

DOCKET NO. 548698

**ORIGINAL APPLICATION FOR
BELLY BROTHERS LLC
d/b/a Kluosoz Martini Bar &
Ultra Lounge**

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**BEFORE THE TEXAS

ALCOHOLIC

BEVERAGE COMMISSION**

**LUBBOCK COUNTY, TEXAS
(SOAH DOCKET NO. 458-07-1724**

ORDER

CAME ON FOR CONSIDERATION this 23rd day of April, 2007, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Brian Phillips. The hearing convened on February 23, 2007, and closed on the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 28, 2007. 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.

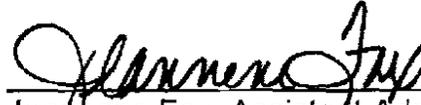
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that **Respondent's original application be granted**.

This Order will become final and enforceable on the date it is signed.

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

SIGNED on this 23rd day of April, 2007, at Austin, Texas.

On Behalf of the Administrator,



Jeanene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

JF/dn

The Honorable Brian Phillips
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
VIA FACSIMILE: 806-792-0149

Dewey Brackin
ATTORNEY FOR RESPONDENT
VIA FACSIMILE: 512-542-7225

BELLY BROTHERS LLC
RESPONDENT
d/b/a Kluosz Martini Bar & Ultra Lounge
1820 Buddy Holly Ave.
Lubbock, TX 79401
VIA REGULAR MAIL

City of Lubbock
PROTESTANT
Chief Claude Jones
ATTORNEY FOR PROTESTANT
VIA FACSIMILE: 806-472-2662

Barbara Moore
ATTORNEY FOR PETITIONER
VIA FACSIMILE: 214-678-4050

Licensing Division

Lubbock District Office

II. HEARING AND EVIDENCE

On February 23, 2007, a hearing was convened before Judge B. L. Phillips, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. Petitioner was represented by Barbara Moore, attorney. Respondent appeared and was represented by Dewey Brackin, attorney. The record closed the same day.

III. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to the Code §§ 11.46(a)(8) and 11.61(b)(7), the Commission may refuse to issue an original application for a permit or license if it finds that the place or manner in which the applicant may conduct his business warrants the refusal of a permit or license based on the general welfare, health, peace, morals, and the safety of the people and on the public sense of decency. Pursuant to § 11.41, the Commission may give due consideration to the recommendation of the chief of police of the city in which the premises sought to be licensed are located.

IV. EVIDENCE

A. Documentary Evidence

Petitioner admitted into evidence exhibits, including the Notice of Hearing issued in the case, the Respondent's Application For Retailer's Permit or License and the TABC file regarding the Original Application Protest. Respondent admitted into evidence exhibits in support of the original application and Respondent's fitness to hold the proposed permit.

B. Jonathan Castillo, TABC Agent

Agent Castillo testified that he conducted the protest investigation into Respondent's original application and compiled the protest package that was admitted into evidence at the hearing. The

protest package consisted of Inter-office Communications regarding the protest, Complaints taken in the protest, the Agent's report, a Protest Letter filed by the Lubbock Police Department (LPD) Chief of Police, and an article about a club called "Heat" which was previously managed by Respondent. The protest letter from LPD stated that, between January 16, 2005, and September 16, 2006, there were one hundred and eleven service calls to LPD at Club Heat. However, Castillo testified that only one TABC investigation resulted for these calls and that there were only two open complaints and one administrative case filed with TABC regarding the other two clubs managed by Respondent. In fact, Castillo admitted that no protests were filed against the renewal applications of these other two clubs also under the control of Respondent. Regarding the LPD protest letter, Castillo stated that it did not have a break down of the period for the statistics which might show how many of the complaints were made before Respondent managed Club Heat.

C. Cpl. Bill Bates, Lubbock Police Department

Corporal Bates testified at the hearing on behalf of LPD Chief of Police Claude Jones, who signed the LPD protest letter in this case. Bates testified that the reports he reviewed in support of the protest letter included activity at three clubs managed by Respondent: Club Heat, Daiquiri Lounge and Club Heaven. Bates stated that, in his opinion, there were an excessive number of service calls to Club Heat during the time period for the statistics that he reviewed and that this constituted a risk to the public.

D. Troy Mesa, Respondent

Mr. Mesa is the owner of Club Heaven, Daiquiri Lounge, and the proposed club which is the subject of the protest hearing, Klusoz Martini Bar & Ultra Lounge (Klusoz). He testified that the permits for Club Heaven and Daiquiri Lounge were renewed by TABC in February, 2007, and August, 2006, respectively, and that neither renewal application was protested by TABC. He stated that Klusoz has been ready to be opened since December of 2006, but that he did not know that the original permit application would be protested until near to completion of work on the club. Klusoz

is marketed as a club for professionals such as doctors and lawyers and is intended for an upscale clientele.

Regarding Club Heat, Mr. Mesa took over management of that club in September, 2005, after he became aware that the state comptroller's office was shutting down the previous management of the club. He applied for a new liquor license for the premises which was granted by TABC, and he eventually let that permit expire when he was told that it would be protested because of numerous problems at the club. Mr. Mesa testified that Club Heat was a hip-hop, gangster, urban rap club, which had a large parking lot with numerous entrances. He stated that most of the service calls to the premises were due to violations occurring in the parking lot, which he admitted was difficult to control. Regarding control of the patrons, Mr. Mesa employed ten floor walkers and three to five armed guards outside the club, conducted pat downs and searches of patrons, and called police whenever necessary. Mr. Mesa testified that the problems that TABC had with Club Heat escalated after a Texas Tech football player was allegedly stabbed in the parking lot, although TABC did not file a breach of the peace violation after the incident. He stated that the Texas Tech football players and Lubbock eastiders were basically two rival gangs in town and that caused problems at the club.

V. ANALYSIS

The evidence is undisputed that Club Heat was managed by Respondent for a brief time period and that there were numerous problems with the club's clientele that required police intervention. The only issue was whether or not Respondent's management of Club Heat and the other clubs that he owns makes him not fit to operate his proposed new club, Klusoz, because the place or manner in which the applicant may conduct his business warrants the refusal of a permit or license based on the general welfare, health, peace, morals, and the safety of the people and on the public sense of decency.

The evidence from Agent Castillo and Cpl. Bates certainly demonstrates that Club Heat and its clientele represented a problem for the Lubbock Police Department and possibly a public menace

to the citizens of Lubbock. However compelling that evidence is, the preponderance of the evidence does not demonstrate that the manner in which Respondent conducted the operation of Club Heat means that he is not fit to own and operate another club in Lubbock. The evidence shows that Respondent already owns and operates two other clubs that do not represent a problem for the Lubbock Police Department or TABC. In fact, permits for both clubs were renewed by TABC within the seven months without protest by TABC or the Lubbock Police Department. It appears from the evidence that Respondent operates those clubs within the law and with respect for the general welfare, health, peace, morals, safety of the people, and the public sense of decency of the community.

The evidence in support of the protest of Respondent's original application for a permit for Klusoz focuses on the problems that were experienced at Club Heat while Respondent held the liquor license for those premises. The evidence that, between January 16, 2005 and September 16, 2006, there were one hundred and eleven service calls to LPD at Club Heat is only part of the picture. Club Heat existed prior to Respondent taking control of the premises and continues to exist, under another name, since Respondent allowed his permit for the club to expire. Respondent did not take over management of Club Heat until September, 2005, so all of the service calls made to the location during the period that LPD used for the protest cannot be attributed to Respondent's management. Mr. Mesa also testified that the location that used to be called Club Heat is still in the news today because of police calls to the club because of the behavior of the patrons. The preponderance of the evidence suggests that it is the clientele that frequents the former Club Heat premises that is the real problem. The club seems to attract a crowd that has little respect for the law and is difficult to control, no matter who is managing the premises.

It would be completely unfair to judge Respondent's management of a licensed premises based on his experience with Club Heat alone. Indeed, TABC and LPD seem to have not judged him solely on that experience because they allowed his two other clubs, Club Heaven and Daiquiri Lounge, to renew their permits without protest. Respondent is asking for a permit to run a new club

with a completely different club style and clientele for that of Club Heat, and the evidence does not support a finding that a protest against the issuance of this permit is valid.

VI. PROPOSED FINDINGS OF FACT

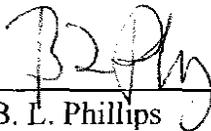
1. Belly Brothers LLC dba Klusoz Martini Bar & Ultra Lounge, Lubbock County, Texas, filed an original application for a mixed beverage and mixed beverage late hours permit for the premises located at 1802 Buddy Holly Avenue, Lubbock, Lubbock County, Texas.
2. TABC received a protest against the issuance of the permits on October 6, 2006, and determined that sufficient facts existed to warrant a protest hearing.
3. Respondent received proper and timely notice of the hearing from the TABC in a notice of hearing dated February 9, 2007.
4. The hearing on the merits convened February 23, 2007, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. The TABC was represented by attorney Barbara Moore. The Respondent appeared and was represented by Dewey Brackin, attorney. The record closed on the same day.
5. Respondent previously held a permit for a licensed premises, Club Heat, where the Lubbock Police Department made one hundred eleven service calls during a period between January 16, 2005, and September 16, 2006.
6. Respondent did not take over management of Club Heat and receive a permit for the club until September, 2005, and let the permit expire when it came time for renewal.
7. Club Heat experienced the problems that it had with law enforcement due to the club style as a hip-hop, gangster, urban rap club, and the apparent lawless nature of the clientele, not due to Respondent's management of the club.
8. Respondent also owns and operates two other clubs, Club Heaven and Daiquiri Lounge, in Lubbock, Texas, and neither club has had significant activity involving either TABC or LPD.
9. The permits for Club Heaven and Daiquiri Lounge were renewed in the last seven months by TABC without protest.

VII. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 61.71, and 61.73.
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2. SOAH 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. Notice of the hearing was provided as required by the TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based upon Findings of Fact No. 5-9, the Commission did not prove that Respondent may conduct his business in a manner which warrants the refusal of a permit or license based on the general welfare, health, peace, morals, and the safety of the people and on the public sense of decency
5. Based on the foregoing, the Administrative Law Judge recommends that Respondent's Application for a Mixed Beverage and Mixed Beverage Late Hours Permit be granted.

SIGNED: March 28th, 2007



B. L. Phillips
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

March 28, 2007



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

REGULAR MAIL

RE: Docket No. 458-07-1724; Re: Belly Brothers LLC d/b/a Kluosoz Martini Bar & Ultra Lounge

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 that reads "B.L. Phillips".

B.L. Phillips
Administrative Law Judge

BLP/vu

Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- VIA REGULAR MAIL
Barbara Moore, Texas Alcoholic Beverage Commission, 8700 Stemmons Frwy., Ste. 460, Dallas, TX 75427
VIA REGULAR MAIL
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
VIA REGULAR MAIL
Dewey Brackin, Attorney, 600 Congress Avenue, Suite 3000, Austin, TX, 78701-2978.-VIA REGULAR MAIL

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