

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

March 27, 2009

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

VIA INTERAGENCY MAIL

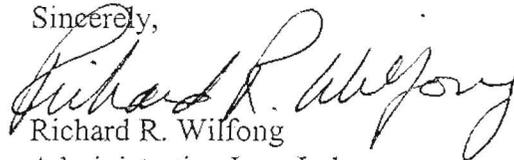
RE: Docket No. 458-09-2355; Texas Alcoholic Beverage Commission vs. Hever Corporation, Ltd. d/b/a Midnight Rodeo

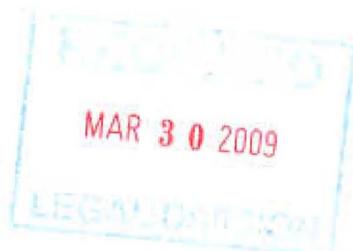
Dear Mr. Steen:

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.

Sincerely,


Richard R. Wilfong
Administrative Law Judge



RRW/sb
Enclosure

xc Judith Kennison,, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA

INTERAGENCY MAIL

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

Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA
INTERAGENCY MAIL (with TABC Exhibits Nos. 1, 2, 3, 4, 4A, 5, 6, and 7 and Hearing CD)

Tracey McCormek, Attorney, 12260 Nacogdoches #102. San Antonio, TX 78217 - VIA REGULAR MAIL

SOAH DOCKET NO. 458-09-2355

TEXAS ALCOHOLIC BEVERAGE COMMISSION,	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	
	§	OF
	§	
HEVER CORPORATION, LTD. D/B/A MIDNIGHT RODEO (TABC CASE NO. 582885)	§	
	§	
	§	
	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Hever Corporation., Ltd. d/b/a Midnight Rodeo (Applicant or Midnight Rodeo) has applied to the Texas Alcoholic Beverage Commission (TABC or Commission) for a Mixed Beverage Permit, a Beverage Cartage Permit, a Mixed Beverage Late Hours Permit and Caterer's Permit for premises located at 2581 Sunset Drive, San Angelo, Texas. The Protestants (Protestants), consisting of the ministers of local Baptist churches, assert that the permits should be denied based upon the general welfare, peace, morals, safety and sense of decency of the people. It was the position of the Commission's staff (Staff) that the Commission had no independent evidence to protest the issuance of the permits, and the Applicant had: met all Commission requirements to hold permits at the location; and properly posted and published notice; and, complied with all Texas Alcoholic Beverage Code requirements in effect at the time of the application. This proposal for decision recommends that the permits be issued.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Staff issued a notice of hearing on February 11, 2009, informing all parties that a hearing would be held on the application, as required by § 2001.052 of the Administrative Procedure Act, TEX. GOV'T CODE ANN. Chapter 2001. The public hearing was convened on February 25, 2009, in San Angelo, Texas, before Richard R. Wilfong, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). Staff appeared and was represented by Judith Kennison, Staff Attorney. Applicant appeared and was represented by Tracey McCormick, Attorney.

Protestant, The Heights Baptist Church was represented by Pastor Roger D. Blocker. Protestant, Harriett Baptist Church was represented by Pastor Mike Dixon. The hearing concluded and the record closed that same day.

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are set out in the proposed findings of fact and conclusions of law without discussion here.

II. DISCUSSION

A. Applicable Law

Protestants challenge the application on the basis of § 11.46(a)(8) and/or § 11.61 (b)(7) of the Texas Alcoholic Beverage Code, which provides that the Commission or administrator may refuse to issue an original or renewal permit with or without a hearing if it has reasonable grounds to believe and finds:

The place or manner in which the [Applicant may] conduct its business warrants refusal of a permit based on the general welfare, health, peace, morals and safety of the people and the public sense of decency.

In a protest hearing, the burden is on the Protestants to show by a preponderance of the evidence that the permits should not be issued.

B. Background

The Applicant proposes to open and operate a new Midnight Rodeo entertainment facility in a commercial area at the intersection of Sul Ross Street and Sunset Drive in San Angelo, Texas. A residential area is located across Sunset Drive and to the west of the proposed Midnight Rodeo location. There are a number of other businesses in the general area that are licensed to serve beer and mixed beverages.

C. Summary of Evidence and Argument

1. Protestants' case

Mike Dixon, Pastor of the Harriett Baptist Church, and Roger Blocker, Pastor of the Heights Baptist Church, testified on behalf of the Protestants. Petitions signed by approximately 70 persons against the issuance of the permits to Midnight Rodeo were admitted as exhibits. Protestants collectively cited several reasons for their permit opposition including traffic congestion, intoxicated drivers, noise, criminal activity and nuisance.

Pastor Dixon testified that Midnight Rodeo is a large capacity drinking establishment that does not bring forth the best in a community and is inconsistent with family values, stable marriages and the general health and welfare of the City. He further testified that, due to the large residential neighborhood very near to the proposed location of Midnight Rodeo, it would be unwise and against the best interests of the citizens of the City and the County for it to be located there. He urged that it should be moved somewhere else. He further elaborated on the ills of alcohol and the devastation that it wreaks on marriages, families and communities.

Pastor Blocker testified that Midnight Rodeo will likely cause traffic and safety concerns in the vicinity where it is located. He also recited experience with other drinking establishments where his church members have tried to minister in the many tragic situations caused by alcohol. He cited situations where children were left in cars while the parents were drinking and the frequently encountered need to take people home who were unable to safely drive their cars. He further described the damage caused by alcohol to community values and the way that alcohol erodes families.

For all of these reasons, Protestants argue that it will be detrimental to the community's general welfare, health, peace, morals, safety, and sense of decency if the permits are granted in this case.

2. Applicant's case**Kelly A. McCormick**

Kelly A. McCormick, a 20 percent owner of Midnight Rodeo, testified that Midnight Rodeo strictly adheres to high level business standards. For example, the dispensing of alcohol is precisely measured so that no over-serving occurs. Further, very careful attention is paid to the protection of the welfare and safety of the neighborhood, the community and patrons of Midnight Rodeo.

Kate Kesler

Kate Kesler, another 20 percent owner of Midnight Rodeo, testified that she learned the business from the grass-roots, and Midnight Rodeo provides a very unique product that it has successfully promoted for 26 years. Midnight Rodeo is not just a bar or a nightclub. Their facilities are frequently used for private parties, weddings, fund raisers for charitable organizations, law enforcement benefit gatherings and other corporate functions that promote the beneficial interests of the entire community. Entertainment events are attended by many people that do not engage in drinking and their participation is invited. A very high level of security is maintained at all times, including regular utilization of off-duty police officers.

David C. Steitle, P.E.

David C. Steitle, P.E., a consulting traffic engineer, provided testimony of the extensive study he conducted regarding the site of Midnight Rodeo and its potential impact on traffic and the safety of the area. His investigation included the classification of the roadways in the area, traffic count per day and during the hours of operation by the Applicant, historical accident reports and personal observations. Based on his study, Mr. Steitle concluded that Midnight Rodeo will have no adverse impact on vehicular traffic in the area whatsoever and that any concern regarding traffic or related safety issues is negligible for this site.

Michael Horton

Michael Horton, an agent with 20 years of employment with the Texas Alcoholic Beverage Commission, provided testimony concerning his processing of the permit applications for Midnight Rodeo and the Applicant's compliance with all Commission requirements to hold the permits applied for. He confirmed that the City of San Angelo had certified that the site of the Midnight Rodeo establishment was appropriately zoned. He testified that a review of the business information presented by the Applicant shows that all people involved are well qualified. He further stated that there are many beer and mixed beverage premises in the same general vicinity and he identified those locations on an aerial photograph of the area.

Darrell W. Morris, Jr.

Darrell W. Morris, Jr., employed by Midnight Rodeo as Operations Manager, testified that he was familiar with the manner in which Midnight Rodeo operates its entertainment establishments through his responsibilities for the Midnight Rodeo locations in Amarillo and San Antonio, Texas. Regarding safety, he stated that police officers are most always on the premises and patrolling through the parking lots. Regarding noise, he testified that the buildings are well insulated specifically for sound control, music is maintained at a reasonable sound level, and the doors of the facility remain closed to prevent sound from being emitted outside. He explained that the hours of operation are Wednesday through Saturday from 7:00 p.m. to 2:00 a.m. The maximum occupancy capacity is 820 people, and the typical actual maximum capacity is approximately half that amount. Adequate parking space is provided, and there is an orderly flow of people arriving and leaving. The peak hour for attendance is usually around 11:00 p.m.

Mr. Morris also said that the standards of operation followed by Midnight Rodeo are in all respects above the minimum requirements. Midnight Rodeo is committed to going "above and beyond" to assure that its business as a dancing and entertainment provider is high quality, and that it benefits the community. For example, no alcohol above 90 proof is served and all mixed drinks are properly measured. Forty to 50 employees are present in the establishments at all times. All employees are trained to not over serve customers and to monitor the customers as they leave to

detect any that might pose a risk to themselves or others. Any customers thought to have consumed alcoholic beverages excessively are consulted to determine whether they are with other people who are capable of escorting them safely; or if not, transportation is arranged for them. Security personnel and police officers are also present at all times. If a customer resists the effort to provide safe travel, the situation is reported to the police. High level "entertainment" is Midnight Rodeo's business. Midnight Rodeo is a regular provider of music concerts presented by acclaimed local and nationally recognized entertainers.

Duane Thompson

Duane Thompson, also employed by Midnight Rodeo as Operations Manager, testified that Midnight Rodeo has never received a violation citation from the Commission. Midnight Rodeo is dedicated to providing a safe and lawful entertainment environment for persons in the 18 to 20 age range. Great care is taken to prevent any under-age person from drinking alcoholic beverages. All customers are required to wear wrist bands. Those above the age to lawfully drink wear the wrist band on the same arm, and the under-age customers wear the wrist band on the other arm. Different, and easily distinguishable, containers are used to serve non-alcoholic beverages. Midnight Rodeo has frequent teenage nights from 7:00 p.m. to 11:00 p.m.

Ralph Thompson

Ralph Thompson, employed by Midnight Rodeo as Operation Consultant, testified that Midnight Rodeo manages the outside of its entertainment establishments as well as inside. Midnight Rodeo provides outside security personnel and valet services. To heighten their effectiveness, security personnel are equipped with radios. Security personnel remain, both inside and outside, until all employees leave after closing. Strict policies, guidelines and procedures are enforced and followed. All employees receive extensive high-level training. For example, every employee goes through alcohol awareness training in addition to the training to do what job they perform. Customized training is provided to managers tailored to the areas where they need training the most. Practices and policies are strictly enforced through an employee discipline policy.

Mark Easterling

Mark Easterling, President of Blue Bonnet Advertising, Inc., provided testimony as a consultant for Midnight Rodeo concerning specific fund raising efforts conducted by Midnight Rodeo, including fund raisers to benefit law enforcement and hospitals.

For all these reasons, Applicant contends that the granting of the permits will not be contrary to the general welfare, peace, morals, and safety of the people or the public sense of decency.

D. Analysis

After considering the evidence, the ALJ concludes there is no reasonable basis for denying the permits based on the community's general health, peace, morals, safety, and sense of decency.

In order to justify the refusal of an application on the basis that there will be 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. Mikulanka d/b/a Frigate Club*, 510 S.W. 2d 616, 619 (Tex. App. – San Antonio 1974). In the case at issue, no evidence of an unusual condition or situation was presented by the Protestants. Rather, the Protestants presented general concerns relating to alcohol consumption in that it can be detrimental to the institution of marriage, family relationships, religious and community values. The Protestants' objections to business establishments that serve alcoholic beverages applied to all such businesses, and no specific objection was directed toward the Midnight Rodeo. In argument, the Protestants expressed appreciation for the high-level training and business standards maintained by Midnight Rodeo, but continued to highlight the overall depravity that alcohol bestows on human relationships and institutions. This concern, while genuinely sincere and understandable, does not rise to the level of a specific unusual condition or situation relating to Midnight Rodeo as would justify refusal of the permits based on general welfare, health, peace, morals, safety, or sense of decency of the people.

Having considered the evidence, the ALJ finds insufficient grounds to demonstrate that the place or manner in which Midnight Rodeo will conduct its business warrants denial of the application for the permits based on general welfare, health, peace, morals safety and sense of decency of the people. Accordingly, the ALJ recommends issuance of the Applicant's requested permits. In support of this recommendation, the ALJ makes the following findings of fact and conclusions of law.

III. FINDINGS OF FACT

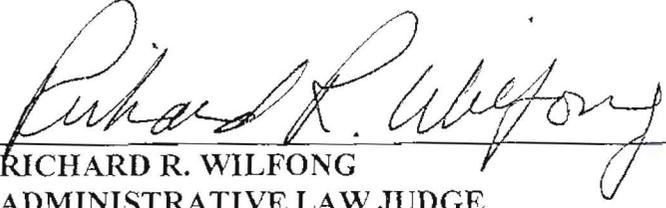
1. Hever Corporation, Ltd. d/b/a Midnight Rodeo (Applicant or Midnight Rodeo) filed an original application with the Texas Alcoholic Beverage Commission (the Commission or TABC) for a Mixed Beverage Permit, a Beverage Cartage Permit, a Mixed Beverage Late Hours Permit and a Caterer's Permit for premises located at 2581 Sunset Drive, San Angelo, Tom Green County, Texas.
2. Protests to the application were filed by residents of the area where the premises are located and The Heights Baptist Church and Harriet Baptist Church.
3. On February 11, 2009, the Commission's Staff issued a notice of hearing informing the parties of the time, date, and location of the hearing on the application; the applicable rules and statutes involved; and a short, plain statement of the matters asserted.
4. A public hearing was convened on February 25, 2009, in San Angelo, Texas, before Richard R. Wilfong, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). Staff appeared and was represented by Judith Kennison, a Commission Staff Attorney. Applicant appeared and was represented by Tracey McCormick, Attorney. Protestant, The Heights Baptist Church, was represented by Pastor Roger D. Blocker and Protestant, Harriett Baptist Church, was represented by Pastor Mike Dixon (Protestants). The hearing concluded and the record closed that same day.
5. The proposed licensed premises for Midnight Rodeo, is located in the Southwest Plaza Shopping Center in a commercial area of San Angelo, Texas, at 2581 Sunset Drive.
6. There are at least six beer and mixed beverage establishments located in the same general vicinity as the proposed Midnight Rodeo premises.
7. Noise will be reasonably controlled with building insulation, keeping the doors closed and moderate music volume.
8. Safety will be provided by properly trained and equipped security personnel, and police officers.

9. Midnight Rodeo will have a negligible impact on traffic in the area where it is located.
10. The proposed Midnight Rodeo premises is not in close proximity to other facilities which might be incompatible with the sale of alcohol (such as a hospital, church, drug and alcohol treatment center, or school).
11. Wristbands and distinguishable containers are used to prevent under-age patrons from consuming alcoholic beverages.
12. Midnight Rodeo employees are trained to monitor patrons as they leave and to assure that no intoxicated person drives home.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Chapters 1 and 5 and §§ 6.01, 11.41, 11.46, and 32.01.
2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Chapter 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the foregoing findings of fact, issuance of the requested permits will not adversely affect the safety of the public, the general welfare, peace, or morals of the people, nor violate the public sense of decency, in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.46(a)(8) or 11.61(b)(7).
5. Based on the foregoing findings and conclusions, the application of Hever Corporation, Ltd. d/b/a Midnight Rodeo, for a Mixed Beverage Permit, a Beverage Cartage Permit, a Mixed Beverage Late Hours Permit and a Caterer's permit, should be granted.

SIGNED March 27, 2009.


RICHARD R. WILFONG
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS