

DOCKET NO. 581265

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, Petitioner	§	
	§	
KILLEEN POLICE DEPARTMENT,	§	
Protestant	§	
	§	
VS.	§	
	§	
	§	
XECUTIVES PRIVATE CLUB	§	
D/B/A XECUTIVES BAR & GRILL,	§	ALCOHOLIC
Respondent	§	
	§	
PERMIT NOS. N666212, NL, PE	§	
	§	
BEXAR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-09-1909)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 11th day of January, 2011, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge (ALJ) Craig R. Bennett presiding. The hearing convened on February 13, 2009. The ALJ made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on April 1, 2009. The Proposal for Decision, which recommended that the application be granted, was properly served on all parties.

The copy of the Proposal for Decision that was mailed by SOAH on April 1, 2009 to Kevin Walker (Respondent's representative) at the mailing address on file with the Texas Alcoholic Beverage Commission (Commission) was returned to SOAH marked by the United States Postal Service as "Not Deliverable as Addressed". On April 16, 2009, SOAH mailed the Proposal for Decision to Kevin Walker at the location address. It was also returned to SOAH by the United States Postal Service, marked "Not Deliverable as Addressed; Unable to Forward". The mailing address on file with the Commission and the location address are the same: Xecutives Private Club D/B/A Xecutives Bar & Grill, 836 Fort Hood Street #32, Killeen, Texas 76541. This is the same address at which Kevin Walker accepted and signed for receipt of delivery of the Notice for Hearing on January 20, 2009. Mr. Walker appeared at and testified in the hearing on February 13, 2009. All subsequent pleadings and responses were mailed to the same address. The record does not show if they were returned as undeliverable.

On April 20, 2009, Petitioner filed exceptions to the Proposal for Decision. On April 22, 2009, the ALJ filed a response to the exceptions, recommending that no changes be made to the Proposal for Decision. On July 8, 2009, Petitioner filed a Motion to Change Conclusions of Law in the Proposal for Decision. On July 9, 2009, the ALJ filed a response to the Motion to Change Conclusions of Law in the Proposal for Decision, recommending that no changes be made to the Proposal for Decision. On July 10, 2009, Petitioner wrote a letter to the Administrator of the Texas Alcoholic Beverage Commission, asserting that the ALJ's July 9, 2009 response was "outside of established procedures set forth under the APA and the State Office of Administrative Hearings Rules". Nothing has been filed since that date.

Permit No. N666212 was originally issued on July 24, 2007, with an expiration date of July 23, 2008. An application for renewal was submitted on July 15, 2008, which is the subject of this protest proceeding. The protest was withdrawn, and the 2008 renewal permit was issued on August 28, 2009. The 2008 permit was dated July 24, 2008, with an expiration date of July 23, 2009.

No renewal application was received from Xecutives Private Club for 2009. Instead, Permit No. BG730500 was issued on August 31, 2009 for the same location (836 S Fort Hood Street #32, Killeen, Texas 76541) to a different applicant, Jade Lou Behrens D/B/A Jade's Son Loc Vietnamese Restaurant and Club. Permit No. BG730500 expired on August 30, 2010. However, Permit No. RM760759 was issued to Jade Lou Behrens D/B/A Jade's Son Loc Vietnamese Restaurant and Club for the same location on November 1, 2010, with an expiration date of October 31, 2012.

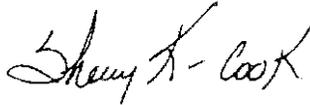
Because Permit No. N666212 is expired, permittee Xecutives Private Club did not seek to renew the permit in 2009, the premises is now occupied by a different permittee, and the protest was itself withdrawn, this matter is now moot and will be dismissed because no relief may be granted.

A permittee may not voluntarily surrender a permit in the face of a cancellation proceeding, because the cancellation of a permit may have consequences relating to future applications by the permittee or for the premises (see, for example, Alcoholic Beverage Code §§11.44(a) and 11.46(c)). Similarly, under Alcoholic Beverage Code §11.44(b), an applicant may not simply let a permit expire or voluntarily surrender it before a hearing, when the protest involves certain allegations. Here, however, the protest itself was withdrawn. Indeed, although the 2008 renewal was the subject of the protest, the 2008 renewal was actually granted when the protest was withdrawn. There cannot be two permittees at the same location. Thus, once the protest was withdrawn and the new permit for the location was granted to a different applicant, there was (and is) neither a pending renewal application, nor a pending protest, nor a permit to cancel.

IT IS THEREFORE ORDERED that this proceeding be dismissed as moot.

This Order will become final and enforceable on the 8th day of February, 2011, unless a Motion for Rehearing is filed **before** that date.

SIGNED this the 11th day of January, 2011, at Austin, Texas.



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 13th day of January, 2011.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Craig R. Bennett
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
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VIA FACSIMILE: (512) 322-2061

Xecutives Private Club,
d/b/a Xecutives Bar & Grill
RESPONDENT
836 South Fort Hood Street #32
Killeen, Texas 76541
VIA REGULAR MAIL

Jerris Mapes
ATTORNEY FOR PROTESTANT
City of Killeen
402 N. 2nd Street
Killeen, Texas 76541

Judith Kennison
ATTORNEY FOR PETITIONER
TABC Legal Division

TABC Licensing Division

Lt. Tom Dickson
TABC Waco District Office

SOAH DOCKET NO. 458-09-1909

TEXAS ALCOHOLIC BEVERAGE
COMMISSION, and

KILLEEN POLICE DEPARTMENT

VS.

XECUTIVES PRIVATE CLUB
d/b/a XECUTIVE'S BAR & GRILL
(TABC CASE NO. 581265)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Respondent Xecutives Private Club (Xecutives) is the holder of a Private Club Registration Permit, Private Club Late Hours Permit, and Beverage Cartage Permit issued by the Texas Alcoholic Beverage Commission (TABC) for the premises known as Xecutive's Bar & Grill, located at 836 S. Fort Hood Street #32 in Killeen, Texas. The Killeen Police Department (KPD) and Staff of the TABC oppose the renewal of Xecutives' permits based on general welfare, health, peace, moral, and safety concerns. After considering the arguments and evidence presented by the parties, the Administrative Law Judge (ALJ) finds there is an insufficient basis for denying renewal of the permits and, therefore, recommends that the permits be issued.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

On February 13, 2009, a public hearing was convened in this matter in Waco, Texas, before ALJ Craig R. Bennett. The Respondent was represented by Kevin Walker, one of the owners/managers of Xecutives. TABC was represented by Judith Kennison, staff attorney. KPD was represented by Jerris Mapes. The hearing concluded and the record closed that same day. There are no contested issues of notice or jurisdiction in this proceeding. Therefore, those matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

II. DISCUSSION AND ANALYSIS

A. The Issue Presented

Typically, when TABC opposes the renewal of a permit, it is based upon past violations of the permittee or specific incidents of conduct attributable to the permittee. However, in this case, the opposition by TABC and KPD to the permit renewal is based upon the high incidence of criminal acts and calls to the police at or near the club. However, none of the criminal behavior is directly attributable to the permittee or its agents or employees. In fact, as the evidence shows, numerous criminal acts were reported by the permittee, and many of the calls for police assistance were made by the permittee. But, because of the high association of criminal activity in connection with the Xecutives' club premises or adjacent parking lot, TABC and KPD contend that its permit should not be renewed. They rely on the place or manner provisions of the Texas Alcoholic Beverage Code, which are set out in Section B below.

Thus, the issue presented is whether Xecutives' permits should not be renewed—even if there is no showing of wrongful conduct by or allowed by Xecutives. Ultimately, under the circumstances of this case and the specific statutory provisions relied on by TABC, the ALJ finds that non-renewal is not justified. Therefore, the ALJ recommends that the permits be renewed.

B. Applicable Law

KPD and TABC oppose Xecutives' renewal application on the basis of Sections 11.46(a)(8) and 11.61(b)(7) of the Texas Alcoholic Beverage Code. Section 11.46(a)(8) provides that the Commission or administrator may refuse to issue an original or renewal permit if it has reasonable grounds to believe and finds that "the place or manner in which the Respondent 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." Similarly, Section 11.61(b)(7) provides that the Commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if, after notice and hearing, it is determined that "the place or manner in which the permittee conducts his business warrants the cancellation

or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.”

In a protest hearing such as this, the burden is on the protesting parties to show by a preponderance of the evidence that the permit(s) should not be renewed.

C. Arguments and Evidence

1. TABC's Evidence and Arguments¹

At the outset, it is important to note that this case does not involve a particular incident or offense. Rather, this case involves a pattern of incidents occurring at or near the Xecutives club. Combined, TABC contends that the number of incidents associated with Xecutives warrant a denial of its permit renewal on the basis of the “place or manner” provisions cited above.

TABC argues that Xecutives is a dangerous establishment plagued by gang-related criminal activity, and remedial measures taken by Xecutives' management have been ineffective in controlling the establishment and adjacent parking lot. TABC contends that the number of calls and police incident reports associated with Xecutives over the past two years vastly exceed the number for similar establishments in the area. In total, TABC alleges that there were at least 177 calls for service to the police between January 2007 and January 2009 in relation to the club. TABC offered printouts of these calls for service into evidence. TABC also offered police incident reports from 27 separate incidents between July 2006 and January 2009.² Out of these 27 incidents, five involved actual criminal activity occurring inside the club, ranging from assault to drug possession. For at least three of the five incidents that occurred in the club—and 10 of the 27 total incidents—club personnel were positively involved by either contacting the police, detaining the suspect, or attempting to stop the allegedly criminal behavior (such as efforts to restrain individuals attempting to fight).

¹ At the hearing, KPD indicated that it was relying on TABC to present evidence and arguments in opposition to the permit renewal; thus, KPD did not present any separate evidence or arguments but, instead, adopted and relied upon that presented by TABC.

² TABC Ex. 4 contains both the incident reports and printouts of calls for police assistance.

In addition to the documentary evidence offered, TABC presented testimony from Daniel Garcia (a TABC enforcement officer), John Bowman (a detective who is gang intelligence expert with KPD), Ricky Rounds (a military officer with Fort Hood), Denise Smith (a KPD patrol officer), and John Grider (a KPD police sergeant). These witnesses testified to prevalent and dangerous criminal activity occurring at Xecutives or its adjacent parking lot, including shots fired, assaults, fights, unlawful carrying of weapons, weapons in plain view, and drug activity.

Detective John Bowman of KPD testified that he had been inside of Xecutives' club on two occasions and had also checked the gang affiliations of some Xecutive members. He found several of those members—and one former employee, Califony Pondexter—associated with the Gangster Disciples, a Chicago-based national gang. He testified that the Gangster Disciples used Xecutives as a hang-out and established it as their “turf.” In his opinion, many of the assault incidents at the club arose from the Gangster Disciples fighting with rival gang members who also frequented the club. He concluded the club effectively was under the “control” of the Gangster Disciples or one of its offshoot entities, a car club known as the “Trendsetters.”³ Detective Bowman stated the presence of gang colors, bandanas, and gang hand signs, coupled with the criminal activity at the club, should put a reasonable operator on notice of a potential gang problem. He testified that a reasonably prudent club operator would have taken steps to learn about and curtail the problem, or moved locations.

Other witnesses testified to seeing gang signs in the club and parking lot. Neither TABC nor any of the witnesses presented, however, accused Xecutives' owners or managers of personal gang affiliation. The majority of the police service calls to the club came at closing time when large numbers of club patrons would be found lingering in the parking lot. Mr. Garcia and the two KPD officers testified that, in their opinion, the club had insufficient security in the parking lot to handle the number of people and the dangerous nature of the conduct. Mr. Rounds, the police intelligence coordinator at Fort Hood, testified the number of calls for service and an incident involving the stabbing of a serviceman led the Armed Forces Disciplinary Control Board to designate Xecutives off-limits to all service members from Fort Hood.⁴

³ The ALJ is uncertain of the spelling of the car club's name, as it was not clarified at the hearing.

⁴ TABC Exs. 9 and 10.

The KPD officers testified that the significant number of calls to the police created a burden on KPD, which generally has only 12 officers on duty between 9:00 p.m. and 7:00 a.m. The officers testified that they were required to respond to calls at Xecutives an average of two to four times per weekend. When responding to reports of shots fired, KPD always sent a minimum of four officers—which is one-third of the officers on duty during the evening shift. Officers testified that Xecutives strained the resources of KPD and took away officers from other responsibilities and locations within Killeen. In fact, on September 1, 2008, a reported a riot took place in the parking lot at the club and all available units in Bell County were called to preserve order.

TABC contends that many of the problems associated with Xecutives stem from its relationship to gang activity. TABC alleges that the club, while not directly under the control of gangs, is essentially gang-controlled because a particular criminal gang has chosen to make the club a hang-out. Because of the significant criminal activity associated with Xecutives, TABC argues it will be detrimental to the community's health, safety and welfare, or adverse to the public sense of decency to renew the permits in this case.

2. Xecutives' Evidence and Arguments

Xecutives denied allegations that it allowed gang activity or criminal activity to occur. It argued that the location and its manner of conducting the business are as safe as possible given the nature of the business and the fact that it shares a parking lot with two other establishments licensed to sell alcoholic beverages.

Xecutives presented the testimony of numerous witnesses, including Kevin Walker (one of the owners/managers), Joseph Bryant (a club security guard), James Walker, Jr. (the club's principal owner), Katrina Richardson (a club employee for three years), and others familiar with the club or its owners. The testimony of these witnesses overlapped significantly and often was duplicative. The witnesses testified that Xecutives had no affiliation with any gangs and that the club was not controlled in any manner by any gangs. They also denied having any knowledge of a gang problem at the club.

Further, numerous witnesses pointed out that the vast majority of problems occurred outside the club (in fact, 22 of the 27 incident reports offered by TABC involved conduct outside the club). The witnesses noted that the club was located in a strip center and that there were other establishments in the shopping center that sold alcoholic beverages. In particular, Xecutives shares its parking lot with two other licensed, late-night businesses. Big Al's German American Restaurant is located a few doors down from Xecutives. KPD began associating criminal activity with Big Al's starting in November 2008. Another licensed business, a late-night pool hall, is in the same shopping center. Of the 27 KPD incident reports from July 2006 to January 2009, four involved either a Big Al's patron or Big Al's security personnel, or were linked to Big Al's through witness statements. Similarly, many other reports involved weapons and marijuana found in parked vehicles. Xecutives denied that it had any responsibility to search parked cars in the shared parking lot of the shopping center.

In fact, Xecutive witnesses and management testified that they could not control the parking lot, because it was a common parking lot for the shopping center and the other businesses in the shopping center. Club employees testified that they had contacted the police numerous times for assistance in the parking lot and had been informed by KPD that it was not the police's responsibility to provide crowd control in the parking lot. Therefore, the club employees felt there was nothing else they could do once they kicked people out of the club, and Xecutives argues it should not be responsible for actions that occur in the parking lot or otherwise outside the club.

Further, Xecutives argued that the number of calls to KPD did not accurately reflect the number of actual incidents. Several of TABC's witnesses agreed that a single incident could result in numerous calls to the police. Therefore, Xecutives argues that the number of calls should not be considered dispositive. James Walker, Jr. testified Xecutives had no significant problems before late 2007 because the club management and employees generally did not call the police for assistance. On encouragement from KPD, club policy changed and management started calling KPD in regard to problems that arose. Both Kevin and James Walker testified that management's decision to start calling KPD has resulted in the club now being perceived as a problem. They contend that this is more about perception rather than a particularly dangerous

situation at the club. They assert that the number of police calls also has led to "blacklisting" by Fort Hood and forced the club to close its doors on February 8, 2009.⁵

Xecutives refuted accusations of gang affiliation or activity in the club. Again, no party claimed Xecutives' management had personal affiliation with a gang. Xecutives argues that gang members are not readily identifiable among the patrons. Detective Bowman testified on cross-examination that the general public had no access KPD's organized crime databases to check Xecutives membership. Further, even TABC's own agent and some of the KPD officers testified that they had no expertise in gang signs, identifying marks, and behaviors and were unable to give clear descriptions of gang activity. Xecutives employees challenged how they could be expected to know such information when even TABC's own agent did not. Kevin Walker testified that the club's policy was to welcome anyone over 21 years of age who complied with the dress code and had not otherwise caused problems in the past. He denied that the club could just refuse to allow people to enter because it may suspect that they were a gang member.

Kevin Walker similarly denied that gangs controlled the club, and he identified steps taken to ensure the patrons' safety. First, Xecutives implemented a dress code forbidding bandanas and white t-shirts, and patrons were searched before being allowed to enter. Second, management banned the car club "Trendsetters," (although TABC witnesses testified that the group refused to be banned and later returned). Third, Xecutives noted that the only employee with gang affiliation that TABC had identified had been fired after only a month of employment. Fourth, Xecutives asks all employees about gang affiliation as part of its hiring process and will not hire someone with any gang affiliation. Fifth, Kevin Walker, his brother Timothy Walker, and hired security personally supervise the club (and the parking lot to a lesser extent). KPD incident reports contain numerous examples of club security detaining disorderly patrons and supplying witness statements for the police.

⁵ At the hearing, but off the record, club management indicated that they had no intention of re-opening the club even if the permits are renewed. However, they insisted on moving forward with the hearing in order to clear their name. They indicated they may wish to open a club at a different location sometime in the future. Ultimately, Xecutives has a right to a hearing on the permit renewals as long as they are seeking the permits. Thus, the ALJ proceeded with the hearing.

Therefore, Xecutives contends that it has done everything possible to ensure a safe and secure club, and that renewal of the permits in this case would not be contrary to the general welfare, peace, morals, and safety of the people or the public sense of decency.

D. Analysis

The evidence certainly indicates that Xecutives has attracted a significant criminal element. The volume of police calls to the club's location and the criminal activity recorded there is significant. However, the evidence also shows that many of the calls to the police were made by club employees. Further, many criminal activities were first discovered by club employees, who apprehended suspects and held them until police could arrive. Thus, we have a situation where it appears that club employees are doing much to combat the criminal element present but are unable to completely control it.

The testimony of the KPD officers who testified is rather telling. Detective Bowman testified that he was aware that Xecutives had tried to kick out gangs from the club. When asked what would happen if Xecutives was closed down, Detective Bowman opined that the gang members frequenting the club would just find another club to gather at and that closing down Xecutives would not solve the gang issue. Sergeant Grider testified that he had no problem with the club or its management or owners. Rather, his problem was with the patrons who frequented the club. So, the clear evidence indicates that the problem is not with the actions of the club's owners or employees.

Although TABC has argued that Xecutives is gang-controlled, the evidence does not support this. There is absolutely no evidence at all that the owners, management, and employees of Xecutives are affiliated with gangs. While there was one individual employee in the past who was known to associate with a gang, that employee (Califony Pondexter) was fired within one month of being hired. Moreover, his short period of employment by Xecutives occurred nearly two years ago. Other evidence of gang "control" of the club consisted of two photographs of individuals allegedly inside the club wearing "Trendsetter" vests or with gang hand signs,⁶

⁶ TABC Exs. 7 and 8.

testimony from Agent Garcia that he observed people make gang signs in the club, and Detective Bowman's testimony that he had heard that the Trendsetters were not going to allow themselves to be run out of the club. Each of these alleged grounds lose their weight when examined closely.

When questioned, TABC Agent Garcia clearly acknowledged that he was not a gang expert and could not reliably demonstrate gang hand signs. On the other hand, Detective Bowman was familiar with gang signs but did not testify to ever personally seeing such signs made inside the club during his two visits to the club. Instead, he observed them in a photograph purportedly taken inside the club. While he testified that he had heard gang members say they were not going to allow themselves to be run out of the club, he also acknowledged that Xecutives had taken steps to ban them from the club and that he believed Xecutives had genuinely attempted to keep the gang from the club. Finally, even assuming the two pictures were taken inside the club (which is uncertain because the pictures show what could be the dark premises of any bar or club with no link to Xecutives), those pictures do not establish any control over the club. They simply show a few people around a table with drinks in their hands—the people are not in positions where it would appear they have some level of control of the club (such as in a management office, behind the bar, at a DJ stand, etc.). While some gang members may be present within the club, to say the club is gang-controlled is not supported by the evidence and exaggerates the limited gang-related facts presented.

As noted above, 22 of the 27 incidents supported by police reports occurred outside the club. It is difficult to say that Xecutives should be solely liable for incidents in the parking lot, when the evidence shows that the parking lot is mutually shared by other stores and licensed establishments that also sell alcoholic beverages. The fact that three TABC-licensed businesses share the same shopping center increases the volume of patrons within the parking lot at any one time, especially when businesses close at similar late hours. The vast majority of the police incident reports took place in the shared parking lot with a number of incidents involving the police visually identifying weapons or drugs in parked cars. If Xecutives had exclusive control over its parking lot, as many licensed establishments do, then the club could be held responsible for monitoring and addressing all activity within that specific area. However, that is not the case

here and Xecutives has expressed frustration over its inability to lawfully be able to remove people from the parking lot, being limited to calling the police. And, although Xecutives does not have exclusive control over the parking lot, it has taken steps to prevent incidents in the parking lot. Xecutives management hired additional outside security and the police incident reports are filled with commentary of actions taken by club security to subdue individuals engaging in unlawful behavior. Both Kevin Walker and James Walker testified to being personally present in the parking lot on different occasions to disburse crowds at closing time.

Neither should Xecutives be faulted for calling the police when needed. Xecutives' management, employees and patrons should be encouraged to utilize KPD as a resource when needed. Leaving club owners without official recourse constitutes a significant risk to the owners and patrons of that establishment, as well as the community at large. Refusing to renew Xecutives' permits simply on the basis of the number of calls to the police would discourage reporting and encourage clubs to handle potentially dangerous situations without the training, expertise, and official authority of law enforcement. This is certainly contrary to the public interest.

Under the circumstances, this case really boils down to whether a permittee should be responsible for the actions of others on its own premises when neither it nor its agents have done anything to specifically encourage or allow that behavior. There are certainly good policy reasons for concluding why permits should not be allowed in such situations. And, in fact, it appears that the legislature has recognized these concerns and attempted to address them. Specifically, TEX. ALCO. BEV. CODE § 81.004 states that:

The commission, administrator, or county judge, as applicable, may refuse to issue an original or renewal permit, after notice and an opportunity for a hearing, if the commission, administrator, or county judge finds, that, at any time during the 12 months preceding the permit or license application, a common nuisance existed on the premises for which the permit or license is sought, regardless of whether the acts constituting the common nuisance were engaged in by the applicant or whether the applicant controlled the premises at the time the common nuisance existed.

“Common nuisance” is defined in TEX. CIV. PRAC. & REM. CODE § 125.015. In particular, a common nuisance exists when someone maintains a place to which persons habitually go to engage in any of a number of criminal activities, including various offenses involving drugs, gambling, prostitution, firearms, and engaging in organized criminal activity. So, it appears that TEX. ALCO. BEV. CODE § 81.004 would allow TABC to choose not to renew a club’s permit when the actions of others have created a nuisance at the club.

However, Section 81.004 was never cited nor relied upon by TABC in this case. The notice of hearing identified only Sections 11.46(a)(8) and 11.61(b)(7) of the Texas Alcoholic Beverage Code as the basis for non-renewal. Those provisions deal with the place or manner in which a permittee operates. Under the Commission’s rules—specifically 16 TEX. ADMIN. CODE 35.31—criminal offenses that occur on premises will support a violation of the place or manner restrictions of Sections 11.46(a)(8) and 11.61(b)(7) if the offenses are (1) committed by the licensee, or (2) committed by someone else on the licensee’s premises and the licensee knew or should have known of the offense or the likelihood of its occurrence and failed to take reasonable steps to prevent it. In this case, the ALJ does not believe that either of these elements under 16 TEX. ADMIN. CODE 35.31 has been shown.

Only two of the police incidents in the record allegedly involve conduct directly attributable to the licensee or its agents and employees. In one incident, club security was accused of using excessive force against an unruly patron. The patron was not seriously injured and no criminal charges resulted from the incident. In the other incident, Timothy Walker was arrested for being in possession of a weapon. He was stopped by a police officer who was investigating because he saw a vehicle parked behind the club. It was Timothy Walker’s vehicle, and he was exiting the club with the cash receipts for the evening. He had a handgun on him for security purposes. However, because the police officer thought Mr. Walker had a felony conviction, he arrested him for unlawful possession of a weapon. Mr. Walker did not have a prior felony conviction; therefore, his possession of the weapon was not unlawful and he was later released without being criminally charged. Neither of these incidents would support the finding of a place or manner violation under the Commission’s rules.

So, the only question is whether Xecutives knew or should have known of the excessive criminal activity at or near the club and failed to take reasonable steps to prevent it. Based on the evidence presented, the ALJ concludes that Xecutives has taken reasonable steps to prevent criminal activity from occurring. They have attempted to ban gang members from the premises, they have chosen not to hire gang members, they have frequently asked for law enforcement assistance, and they have frequently kicked people out of the club who are causing a disturbance.

Because the parking lot adjacent to the club is shared by other businesses, Xecutives does not have a right to control it and remove people from it. At most, they can only call the police if they see a disturbance and, in fact, the evidence reflects they have done this. Interestingly enough, even KPD officers testified to being somewhat fearful of the large crowds that gather in the parking lot near the club. Therefore, KPD officers have generally only approached the crowds in the parking lot when sufficient officers have been present (usually three to four officers if it involves a significant crowd, which is not uncommon based upon the testimony). If even KPD officers are concerned about attempting to control crowds in the parking lot, it is difficult to conclude that Xecutives' club security should be able to handle and control such crowds.

Finally, it cannot be argued that the "place" of the club is inherently unsafe. Unlike locations that are near a curve in the road or close to schools or other sensitive areas, there is nothing particularly sensitive about the club's location. In fact, there are two other establishments that have TABC permits in the same shopping center. While there might be an argument that it is not appropriate to have so many licensed clubs near each other, such an argument has not been made in this case. Further, that reasoning might support denial of a permit in the first place, but it hardly seems ground to not renew a permit later, since it did not prohibit issuance of the permits originally.

Ultimately, the ALJ finds that the evidence does not support non-renewal in this case—at least not under the "place or manner" provisions of Sections 11.46(a)(8) and 11.61(b)(7) of the Texas Alcoholic Beverage Code, because there is nothing inherently unsafe about the location nor is the manner in which Xecutives operates the club against the public morals, etc. While a

non-renewal might be justified under TEX. ALCO. BEV. CODE § 81.004 (which appears most relevant to the facts of this case), that provision was not cited nor relied on by TABC or KPD. And, since Xecutives was never given notice and an opportunity to defend against that provision, the ALJ cannot unilaterally apply it to this case after the fact.

Therefore, under the circumstances, the ALJ does not conclude that the place or manner in which Xecutives conducts its business warrants the refusal of the requested permits based on the general welfare, peace, morals, and safety of the people and on the public sense of decency. Because there is not a sufficient basis for TABC to deny renewal of the permits, the ALJ recommends that the application be granted and the requested permits be issued. In support of this recommendation, the ALJ makes the following findings of fact and conclusions of law.

III. FINDINGS OF FACT

1. The Texas Alcoholic Beverage Commission (TABC) issued a Private Club Registration Permit, a Private Club Late Hours Permit, and a Beverage Cartage Permit to Xecutives Private Club (Respondent) for premises located at 836 S. Fort Hood Street #32, Killeen, Bell County, Texas 76541.
2. Protests to the application were filed by the Killeen Police Department (KPD) and the Staff of the TABC.
3. On January 6, 2009, this case was referred to the State Office of Administrative Hearings (SOAH) for assignment to an Administrative Law Judge (ALJ) for hearing.
4. On January 15, 2009, 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.
5. The notice of hearing in this case indicated that the permit renewals were being opposed on the basis of Sections 11.46(a)(8) and 11.61(b)(7) of the Texas Alcoholic Beverage Code.
6. The notice of hearing did not contain any reference to Section 81.004 of the Texas Alcoholic Beverage Code, and TABC and KPD did not rely on that provision at any time during the hearing.

7. On February 13, 2009, a public hearing was convened on this matter in Waco, Texas, before ALJ Craig R. Bennett. The Respondent was represented by Kevin Walker, one of the owners/managers of Xecutives Private Club. TABC was represented by Judith Kennison, attorney. KPD was represented by Jerris Mapes. The hearing concluded and the record closed that same day.
8. There were at least 27 separate incidents involving police investigation at Xecutives' club or adjacent parking lot between July 2006 and January 2009. Out of these 27 incidents, five involved actual criminal activity occurring inside the club, ranging from assault to drug possession. For at least three of the five incidents that occurred in the club—and 10 of the 27 total incidents—club personnel were positively involved by either contacting the police, detaining the suspect, or attempting to stop the allegedly criminal behavior (such as efforts to restrain individuals attempting to fight).
9. None of Xecutives' owners, managers, or employees have any personal gang affiliation.
10. Xecutives does not currently employ any known gang members.
11. Xecutives has employed only one known gang member in the past, and that individual's employment was terminated within one month of his being hired.
12. Xecutives has attempted to ban a known gang from frequenting the club.
13. Xecutives' employees frequently have called the police for assistance with stopping criminal activity, to control crowds and possible criminal behavior, or to take into custody patrons that club security have detained for violations of the law.
14. Xecutives has implemented a dress code forbidding bandanas and white t-shirts and patrons are searched before being allowed to enter the club.
15. Two other late-night establishments are permitted to sell alcohol within the same shopping center as Xecutives' club.
16. Xecutives does not have complete control and custody over the parking lot adjacent to the club, because that parking lot is for the entire shopping center of which Xecutives is a part.
17. TABC has not identified any known criminal offenses committed by Xecutives owners, managers, or employees.
18. None of the criminal offenses identified by TABC in this case are offenses that Xecutives knew or should have known about (or the likelihood of its occurrence) and failed to take reasonable steps to prevent.

IV. CONCLUSIONS OF LAW

1. TABC 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. SOAH 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 and TEX. ALCO. BEV. CODE ANN. §§ 5.43 and 11.015.
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. Under the Commission's rules—specifically 16 TEX. ADMIN. CODE 35.31—criminal offenses that occur on premises can support a violation of the place or manner restrictions of Sections 11.46(a)(8) and 11.61(b)(7) if the offenses are (1) committed by the licensee, or (2) committed by someone else on the licensee's premises and the licensee knew or should have known of the offense or the likelihood of its occurrence and failed to take reasonable steps to prevent it.
5. A preponderance of the evidence does not show that the place or manner in which Xecutives conducts or may conduct its business warrants the refusal to renew the permits under TEX. ALCO. BEV. CODE ANN. §§ 11.46(a)(8) or 11.61(b)(7).
6. Based on the foregoing findings and conclusions, Xecutives' Private Club Registration Permit, Private Club Late Hours Permit, and Beverage Cartage Permits should be renewed.

SIGNED April 1, 2009.



CRAIG R. BENNETT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS