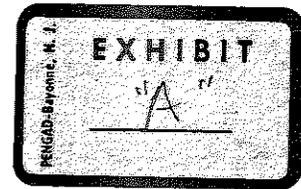


DOCKET NO. 458-03-0532



TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
V.	§	OF
COWBOY CORRAL PRIVATE CLUB, INC. D/B/A COWBOY CORRAL PRIVATE CLUB, Applicant Ellis County, Texas (TABC CASE NO. 601492)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Cowboy Corral Private Club, Inc. d/b/a Cowboy Corral Private Club (Applicant), seeks a Private Club Registration Permit and a Beverage Cartage Permit for a premises to be located at 858 Old Highway 287 South, Waxahachie, Ellis County, Texas, from the Texas Alcoholic Beverage Commission (the Commission/TABC). The TABC Staff is protesting the issuance of these permits, alleging that Applicant has or will violate provisions of the Texas Alcoholic Beverage Code (the Code) or the Texas Alcoholic Beverage Commission rules (the Rules). TABC Staff specifically alleges that Applicant has failed to secure a suitable location for the proposed premises; that Applicant made false or incorrect answers to questions in its application; that Applicant has or will engage in a device, scheme, or plan which surrenders exclusive control of the proposed premises to persons other than Applicant; and that the place and manner in which Applicant may operate its proposed premises will be contrary to the general welfare, health, peace, morals and safety of the people or contrary to the public sense of decency. The Administrative Law Judge finds TABC Staff's evidence is sufficient to warrant denial of Applicant's application.

I. PROCEDURAL HISTORY

On July 9, 2002, Applicant filed an original application for a Private Club Registration Permit and a Beverage Cartage Permit. The premises where this application is sought is located at 858 Old Highway 287 South, Waxahachie, Ellis County, Texas. TABC Staff, upon a review of the application, determined that the application did not meet requirements of the Code or Rules as listed above. Therefore, TABC Staff protested this application and seeks its denial by the Commission.

TABC Staff issued a notice of hearing on October 10, 2002, informing all parties a hearing would be held on the application, as required by § 2001.052 of the Administrative Procedure Act, TEX. GOV'T CODE ANN. Chapter 2001. The hearing was held on November 8, 2002, in Dallas, Texas, before Tanya Cooper, an

Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). TABC Staff appeared and was represented by Timothy E. Griffith, TABC Staff Attorney. Applicant appeared and was represented by its President, Ricky M. Fuller. There were no challenges to the notice of hearing as provided, jurisdiction or venue. The hearing concluded on that date.

II. JURISDICTION

The Commission has jurisdiction and authority over this matter pursuant to Chapter 5 and §§ 6.01, and 11.61 of the Code. TEX. ALCO. BEV. CODE ANN. § 1.01 *et seq.* The State Office of Administrative Hearings has authority to conduct a hearing in this matter and make recommendations to the Commission, including the issuance of a proposal for decision containing findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Chapter 2003 and § 5.43 of the Code.

III. DISCUSSION

A. Applicable Law

The statutory foundations for Staff's protest to this application are as follows:

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:

...

(4) the applicant failed to answer or falsely or incorrectly answered a question in an original . . . application;

...

(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. TEX. ALCO. BEV. CODE ANN. § 11.48(a).

...

A private club registration permit may only be issued to a club which meets the following requirements:

...

(f) The club must own, lease, or rent a building or space in a building of such extent and character as in the judgment of the Commission is suitable and adequate for the club's members and their guests. TEX. ALCO. BEV CODE ANN. § 32.03.

TABC Staff also relies on Section 109.53 of the Code which prohibits any device, scheme or plan which surrenders control of the employees, premises or business of the permittee to persons other than the permittee. Finally, the Commission may suspend an original permit if it is found that a permittee has violated a provision of the Code or a Rule of the Commission. TEX. ALCO. BEV. CODE ANN. § 11.61.

B. Evidence

1. **The Staff's Evidence.** TABC Staff presented two exhibits: the Notice of Hearing letter provided to Applicant and Applicant's original application for a Private Club Registration Permit and Beverage Cartage Permit. One witness, Agent Tim Maloney, testified on behalf of TABC Staff. Agent Maloney has been a TABC agent for 15 years. He is knowledgeable about the requirements of the Code and Rules applicable to the permits sought by Applicant. He stated that the application process for approval to operate a private club can be difficult. This was Applicant's second attempt to secure the requested permits. Its first application, filed on April 3, 2002, was withdrawn due to a variety of discrepancies contained within the original application.

Agent Maloney discussed numerous questions and responses contained within Applicant's current application. He noted several responses to questions which were false, incorrect, or incomplete in his opinion. They are listed as follows:

1. The residential addresses listed for Ricky M. Fuller, Applicant's President, were not consistent between his personal history sheet and other responses concerning his residential address contained in the current application. Some responses concerning his address also differed from the responses to the same questions contained in the April 3 application.

2. The location of the private club is listed as within the city limits of Waxahachie when, in fact, the club is located in an unincorporated area of Ellis County, Texas, in the community of Reagor Springs.

3. The total number of club's charter members was listed in Question N7B of the application as 55 members, but the actual total number of original members, as determined from a review of the Charter Membership Applications, showed there were 61 members.

4. An employee, T.J. Presley, was listed as a member of the membership committee in the response to Question E2A and the response to Question E2B said that no member of the membership committee would be employed by the club. The response to Question E2B is incorrect because the Management Agreement executed by Ms. Presley and Mr. Fuller indicates that she will receive 25% of the monthly gross revenue derived by the club from the service charge of alcoholic beverages consumed by club members.

5. Cynthia Ann Browning is Applicant's Vice-President. Her residence is listed as 6 Covey Run Circle, Waxahachie, Texas, on her personal history, which is the same address as Mr. Fuller's address on his personal history sheet. Ms. Browning lists no business or residential telephone, while Mr. Fuller's personal history sheet lists these telephone numbers. Based upon this, Agent Maloney opined that Ms. Browning's personal history sheet was incomplete.

6. The application fails to provide needed information concerning the building's owner. The application listed the premises as owned by Hong Hong, while a lease agreement submitted with Applicant's application shows the landlord is a person named Hong Thong. This individual holds a Beer Retailer's Off-Premises License issued by the Commission. This premises is located next to applicant's property and Mr. Thong is at the proposed premises a good portion of the time.

7. Bank records for the Applicant were requested, but never received. Failure to provide the requested bank records made the application incomplete.

8. The bond rider was not signed by an officer of the club, making the application incomplete. This is a necessary part of the application.

9. In an agreement between Applicant and Mr. Fuller, Applicant received \$5,581, but the application did not state what these funds were to be used for. This makes the application incomplete according to Agent Maloney.

10. Signatures were missing from some forms and some questions were not responded to in any fashion.

TABC Staff further contends that the application, and its supporting documents, show additional incorrect information is contained in the application and that violations of provisions of the Code and Rules exist, as follows:

1. The application is incomplete because no dates are on the Sublease Agreement or the Bylaws and House Rules for Members. These dates are required to be included in an application of this type to show that the proper chronology of events for the formation of private club is being observed. This is necessary to determine if the time periods for activities is demonstrating Applicant's intention to operate a private club in a correct manner according to the Code and Rules.

2. The surety bond submitted with Applicant's application is invalid because corporate seals for Applicant and the surety company are not affixed to the surety bond. This also make the application incomplete since a valid bond is a requirement in this instance.

3. Applicant does not have a building adequate for its operations. The Sublease Agreement between Mr. Fuller and Applicant, which was approved by the landlord, Mr. Thong, does not convey Applicant an exclusive right to use the location or structure.

4. A subterfuge in the operation of the premises is indicated by several factors. The Management Agreement between Ms. Presley, designated as the private club's manager, and Applicant, provides that Ms. Presley will furnish personnel, as may be necessary for the efficient operation of the premises. Ms. Presley will be responsible for compensating these persons for their services and that these persons shall not be considered as employees of Applicant for any purpose.

Ms. Presley and Mr. Fuller both received percentages of gross revenues from the Applicant's operations. No such payments, which amounts to "skimming off the top," are permissible in the proper operation of a private club. Pursuant to the Code, private clubs should exist for the benefit of the club members, not for the benefit of its operators, which in this instance are Mr. Fuller and Ms. Presley.

Applicant's management structure is centralized in its control, which is circumstantial evidence of a subterfuge. Control is held within a few persons, mainly Mr. Fuller and Ms. Presley, rather than decentralized into the private club's membership. Mr. Fuller owns the furniture, fixtures, and equipment to be used in Applicant's business. He is the original incorporator of the corporation and is Applicant's President and a Director. He is a member of the membership committee. Applicant's address is the same as Mr. Fuller's address. He had donated/loaned money to Applicant for an unspecified purpose, and receives a sizeable percentage of Applicant's gross profits. Mr. Fuller is the original tenant in the premises, which he has sublet to Applicant. He has executed portions of the application as the permittee, rather than as an officer on behalf of Applicant.

Within the application, Question 10L asks if this application is being made for the benefit of someone else. The response was listed as "No." TABC Staff argues that the response is incorrect since the above-listed factors support the conclusion that Applicant's business will be operated for the benefit of others, namely Mr. Fuller and Ms. Presley.

2. The Applicant's Evidence.

Ricky M. Fuller testified at the hearing. Mr. Fuller is the President of the Applicant. He stated that an application preparation service, operated by Kathy Gildon,

had been relied upon to complete the application filed with TABC Staff for these permits.

During this process, Mr. Fuller testified that he often felt in the middle between Agent Maloney and Ms. Gildon. According to Mr. Fuller, Agent Maloney would point out instances where the application was deficient, but Ms. Gildon would not correct the information, saying that Agent Maloney was incorrect on the directions that he was providing to them.

Mr. Fuller did not deny that the service had made errors in completing the forms which were submitted to TABC Staff. Mr. Fuller cited an instance where Ms. Gildon had put incorrect information in the application. Question 11E2 states that the lease payment to the building's landlord for premises location would be calculated at 10% of the gross sales from the club. Mr. Fuller said that the rental fee was not a percentage, but was a flat monthly rate of \$750.00.

Cynthia Browning, Applicant's Vice-President, testified that Mr. Fuller was out of town and that she had gathered some of the information Ms. Gildon requested. She had not seen the contents of the application until after it had been filed with TABC Staff by Ms. Gildon. Ms. Browning also said that the service had not completed the application correctly. She stated the neither she nor Mr. Fuller had any experience in this type of business and had relied upon the preparation service to do the job correctly.

C. Analysis, Conclusion, and Recommendation

Based on the evidence presented by TABC Staff and Applicant's witnesses, the ALJ believes that Applicant's application contains numerous false or incomplete answers. Although an application service was relied upon by Applicant to complete the required forms properly, it is still the responsibility of Applicant and its representatives to insure that all information contained within an application is correct prior to its filing with TABC Staff. Further, while it was perhaps unintentional, the proposed management structure of the Applicant's business does surrender control of the business or premises to a person other than Applicant. Given the number and seriousness of these violations alone, the ALJ recommends that the requested permits be denied. No further analysis of additional alleged violations is warranted. Accordingly, the request for these permits should be denied.

IV. FINDINGS OF FACT

1. On July 9, 2002, Cowboy Corral Private Club, Inc. d/b/a Cowboy Corral Private Club (Applicant), filed an original application with the Texas Alcoholic Beverage Commission (the Commission/TABC) for a Private Club Registration Permit and a Beverage Cartage Permit for a premises located at 858 Old Highway 287 South, Waxahachie, Ellis County, Texas.

2. TABC Staff protested the application asserting, among other things, that the permits should be denied because false or incorrect answers were made to questions on the application form and that the Applicant has or will engage in a device, scheme, or plan which would surrender control of the premises or business to another.
3. On October 10, 2002, TABC Staff issued a notice of hearing informing all parties that a hearing would be held on the application and the time, place, and nature of the hearing.
4. The hearing was held on November 8, 2002, in Dallas, Dallas County, Texas, before Tanya Cooper, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). TABC Staff appeared and was represented by Timothy E. Griffith, TABC Staff Attorney. Applicant appeared and was represented by Ricky M. Fuller, Applicant's President. The hearing concluded on that same day.
5. Applicant utilized an application preparation service operated by Kathy Gildon to submit the current application for a private club registration permit and beverage cartage permit.
6. Ms. Gildon completed this application with information that she obtained, in part from Applicant's representatives, Mr. Fuller and Cynthia Browning.
7. When the application was filed with TABC Staff, numerous errors were noted in responses to questions, or in supporting documents incorporated into the application. The following are instances where this application is inaccurate or incomplete:
 - Consistent residential addresses for Applicant's President, Ricky Fuller, were not provided;
 - The location for the proposed premises was listed as within the city limits of Waxahachie, when it is not within the city limits of any incorporated city;
 - The number of charter members in the private club was not accurately provided;
 - An employee, T.J. Presley, was listed as a member of the membership committee. She is designated as the manager of the private club in a Management Agreement, yet on Question E2B of the application, the response showed that no member of the membership committee would be employed at the club.

- Telephone numbers were not provided for Ms. Browning on her Personal History Sheet.
- The application fails to identify the landlord for the proposed premises.
- Bank records for Applicant were requested, but not provided.
- The Surety Bond's rider was not signed by an officer of the private club.
- Funds were advanced to Applicant by Mr. Fuller, but no explanation was provided for how the funds were to be used.
- Dates were missing from the Sublease Agreement and the Bylaws and House Rules for Members.
- Applicant's Surety Bond submitted with its application was invalid because the seals for Applicant and its surety were not affixed.

8. The application's information also showed that the management structure of Applicant would surrender exclusive control of the premises to persons other than Applicant or its members.

- A Management Agreement between Ms. Presley and Applicant provided that Ms. Presley would obtain a sufficient number of employees to operate the premises, and that these persons were not employees of Applicant.
- Ms. Presley and Mr. Fuller were compensated by a percentage of gross profits from the sale of alcoholic beverages from the proposed premises.
- Control of the business activities on the premises was centralized in a few persons, chiefly Mr. Fuller and Ms. Presley, rather than decentralized in the membership of the club.
- Mr. Fuller owns all the fixtures, furnishings, and equipment to be utilized on the proposed premises.
- Mr. Fuller is the incorporator of Applicant; he is Applicant's president; he is the tenant in the location's original lease, which he has sublet to Applicant; Applicant's address is the same as Mr. Fuller's residence address; Mr. Fuller had advanced money to Applicant without any specific purpose; and he executed portions of the application as the permittee, rather than as a representative for Applicant.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Chapter 5 and §§ 6.01 and 11.61 and TEX ALCO. BEV. CODE ANN. § 1.01 *et seq.*
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. Chapters 2001 and 2003, and 1 TEX. ADMIN. CODE §155.1 *et seq.*
3. No objections to the notice of hearing were raised by the parties and notice is sufficient as required by the Administrative Procedure Act, TEX. ADMIN. CODE §§ 2001.051 and 2001.052.
4. Based on the foregoing findings, a preponderance of the evidence shows that Applicant failed to answer or falsely or incorrectly answered questions to an original application, contrary to TEX. ALCO. BEV. CODE ANN. §11.46(a)(4).
5. Based upon the foregoing findings, a preponderance of the evidence shows that Applicant's management structure will surrender exclusive control of the premises contrary to TEX. ALCO. BEV. CODE ANN. § 109.53.
6. Based on the foregoing findings and conclusions, the application of Cowboy Corral Private Club, Inc. d/b/a Cowboy Corral Private Club for a Private Club Registration Permit and Beverage Cartage Permit should be denied

Signed this 16th day of December 2002.


TANYA COOPER, ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 601492

IN RE COWBOY CORRAL PRIVATE	§	BEFORE THE
CLUB INC.	§	
ORIGINAL APPLICATION N, PE	§	
	§	TEXAS ALCOHOLIC
	§	
ELLIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-0532)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 7th day of January 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Tanya Cooper. The hearing convened on November 8, 2002, and adjourned on November 8, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 16, 2002. 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. 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 the Original Application for an N and PE are hereby **DENIED**.

This Order will become final and enforceable on January 28, 2003, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile or through the U.S. Mail, as indicated below.

SIGNED this 7th day of January, 2003.

On Behalf of the Administrator,



Jeannene Fox, Acting Assistant Administrator
Texas Alcoholic Beverage Commission

/bc

The Honorable Tanya Cooper
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (817) 377-3706

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