

DOCKET NO. 531926

ORIGINAL APPLICATION OF	§	BEFORE THE TEXAS
DALE MCNUTT	§	
D/B/A CLUB HELIOS	§	
(MB, LB)	§	ALCOHOLIC
	§	
EL PASO COUNTY, TEXAS	§	
<i>(SOAH DOCKET NO. 458-06-2956</i>	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 12th day of February 2007, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge John H. Beeler. The hearing convened on August 30, 2006 and adjourned on November 2, 2006. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on December 19, 2006. The 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 and Replies were filed to which the Administrative Law Judge replied and recommended that no changes be made to the Proposal for Decision.

The Assistant Administrator of the Texas Alcoholic Beverage Commission after review and due consideration of the Proposal for Decision and Exhibits adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, that 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.

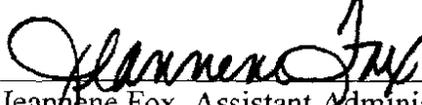
IT IS THEREFORE ORDERED by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's original application is hereby **DENIED**.

This Order will become final and enforceable on the 8th day of March 2007, unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties in the manner indicated below.

SIGNED on this 12th day of February 2007, at Austin, Texas.

On Behalf of the Administrator,


Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

LBH/aa

The Hon. John H. Beeler
Administrative Law Judge
State Office of Administrative Hearings
300 West 15th Street, Suite 502
Austin, Texas 78711
VIA FACSIMILE: (512) 475-4994

Dale Wayne McNutt
d/b/a Club Helios
RESPONDENT
416 E. Rio Grande Avenue
El Paso, Texas 79902
VIA CERTIFIED MAIL RRR 7005 3110 0000 6411 4317
and U.S. FIRST-CLASS MAIL

Robert G. Gilbert
ATTORNEY FOR RESPONDENT
201 E. Main Drive, Suite 601
El Paso, TX 79901
VIA FACSIMILE: (915) 541-6490

St. Clement' s Episcopal Parish School
PROTESTANT
600 Montana Avenue
El Paso, Texas 79902
VIA CERTIFIED MAIL RRR 7005 3110 0000 6411 4324

Senator Eliot Shapleigh
PROTESTANT
800 Wyoming Avenue, Suite A
El Paso, Texas 79902
VIA FACSIMILE: (915) 544-1998

Pro Cathedral Church of Saint Clement
PROTESTANT
810 North Campbell at Montana
El Paso, Texas 79902-5203
VIA U.S. FIRST CLASS MAIL

Watchtower of the Rio Grande
PROTESTANT
P.O. Box 1977
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Ron and Debbie Pate
Carmen Cazares
Torreon Properties
PROTESTANT
1011 Montana
El Paso, Texas 79902
VIA U.S. FIRST CLASS MAIL

Lindy B. Hendricks
Sandra K. Patton
ATTORNEYS FOR THE COMMISSION
TABC Legal Section

Licensing Division

El Paso District Office

SOAH DOCKET NO. 458-06-2956

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
V.	§	
	§	OF
ORIGINAL APPLICATION (MB, LB) OF	§	
DALE MCNUTT	§	
D/B/A CLUB HELIOS	§	
EL PASO COUNTY, TEXAS	§	
(TABC CASE NO. 531926)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Dale McNutt, d/b/a Club Helios (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 Club Helios, located at 416 E. Rio Grange, El Paso, El Paso County, Texas. Protests were filed by Senator Eliot Shapleigh, St. Clement's Episcopal Parish School, Pro Cathedral Church of Saint Clement, Watchtower of the Rio Grande, Ron and Debbie Pate, Carmen Cazares, and other concerned citizens of El Paso County, Texas (Protestants), asserting that the manner in which Applicant may operate his business warrants the refusal of the permits based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency, in violation of TEX. ALCO. BEV. CODE ANN § 11.46 (a) (8). Specifically, Protestants alleged that the premises are within 300 feet of a school, in violation of El Paso City Code § 20.08.090. The Commission's staff (Staff) took the position that, if Protestants' allegations are true, the permits should not be issued. The Administrative Law Judge (ALJ) recommends that the Commission deny Applicant the requested permits.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No contested issues of notice, jurisdiction, or venue were raised in this proceeding. Therefore, these matters are set out in the findings of fact and conclusions of law without further discussion here.

On August 30, 2006, a public hearing was held before John H. Beeler, ALJ, at the offices of the State Office of Administrative Hearings, El Paso, El Paso County, Texas. Staff was represented by Lindy B. Hendricks, attorney. Protestants were represented by Robert G. Gilbert, attorney. Applicant appeared *pro se*. Evidence was received and the record was to be closed on September 20, 2006. But subsequent actions taken by the City El Paso prompted the parties to request a telephone conference in which Applicant and TABC requested that the hearing be reconvened to allow Applicant to present evidence. The ALJ granted the request, the hearing was reconvened on November 2, 2006, and the record closed that day. Applicant did not appear at the reconvened hearing and was not represented.

II. ISSUE

The only issue to be decided is whether the premises are located within 300 feet of a school, as Protestants allege. Applicant's position is that the City of El Paso has given him approval and therefore, he must be in compliance.

IV. EVIDENCE AND DISCUSSION

As reflected in the Findings of Fact, there was convincing evidence that the premises are located within 300 feet of a school. Applicant presented no evidence to the contrary. The preponderance of the evidence, therefore, demonstrates that the operation would be in violation of the city code. Accordingly, the ALJ recommends that the permits not be issued.

VI. FINDINGS OF FACT

1. Dale McNutt, d/b/a Club Helios (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 Club Helios, located at 416 E. Rio Grande, El Paso, El Paso County, Texas.
2. Protests were filed by Senator Eliot Shapleigh, St. Clement's Episcopal Parish School, Pro Cathedral Church of Saint Clement, Watchtower of the Rio Grande, Ron and Debbie Pate, Carmen Cazares, and other concerned citizens of El Paso County, Texas (Protestants) asserting that the manner in which Applicant may operate his business warrants the refusal of the permits based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency, in violation of TEX. ALCO. BEV. CODE ANN § 11.46 (a) (8). Specifically, Protestants alleged that the premises are within 300 feet of a school, in violation of El Paso City Code § 20.08.090.
4. A notice of protest hearing dated July 24, 2006, was issued by Staff 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; the particular sections of the statutes and rules involved; and the matters asserted.
5. The City of El Paso approved Applicants request to operate a nightclub on the premises.
6. On August 30, 2006, a public hearing was held before John H. Beeler, ALJ, at the offices of the State Office of Administrative Hearings, El Paso, El Paso County, Texas. Staff was represented by Lindy B. Hendricks, attorney. Protestants were represented by Robert G. Gilbert, attorney. Applicant appeared *pro se*. Evidence was received, and the record was to be closed on September 20, 2006.
7. After August 30, 2006, the City of El Paso revoked its approval for Applicant to operate the premises.
8. On November 2, 2006, the hearing reconvened to allow Applicant to present evidence.
9. Applicant did not appear at the November 2, 2006 hearing and was not represented.
10. Applicant's premises are located within 300 feet of a school.

VII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5 and § 11.46(a)(8).
2. The State Office of Administrative Hearings has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was effected on all parties pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE § 155.55.
4. If a permit were granted, Applicant's premises would operate in violation of City of El Paso Code § 20-08-090.
5. Applicant's application for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit should be denied based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency pursuant to TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).

SIGNED December 19, 2006.



**JOHN H. BEELER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

December 19, 2006

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

HAND DELIVERY

RE: Docket No. 458-06-2956; TABC No. 531926; Texas Alcoholic Beverage Commission v. Original Application (MB, LB) of Dale McNutt d/b/a Club Helios,, El Paso County, Texas (TABC Case No. 531926)

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in black ink, appearing to read "John H. Beeler".

John H. Beeler
Administrative Law Judge

JHB/sb
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA HAND DELIVERY**
Lindy B. Hendricks, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
VIA HAND DELIVERY
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
VIA HAND DELIVERY
Dale Wayne McNutt d/b/a Club Helios, 416 E. Rio Grande Avenue, El Paso, TX 79902 - **VIA REGULAR MAIL**
Robert G. Gilbert, P. O. Box 472, El Paso, TX 79943-**VIA REGULAR MAIL**