

DOCKET NO. 553865

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	ALCOHOLIC
	§	
ORIGINAL APPLICATION OF	§	
UP TO PAR PRIVATE CLUB INC.	§	
D/B/A UP TO PAR PRIVATE CLUB INC.	§	
N & PE	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-07-02768)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION on this day the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Michelle Kallas. The hearing convened on May 30, 2007 and adjourned May 30, 2007. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on July 16, 2007. 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. 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 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.

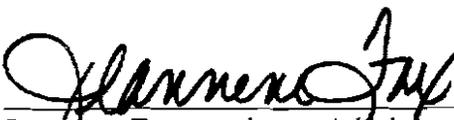
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's original application a Private Club Registration Permit and a Beverage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

This Order will become final and enforceable on September 20, 2007, unless a Motion for Rehearing is filed **before** that date.

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

SIGNED on August 27, 2007.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

BM/dbs

Timothy E. Griffith
ATTORNEY FOR RESPONDENT
101 East Park Blvd., Suite 600
Plano, Texas 75074
VIA FAX 469-742-9521

UP TO PAR PRIVATE CLUB INC.
RESPONDENT
DBA UP TO PAR PRIVATE CLUB INC.
3015 N SHILOH ROAD
GARLAND, TX 750448011
VIA U.S. POSTAL SERVICE

Barbara Moore
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Dallas District Office

SOAH DOCKET NO. 458-07-2768

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	OF
	§	
UP TO PAR PRIVATE CLUB INC. Respondent	§	
	§	ADMINISTRATIVE HEARINGS
	§	
DALLAS COUNTY TABC NO. 553865	§	

PROPOSAL FOR DECISION

Up to Par Private Club, Inc. d/b/a Up to Par Private Club (Respondent) filed an original application with the Texas Alcoholic Beverage Commission (TABC, Petitioner) for a Private Club Registration Permit and Beverage Cartage Permit for the premises located at 3015 N. Shiloh Road, Garland, Dallas County, Texas. A protest was filed by Brighter Horizons Academy (Protestant) asserting that the place or manner in which the applicant plans to conduct business warrants a refusal of the permits based on the general welfare, health, peace, morals, safety, and sense of decency of the people. Petitioner took no formal position on the matter.¹ The Administrative Law Judge (ALJ) recommends that Petitioner grant Respondent the requested permits.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 6.01 and 11.46. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

¹ The protest was filed by Brighter Horizons Academy. The TABC's staff appeared only as a jurisdictional petitioner, had no independent evidence to protest the issuance of the permits, and is neutral on the issues.

On May 14, 2007, Petitioner issued its notice of hearing directed to Respondent. On May 30, 2007, a hearing convened before SOAH ALJ Michelle Kallas at 6333 Forest Park Road, Suite 150-A, Dallas, Dallas County, Texas. Petitioner was represented at the hearing by Barbara Moore, TABC Staff Attorney. Protestant Brighter Horizons Academy appeared through Said Said and David Okkeh. Respondent appeared and was represented by Timothy Griffith, attorney. The record closed on May 30, 2007.

II. DISCUSSION

A. Applicable Law

The Protestant challenges the application on the basis of § 11.46(a)(8) of the Texas Alcoholic Beverage Code (Code). Section 11.46(a)(8) provides that a permit may be denied if the Commission has reasonable grounds to believe and finds that “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. Evidence

1. Petitioner’s Evidence

Petitioner took no formal position on the application in this case. Petitioner produced the license packet for Respondent along with the testimony of Agent Laramie Mergerson. The license packet included Agent Mergerson’s report, a copy of the protest letter, a copy of the City of Garland Ordinances, and a copy of Respondent’s application.

Agent Mergerson testified at the hearing that upon his investigation, there were no grounds for TABC to join in the protest. He stated that the file was forwarded to TABC’s legal division in

Austin, Texas, for a final determination. TABC ultimately decided not to join in the protest.

2. Protestant's Evidence

a. Said Said

Said Said testified at the hearing on behalf of protestant, Brighter Horizons Academy (BHA). Mr. Said is a BHA school board member and father to four students attending the school. According to Mr. Said, BHA is a private school with students from about 258 families in attendance. He stated that he was present to speak on behalf of the BHA students and parents.

Mr. Said testified that his main concern is for the safety of the students attending BHA. He pointed out that there is no safety net between Respondent's premises, a golf course, and the school. According to Mr. Said, they already find golf balls in the school's parking lot and on the soccer field. His concern is that students will be struck by golf balls hit by patrons who have become impaired due to any alcohol consumption on Respondent's premises. He is worried that people who have consumed alcohol have less common sense to be careful.

Mr. Said was also concerned that Respondent's selling of alcoholic beverages would adversely affect traffic in the area. He suggested that allowing Respondent to sell alcohol would increase congestion. According to Mr. Said, Respondent's patrons and the student's parents would be fighting to get into the area.

He acknowledged that there are other businesses in the vicinity which sell alcoholic beverages. However, he pointed out that those businesses are gas stations, and they sell alcoholic beverages which are not to be consumed on the premises.

b. David Okkeh

David Okkeh also testified at the hearing on behalf of BHA. Mr Okkeh works at BHA and usually is present at the school from 7:30 a.m until 5:30 p.m. According to Mr. Okkeh, the school's staff is present from around 7:30 a.m. until 5:00 p.m. The students also begin arriving around 7:30 a.m. A majority of the students leave by 3:15 p.m. Some students do remain on the school premises after 3:15 for extra curricular activities.

The majority of the school property backs up to the driving range. He has observed golfers within 15-20 feet of the school property. He testified that he finds golf balls in the school parking lot and that a school bus has been struck by a golf ball, but the bus was not damaged. To his knowledge, no child or parent has been struck by a golf ball from Respondent's business.

Mr. Okkeh is concerned for the safety of the students. According to Mr. Okkeh, it is dangerous for children to be around people playing golf. He is also concerned about increased traffic in the area and golfers consuming alcoholic beverages in Respondent's parking lot.

3. Respondent's Evidence

Respondent's President, Suk Ki Lee, testified at the hearing. The business is a nine-hole golf course and driving range. Mr. Lee testified that the tee box for the driving range is approximately 350 yards from the school property. Respondent offered numerous photographs of the golf premises. Mr. Lee testified that his business is seasonal in nature. His hours of operation are 9:00 a.m. until 9:00 p.m. During the week, most of his business occurs after 5:00 p.m. He testified that the majority of his business actually occurs on the weekends. According to Mr. Lee, there is not a traffic problem. His parking lot accommodates around thirty vehicles at one time. At no time are all of his members there at the same time. The patrons, described as older and responsible, come and go throughout out the day.

According to Mr. Lee, patrons will be allowed to purchase alcohol only in the golf course clubhouse for consumption only in the clubhouse or on the driving range. Alcohol will not be allowed on the 9-hole golf course. Mr. Lee testified that the alcohol will be sold from coolers located in the clubhouse. In addition to alcohol, Mr. Lee will be providing limited food service. Respondent has no prior history with Petitioner. Mr. Lee testified that all servers will be seller certified and instructed not to sell alcoholic beverages to intoxicated persons or those under 21 years of age. He stated that he does not anticipate selling a lot of alcohol during the times when school is in session.

C. Discussion and Recommendation

Petitioner did not take a formal position at this hearing. The Protestants expressed concern that the issuance of the permits would be dangerous for the children attending BHA.

In order to justify the refusal of an application on the basis that there will be a detriment to the general welfare, health, peace, morals, safety, and sense of decency of the people, some unusual condition or situation must be shown. Texas Alcoholic Beverage Commission v. Jack E. Mikulenska d/b/a Frigate Club, 510 S.W.2d 616, 619 (Tex.App.-- San Antonio 1974). In the instant case, no evidence of an unusual condition or situation was presented by the Protestants. There was no evidence that Respondent's business is within a prohibited distance from a public or private school. The Protestants are concerned that the students will be exposed to an increased risk of injury from golf balls being hit by intoxicated persons. This concern, albeit understandable, does not rise to the level of an unusual condition which justifies refusal of the permit based upon the general welfare, health, peace, morals, safety, or sense of decency of the people. The students attending BHA are already exposed to the possibility of being struck by golf balls, regardless of whether or not Respondent is serving alcoholic beverages. In addition, it appears from the testimony presented that the risk of injury to the students and parents is slight given that the majority of Respondent's business takes place when most of the students are not even present at the school, i.e., on the

weekends and after 5:00 p.m. on the weekdays. The likelihood that a student or parent will be struck by a golf ball is remote and not dependent upon Respondent's selling of alcoholic beverages to his members.

Furthermore, although granting Respondent's application may result in additional traffic in the area, there is no requirement that Applicant must select a location virtually free of traffic hazards in order to qualify for a permit. A potential increase in traffic congestion and the presence of a nearby school, when Applicant has met all the necessary legal requirements, do not alone constitute an unusual condition or situation warranting the denial of the permits. Kernit Concerned Citizens Committee v. Colonial Food Stores, Inc., 650 S.W.2d 208 (Tex.App.—El Paso 1983).

Having considered the evidence, the ALJ finds insufficient grounds to demonstrate that the place or manner in which Respondent will conduct its business warrants denial of the application for the permits based on the general welfare, health, peace, morals, safety and sense of decency of the people. Accordingly, the ALJ recommends issuance of Respondent's requested permits.

III. FINDINGS OF FACT

1. Up to Par Private Club Inc. d/b/a Up to Par Private Club filed an original application with the Texas Alcoholic Beverage Commission (Petitioner) for a Private Club Registration Permit and a Beverage Cartage Permit for the premises located at 3015 N. Shiloh Road, Garland, Dallas County, Texas.
 2. Petitioner filed a protest on behalf of Brighter Horizons Academy (BHA) asserting that the application should be denied on the basis that the manner in which Respondent may conduct his business warrants the refusal of the permits based upon the general welfare, health, peace, morals, and safety of the people, and on the public sense of decency.
 3. On May 14, 2007, Petitioner sent a notice of hearing by certified mail, return receipt requested, to Respondent's mailing address as listed in the Commission's records, informing Respondent of the date, time, and place of the hearing, the statutes and rules involved, and the legal authorities under which the hearing was to be held.
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4. The hearing on the merits convened May 30, 2007, at the State Office of Administrative Hearings, 6333 Forest Park Road, Suite 150-A, Dallas, Texas 75235, before ALJ Michelle Kallas. Petitioner was represented by Barbara Moore, attorney. Respondent appeared and was represented by Timothy Griffith, attorney. Said Said and David Okkeh appeared personally on behalf of protestant Brighter Horizons Academy. The record closed on May 30, 2007.
5. Petitioner took no formal position on the protest of Respondent's application.
6. Respondent's location is not within a prohibited distance from a public or private school.
7. Other businesses in the area hold permits to sell alcoholic beverages.
8. The majority of Respondent's business takes place when most the students are not present on the BHA campus.
9. The BHA students are already exposed to the possibility of being struck by a golf ball hit by one of Respondent's members. There was insufficient evidence to show that issuance of the permits, to sell alcohol, most likely would create an increased risk of injury to the students.
10. Respondent has no prior history with Petitioner.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 6.01 and 11.46.
 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. Proper and timely notice of the hearing was effected on Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, 1 TEX. ADMIN. CODE (TAC) § 155.55 and 16 TAC § 37.3.
 4. The place or manner in which Respondent conducts its business does not warrant the refusal of the permits based upon the general welfare, health, peace, morals, and safety of the people
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or public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46 (a)(8).

5. Respondent's original application for a Private Club Registration Permit and Beverage Cartage Permit should be granted.

SIGNED July 16, 2007.

**MICHELLE KALLAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**