

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

April 11, 2011

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

**VIA REGULAR MAIL**

**RE: Docket No. 458-11-1501; Texas Alcoholic Beverage Commission vs. Lake  
Conroe Pub Inc., d/b/a Lake Conroe Pub**

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](http://www.soah.state.tx.us).

Sincerely,

A handwritten signature in black ink that reads "S. Burger".

Stephen Burger  
Administrative Law Judge

SJB/mr  
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**  
Sandra Patton Texas Alcoholic Beverage Commission, 427 W 20<sup>th</sup> Street, Suite 600, Houston, TX 77008- **VIA REGULAR MAIL**  
Emily Helm, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**  
Gary Beauchamp, Attorney at Law, P.O. Box 131225, The Woodlands, Texas 77393-1225 -**VIA REGULAR MAIL**



## II. LEGAL STANDARDS AND APPLICABLE LAW

The commission or its administrator may suspend or cancel a permit if the permittee, its agent, servant, or employee was intoxicated on the licensed premises, in violation of TEX. ALCO. BEV. CODE ANN. §§ 1.04(11), 11.61(b)(2) and 11.61(b)(13). The commission or administrator may suspend or cancel a permit if the permittee, its agent, servant, or employee sold, served, or delivered an alcoholic beverage to an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. §§ 1.04(11), 11.61(b)(2) and 11.61(b)(14).

“Intoxicated” is defined as (A) not having the normal use of mental or physical faculties by the introduction of alcohol, or (B) having an alcohol concentration of 0.08 or more. TEX. PENAL CODE ANN. § 49.01(2).

## III. DISCUSSION OF EVIDENCE AND ANALYSIS

### A. Petitioner’s Case

Respondent is the holder of a Mixed Beverage Permit and Mixed Beverage Late Hours Permit, MB645636, LB, issued by the TABC for the premises located at 19380 Hwy. 105 W., Suite 522, Montgomery, Montgomery County, Texas. Petitioner alleges that an agent for Respondent, Vera Davis, was intoxicated at Respondent’s establishment on October 26, 2009, (Count 1) and that Respondent sold, served, or delivered an alcoholic beverage to Vera Davis on October 26, 2009 (Count 2). Petitioner requests a 25-day suspension of Respondent’s permit for Count 1, and a 10 day suspension for Count 2. Petitioner’s witnesses’ testimony is summarized below.

Vera Davis testified that she is the permit holder. She admits that on October 26, 2009, she was arrested for driving while intoxicated (DWI) and subsequently found guilty. She remembers having two glasses of wine prior to the stop but remembers nothing else about that evening.

Oscar Williams is an agent with the TABC. He is familiar with the Pub and knows that Vera Davis is the president of its corporation. On July 3, 2010, he became aware that Ms. Davis had been arrested for DWI. On July 3, 2010, he spoke with Ms. Davis, who told him that she had been arrested for DWI on October 26, 2009, and that she had been drinking at the Pub before the arrest.

He has reviewed Ms. Davis' October 25 and 26, 2009, Pub receipts in the amounts of \$6.00 and \$8.00. He admits that the receipts do not state what was purchased. However, based on all his information, he issued an administrative citation against Respondent for the issues that are the subject of this proceeding.

Petitioner's Exhibit 3 shows that Ms. Davis had a blood alcohol content of .24 per 100 milliliters of blood sometime after her arrest for DWI on October 26, 2009. When the blood was drawn is not set forth in that Exhibit.

#### **B. Respondent's Case**

Respondent contends that there is no proof that Ms. Davis was served alcohol at the Pub prior to her being arrested for DWI. Respondent called John Kerekes, who testified that he has been the manager of the Pub for the past two years. He has examined the \$6.00 and \$8.00 receipts previously mentioned, and he stated they do not reveal what was purchased.

#### **C. Analysis**

Petitioner argues that the admission of Ms. Davis to drinking alcohol at the Pub, her admission to a judgment against her for DWI, two receipts showing that Ms. Davis purchased something at the Pub, and her blood alcohol content of .24, all prove that on October 26, 2009, she was intoxicated on Respondent's premises, and that while she was intoxicated, Respondent sold her an alcoholic beverage in violation of the Code. It is undisputed that sometime on October 26, 2009, Ms. Davis' blood alcohol content was .24 grams of alcohol per 100 milliliters of blood. There is no evidence as to when the blood sample was taken that day. However,

Ms. Davis having tested above a .08 blood-alcohol content, standing alone, does not prove she was intoxicated or had been served alcohol while she was on Respondent's premises. Petitioner, who has the burden of proof, must prove that Respondent's agent, servant, or employee knew or should have known that when Ms. Davis was on Respondent's premises that Ms. Davis was either at or above a 0.08 alcohol level, or knew or should have known that Ms. Davis did not have the normal use of her mental or physical faculties by the introduction of alcohol. Petitioner presented insufficient evidence of either. Petitioner presented no witnesses or any other evidence as to Ms. Davis' demeanor, actions, appearance, or activity while she was at the Pub on October 25 and October 26, 2009.

The only other evidence submitted regarding Ms. Davis' presence at the Pub on the date in question was the testimony of Agent Williams that Ms. Davis admitted to him that she had been drinking at the Pub before her arrest for DWI, and two receipts indicating that Ms. Davis purchased something at the Pub on October 25 and October 26, 2009. Even assuming that the two receipts were for alcohol, this evidence does not automatically result in a finding for Petitioner. Simply selling alcohol to a patron is not a Code violation.

It is the opinion of the ALJ that there is insufficient evidence that while at the Pub on October 25 or October 26, 2009, Respondent's agent, servant, or employee knew she was either at or above 0.08 alcohol level, or knew that she did not have the normal use of her mental or physical faculties from ingesting alcohol. There is also insufficient evidence that Respondent's agent, servant, or employee sold, served, or delivered an alcoholic beverage to an intoxicated person, allegedly Ms. Davis, on the aforementioned dates. While the ALJ may make reasonable inferences, in this matter it would be highly unreasonable based on the dearth of evidence to infer that Vera Davis was intoxicated while on Respondent's premises on October 25 or October 26, 2009.

#### IV. FINDINGS OF FACT

1. Lake Conroe Pub Inc., d/b/a Lake Conroe Pub (Respondent), is the holder of a Mixed Beverage Permit and Mixed Beverage Late Hours Permit, MB645636, LB, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 19380 Hwy.

105 W., Suite 522, Montgomery, Montgomery County, Texas.

2. A Notice of Hearing dated December 6, 2010, was issued by the TABC notifying Respondent of the time, date, and nature of the hearing; legal authority and jurisdiction under which the hearing would be held; applicable statutes and rules; and the matters asserted.
3. On February 18, 2011, a hearing was held before Administrative Law Judge (ALJ) Stephen J. Burger in Houston, Texas. The Respondent appeared at the hearing and was represented by Gary Beauchamp, attorney. The TABC was represented by Sandra Patton, staff attorney. The record was closed on the same day.
4. On October 25 and 26, 2009, Vera Davis was the president of Respondent.
5. On October 26, 2009, Vera Davis was arrested for driving while intoxicated (DWI) and subsequently found guilty.
6. On July 3, 2010, Agent Oscar Williams became aware that Vera Davis had been arrested for (DWI) on October 26, 2009, and Vera Davis informed Agent Williams that she had been drinking at Respondent's premises.
7. Vera Davis had a blood-alcohol content of .24 per 100 milliliters of blood sometime after her arrest for DWI on October 26, 2009.
8. Vera Davis consumed an unknown quantity of alcoholic beverages on Respondent's premises on October 25 and or 26, 2009.

## V. CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 28.01, 29.01 and 11.61(b)(13) and (14).
2. The State Office of Administrative Hearings (SOAH) has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003 and TEX. ALCO. BEV. CODE ANN. § 5.43.
3. Proper and timely notice of the hearing was given to Respondent pursuant to the TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. There is insufficient evidence that on October 25 and 26, 2009, Respondent or Respondent's agent, servant, or employee, Vera Davis, was intoxicated on the permitted premises in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 11.61(b)(13).
5. There is insufficient evidence that on October 25 and 26, 2009, Respondent or

Respondent's agent, servant, or employee, sold, served, or delivered an alcoholic beverage to an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 11.61(b)(14).

6. Petitioner is not authorized to suspend Respondent's Mixed Beverage Permit and Mixed Beverage Late Hours Permit MB645636, LB, for the premises located at 19380 Hwy. 105 W., Suite 522, Montgomery, Montgomery County, Texas.

SIGNED April\_\_11\_\_, 2011.

  
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**STEPHEN J. BURGER**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**DOCKET NO. 596012**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner</b>	§	<b>BEFORE THE TEXAS</b>
	§	
	§	
<b>VS.</b>	§	
	§	
<b>LAKE CONROE PUB INC. D/B/A LAKE CONROE PUB, Respondent</b>	§	<b>ALCOHOLIC</b>
	§	
<b>PERMIT NOS. MB645636, LB</b>	§	
	§	
<b>MONTGOMERY COUNTY, TEXAS (SOAH DOCKET NO. 458-11-1501)</b>	§	<b>BEVERAGE COMMISSION</b>

**ORDER**

**CAME ON FOR CONSIDERATION** this 10th day of August, 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 Stephen Burger presiding. The hearing convened on February 18, 2011 and the SOAH record closed the same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on April 11, 2011. The Proposal for Decision was properly served on all parties, who were given an opportunity to file exceptions and replies as part of the record herein. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge that 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 motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

I do not necessarily agree with all of the Analysis in the Proposal for Decision. Nonetheless, this Order rests on the specific facts of this case (as stated in the Findings of Fact), and on my judgment that the alleged violations were not proven by a preponderance of the evidence (as stated in Conclusions of Law Nos. 4 and 5).

**THEREFORE IT IS ORDERED** that **NO ACTION** be taken against Respondent's permits based on the allegations in this proceeding.

This Order will become final and enforceable on the 5th day of September, 2011, unless a Motion for Rehearing is filed **BEFORE** that date.

**SIGNED** this the 10th day of August, 2011, at Austin, Texas.

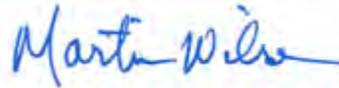


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Sherry K-Cook, Assistant Administrator  
Texas Alcoholic Beverage Commission

### **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 10th day of August, 2011.



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Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Stephen Burger  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
2020 North Loop West, Suite 111  
Houston, Texas 77018  
**VIA FACSIMILE: (713) 812-1001**

Lake Conroe Pub Inc.  
d/b/a Lake Conroe Pub  
**RESPONDENT**  
1120 N Frazier Street  
Conroe, Texas 77301  
**VIA REGULAR MAIL**

Gary Beauchamp  
**ATTORNEY FOR RESPONDENT**  
P.O. Box 131225  
The Woodlands, Texas 77393-1225  
**VIA REGULAR MAIL**  
**AND VIA FACSIMILE: (713) 292-3937**

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