufficient reason to deny the application of an otherwise qualified applicant. But that case dealt with issuance of a mixed beverages permit in a *wet* area. The Court reasoned that the question of whether the sale and purchase of alcohol should be permitted is a political one to be determined by the voters under the local option sections of the Liquor Control Act. In that context, the court held that "in order to deny a permit to a fully qualified applicant who proposed to operate a lawful business in a wet area . . . some unusual condition or situation must be shown so as to justify a finding that the place or manner in which the business may be conducted warrants refusal of a permit."⁵

Here, however, the political decision has been to keep Precinct 1 dry. Hence, the request for a private club registration. The ALJ and, ultimately, Commission are called upon in this proceeding to assess the rather broad and nebulous questions of the impact of the requested permits on the "general welfare, peace, morals, and safety of the people and on the public sense of decency." To a large extent, these matters are essentially defined by the public.⁶ Accordingly, the ALJ believes the public's collective opinion regarding the requested permits in this dry precinct is an appropriate consideration in assessing these issues.

Additionally, Section 11.41 of the Code provides that, in reaching its decision on this matter, the Commission may give "due consideration" to the recommendation of specified local officials, including the county commissioner who represents the area in question. The broad issues of general welfare and the public sense of decency being assessed here are questions with which the local elected official should be familiar--and upon which he or she is situated to speak authoritatively. In keeping with the views of his constituency, Commissioner Bush strongly opposed the permit for this area.⁷ In the ALJ's view, the community opposition to this application in a dry precinct combined with Commissioner Bush's opposition to the permit should be given significant

⁵ 510 S.W.2d at 619.

⁶ In particular, the "public sense of decency" can hardly be defined as anything other than the collective sense of decency of the public. One could argue that the "public" in question should be defined more broadly than the Douglass area. But the political decision to maintain a dry precinct is made at a very local level, apparently out of respect for the differing sensibilities of voters from precinct to precinct. And, as discussed below, the view of the county commissioner for the precinct in question is entitled to due consideration. Accordingly, it seems clear that the public sense of decency, at least, should be defined on a very local level. Even so, the Douglass community makes up only a small percentage even of Precinct 1, which has approximately 14,000 residents. But there is no indication that the sentiments of the Douglass community are not shared by the precinct at large. To the contrary, Commissioner Bush's testimony suggests these views *are* shared by most other residents of Precinct 1.

⁷ Commissioner Bush was unaware of any other TABC private club permits in his precinct. Agent Parmley initially believed that there were no other TABC-permitted private clubs in Precinct 1; he testified at hearing, however, that he was aware of one other private club, known as "Spitfire's."

consideration in assessing whether the permits are consistent with the general welfare, peace, morals, and safety of the people and the public sense of decency.⁸

Noise and Litter. Cathy Adams, who lives six houses down from the Restaurant testified that the Restaurant sometimes holds very loud outdoor concerts that keep her from sleeping and give her migraine headaches. Despite these problems, Ms. Adams has not called or otherwise complained to the Restaurant. Ms. Adams mows her own lawn, her parents lawn, and the First Baptist Church property. She testified that she has picked up several bags of empty beer cans and bottles after these concerts. Ms. Adams expressed concern that permitting the restaurant to serve beer and wine would exacerbate these problems that exist as a result of the current BYOB affairs. Areas resident Rayford Butler, who lives about 200 yards from the restaurant, also addressed this issue. He testified that noise is a big problem when the restaurant has an outdoor concert, but not otherwise. He stated that the restaurant's owners have paid for his wife and him to spend the night at a hotel when it holds its outdoor concerts.

The ALJ is unpersuaded that noise and litter concerns militate against issuance of the permits. From the neighbors' perspective, there is an existing problem with noise and trash from the restaurant when it hosts outdoor concerts. Mr. Peoples testified that the restaurant has no current plans to hold outdoor concerts in the future, although he could not commit the restaurant in this respect. In any event, there is no indication that these concerts would become more frequent with the granting of the permits. Nor is there any real indication that the permits would exacerbate these existing problems. As it is, people can bring their own beverages onto the premises and may leave with them. The volume of the music would be unaffected by the permits. If anything, permitting would likely decrease litter because the restaurant would become obliged to assess the sobriety of its customers and to prevent them from leaving with alcohol containers.

Character and Reputation of Applicant. Section 11.46(a)(6) of the Code provides that the Commission may deny a permit if "the applicant is not of good moral character or his reputation for being a peaceable, law-abiding citizen in the community where he resides is bad." Protestants point to an early morning incident on August 5, 2001. The incident occurred at the restaurant's corporate offices and involved Joe Bradley Bass, the Secretary-Treasurer of the Applicant, and Mr. Rick Moore, another principle with the restaurant. As Mr. Bass explained it at hearing, Mr. Moore was intoxicated and was under the impression that certain guests staying at the offices were uninvited, whereas in Mr. Bass's view, they were invited. Mr. Bass himself had had several beers earlier in the day and had been awake for close to three days. An altercation occurred, Mr. Moore apparently filed a complaint, and a constable came to Mr. Bass's house. The Constable apparently advised the participants to "sleep on it," and no charges were filed.

⁸ The Applicant points out that no other public officials have voiced opposition to this permit. But neither have they voiced support of it. In any event, it appears that Commissioner Bush is best situated to address the concerns and public sentiment within Precinct 1.

The Applicant responds that Mr. Bass is not the applicant and that Mr. Bass submitted a personal history sheet to the TABC, which approved Mr. Bass as an officer. In the ALJ's view, the conduct of the Secretary-Treasurer of a corporate applicant can have some bearing in assessing the character and reputation of the corporate applicant. Nevertheless, while the incident on August 5, 2001, is certainly unhelpful to that reputation, it was rather minor in nature and may well not have been the fault of Mr. Bass. The ALJ does not believe it should play a significant role in the decision making process.

Conclusion. The combination of Commissioner Bush's testimony against the application, the strong public opposition to the permits as inconsistent with the community's morals and sense of decency, and the somewhat dangerous highway on which the restaurant is located lead the ALJ to recommend that the requested licenses be denied. These are matters of local concern, and the statutory framework requires consideration of local sentiment. The strong public discomfort with issuance of any kind of a beer and wine permit make it particularly inappropriate to license an unwanted private club on a dangerous stretch of road in this dry precinct.

III. FINDINGS OF FACT

1. OST Social Club, Inc. (Applicant) filed an original application with the Texas Alcoholic Beverage Commission (the Commission) for a Private Club Registration Permit and a Beverage Cartage Permit for a premises located at on State Highway 21 in the Community of Douglass, Nacogdoches County, Texas.
2. Protests to the application were filed by residents of the area and by Nacogdoches County Commissioner Tom Bush, the commissioner for Precinct 1, where the premises are located.
3. On August 30, 2001, Commission's Staff issued a notice of hearing 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.
4. The hearing was held on September 21, 2001, in Nacogdoches, Nacogdoches County, Texas, before Kerry D. Sullivan, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). Commission Staff appeared and was represented by Dewey A. Brackin, Staff Attorney. Applicant appeared and was represented by Clayton E. Dark, Jr., attorney. Protestants appeared and were represented by Jack Sheridan, attorney. The hearing concluded on September 21, 2001, and the record was closed on October 5, 2001.
5. The requested permits would be for the premises of the Old Spanish Trail Restaurant, which has been open and operating for several years.
6. The stretch of Highway 21 on which the restaurant is located is a heavily traveled winding and hilly roadway. It is partially under construction between the Community of Douglass

and Nacogdoches. It has two lanes and no shoulder or turn lanes. It is a dangerous stretch of road.

7. Most of the residents of the Douglass area oppose the requested permits. 153 residents of Precinct 1 who identified themselves as citizens of Douglass signed a petition in opposition to the permits. The Community of Douglass has between two hundred and three hundred residents.
8. The Honorable Tom Bush, the County Commissioner for Precinct 1, received 25-30 calls in opposition to the permits and only two in support of them.
9. Commissioner Bush opposes issuance of the permits as inconsistent with the general welfare of the citizens of Douglass and with the community sense decency.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN., including Chapters 1 and 5 and §§ 6.01, 11.46, and 32.01.
2. The State Office of Administrative Hearings has jurisdiction over all matters related 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 TEX. GOV'T CODE ANN. Chapter 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the foregoing findings, a preponderance of the evidence shows that issuance of the requested permits would adversely affect the safety of the public, and the general welfare, peace, or morals of the people and would violate the public sense of decency, in violation of TEX. ALCO. BEV. CODE ANN. §11.46(a)(8).
5. Based on the foregoing findings and conclusions, the application of OST Social Club, Inc., for a Private Club Beer and Wine Permit, Beverage Cartage Permit, and Food and Beverages Certificate should be denied.

Signed this 2nd day of November, 2001.


KERRY D. SULLIVAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS