

DOCKET NO. 595666

IN RE ORIGINAL APPLICATION OF
PAPA DULCES CANTINA
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COMANCHE COUNTY, TEXAS
(SOAH DOCKET NO. 458-02-0279)

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BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 15th day of January, 2002 the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Craig R. Bennett. The hearing convened on November 1, 2001, and adjourned November 1, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 29, 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. 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.

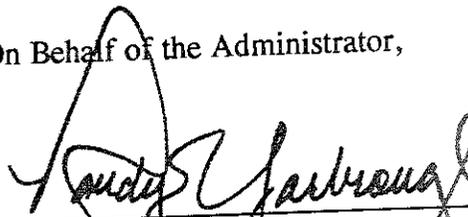
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's permits are hereby **GRANTED**.

This Order will become final and enforceable on **FEBRUARY 5, 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 15th day of January, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

KGG/vr

The Honorable Craig R. Bennett
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (512) 475-4994

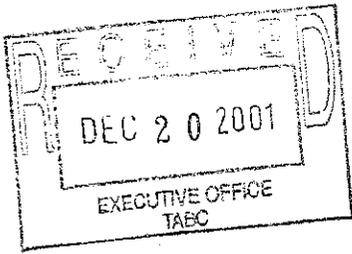
Tommy Adams
ATTORNEY FOR PROTESTANTS
P. O. Box 782
Goldwaite, Texas 76844
VIA CERTIFIED MAIL NO. 7000 1530 0003 1929 1139

Keith Woodley
Woodley & Dudley
ATTORNEYS FOR RESPONDENT
P. O. Box 99
Comanche, Texas 76442
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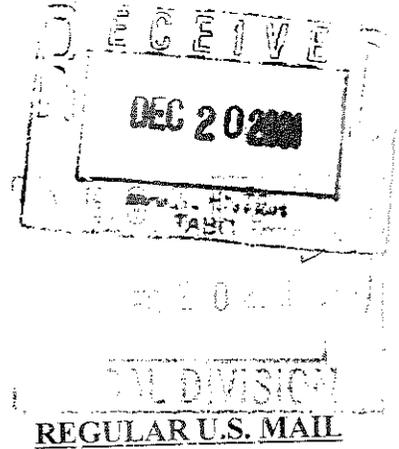
Gayle Gordon
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Abilene District Office

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



December 19, 2001

Mr. Rolando Garza, Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78711

RE: Docket No. 458-02-0279; *TABC and Judy Hasley and John Seth Representatives of Protesting Comanche County Citizens vs. Papa Dulces Cantina - TABC Case No. 595666*

Dear Mr. Garza:

Please find enclosed a Proposal for Decision that has been prepared for your consideration in the above referenced case. A copy of the Proposal for Decision is being sent to Gayle Gordon, Staff Attorney representing the Texas Alcoholic Beverage Commission, Tommy Adams, Attorney representing Protestants and to Keith Woodley, Attorney representing Respondent. For reasons discussed in the Proposal for Decision, this proposal finds that there is insufficient basis for denying the application and recommends that the permits be issued.

Exceptions and replies must be filed according to the time limits specified in TABC rules. A copy of any exceptions, briefs on exceptions, or replies must also be filed with the State Office of Administrative Hearings and served on the other parties in this case.

Sincerely,

Craig R. Bennett
Administrative Law Judge

CRB:dc

Enclosure

xc: Gayle Gordon, Staff Attorney, P. O. Box 13127, Austin, Texas 78711-3127 - Regular U. S. Mail
Keith Woodley, Attorney, P. O. Box 99, Comanche, Texas 76442 - Regular U. S. Mail
Tommy Adams, P. O. Box 782, Goldthwaite, Texas 76844 - Regular U.S. Mail

SOAH DOCKET NO. 458-02-0279

TEXAS ALCOHOLIC BEVERAGE
COMMISSION, and

JUDY HASLEY and JOHN SETH,
REPRESENTATIVES OF PROTESTING
COMANCHE COUNTY CITIZENS

VS.

PAPA DULCES CANTINA
(TABC CASE NO. 595666)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Papa Dulces Cantina (Applicant) has applied to the Texas Alcoholic Beverage Commission (Commission) for a Private Club Registration Permit and a Beverage Cartage Permit for a premises located at 127 N. Houston, Comanche, Comanche County, Texas.¹ Numerous citizens of Comanche County filed a protest to the issuance of the permits based on general welfare, health, peace, moral, and safety concerns. The Commission's staff (Staff) remained neutral on the application.

After considering the arguments and evidence presented by the parties, the Administrative Law Judge (ALJ) finds that there is insufficient basis for denying the application and recommends that the permits be issued.

I. PROCEDURAL HISTORY, NOTICE AND 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 November 1, 2001, a public hearing was convened on this matter in Comanche, Texas, before Administrative Law Judge Craig R. Bennett. The Applicant was represented by Keith Woodley, attorney. Staff was represented by Gayle Gordon, attorney. The protesting citizens (Protestants) were represented by their attorney, Tommy Adams, and their citizen-representatives, Judy Hasley and John Seth. The hearing concluded on November 1, 2001, and the record closed the same day.

¹ Papa Dulces Cantina is the name of the business to be permitted. The application itself was filed by John Huett and his son, Ryan Huett, who are the proprietors of the intended business.

II. DISCUSSION AND ANALYSIS

A. Applicable Law.

Protestants challenge the application on the basis of §§ 11.46(a)(6) and (8) of the Texas Alcoholic Beverage Code (Code), which provide:

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:

...

(6) 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;

...

(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.

B. Arguments and Evidence.

1. Protestants' Case.

The Protestants, who have the burden of proof, oppose issuance of the permits for several reasons. Specifically, Protestants contend that John Huett and Ryan Huett are not of sufficient moral character to hold the requested permits, because they have exhibited public behavior which was threatening, inflammatory, and profane. Moreover, Protestants claim that the issuance of the permits will (1) not be consistent with the standards of the community for appropriate uses of the downtown area; (2) create noise and other disturbances that will affect the peace and serenity of the community; and (3) add to traffic safety problems in the area.

The Protestants called four witnesses: John Seth, John Hicks, Ronnie Clifton, and Dr. Van Christian. Dr. Christian is the pastor of the largest local church in the community, and the other witnesses are residents in the community. Their testimony is summarized below.²

² The testimony section for each witness contains merely a summary of the testimony and is not intended to reflect the ALJ's factual findings, or the ALJ's determination as to the credibility of the witnesses' testimony.

John Seth

Mr. Seth works as a nurse practitioner and also is a part-owner in a bakery several hundred feet from the intended location of Applicant's private club. Mr. Seth has known of John Huett for a number of years, primarily because John Huett is the local pharmacist and operates the pharmacy located near Mr. Seth's bakery. Mr. Seth testified that after he expressed his opposition to the permit application, John Huett was hostile toward him on a number of occasions.³

In the first instance, John Huett approached Mr. Seth outside his business on June 8, 2001, and asked to speak with him. John Huett then told Mr. Seth that he was "no good" for having signed the petition in opposition to the proposed permit. Mr. Seth responded by arguing it was his right to voice his opinion. Mr. Seth testified that John Huett then cursed him and walked away. While he was walking away, John Huett turned around and glared at Mr. Seth and asked him "do you want a piece of me?" (in an apparent challenge to a fight). Mr. Seth responded "no" and John Huett then walked away.

John Huett approached Mr. Seth several months later and apologized for the earlier incident. He also offered to apologize to Mr. Seth's wife and daughter, but Mr. Seth indicated that wasn't necessary. Then, John Huett stated that Mr. Seth needed to withdraw his protest so the Huetts could get the permit for their club. If the protest wasn't withdrawn, John Huett threatened to bring down the Main Street Project, which was an existing application for funding for improvement of the downtown area in Comanche. This was a project in which Mr. Seth was interested. Despite these threats, Mr. Seth did not agree to withdraw his protest.

Several weeks later, Ryan Huett contacted Mr. Seth and again urged him to withdraw his protest, expressing concern about what his father, John Huett, might do if the permits were not issued. Ryan Huett expressed the possibility that his father might attempt to open some other business that Mr. Seth would find offensive, such as an X-rated store. After this conversation, Ryan Huett called Mr. Seth one more time and threatened to spread rumors in the community about him unless he withdrew his protest. Mr. Seth still did not withdraw his protest and, to his knowledge, no further action was taken by either John or Ryan Huett.

On cross-examination, Mr. Seth agreed that John Huett had been helpful when Mr. Seth first started his bakery, apparently making pharmacy customers aware of the bakery and referring business there. When John Huett later apologized, he told Mr. Seth that he had felt betrayed by Mr. Seth's opposition to the application in light of John Huett's efforts to help promote Mr. Seth's bakery. Mr. Seth also conceded that, although he felt threatened by John Huett, he never filed a formal complaint or pursued any criminal action against John Huett. Finally, Mr. Seth admitted that he had never expressed any opposition to the other businesses in the community which were permitted to serve alcohol.

³ Throughout the PFD, the ALJ refers to John and Ryan Huett with both their first and last name-instead of with the title "Mr."-so as to distinguish them from one another.

John Hicks

Mr. Hicks operates a food store in Comanche, has lived in Comanche County for 44 years, and has known John and Ryan Huett much of his life. Mr. Hicks also opposed the permit application once he learned of it, and his signing the petition against the application led to a run-in with John Huett. In particular, Mr. Hicks stated that John Huett came up to him at a town event and told him to "shove the petition up his ass" and threatened to "kick his ass." As Mr. Hicks and John Huett were standing face to face having words, Ryan Huett allegedly came up and separated them and told Mr. Hicks that he (Ryan) could "kick [Mr. Hicks'] ass" if his father could not. Both Huetts then walked away from Mr. Hicks and he had no further incidents with them. In Mr. Hicks' opinion, it would be a detriment to the community standards if the permits were issued and the Applicant were to operate a business serving alcohol in the downtown area.

Ronnie Clifton

Mr. Clifton has lived in Comanche for 12 years and is the current high school principal for the Comanche Independent School District. Mr. Clifton expressed his opinion that having a bar in downtown Comanche sent mixed signals to high school students when the school administrators were trying to teach them not to drink alcohol. He thought this was a bad standard to set. However, on cross-examination, he conceded that there were numerous other establishments in the community that served alcohol and that "there is a time and a place for everything" (implying that he was not entirely opposed to the consumption of alcohol).

Dr. Van Christian

Dr. Christian has lived in Comanche for four years while serving as the pastor of the First Baptist Church in Comanche, which has the largest membership in the community. Dr. Christian testified that, in his opinion, the permits were not consistent with the community's standard of morality. He noted that the citizens had voted to keep the county a "dry" county, thus expressing their views against alcohol. He also stated that he counsels approximately two families per month for alcohol-related problems and that the addition of another club licensed to serve alcohol will likely add to community problems.

On cross-examination, Dr. Christian conceded that he did not know when Comanche County was made a "dry" county, and whether it had been decades before. He also agreed that there was at least one precinct in the county where alcohol could lawfully be purchased for off-premises consumption. He admitted that he dines at the Par Country Club, which serves alcohol. He also admitted that there were a few other existing establishments in the county that serve alcohol. As for John Huett, Dr. Christian acknowledged that he was a member of the congregation of First Baptist Church and that he had no opinion on John Huett's reputation for truthfulness; but, to his knowledge, Dr. Christian felt that John Huett had been truthful in his dealings with him.

2. Applicant's Case.

The Applicant argues that the location of the proposed establishment is entirely appropriate and will not negatively impact the community in the manner alleged by Protestants. Applicant notes that a sports bar was located on the same block of the town square until a couple of years ago, and the sports bar was not challenged by the Protestants.

In support of its case, Applicant presented the testimony of five witnesses: Donna Jones, Bonnie Huett, John Gleaton, Ryan Huett, and Jim Parker. Their testimony is discussed below.

Donna Jones

Ms. Jones currently operates a bed and breakfast in Comanche. Prior to that, she operated Brock's Sports Bar between 1997 and 2000. Brock's Sports Bar was permitted to serve alcohol and was located on the town square, close to where Applicant's club is proposed. Ms. Jones testified that she did not have any formal community opposition at the time that she applied for and obtained permits to operate Brock's Sports Bar and serve alcohol. She did not want to operate the bar on the downtown square, but because of the TABC rules regarding the location of permitted clubs, she felt that the downtown square was practically the only place where the bar could be located.

Ms. Jones testified that her business was close to John Huett's pharmacy and that he was a very good business "neighbor." She testified that she never saw him exhibit any aggressiveness or violence toward anyone. She also knows Ryan Huett, and testified that she does not believe him to be a violent or aggressive person.

Bonnie Huett

Ms. Huett is the mother of Ryan Huett and the ex-wife of John Huett. She also has served as the municipal judge for Comanche since 1993. As municipal judge, she presides over disorderly conduct cases that arise in the community, including those arising from the former operation of Brock's Sports Bar. She testified that, during the two years Brock's Sports Bar operated, only two disorderly conduct cases arose from it. She testified that many more disorderly conduct cases arose from the high school.

Ms. Huett testified that John Huett has operated the pharmacy in Comanche, either solely or in partnership with his father and another man, since the late 1960s. Ms. Huett testified that, even though they are divorced, she has a good working relationship with John Huett and has never known him to be a violent person.

John Gleaton

Mr. Gleaton is a local attorney who also owns and operates Comanche County Abstract Company. He has known John Huett for approximately fifty years and testified that John Huett's reputation in the community for being a peaceable and law-abiding citizen is good.

Ryan Huett

Ryan Huett is a real estate agent and also one of the principal owners of the proposed club who, along with his father, submitted the application for the permits. If permitted, he will be in charge of the operation of the bar. He has never been convicted of any crime other than a traffic ticket.

Ryan Huett testified that he and his father have invested significant effort in remodeling the premises where the proposed club will be located. He testified that the adjacent building is currently unoccupied and the other surrounding businesses include a Ben Franklin's five-and-dime store and a bingo hall. He stated that he and his father intend to run the club in a reputable and orderly manner, and have purchased metal detectors and intend to purchase security cameras for the safety of patrons.

Ryan Huett testified that he observed part of the exchange between his father and John Hicks, which occurred during a local auction benefitting the Main Street Project. He stated that he was leaving his pick-up truck when he saw his father standing chest to chest with Mr. Hicks. He went over and separated the two, and Mr. Hicks said he just wanted to be left alone. Ryan Huett told him that is what they were "shooting for" and that was the end of the incident. Ryan Huett testified that he did not make any threats toward Mr. Hicks, nor did he hear any of the words spoken between his father and Mr. Hicks prior to him separating them. Ryan Huett was not asked, and did not testify, about any of the other incidents alleged by John Seth.

Jim Parker

Mr. Parker is an attorney who has lived and practiced in Comanche County for at least 25 years. He also was elected as a state representative for five terms and worked for the governor for a period of time. He has known John Huett for approximately 40 years. Mr. Parker testified that John Huett's reputation in the community for being a law-abiding citizen is good.

C. Analysis.

Even though the Protestants challenged the application on numerous grounds, they presented evidence on only two grounds at the hearing. First, Protestants presented evidence that the permits would not be in keeping with the general welfare, peace, morals, and safety of the community. Second, they presented evidence regarding the character and reputation of John and Ryan Huett. After considering this evidence, the ALJ concludes that it does not establish a legitimate basis for denying the permits.

1. Protection of the Community's General Welfare, Morals and Public Sense of Decency.

Protestants argue that an establishment serving alcohol is not in keeping with the community's purposes for the downtown area and with the general morals and welfare of the community. However, the evidence establishes that until a couple of years ago, a sports bar was located on the town square without any opposition. That bar shut down voluntarily and not because of protests or any incompatibility with the downtown area. The adjacent building is unoccupied and the other businesses close by include John Huett's pharmacy, a bingo hall, and a variety store. The proposed club does not appear to be inconsistent with other uses in the area.

Further, the ALJ does not conclude that the proposed club is inconsistent with the community's general morals or welfare. There are numerous other establishments in the county and the community that serve alcohol. Until just a couple of years ago, there was a similar club located on the town square. Even Protestant's witnesses were mixed in their testimony on this issue. Mr. Clifton, the high school principal, conceded that there could be a time and a place for drinking alcohol. Dr. Christian, the pastor called by Protestants, admitted that he dined at the Par Country Club, which also serves alcohol. No local officials appeared at the hearing in opposition to the application, and the Protestants did not present sufficient evidence establishing a community consensus against the application. Protestants simply presented no credible evidence why the establishment proposed by Applicant presents any greater harm or is somehow more incompatible with the community's morals and general welfare than any of the other establishments that are already permitted to serve alcohol in the community. There was no evidence that the business's location was unsafe in some manner (such as near a winding curve in the road), or located in close proximity to other facilities which might be incompatible (such as a hospital, church, or school). Under the circumstances, the ALJ simply does not conclude that the place or manner in which the Applicant may conduct 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.

2. 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 a few incidents that have occurred after they challenged Applicant's request for a permit. In particular, there is evidence regarding three specific incidents involving John Huett, one of which also involved Ryan Huett. Also, there is evidence regarding two phone calls made by Ryan Huett to John Seth. In the incidents involving John Huett, he cursed at and threatened two individuals who had expressed opposition to the application. Ryan Huett also allegedly cursed at and threatened one of those same individuals. For the most part, the Huetts did not challenge the evidence regarding these incidents and the ALJ believes that they likely occurred as testified to by Protestants' witnesses.

