

**DOCKET NO. 575489**

TEXAS ALCOHOLIC BEVERAGE COMMISSION, <b>PETITIONER</b>	§	BEFORE THE TEXAS
	§	
	§	
MARIA J. NAVARRO,	§	
MALCOM D. PUTTY,	§	
GERRI A. BRINK AND	§	
OTHER CONCERNED CITIZENS,	§	
<b>PROTESTANTS</b>	§	
	§	
VS.	§	
	§	
ORIGINAL APPLICATION OF	§	ALCOHOLIC
FUEGO WESTERN CLUB L.L.C.	§	
d/b/a FUEGO WESTERN CLUB L.L.C.	§	
(MB, LB, PE), <b>RESPONDENT</b>	§	
	§	
	§	
HIDALGO COUNTY, TEXAS	§	
(TABC CASE NO. 458-08-3512)	§	BEVERAGE COMMISSION

**ORDER ADOPTING PROPOSAL FOR DECISION**

**CAME ON FOR CONSIDERATION** this 8th day of June, 2009, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Steven M. Rivas. The hearing convened on March 24, 2009 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 7, 2009. 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.

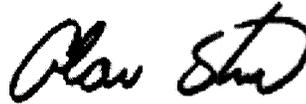
The Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and 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 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 the Original Application of Fuego Western Club, LLC d/b/a Fuego Western Club, LLC for the issuance for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit and a Beverage Cartage Permit be **GRANTED**.

This Order will become final and enforceable on July 2, 2009, 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** this the 8th day of June, 2009, at  
Austin, Texas.



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Alan Steen, Administrator  
Texas Alcoholic Beverage Commission

Hon. Steven M. Rivas  
ADMINISTRATIVE LAW JUDGE  
State Office of Administrative Hearings  
300 West 15<sup>th</sup> Street, Suite 502  
Austin, TX 78701  
**VIA FACSIMILE (512) 475-4994**

Joe Palacios  
ATTORNEY FOR RESPONDENT  
1900 S. Jackson Rd., Suite 5  
McAllen, TX 78503  
**VIA FACSIMILE (956) 627-3815**

Fuego Western Club L.L.C.  
D/B/A Fuego Western Club L.L.C.  
**RESPONDENT**  
P.O. Box 4824  
Edinburg, TX 78540  
**VIA REGULAR MAIL**

Florencio Lopez  
ATTORNEY FOR PROTESTANT  
Maria J. Navarro  
106 South 12<sup>th</sup> Street, Suite 208  
Edinburg, TX 78539  
*VIA FACSIMILE (956) 287-4384*

Malcom Putty  
PROTESTANT  
10900 N. 29<sup>th</sup> Street, Apt. A  
McAllen, TX 78504  
*VIA REGULAR MAIL*

Ralph Luna  
PROTESTANT  
1407 N. Hoehn Dr.  
Edinburg, TX 78541  
*VIA REGULAR MAIL*

Sandra K. Patton  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division

McAllen Enforcement Division

SKP/aa

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

May 7, 2009

RECEIVED

MAY 1 2009

TABC HOUSTON  
LEGAL

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

INTERAGENCY MAIL

**RE: Docket No. 458-08-3512; Texas Alcoholic Beverage Commission, Maria J. Navarro, Malcom D. Putty, and Ralph Luna v. Original Application of Fuego Western Club, LLC d/b/a Fuego Western Club, LLC**

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 § 155.507(c), a SOAH rule which may be found at [www.soah.state.tx.us](http://www.soah.state.tx.us).

Sincerely,

A handwritten signature in black ink, appearing to read "Steven M. Rivas".

Steven M. Rivas  
Administrative Law Judge

SMR/lh  
Enclosure

xc Sandra Patton, Attorney, Texas Alcoholic Beverage Commission, 420 West 20<sup>th</sup> St., Suite 600, Houston, TX 77008-  
VIA REGULAR MAIL

Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA  
INTERAGENCY MAIL

Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA  
INTERAGENCY MAIL Exhibits Returned: TABC's exhibits 2-A, 2-B, 2-C, 2-D, Respondents exhibits 1-3 & 1 data  
CD dated 3-24-09.

Joe Palacios, Attorney, 1900 S. Jackson Rd., Suite 5, McAllen, TX 78503 - VIA REGULAR MAIL

Florencio Lopez, Attorney, 106 South 12<sup>th</sup> St., Suite 208, Edinburg, TX 78539 - VIA REGULAR MAIL

Malcolm Putty, 10900 N. 29<sup>th</sup> Street, Apt. A, McAllen, TX 78504 - VIA REGULAR MAIL

Ralph Luna, 1407 N. Hoehn Dr., Edinburg, TX 78541 - VIA REGULAR MAIL

William P. Clements Building  
Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025  
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994  
<http://www.soah.state.tx.us>

SOAH DOCKET NO. 458-08-3512

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
	§	
	§	
<b>MARIA J. NAVARRO, MALCOM D. PUTTY, and RALPH LUNA, Protestants</b>	§	
	§	
	§	
<b>V.</b>	§	<b>OF</b>
	§	
<b>ORIGINAL APPLICATION OF FUEGO WESTERN CLUB, LLC D/B/A FUEGO WESTERN CLUB, LLC, Respondent</b>	§	
	§	
	§	
<b>HIDALGO COUNTY, TEXAS (TABC CASE NO. 575489</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

Fuego Western Club LLC., Respondent, is the applicant for a Mixed Beverage, Mixed Beverage Late Hours permit, and a Beverage Cartage Permit to be issued by the Texas Alcoholic Beverage Commission (Commission) for the premises known as Fuego Western Club, located at 11205 North 23<sup>rd</sup> Street, McAllen, Hidalgo County, Texas 78504.

Residents living near the proposed premises location protested the application, asserting that Respondent's original application should be denied based on the general welfare, health, peace, morals, and safety of the people, and on the public sense of decency. The Commission's staff (Staff) had no independent evidence to protest the issuance of the permits. The Administrative Law Judge (ALJ) recommends that the original application for permits be granted by the Commission.

**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 only in the findings of fact and conclusions of law.

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LEGAL STANDARD AND APPLICABLE LAW

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EVIDENCE

A. Aff Evidence C

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Mr. Putty asserted he has complained to the sheriff's office 12 to 14 times about the noise level, but that they have been ineffective in lowering the noise level. He stated the police sometimes do not even respond to his calls anymore.

On cross-examination, Mr. Putty admitted the noise coming from the premises was measured by a decibel reader and was found to be within legal levels.<sup>1</sup> However, Mr. Putty argued he did not care that the decibel levels were within legal limits because the noise still disturbs him. Mr. Putty also recalled a meeting he had with Respondent, the sheriff's office, and TABC. According to Mr. Putty, Respondent indicated he would not work with anyone about the noise level at the premise.

#### 4. **Ralph Luna**

Mr. Luna testified he does not live near the premises but that he owns rental property near the premises. Mr. Luna argued he has lost rental business over the noise at the premises because tenants have moved out on prior occasions due to the noise level. Mr. Luna testified his livelihood is adversely affected by Respondent because when tenants move out due to the noise, he is unable to collect rent payments. Mr. Luna also expressed frustration with taking legal action against the tenants who break a lease because it is too costly and time consuming.

On cross-examination, however, Mr. Luna could name only one occasion when a tenant moved out before the lease expired. On that occasion, Mr. Luna admitted the tenant moved out before he could talk to her, but "assumed" she moved out over the noise level from the premises.

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<sup>1</sup> Mr. Putty stated the TABC measured the decibel level, but no documentation of the test was submitted by TABC or Mr. Putty. A decibel reading was contained in a Hidalgo County Sheriff's Department incident report that was later admitted as evidence.

### C. Respondent's Evidence

Respondent offered three incident reports from the Hidalgo County Sheriff's Department. The first report dated July 25, 2008, indicates deputy Rafael Rivera responded to a call from a "concerned citizen" over loud noise coming from the premises. Deputy Rivera reported the music was not "extremely loud" and that a few minutes after he arrived the "volume was lowered."

The next report, dated August 29, 2008, indicates deputy Juan Cardona responded to a call from a "concerned citizen" in reference to loud music at the premises. Deputy Cardona reported that when he arrived on scene, he observed "no loud music."

The next report, dated March 20, 2009, indicates deputy William Johnson responded to a call from a "concerned citizen" in reference to loud music at the premises. Deputy Johnson reported that he heard music at the premises but it "did not seem loud." The report indicates Deputy Johnson used a RadioShack digital sound level meter to measure the decibel levels of the music. According to Deputy Johnson, the decibel level at various points of the premise was as follows:

Area	Decibel level
Front doors	85 db
Southwest property line	72 db
Northwest property line	74 db
Southeast property line	76 db
Northwest property line	81 db

According to Deputy Johnson, "all readings were under reasonable readings of 85 db." Protestants offered no evidence of any regulation, city ordinance, or home owners association rule that deems any of the decibel levels measured at the premises were inappropriate.

#### IV. ANALYSIS

The evidence and public comment in the instant case shows that Respondent has applied for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and Beverage Cartage Permit to do business as Fuego Western Club at 11205 North 23<sup>rd</sup> Street, McAllen, Hidalgo County, Texas. The Commission has determined that Respondent has met all Commission requirements for the issuance of the permits and does not join in the protest

Protestants challenged Respondent's original applications maintaining that they should be denied on the basis that the way Respondent may conduct business warrants refusal based on the general welfare, health, peace, morals, safety of the people, and the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(6). To deny a permit on such basis "some unusual conditions or situations must be shown so as to justify a finding that the place or manner in which the applicant may conduct his business warrants a refusal of a permit." Dienst v. Texas Alcoholic Beverage Commission, 536 S.W.2d 667, 669 (Tex.Civ.App. — Corpus Christi 1976). *See also: Texas Alcoholic Beverage Commission v. Jack E. Mikulenka d/b/a Frigate Club*, 510 S.W.2d 616, 619 (Tex.App. — San Antonio 1974); 650 S.W.2d 208; Kermit Concerned Citizens Committee v. Colonial Food Stores, Inc., 650 S.W.2d 208, 210 (Tex. App. — El Paso 1983).

The evidence in the instant case does not show that issuing the requested permits would cause unreasonable noise levels, increase traffic congestion, or negatively impact the existing nature of the neighborhood Ms. Navarro and Mr. Putty were the only residents living near the premises who protested against Respondent receiving the permits. The ALJ, while considerate of the issues presented by these two residents, does not get a sense that there is a community-wide concern or effort to oppose the permits. No evidence from any law enforcement officers or elected officials was presented to show that the issuance of the requested permits would have either a new negative effect or a new, unusual, or significant threat in the area. To the contrary, the only evidence from law

enforcement officials reflected that Respondent was operating the premises in compliance with applicable noise restrictions.

## V. RECOMMENDATION

Accordingly, the ALJ recommends that Respondent's original application for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and Beverage Cartage Permit to do business as Fuego Western Club at 11205 North 23<sup>rd</sup> Street, McAllen, Hidalgo County, Texas, be granted.

## VI. FINDINGS OF FACT

- 1 Fuego Western Club LLC., Respondent, filed an original application for a Mixed Beverage, Mixed Beverage Late Hours permit, and a Beverage Cartage Permit to be issued by the Texas Alcoholic Beverage Commission (Commission) for the premises known as Fuego Western Club, located at 11205 North 23<sup>rd</sup> Street, McAllen, Hidalgo County, Texas.
- 2 Respondent has met all Commission requirements for issuance of the permits.
- 3 Commission received a protest from residents of the neighborhood requesting that the original application be denied on grounds that the manner in which applicant may conduct business warrants refusal based on the general welfare, health, peace, morals and safety and on the public sense of decency.
- 4 A Notice of Hearing dated July 25, 2008, was issued by The Commission's Staff notifying Respondent of the protest and informing the parties of the nature of the hearing, the statutes and rules involved, and the legal authorities under which the hearing was to be held.
- 5 On March 24, 2009, a public hearing was held before Steven M. Rivas, ALJ, with the State Office of Administrative Hearings at the Lark Branch Library, 2601 Lark Avenue, McAllen, Texas 78504. Staff was represented by Sandra Patton, attorney. Protestant Maria J. Navarro was represented by Florencio Lopez, attorney. Protestants Malcolm Putty and Ralph Luna appeared *pro se*. Respondent was represented by Joe Palacios, attorney. The record was closed on the same date.
- 6 Although there was evidence that two neighborhood residents are disturbed and unable to sleep because of the noise coming from Respondent's premises, the only measured decibel levels on record did not exceed any regulatory levels.

7. There was insufficient evidence to prove that granting Respondent's applications would increase noise levels that would negatively change or affect the neighborhood.
8. No unusual condition or situation exists to warrant refusing Respondent's permits.

## VII. CONCLUSIONS OF LAW

The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, §§ 6.01 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. The parties received proper and timely notice of the hearing pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE § 155.55.
4. Granting Respondent's original application for permits will not adversely affect the general welfare, health, peace, morals, safety of the people, and the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).
5. Respondent's original application for a Mixed Beverage permit and Mixed Beverage Late Hours permit Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and Beverage Cartage Permit to do business as Fuego Western Club at 11205 North 23<sup>rd</sup> Street, McAllen, Hidalgo County, Texas, should be granted.

**SIGNED May 7, 2009.**



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**STEVEN M. RIVAS  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**