

DOCKET NO. 632854

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, Jurisdictional Petitioner	§	
	§	
RANDY FLUITT, TIMOTHY W.	§	
WILKINSON, AND RICHARD DAVID	§	
YATES, Protestants	§	
	§	
V.	§	
	§	ALCOHOLIC
ORIGINAL APPLICATION OF HOOPER'S	§	
BAR AND GRILL, LLC, D/B/A	§	
HOOPER'S BAR AND GRILL, Applicant	§	
for MB , PE Permits	§	
	§	
	§	
CALHOUN COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-15-4581)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 16th day of December, 2015, 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 John H. Beeler presiding. The hearing convened on August 5, 2015 and the SOAH record closed that same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on October 5, 2015. 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. Exceptions titled "Objections to Proposal for Decision" were filed by Protestants on October 22, 2015. No replies were filed. On November 10, 2015, the Administrative Law Judge filed a letter recommending that "the Proposal for Decision should stand as written".

After review and due consideration of the Proposal for Decision, the exceptions and the Administrative Law Judge's November 10 letter, and with the following modifications to Finding of Fact No. 5 and Conclusion of Law No. 5, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order as if such were fully set out and separately stated herein.

Finding of Fact No. 5 is modified to read:

The proposed premises are to be located in a wet area at 2441 West Maple, Port O'Connor, Calhoun County, Texas.

Conclusion of Law No. 5 is modified to read:

Applicant's original application for a Mixed Beverage Permit and a Beverage Cartage Permit should be granted.

The modifications to Finding of Fact No. 5 and Conclusion of Law No. 5 are made to correct typographical errors.

All motions, requests for entry of Proposed Findings of Fact and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied unless specifically adopted herein.

IS THEREFORE ORDERED that Applicant's original application for a Mixed Beverage Permit and a Beverage Cartage Permit be **GRANTED**.

This Order will become **final and enforceable** on the 9th day of January, 2016, **unless a Motion for Rehearing is filed by the 8th day of January, 2016.**

SIGNED this the 16th day of December, 2015, at Austin, Texas.



Sherry K-Cook, Executive Director
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 16th day of December, 2015.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

John Beeler
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
300 W. 5th Suite 502
Austin, TX 78701
VIA FAX (512) 322-2061

Ashley Pall
ATTORNEY FOR APPLICANT
101 W. Goodwin, Suite 1116
Victoria, TX 77901
VIA FIRST CLASS MAIL, CMRRR #70090960000121491384

Richard C. King, Jr.
ATTORNEY FOR PROTESTANTS
406 Sterzing Street, Suite 202
Austin, TX 78704
VIA FIRST CLASS MAIL, CMRRR#70090960000121491391

Terri Hamby
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: terri.hamby@tabc.texas.gov

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The hearing in this case was held on August 5, 2015, in Victoria, Texas, before ALJ John H. Beeler. Applicant appeared and was represented by attorney Ashley Pall. TABC's Staff (Staff) was represented by staff attorney Terri Hamby. Protestants appeared and were represented by attorney Richard C. King, Jr. The hearing concluded and the record closed that same day.² Issues of notice or jurisdiction are addressed in the proposed findings of fact and conclusions of law without further discussion here.

II. DISCUSSION AND ANALYSIS

A. Applicable Law

Protestants have the burden of proof to establish, by a preponderance of the evidence, that the permits should not be issued. 1 Tex. Admin. Code § 155.427. Texas Alcoholic Beverage Code § 11.46(a)(8) provides that an original permit may be denied if "the place or manner in which the applicant may conduct his business warrants the refusal of a permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency."

B. Arguments and Evidence

1. Staff

Staff did not take a position on the application and appeared solely as a jurisdictional petitioner. It produced its records relating to the application.

2. Protestants

Protestants contend that the place or manner in which Applicant would operate the premises would be against the general welfare, health, peace, morals, and safety of the community. Applicant

² While preparing this proposal for decision, the ALJ noticed that a copy of a proposed settlement agreement had been filed. The ALJ did not read or in any way learn of the specific contents of that filing.

previously operated another licensed premises in Port O'Connor, an unincorporated area of Calhoun County. Protestants do not assert that Applicant conducted business at its previous location in any way contrary to these concerns. The proposed business is to be located on West Maple Street in Port O'Connor, a "wet" area, meaning that alcohol may be legally bought and sold there. Specifically, Protestants contend that the area is primarily residential and that licensing the premises would result in increased traffic, safety issues, noise levels, and crime.

Testimony of David Yates

Mr. Yates lives in New Braunfels, Texas, and is planning to build a vacation home in Port O'Connor two lots away from Applicant's premises. He is concerned that traffic from the premises will cause problems. Maple Street has no street lights and no shoulder. He is worried that drunks will urinate on his property and vandalize it. He is also worried that crime occurring on and around the premises will tax the resources of the Calhoun County Sheriff's Department. He notes that the premises has only 20 parking places and overflow customers will park on the street. No traffic studies have been conducted.

Testimony of Timothy W. Williamson

Mr. Williamson lives in Sugarland, Texas, but owns a vacation home next door to the proposed premises. He and his family spend some time at the vacation home and also rent it out to other vacationers. He is concerned about noise, public safety, and crime if the permits are granted. He anticipates that vandalism and theft will increase if the permits are issued.

Testimony of Randy Fluitt

Mr. Fluitt lives in Dripping Springs, Texas, and owns several properties in the Port O'Connor area. He was instrumental in the development of the area and believes the area should be residential. Mr. Fluitt is concerned that excess traffic will be a problem if the permits are issued.

3. Applicant

Testimony of James Hooper

Mr. Hooper is the owner of Hooper's. He plans on operating the premises as a restaurant that also serves alcohol. He caters to an older crowd and does not allow loud music or rowdy behavior. He operated his prior restaurant for 7 years and never experienced problems with noise, crime, traffic, or TABC violations. That business was located in a mixed use area of residential and commercial structures. Most of the Port O'Connor area is mixed use, as is Hooper's. A marina is located on one side of the property and one of the Protestant's vacation home is on the other side. TABC visited his prior location on approximately four or five random occasions and never cited him for any violation. Also, during that time, police showed up on two occasions. Once it involved a woman tripping while leaving the restaurant and the other time it involved a noise complaint. Neither incident resulted in any action taken against Applicant.

According to Mr. Hooper, parking should be adequate, especially because many people in the Port O'Connor area use golf carts instead of regular automobiles. Recent legislation enabled people in the Port O'Connor area to use golf carts, and it has become a popular form of transportation. The premises contains parking specifically for golf carts.

The area where the premises are to be located is unincorporated and has no zoning regulations. Another restaurant that serves alcohol is located within a third of a mile from the proposed premises, and another is located in a residential area of Port O'Connor. With the exception of the three Protestants, the area residents have been supportive of opening the restaurant.

Testimony of Paul McGee

Mr. McGee is a licensed realtor in Port O'Connor, which is unrestricted in use of property. He is familiar with the area of the proposed premises and does not believe there will be a problem with additional traffic. He also does not see any reason the premises will cause property values to fall. Because Port O'Connor is a tourist area, the premises will actually be an asset to the area.

Other licensed premises in the area have not resulted in crime or safety problems. He has seen a vast increase in the use of golf carts since the law changed allowing their use in the area.

Mr. McGee is familiar with Applicant's prior location and that Applicant caters to an older crowd. Applicant has never put up with a rowdy crowd and never experienced problems with his clientele.

C. Analysis

After considering the evidence, the ALJ concludes that nothing in the record establishes that the place or manner in which Applicant may conduct its business warrants the denial of the permits. Applicant has a record of operating a licensed premises without causing problems of traffic, noise, safety or crime. Although the area of the proposed premises is located close to residences, no regulations or zoning ordinances prohibit the operation of a business that sells alcohol.

Accordingly, the ALJ finds that the place or manner in which Applicant would conduct his business will not warrant the refusal of the permits based on the general welfare, peace, morals, and safety of the people, and recommends that the permits be granted.

III. FINDINGS OF FACT

1. Hooper's Bar and Grill LLC, d/b/a Hooper's Bar and Grill (Applicant) has filed an original application with the Texas Alcoholic Beverage Commission (TABC) for a Mixed Beverage Permit and a Beverage Cartage Permit for the premises located at 2441 West Maple, Port O'Connor, Calhoun County, Texas.
2. Protests to the application were filed by Randy Fluitt, Timothy W. Wilkinson, and Richard David Yates.
3. TABC 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. On August 5, 2015, a public hearing was convened in Victoria, Texas. Administrative Law Judge (ALJ) John H. Beeler presided. Applicant was represented by attorney Ashley Pall. TABC's Staff was represented by staff attorney Terri Hambi. Protestants appeared and were represented by attorney Richard C. King, Jr.

5. The proposed premises are to be located in a wet area at 241 West Maple, Port O'Connor, Calhoun County, Texas.
6. The premises will operate as a restaurant that also serves alcohol.
7. No zoning or other restrictions prohibit Applicant from operating a restaurant that also serves alcohol at the proposed location.
8. The evidence failed to establish that the manner or place in which Applicant would operate the premises will be contrary to the general welfare, health, peace, morals, and safety of the community.

IV. CONCLUSIONS OF LAW

1. Petitioner has jurisdiction over this case pursuant to Texas Alcoholic Beverage Code Chapters 1 and 5 and § 6.01, 11.46, and 28.01.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Texas Government Code chapter 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, Texas Government Code § 2001.051.-052.
4. Based on the proposed findings of fact, a preponderance of the evidence failed to show that the place in which Applicant proposes to conduct its 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. Tex. Alco. Bev. Code § 11.46(a)(8).
5. Applicant's the original application for a Mixed Beverage Permit and a Beverage Cartage Permit should be granted.

SIGNED October 5, 2015.



JOHN H. BEELER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

October 5, 2015

Sherry Cook
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA INTERAGENCY MAIL

RE: SOAH Docket No. 458-15-4581; Texas Alcoholic Beverage Commission, Jurisdictional Petitioner; Randy Fluitt, Timothy W. Wilkinson, and Richard David Yates, Protestants v. Original Petitioner of Hooper's Bar and Grill, LLC d/b/a Hooper's Bar and Grill

Dear Ms. Cook:

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 Texas Admin. Code § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in cursive script, appearing to read "John Beeler".

John Beeler
Administrative Law Judge

JB/vg

Enclosure

cc Terri Hamby, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA INTERAGENCY MAIL
Emily Helm, 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
Ashley Pail, Attorney at Law, 5606 N. Navarro St., Victoria, Texas 77904 - VIA REGULAR MAIL
Richard C. King, Jr., Attorney, 406 Sterzing Street, Ste. 202, Austin, TX 78704 - VIA REGULAR MAIL