

SOAH DOCKET NO. 458-03-1550

TEXAS ALCOHOLIC BEVERAGE
COMMISSION, and

CONCERNED CITIZENS OF THE CITY
OF ODESSA, PROTESTANTS

VS.

ORIGINAL APPLICATION OF TERRI
LEA BANTA, D/B/A STEPPEN OUT,
RESPONDENT
(TABC CASE NO. 602132)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Terri Lea Banta d/b/a Steppen Out (Applicant) has applied to the Texas Alcoholic Beverage Commission (Commission) for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for the premises known as Steppen Out, located at 2113 Kermit Highway, Odessa, Ector County, Texas 79761. Numerous citizens of the City of Odessa 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 an 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 February 6, 2003, a public hearing was convened on this matter in Odessa, Texas, before ALJ Wendy Harvel. The Applicant was represented by Bobby Bland, attorney. Staff was represented by Dyer Lightfoot, a lieutenant for the Commission. The protesting citizens (Protestants) were not represented by counsel, but nominated six individuals to speak on their behalf: Kathy Rhodes, Sue Blair, Curtis Wilcott, Forrest McCleery, Ron Rennegarbe, and David Wheeler. The hearing concluded on February 6, 2003, and the record closed the same day.

II. DISCUSSION AND ANALYSIS

A. Applicable Law.

Protestants challenge the application on the basis of §§ 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.

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 if the permit is issued, intoxicated people will be in the neighborhood, crossing Kermit Highway on foot. Furthermore, they contend that there will be increased foot traffic in the alley close to a Lutheran church and a neighborhood. They point to specific instances in the past when intoxicated people were found urinating in the alley, sleeping against buildings, and loitering.

The Protestants called five witnesses. Their testimony is summarized below.

Dr. Sue Blair

Dr. Blair is a member of the Board of Trustees of Odessa College.¹ She testified that it is the Board's policy to oppose new alcoholic beverage applications if the establishment applying is located close to the college. She testified that Steppen Out would be within walking distance to the college's residence halls and that many of the students do not have cars. She was concerned about the safety of the students. On cross-examination, Dr. Blair testified that she is unaware of any problems in the past when Steppen Out was operated as a bar by another owner. She also admitted that there are bars closer to campus than Steppen Out.

¹ Neither Odessa College nor Dr. Blair filed a protest to the application. The Applicant did not object to her testimony; therefore, it is included in the discussion.

Ms. Kathy Rhodes

Ms. Rhodes, together with her husband, operates a heating and cooling business on Kermit Highway.² She has operated the business for 26 years, and she lives in the neighborhood. She is concerned because she has seen intoxicated people crossing Kermit Highway while going from one bar to another along the road. She said she has often seen people slumped against her building, and she has had intoxicated people on her premises. She testified that she and her husband often work late hours because of the nature of their business. On cross-examination she testified that she has seen people arrested from other bars on the street. She also testified that she is unaware whether the intoxicated individuals on her property had been drinking on the premises of Steppen Out.

Mr. Forrest McCleery

Mr. McCleery has lived in Odessa since 1959 and lives across the alley from Steppen Out. He testified that his property had been stolen on numerous occasions. He also testified that he has taken the step of erecting a ten-foot fence in an effort to keep intoxicated individuals off his property. Other incidents he was aware of were people driving into a utility pole, gas meter, and a transformer tower. On cross-examination he admitted that there were other bars in the neighborhood and that he did not know whether the people involved in these incidents had been at Steppen Out.

Mr. Curtis Wilcott

Mr. Wilcott testified that he owns Barnes Sign Company, which shares a parking lot with Steppen Out. He said his business had been in that location since 1961, but he has owned it for five years. He testified that his main complaint is the trash in the parking lot next to his business. He testified that he once had tools stolen, and has had to have cars towed out of his parking lot that were blocking the door to his store.

On cross-examination, Mr. Wilcott conceded that he had not discussed the trash problem with the Applicant. He also testified he did not have any negative feelings about Ms. Banta or about her ability to run a nice establishment.

Mr. Ron Rennegarbe

Mr. Rennegarbe is the pastor of the Lutheran church. He has lived in the neighborhood over 17 years. He is also the principal of the school that operates at the church. He testified that the church has been in its present location since 1951, but the daycare and school have been in operation

² Ms. Rhodes did not file protest to the application. The Applicant did not object to her testimony; therefore, it is included in the discussion.

only since 1980. Steppen Out is located approximately one block from the daycare.³ He is concerned about the foot traffic in the alley, and he has teachers who have asked for help when they were in the alley. He testified that since the bar has been closed, pending the new application, he has seen a decrease in the foot traffic in the alley. He believes the presence of the bar would be detrimental to the community. On cross-examination he conceded that the activities at the church did not primarily coincide with the hours the bar operates. He testified that the church does not have activities on weekend nights, but that the daycare stays open for a short time after Steppen Out would open. In addition, Wednesday night church activities continue until 8:00 p.m.

David Wheeler

Mr. Wheeler testified that his main concerns are property crime, trash in the alley, the destruction to a gas meter, fast drivers, the safety of young children in the neighborhood, and fights.

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 bar has been located at the same address since the 1970s, and there are several other bars in the same area.

In support of her case, Applicant presented her own testimony. Ms. Banta testified that she intends to open a dance bar with live music Wednesday through Saturday. She testified the bar would be open Tuesday through Saturday from 5:00 p.m. through 2:00 a.m. Her grandchildren attend the daycare at the Lutheran church, and she used to be a member of the church until the church filed its protest. She worked at the location where she proposes to open Steppen Out when it was owned by another individual. She testified she had never seen any urinating in the alley even though she had been a customer and employee for six years. She understands the daycare to be open until 7:30 p.m., so there is a two and one-half hour overlap in the operating hours, but she testified that she expects most of her customers to arrive around 9:00 p.m.

With respect to the neighborhood, she testified there are two bars across the street from Steppen Out that have been in their locations for some time. She is unaware of any protests or problems at her location or at the neighboring locations.

C. Analysis.

After considering the evidence, the ALJ concludes that it does not establish a legitimate basis for denying the permits.

³ He has 115 students in the school and daycare from the ages of 18 months to 6th grade.

Protestants argue that granting the permit would increase crime in the neighborhood due to having intoxicated persons in the area. However, the evidence establishes that a bar has been operating in this location since the 1970s. There are several other bars in the same area, and two bars that are directly across the street from the proposed location. The Protestants did not know whether the people about whom they complained came from Steppen Out's location. There was no evidence that continuing the operation of a bar in the same location would increase the property crime, or other criminal acts in the neighborhood.

The bar is located close to the Lutheran church, which has a daycare and a school. There are two and one-half hours, three days per week, and three hours one day per week when both the daycare and Steppen Out would be open. Although the bar is near the church, a bar existed in that location for almost ten years prior to the time the church opened its daycare and school. When the church opened the school and daycare, it was aware of the bar and of the potential problems that might create. Furthermore, Ms. Banta sends her grandchildren to the church daycare. With the bar's owner's grandchildren in the church daycare, both the church and the owner have good reasons to ensure the impact from the bar on the church is minimal.

The Protestants 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 area. 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.

III. FINDINGS OF FACT

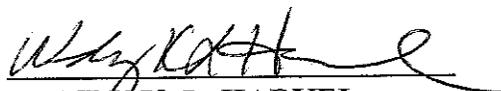
1. Terri Lea Banta d/b/a Steppen Out (Applicant), filed an original application with the Texas Alcoholic Beverage Commission (Commission) for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for the premises known as Steppen Out, located at 2113 Kermit Highway, Odessa, Ector County, Texas 79761.
2. Protests to the application were filed by residents of the area where the premises is located.
3. On January 17, 2003, Commission 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 February 6, 2003, in Odessa, Ector County, Texas, before Wendy K. L. Harvel, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). The hearing concluded on February 6, 2003, and the record closed the same day.

5. The requested permits are for the business establishment of Steppen Out, a bar which has not yet opened.
6. The premises where Steppen Out will open has housed a bar since the 1970s.
7. The Lutheran church has operated a school and daycare approximately one block from the bar since 1980.
8. The Applicant sends her grandchildren to the Lutheran church's daycare.
9. There are two bars across the street from Steppen Out, and there are other bars in the area.
10. 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, safety of the people, and the public sense of decency.

IV. 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, as prohibited by TEX. ALCO. BEV. CODE ANN. §11.46(a)(8).
6. Based on the foregoing findings and conclusions, the application of Terri Lea Banta d/b/a Steppen Out for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit should be granted.

Signed this 18th day of February, 2003.



**WENDY K. L. HARVEL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

DOCKET NO. 602132

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| IN RE ORIGINAL APPLICATION OF | § | BEFORE THE |
| TERRI LEA BANTA D/B/A | § | |
| STEPHEN OUT | § | |
| MB & LB | § | TEXAS ALCOHOLIC |
| | § | |
| | § | |
| ECTOR COUNTY, TEXAS | § | |
| (SOAH DOCKET NO. 458-03-1550) | § | BEVERAGE COMMISSION |

ORDER

CAME ON FOR CONSIDERATION this 27th day of March, 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Wendy K. L. Harvel. The hearing convened on February 6, 2003, and adjourned February 6, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on February 18, 2003. 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.

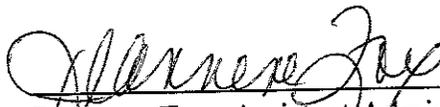
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's original application be **GRANTED** and that the permits be **ISSUED**.

This Order will become final and enforceable on APRIL 18, 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 and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 27th day of March, 2003.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

/vr

The Honorable Wendy K. L. Harvel
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (512) 936-0730

R. N. Bland
ATTORNEY FOR RESPONDENT
403 North Texas
Odessa, Texas 79761
VIA FAX (915) 580-4044

Gayle Gordon
ATTORNEY FOR PETITIONER
TABC Legal Section

Regulatory Division
Odessa District Office

**PROTESTANTS:
VIA REGULAR MAIL**

Lewis Biggers
2103 Kermit Hwy
Odessa, Texas 79761-1137

Jim Blount
2103 Kermit Hwy.
Odessa, Texas 79761-1137

David E. Wheeler
302 & 302 1/2 W. 21st Street
Odessa, Texas 79761-2409

Doris I. Wheeler
302 & 302 1/2 W. 21st Street
Odessa, Texas 79761-2409

Pastor Ronald Rennegarbe
2002 N. Lincoln
Odessa, Texas 79761-2440

Paula Rennegarbe
2002 N. Lincoln
Odessa, Texas 79761-2440

Ramona Russell
2002 N. Lincoln
Odessa, Texas 79761-2440

Rachel Rennegarbe
2002 N. Lincoln
Odessa, Texas 79761-2440

Mark Russell
2002 N. Lincoln
Odessa, Texas 79761-2440

Sam Lagow
2002 N. Lincoln
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David W. Williams
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Florence Clark
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Jeff Harrison
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Cate Nease
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Pearl Hennig
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Odessa, Texas 79761-2440

Richard Frederick
119 W. 4th
Odessa, Texas 79761-5015

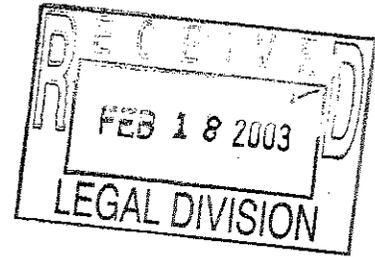
Forrest McClerry
300 W. 21st Street
Odessa, Texas 79761-2409

Rose McCleery
300 W. 21st Street
Odessa, Texas 79761-2409

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



February 18, 2003

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

HAND DELIVERY

RE: Docket No. 458-03-1550; Texas Alcoholic Beverage Commission and Concerned Citizens of the City of Odessa vs. Original Application of Terri Lea Banta, d/b/a Steppen Out; TABC Case No. 602132

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 (TABC), and to R. N. Bland representative for Terri Lea Banta, Respondent. For reasons discussed in the Proposal for Decision, the Administrative Law Judge recommends that the permits be issued.

Pursuant to TEX. GOV'T CODE ANN. §2001.062, each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed according to the time limits specified in TABC rules. A copy of any exceptions, briefs on exceptions, or reply must also be filed with the State Office of Administrative Hearings and served on the other parties in this case.

Sincerely,

A handwritten signature in black ink, appearing to read "Wendy K. L. Harvel".

Wendy K. L. Harvel
Administrative Law Judge

WH/lao
Enclosure

xc: Gayle Gordon, Staff Attorney, TABC, 5806 Mesa, Suite 160, Austin, TX 78731 - VIA HAND DELIVERY
R. N. Bland, 403 North Texas, Odessa, TX 78759 - VIA REGULAR MAIL
All Protestants - VIA REGULAR MAIL
Rommel Corro, Docket Clerk, State Office of Administrative Hearings- VIA HAND DELIVERY

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