The ALJ finds the conduct of John and Ryan Huett to be distasteful and not to be condoned. But, the incidents involved nothing more than the exchange of a few hostile words. John Huett apologized after one of the incidents and acknowledged he was wrong. None of the witnesses testified that either John or Ryan Huett actually took any retaliatory action toward them, other than the exchange of threatening and obscene words. While such behavior is generally not appropriate and should not be condoned, it also is not so serious as to justify the conclusion that John and Ryan Huett are not of sufficient character to operate the proposed club.

Other than the incidents described above, the bulk of the evidence is that John Huett's reputation in the community is good. Even the pastor called to testify by Protestants indicated that he had no reason to believe that John Huett's reputation was not good, and that John Huett had been truthful in his dealings with him. John Huett has served as the local pharmacist for years and has been involved in the community as a reputable business owner for at least 30 years. John Huett's ex-wife and two local attorneys—one a former state representative—testified that he was not violent and had a good reputation in the community. Ryan Huett has been a real estate agent in the community for a number of years and has never been convicted of any crime other than a traffic ticket. Other than the few offensive comments attributed to him by Mr. Seth and Mr. Hicks, there is no evidence that he has engaged in behavior that is reflective of poor character. The ALJ simply does not conclude that the evidence establishes that John and Ryan Huett are not of good moral character or their reputation for being peaceable, law-abiding citizens in the community is bad. As such, there is no basis for denying the application.

III. CONCLUSION

The evidence does not establish (1) that the place or manner in which the Applicant may conduct 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; or (2) that John and Ryan Huett are not of good moral character or their reputation for being peaceable, law-abiding citizens in the community is bad. Because the Applicant appears to have met all other requirements for the issuance of the permits, and there is no basis for denying the application, the ALJ recommends that the application be granted and the requested permits be issued.

IV. FINDINGS OF FACT

1. John Huett and Ryan Huett, on behalf of Papa Dulces Cantina (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 127 N. Houston, Comanche, Comanche County, Texas.
2. Protests to the application were filed by residents of the area where the premises is located.
3. On October 4, 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 November 1, 2001, in Comanche, Comanche County, Texas, before Craig R. Bennett, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). Commission Staff appeared and was represented by Gayle Gordon, attorney. Applicant appeared and was represented by Keith Woodley, attorney. Protestants appeared and were represented by their attorney, Tommy Adams, and their citizen-representatives, Judy Hasley and John Seth. The hearing concluded on November 1, 2001, and the record closed the same day.
5. The requested permits are for the business establishment of Papa Dulces Cantina, a private club which is new to the area and has not yet opened.
6. John Huett is a pharmacist and has operated a pharmacy in Comanche, Texas, for approximately 30 years. John Huett's reputation for being a peaceable, law-abiding citizen in the community is good.
7. Ryan Huett is a licensed real estate agent in Comanche, Texas. Ryan Huett has never been convicted of a crime other than a traffic ticket. There is not evidence that Ryan Huett's reputation for being a peaceable, law-abiding citizen in the community is bad.
8. Between 1997 and 2000, Brock's Sports Bar was operated on the downtown square of Comanche, Texas. Brock's Sports Bar was permitted as a private club and allowed to serve alcohol.
9. At least two other existing establishments in the Comanche community are permitted to serve alcohol.
10. The building adjacent to Applicant's proposed location is unoccupied and the other businesses in close proximity include John Huett's pharmacy, a bingo hall, and a variety store. The proposed club is not inconsistent with other uses in the area.

11. There is insufficient evidence to establish that the place or manner in which the Applicant intends to conduct business is incompatible with the general welfare, peace, morals, and safety of the people and on the public sense of decency.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN., Chapters 1 and 5 and §§ 6.01, 11.41, 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 of fact, a preponderance of the evidence shows that issuance of the requested permits will not adversely affect the safety of the public, the general welfare, peace, or morals of the people, nor violate the public sense of decency, in violation of TEX. ALCO. BEV. CODE ANN. §11.46(a)(8).
5. Based on the foregoing findings of fact, there is insufficient evidence to deny the permits on the basis of TEX. ALCO. BEV. CODE ANN. §11.46(a)(6).
6. Based on the foregoing findings and conclusions, the application of Papa Dulces Cantina for a Private Club Registration Permit and a Beverage Cartage Permit should be granted.

Signed this 19th day of December, 2001.


CRAIG R. BENNETT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS