

DOCKET NO. 458-07-2306

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	
	§	
LANGEMAR LLC	§	OF
D/B/A THE MATRIX GRILL	§	
LICENSE NO. MB-613124, LB, FB	§	
	§	
HARRIS COUNTY, TEXAS	§	
(TABC CASE NO. 559276)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Commission or Staff) brought this enforcement action against Langemar L.L.C. d/b/a The Matrix Grill (Respondent) alleging Respondent made a false or misleading statement in connection with an original or renewal application, either in the application itself or in any other written instrument relating to the application submitted to the commission, its officer or employees in violation of TEX. ADMIN. CODE § 33.5(e).¹ The Staff also alleged that from November 2, 2005 through January 5, 2007, the place or manner in which the Respondent conducts business warrants the cancellation of the permit(s), license(s) and/or certificate(s) 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 §§ 11.61(b)(7) and/or 11.61(b)(2) and/or 16 TEX. ADMIN. CODE § 33.31(a)(b)(c)(16). Because Respondent failed to operate primarily as a food service establishment; and made a false statement or misrepresentation in an original or renewal application, Staff requested that Respondent’s Mixed Beverage Permit, Late Hours Permit,

¹Respondent made a false and misleading statement on or about March 1, 2005 and/or on or about June 24, 2005 and/or on or about October 11, 2006 in connection with an original or renewal application, either in the application itself or in any other written instrument relating to the application submitted to the commission, its officers or employees by claiming that food service is maintained at the permitted location and/or that food service facilities allow cooking or assembling of food on the premises primarily for on-premises consumption and/or that food is served at certain hours of service.

MB-613124, be canceled, and that Respondent's request for renewal of these permits be denied. Respondent denies the alleged violations and claims that they intend to be a restaurant. Further, Respondent claims that they do not need to be a restaurant to have a mixed beverage permit, explaining that the leased premises should not be considered in an "alcohol free zone," because the City of Houston measured improperly from the school property to the shopping center property, rather than to the leased premises. The Administrative Law Judge (ALJ) finds that Respondent committed the alleged violations, recommends that Respondent's permits be canceled, and recommends that Respondent's request for renewal be denied.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, those matters are discussed only in the proposed findings of fact and conclusions of law.

On May 11, 2007, a public hearing was convened before ALJ Don Smith, at the State Office of Administrative Hearings offices, 2020 North Loop West, Houston, Texas. Staff was represented by its attorneys Ramona Perry and Sandra Patton. Respondent was represented by its attorney Ronald Monshaugen. Evidence was received from both parties on that date. The record was closed on May 11, 2007.

II. LEGAL STANDARDS AND APPLICABLE LAW

1. Food and Beverage Certificate. An applicant is not qualified for a food and beverage certificate unless the following conditions, in addition to other requirements, are satisfied:
(1) ...with respect to mixed beverage permits ..., the applicant maintains food service on the premise. 16 TEX. ADMIN. CODE § 33.5(e)(1).

2. Operation at the licensed premises. The commission may review the operation at the

licensed premises to determine the applicant or holder of the food and beverage certificate has or is maintaining food service with food service facilities for the preparation and service of multiple entrees. In doing so the commission may review such items as required in the original or renewal application...16 TEX. ADMIN. CODE § 33.5(i).

3. False or misleading Application. The commission or administrator may ... cancel an original or renewal permit if it is found, after notice and hearing, that ... the permittee made a false or misleading statement in connection with his original or renewal application, either in the formal application itself or in any other written instrument relating to the application submitted to the commission. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(4).

4. Sales Near School. An incorporated city or town may enact regulations applicable in the city or town, prohibiting the sale of alcoholic beverages by a dealer whose place of business is within 1,000 feet of a public school. TEX. ALCO. BEV. CODE ANN. § 109.33(a)(2).

5. Exceptions. TEX. ALCO. BEV. CODE ANN. § 109.33(a)(2) does not apply to the holder of a retail on-premises consumption permit or license if less than 50 percent of the gross receipts for the premises is from the sale or service of alcoholic beverages. TEX. ALCO. BEV. CODE ANN. § 109.33(f)(1).

6. Measurement of the distance. The measurement of the distance between the place of business where alcoholic beverages are sold and the public or private school shall be in a direct line from the property line of the public or private school to the property line of the place of business, and in a direct line across intersections. TEX. ALCO. BEV. CODE ANN. § 109.33(b)(1).

III. EVIDENCE PRESENTED

1. Steven Wayne Tubbs

Steven Wayne Tubbs is an auditor in the Compliance Division of the Texas Alcoholic Beverage Commission (TABC). The auditors in the Compliance Division are responsible for the inspections required for the Food and Beverage Certificates. He testified that the main requisites for a food and beverage certificate is that the applicant have a kitchen, serve eight entrees, and not have over 50 percent of the sales from alcoholic beverages. Agent Tubbs testified that Respondent did not meet any of the above requirements.

Agent Tubbs inspected Respondent's premises on January 4, 2007, and on January 26, 2007. Agent Tubbs testified that Respondent did not serve food in any capacity during the inspections; that there was no kitchen; and that the manager told him that there was never a kitchen, that there was no food service, and that the only food brought in was on special occasions brought in by caterers.

On January 4, 2007, Agent Tubbs arrived at The Matrix Grill at 4 p.m. The door was not locked, so he went in. He looked around the entry and the main floor, then left, observing that The Matrix Grill was not open for business.

On January 26, 2007, Agent Tubbs went back to The Matrix Grill at 7 p.m. Respondent was open, and had about 30 customers. It was Agent Tubbs' opinion, from his observations, that The Matrix Grill was a dance club serving only alcoholic beverages. Agent Tubbs testified that he identified himself to the manager, who told him there was no kitchen, and no food served. Upon further questioning, the manager told Agent Tubbs that the only food served is on special occasions, and that upon those special occasions the food is catered. While inspecting the entire premises, Agent Tubbs did not find any area where food could be prepared, and found a storage room for alcoholic beverages where the kitchen was supposed to be.

Agent Tubbs testified that he issued Respondent three violation notices:

- (1) 751 False Statement on Application.
- (2) 752 False Statements on documents attached to Application.
- (3) 852 Food service not available.

Agent Tubbs explained the violations. In the application Respondent provided a menu; a diagram of the kitchen and food preparation area; a listing of the appliances; and the hours of operation when food was to be served. When Agent Tubbs made his inspection on January 26, 2007, there was no menu and no food being served. Only alcoholic beverages were being served to the customers. There was no kitchen. There was a liquor storage area in the location where the kitchen was supposed to be. In the liquor storage area, there was only a sink, where there should have been a kitchen. There were no appliances, as shown in the application, for the preparation of food. Agent Tubbs' conclusion was that The Matrix Grill is not a restaurant.

In the cross examination of Agent Tubbs, Respondent concentrated on questions about how TABC measures the 1,000 foot rule differently than the City of Houston, and about whether food services could mean bringing in pre-cooked food. Agent Tubbs testified that it was his opinion that Respondent could not have food services without a kitchen.

On cross examination, Agent Tubbs testified about the first TABC inspections. Agent Tubbs explained that on March 1, 2005, Respondent filed an original application for a mixed beverage permit. On March 8, 2005, Agent Richard Wills with TABC conducted an inspection pursuant to the application filed. The report states that the premises is not within 1,000 feet of a public, private or parochial school. Agent Tubbs testified that the measurement would be by visual observation. Also, Agent Tubbs explained that Respondent has to get a certificate from the City of Houston that the premises are not within an "alcohol free zone." The TABC measures differently than the City of Houston. Respondent was informed by the City of Houston that the premises are within an

“alcohol free zone.” Therefore, Respondent could not get a mixed beverage permit unless their application came under one of the exceptions. One of the exceptions is for restaurants.

Agent Tubbs testified about how TABC approved the second inspection with the premises under construction as a restaurant. On June 4, 2005, Respondent filed a Food and Beverage application as a restaurant. On July 20, 2005, Agent Wills conducted an inspection, again noting that the premises are not within 1,000 feet of a public, private or parochial school, and noting that the primary business was a Restaurant and Bar under construction. Agent Tubbs testified that the kitchen would not have been inspected since the site was under construction. On July 28, 2005, Agent Wills noted on the inspection findings that the kitchen was under construction, and approved the inspection.

2. Dale Evans

Dale Evans, Regional Supervisor for Compliance at TABC, was subpoenaed to testify by Respondent. Agent Evans testified about the 1,000 foot rule. He testified that TABC and the City of Houston measure the 1,000 foot rule differently. Agent Evans noted that the Code sets out when TABC is to measure, and when other governmental entities are to make the measurements. For instance, he testified that TABC makes the measurement when required for bond purposes. Agent Evans testified that TABC does not tell other governmental agencies how to measure, only that they have to comply with TEX. ALCO. BEV. CODE ANN. § 109.33(b). Both TABC and the City of Houston measure the same way, from the subject property line to the owner’s property line, when the business is the sole business on the property. The difference in measurements is when there are several businesses on the property, such as in a strip shopping center.

Respondent’s business is located in a strip shopping center. Agent Evans testified that TABC basically measures from the subject property to the leased premises, while the City of Houston measures from the subject property to the property line of the strip shopping center. From how the

TABC measures, Respondent is not within 1,000 feet from the school. But, Agent Evans quickly pointed out, that although TABC makes an eyeball measurement, it is the City of Houston's measurement that controls as to whether Respondent's premises are within an "alcohol free zone."

Agent Evans testified that when Agent Wills made the inspections back in 2005, his observations that the Respondent was not within 1,000 feet from a public school would be by a quick eyeball measurement; that TABC did not measure the premises to the school for any purpose; and that TABC does not make the measurement as to whether premises are within "alcohol free zones."

Agent Evans was asked to explain why TABC issued a food and beverage permit to Respondent if they did not have a kitchen. Agent Evans testified that the compliance department approves the applications from what is submitted. During the construction phase, an application will be approved from the plans submitted. The agents take the applicant's word that they will do what they submit in their plans. Agent Evans testified that very seldom does TABC find out later that the food service facilities were not completed or never done. He explained that applicants need their applications approved during the construction phase so that the restaurant can be open and running after completion, rather than waiting around losing money waiting on permits. Agent Evans testified that food service definitely means that there is a kitchen on the premises.

Respondent asked Agent Evans repeatedly as to what food service means. "Maintaining food service with food service facilities for the preparation and service of multiple entrees" requires a kitchen on the premises, testified Agent Evans. Agent Evans testified that TABC would not approve a food and beverage permit to an applicant who only intended to cater the food to the premises.

3. Rhonda Belt Rhea

Rhonda Belt Rhea is the custom services manager for the City of Houston. TABC

subpoenaed her as a witness. Ms. Rhea testified that she is the one who issues the “certifications” whether the premises are within an “alcohol free zone” within the City of Houston. She explained that in 1996 the State passed a statute allowing local government to create “alcohol free zones” within 1,000 feet of public schools. In April 1997, the City of Houston passed Ordinance No. 96-368 creating “alcohol free zones” within a 1,000 feet of public schools who requested to be in the zones. Ms. Rhea testified that Respondent is in a strip shopping center whose property line is within an “alcohol free zone.”

Under the City of Houston’s rules, Respondent’s premises are considered 900 feet from Emerson Elementary School. Ms. Rhea testified how the measurements were taken. The method used by the City of Houston is to go the straightest route possible from the property line of the school to the property line of the strip shopping center. In May 2005, a Senior Regulatory Investigator with the City of Houston, Daryl Brown, made the measurement. Ms. Rhea also made the measurement. Ms. Rhea testified that the City of Houston’s legal department told her department to measure from property line to property line, although measurements were taken differently in the past.

Ms. Rhea testified that the actual leased premises of Respondent are way outside 1,000 feet from the elementary school, and in the past would not have been considered to be in the “alcohol free zone.” Ms. Rhea explained that when the ordinance was originally passed, her department measured the distances the same way that TABC measures distances: from the subject property line to the leased premises. Ms. Rhea testified that for 4-5 years her department measured from the subject property line to the leased premises, until the legal department changed the measurement rules.

Ms. Rhea testified that she did issue a certificate to Respondent. Respondent originally applied for a Mixed Beverage License, and was told that a certificate could not be issued, because the strip shopping center is within an “alcohol free zone.” Respondent then applied as a restaurant, with a food and beverage application, and menu submitted with the application. Ms. Rhea testified that the certificate issued to Respondent was a conditional certificate requiring Respondent to be a

restaurant.

4. Leroy Langlais

Leroy Langlais testified that he has a 50 percent ownership in Langemar, LLC d/b/a The Matrix Grill. In March 2005, he originally made an application to operate a club. TABC approved, but the City of Houston did not, finding that the club was within an “alcohol free zone.” Mr. Langlais found out he could operate as a restaurant, so he leased more space. On June 23, 2005, the lease was modified to lease an additional 2,400 square feet for a kitchen and restaurant.

Mr. Langlais testified that when he filed the original application for a food and beverage permit, he intended for The Matrix to have a kitchen. He testified that the business did not bring in the anticipated money, so everything was torn out of the kitchen, and a food preparation area was created. Mr. Langlais testified that he ordered food from the Tropical Grill in bulk, would mix the foods to comply with his menu, and would put the food out as a buffet. An example he gave was that the Tropical Grill would bring in buckets of red beans and rice, and meats, and that he would mix the items together to change the items to what his menu listed. Another example was his preparation of “Island Salad.” He offered several pictures of persons eating at The Matrix Grill the night before the hearing.

IV. DISCUSSION

The overwhelming evidence is that Respondent does not operate a restaurant. No food service is maintained at the premises; there are no facilities for cooking or assembling food on the premises; and food is not served during hours of operation.

Agent Tubbs inspected the premises on two occasions and found no food on the premises. During the first inspection, Respondent’s premises were not open for business, although the

inspection was during the hours of operation Respondent listed in the renewal application. Respondent was open for business during the second inspection. During the second inspection, Agent Tubbs found no food service on the premises; found about 30 customers drinking alcoholic beverages; could not find a kitchen, menu, or any place in the premises where food could be prepared. And the manager confirmed the agent's observations by telling the agent that food was not being served, and that there was no kitchen. At the hearing, Mr. Langlais testified that the business did not bring in the money anticipated, therefore some of the listed items in the application used to prepare and serve food could not be attained, and after a period of time the kitchen was removed. On the night before the hearing, Respondent made an attempt to show that food is served on the premises by taking a dozen pictures of seven people posing in several different shots of groups eating food on disposable place settings. The only food consumed on the premises was catered in on special occasions, and that is what the manager told Agent Tubbs during the second inspection.

The Respondent wants to make an issue of whether the premises are within an "alcohol free zone." The issue is a subject left to be argued between the Respondent and the City of Houston. Agent Evans testified that the TABC tells local governmental authorities that they must comply with TEX. ALCO. BEV. CODE ANN. § 109.33(b), but does not dictate how they must make their measurements. The City of Houston certified that Respondent's premises are within an "alcohol free zone," and Respondent knew they could only get their permits as a restaurant.

Respondent made three applications to TABC. The original application for a Mixed Beverage Permit could not be approved, because the City of Houston said that the premises were within an "alcohol free zone." Respondent then applied for a Food and Beverage permit with a Mixed Beverage Permit on June 24, 2005. In the application Respondent projected alcoholic beverage sales of \$300,000, and food sales of \$360,000. Respondent certified that they would maintain food service at the location; would have food service facilities; listed operating hours that food would be served; and listed equipment to be used to prepare and serve the food. Attached to the application was a menu of the food to be served. Also attached to the application was a floor

plan showing a kitchen and appliances for food preparation. The July 28, 2005 TABC inspection clearly shows that the premises were under construction. Agent Evans testified that TABC routinely approves the initial inspection based upon the plans submitted, explaining that very seldom are the food service facilities not completed, and the businesses need to open upon completion of the construction. Respondent filed a Renewal Application on October 11, 2006. In the renewal application, Respondent provided alcoholic beverage sales of \$4,641.25 and food sales of \$11,298.56; said that food service is maintained at the location; that the hours of operation for the sale and service of food and alcoholic beverages are the same; listed the hours of operation; and indicated that the primary business at the location is a restaurant. On January 4, 2007, and January 26, 2007, TABC inspected the premises and found that the business was not a restaurant.

Because Respondent's business is not a restaurant, the permits should be canceled, and the request for renewal should be denied.

V. FINDINGS OF FACT

1. Langemar LLC holds Mixed Beverage Permit MB-613124, which includes the Food and Beverage Certificate, and Mixed Beverage Late Hours Permit for the premises known as The Matrix Grill at 9344 Richmond in Houston, Harris County, Texas.
2. On April 4, 2007, the Texas Alcoholic Beverage Commission (TABC) Staff sent notice of hearing to Langemar LLC d/b/a The Matrix Grill (Respondent).
3. On May 11, 2007, a public hearing was convened at the State Office of Administrative Hearings offices, 2020 North Loop West, Houston, Texas. TABC attorney, Ramona Perry and Sandra Patton represented Staff, and attorney Ronald Monshaugen represented the Respondent. The hearing concluded, and the record closed on the day of the hearing, May 11, 2007.
4. On January 4, 2007, Respondent failed to operate as a restaurant. Specifically, Respondent did not maintain any food service on the premises, had no facilities for cooking or assembling food on the premises, and was not open for food service during hours listed as being open for operations in the renewal application of October 11, 2006.

5. On January 26, 2007, Respondent failed to operate as a restaurant. Specifically, Respondent did not maintain any food service on the premises, had no facilities for cooking or assembling food on the premises, and was not open for food service during hours of operation.
6. Respondent does not operate a restaurant at 9344 Richmond in Houston, Harris County, Texas.
7. Respondent is in an "alcohol free zone" in the City of Houston.
8. On June 24, 2005, Respondent filed an application for a Mixed Beverage Permit stating that Respondent maintained food service at the location, and listed equipment at the location used to prepare and serve food.
9. On June 24, 2005, Respondent attached a menu to the application of the food to be served on the premises.
10. On June 24, 2005, Respondent attached a floor plan to the application showing a kitchen and food preparation area on the premises.
11. On October 11, 2006, Respondent filed a Renewal Application swearing that there were no changes since the original application.
12. At the time that Respondent filed the Renewal Application, Respondent knew that the premises did not have a kitchen.
13. At the time that Respondent filed the Renewal Application, Respondent knew that the premises did not have a food preparation area.
14. At the time that Respondent filed the Renewal Application, Respondent was not serving the food listed on the menu attached to the original application.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. § 61.71.

2. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters relating to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T. CODE ANN. § 2003.
3. The Respondent received proper and timely notice of the hearing, pursuant to TEX. GOV'T. CODE ANN. §§ 2001.051 AND 2001.052.
4. Based upon findings of fact Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, Respondent violated TEX. ALCO. BEV. CODE ANN. § 11.61(b)(4), and 16 TEX. ADMIN. CODE § 35.5(e).
5. Based on the foregoing Findings of Fact and Conclusions of Law, the suspension and cancellation of the permits and licenses are warranted, and the request for renewal should be denied.

SIGNED JUNE 5, 2007.



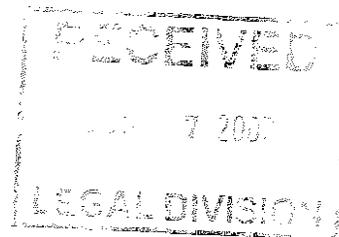
DON SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

June 05, 2007



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

VIA REGULAR MAIL

RE: Docket No. 458-07-2306/Texas Alcoholic Beverage Commission vs. Langemar LLC d/b/a The Matrix Grill

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 "Don Smith".

Don Smith
Administrative Law Judge

DS/mr
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Ramona Perry, Attorney, Texas Alcoholic Beverage Commission, 427 W 20th Street, Suite 600, Houston, TX 77008-
VIA REGULAR MAIL
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
VIA REGULAR MAIL
Ronald Monshaugen, Attorney for Respondent, 1225 North Loop West, Suite 640, Houston, Texas 77008 -**VIA REGULAR MAIL**