

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED on this 15th day of March, 2007, at Austin, Texas.

On Behalf of the Administrator,


Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

CGG/vr

Wade Bingaman
ATTORNEY FOR RESPONDENT
VIA FAX (512) 478-2438

PIZZA PROPERTIES LTD.
RESPONDENT
d/b/a PETER PIPER PIZZA
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VIA REGULAR MAIL

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Licensing Division
McAllen District Office

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

February 14, 2007

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

HAND DELIVERY

RE: Docket No. 458-07-0752; Texas Alcoholic Beverage Commission v. Pizza Properties Ltd., d/b/a Peter Piper Pizza, License Nos. BE311949 and BE436169

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.

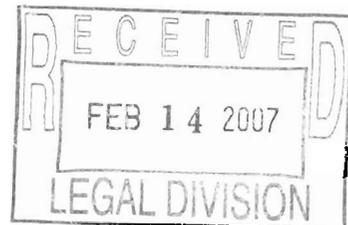
Sincerely,

A handwritten signature in black ink that reads "Sarah G. Ramos".

Sarah G. Ramos
Administrative Law Judge

SGR/ed
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA HAND DELIVERY**
Christopher Gee, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
VIA HAND DELIVERY
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
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Wade Bingaman, Jackson & Bingaman, LLP, 409 W. 14th Street, Austin, TX 78701-**VIA REGULAR MAIL**
Armando X. Lopez, Attorney for Protestant, 1208 Laredo St., Laredo, TX 78040- **VIA REGULAR MAIL**



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SOAH DOCKET NO. 458-07-0752

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
 Petitioner	§	
	§	
V.	§	OF
	§	
PIZZA PROPERTIES LTD.,	§	
D/B/A PETER PIPER PIZZA	§	
LICENSE NOS. BE311949 AND	§	
BE436169,	§	
 Applicant	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Scan, Inc., d/b/a Webb County Community Coalition (Protestant), protested the renewal application filed by Pizza Properties, Ltd., d/b/a Peter Piper Pizza (Applicant), with the Texas Alcoholic Beverage Commission (TABC or Commission), asserting that the manner in which Applicant operated its business poses a risk of harm to the general welfare and health of children who go there. Because Applicant has no history of Texas Alcoholic Beverage Code (Code) violations and Applicant requires its seller-servers to be TABC-certified, the Administrative Law Judge (ALJ) finds that Applicant's licenses should be renewed.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Applicant holds retail dealer's on-premise license BE-311949 for the premises at 4600 San Dario, Unit A, Laredo, Texas, and license BE-436169 for the premises at 4600 Guadalupe, Laredo, Texas. The hearing on the protest convened on January 24, 2007, in the Webb County Courthouse Jury Room, 1110 Victoria, Laredo, Texas, before the undersigned Administrative Law Judge (ALJ). Attorney Wade Bingaman represented the Applicant, and attorney Armando X. Lopez represented the Protestant. TABC Staff Attorney Christopher Gee represented Staff, but Staff took no position on the protest. Notice and jurisdiction are addressed more completely in the Findings of Fact and Conclusions of Law.

II. EVIDENCE AND ARGUMENTS

A. Protestant's Evidence

The Protestant organization was formed in 1999 with the mission of preventing substance abuse, particularly of alcohol and tobacco, by Webb County children. More than 1,000 citizens signed protest letters asking Applicant to stop selling alcohol in its restaurants.¹ Christopher Craddock, Protestant's vice president, testified about Protestant's concerns.

First, Applicant's marketing focuses on children. The business is named after a nursery rhyme, and its website shows young children flanked by balloons and wearing party hats.² One page is entitled "Birthdays & Parties" and refers to game tokens and tickets for the "birthday child," "place setting(s), hats & balloons," and "goodie bags" that include "fun toys, puzzles, coloring sheets, crayons and candy!" Other pages describe a "birthday club," "school & team programs," "games & entertainment" with the "hottest video games you can play," and "the ability to win cool stuff." Also, Mr. Craddock testified that Applicant has rides, arcades, and video games for children. With this marketing focus on children, Applicant has a higher responsibility than other businesses to protect them, he added.

Further, Applicant sells beer by the pitcher; this makes it difficult to monitor consumption and encourages binge drinking, Mr. Craddock testified. Alcohol is served not at the tables but at a beverage station; thus, a customer can purchase beer and provide it to others, including intoxicated persons or minors. Mr. Craddock provided a photograph of one of Applicant's locations that shows a partially emptied pitcher of beer, beer in four mugs, and two soft drink cups sitting on a table at which no persons are present.³ Moreover, the television and arcade areas of the restaurants are sectioned-off from the areas where beverages are served. All these characteristics of Applicant's

¹ Protestant's Ex. 3.

² Protestant's Ex. 1.

³ Protestant's Ex. 4.

beverage service increase the likelihood of children's exposure to intoxicated persons and, on their ride home, intoxicated drivers.

Applicant has entered into at least one agreement with a school in which Applicant agreed to "prohibit the sale or consumption of alcoholic beverages . . . while students from the school are present."⁴ To Mr. Craddock, this reflected Applicant's awareness that serving alcohol while children are present could pose a risk to them.

Mr. Craddock also testified about the number of police calls to Applicant's business. In 2004, there were 151 calls combined to Applicant's two locations, and in 2005, there were 119 calls. In the first eleven months of 2006, there were 122 calls, 70 to the San Dario location and 52 to the Guadalupe location.⁵ In contrast, Mr. Craddock noted, the Pizza Hut on Guadalupe had eight calls in the same year. In Mr. Craddock's opinion, the large number and serious nature of the incidents demonstrate that Applicant's business is not conducted in a manner that supports the welfare of children.

B. Applicant's Evidence

1. John Hjlamquist

Mr. Hjlamquist is Applicant's president. He said the business is a Texas franchisee for a multi-state corporation; the franchise has been in Texas for almost 25 years. Applicant has 40 locations in the state, and beer is sold at all of them. Beer sales produce about four percent of Applicant's revenue.

⁴ Protestant's Ex. 2.

⁵ For 2006, Mr. Craddock tallied the number of calls for which police reports were written, and the number for each category of call was: abandoned children (5); accidents (5); alarms (2); assault (1); burglary of vehicle (14); civil disturbance (3); criminal mischief (3); domestic disturbance (2); fight (4); hit-and-run collision (2); indecent exposure (1); injured person (2); investigate suspicious car/person (5); lost child (1); man down (1); person with gun (1); stalking (1); telephone harassment (1); terroristic threat (1); theft (5); and traffic violation (14). Protestant's Ex. 5.

Applicant requires its seller-servers to complete in-house training about the laws relating to alcohol sales.⁶ In addition, about two or three years ago, Applicant began requiring its seller-servers to be TABC-certified, Mr. Hjlamquist testified.

2. Sharon Voelz

Ms. Voelz is Applicant's vice-president for human resources and risk management. She said that because Applicant recognizes its business caters to families, Applicant has strong training requirements. Ms. Voelz added that when students take a field trip to one of Applicant's locations, the area supervisor may decide to suspend the service of alcohol for the duration of the trip.

3. Rich Hazeltine

As Applicant's training director, Mr. Hazeltine assesses training needs and modifies them as needed. He said Applicant trains its employee about alcohol service, and since 2004, has required those who serve alcohol to attend the TABC's training. Applicant not only pays the fees for the seller-server training, it pays employees' salaries while they attend the training.

4. Juan Ordonez

Mr. Ordonez previously managed Applicant's San Dario location, and now manages a new Laredo location on the Zapata Highway. He has worked with the company for more than ten years. Mr. Ordonez is seller-server certified and said he and the employees monitor alcohol consumption on the premises. When a party is scheduled, a party host is assigned to the group for the duration of the party, and the party host monitors persons to be sure they do not become intoxicated. Similarly, store managers walk through the restaurants while they are on duty to

⁶ Applicant's Exs. 9 and 10.

check for intoxicated patrons. As an added safeguard, Applicant has a policy that requires employees to call a taxi cab for anyone who is intoxicated, but Mr. Ordonez has never had to call one for a customer.

According to Mr. Ordonez, Applicant's beer prices are in the upper half of the price range as compared to similar restaurants in Laredo, such as Pizza Hut and Chili's. Further, while some events, marketed primarily for children, do not have alcohol sales, alcohol is served at others.

5. Timothy Shipton

Mr. Shipton is a sixth-generation Laredo resident. As a TABC agent for nineteen years, he was responsible for TABC enforcement in the Laredo area. He mentioned places in Laredo where children are present and alcohol is sold, such as the Laredo International Fair, the Bucks hockey games, and church celebrations. When he worked for TABC, he issued permits for some of those events.

6. Applicant's Documentary Evidence

An elementary school principal, in a letter in support of the application, wrote that students like to go on field trips to Applicant's business, and no alcohol is consumed during the field trips. Besides, the principal wrote, "[t]here is nothing wrong for a family to . . . enjoy a fun filled evening with pizza for the children and a beer for the adults after a hard week at work."⁷

At Applicant's request, TABC's Captain of Region 8 wrote a letter about a sting operation conducted at Applicant's San Dario location during which Applicant's employee was, "firm in requesting proof of age," and "confidently denied the sale."⁸

⁷ Applicant's Ex. 3. The principal also wrote, "It is up to the child's parent to instill the values of over indulgence [*sic*] in alcoholic beverages." The ALJ assumes the principal meant something other than what she wrote.

⁸ Applicant's Ex. 4.

Applicant's policies regarding the sale and consumption of alcohol and alcoholic beverage servers state that Applicant, "does not knowingly sell, serve or provide alcoholic beverages to an individual who is obviously intoxicated." The policies likewise prohibit the sale of alcohol to persons younger than 21 years of age. And Applicant has a specific policy outlining the reasons a server may refuse service, such as when a person is intoxicated, a safety threat, or underage.⁹

Applicant's exhibits 1 and 2 show the number of police calls in 2005 to the Walmart store and in 2006 to the H.E.B. store. While Applicant did not break down the calls as Protestant did, the lists show similar types of crimes as those reported for Applicant's locations.

C. Arguments

Protestant asserted that Applicant's method of selling beer by the pitcher supports binge drinking. As for Applicant's policies against serving minors and intoxicated persons and requiring training for its seller-servers, Protestant argued that Applicant clearly realizes its business poses a particular risk to children; otherwise, Applicant would not have to place so much pressure on its employees to make judgement calls. Similarly, Applicant cited the number of police calls to Applicant's locations to support its position that selling alcohol fuels the danger to children.

Applicant highlighted its training requirements to show its servers are qualified to detect intoxicated persons. Its competitors are free to serve alcohol, and it is common for alcohol to be served at family events in the Laredo community. In addition, Applicant noted that it has had no Code violations.

⁹ Applicant's Ex. 7.

D. Applicable Law

Chapter 61 of the Code pertains to licenses to sell beer.¹⁰ In the notice of hearing, Staff cited Code § 61.42(a)(3) as the specific standard by which this case should be decided. That section refers to a county judge's authority to approve a retail dealer's license. One reason listed as a basis for denial is when the place or manner in which an applicant may conduct business warrants a refusal of a license based on the general welfare, health, peace, morals, safety, and sense of decency of the people. The ALJ believes a more appropriate section under which to consider these applications is Code § 61.71 (a)(17). Section 61.71(a)(17) lists the same reasons for denial as § 61.42(a)(3), but vests authority to grant or deny the application in the Commission or Administrator. Since there was no objection to notice or jurisdiction, the ALJ finds the parties had notice of the legal standard by which the renewal applications would be considered and evaluates the evidence using the provisions of § 61.71(a)(17).

III. ANALYSIS

The ALJ appreciates the efforts Protestant has invested in preventing substance abuse by Webb County children. Protestant's case was clearly presented and focused, and Protestant's concerns merit consideration. It is reasonable to conclude that alcohol consumption could be more difficult to monitor when beer is sold by the pitcher than by the glass. Moreover, Protestant's concerns about the difficulty of monitoring consumption when part of the restaurant is sectioned off and not visible to the seller-servers appear to be well-founded.

Even so, the ALJ found Applicant's evidence in favor of the renewal applications to be more persuasive than Protestant's objections. To Applicant's credit, the company not only provides in-house training, but it requires seller-servers to receive TABC certification. Applicant has established procedures to monitor persons in its restaurants, and its policies clearly prohibit alcohol sales to minors and intoxicated persons. Applicant's employee successfully followed the policy when TABC

¹⁰ Code § 61.01.

conducted the sting operation. Furthermore, Applicant has not been sanctioned for any Code violation. Finally, Applicant has given its area supervisors the authority to suspend alcohol sales under certain circumstances. Based on these factors, the ALJ finds that Applicant's licenses should be renewed.

IV. FINDINGS OF FACT

1. Scan, Inc., d/b/a Webb County Community Coalition (Protestant), protested the renewal application filed by Pizza Properties, Ltd., d/b/a Peter Piper Pizza (Applicant), with the Texas Alcoholic Beverage Commission (TABC or Commission), asserting that the manner in which Applicant operated its business poses a risk of harm to the general welfare and health of children who go there.
2. TABC's staff sent notice of hearing concerning the protest to Applicant and Protestant on November 16, 2006. The notice included the time, date, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
3. The hearing was held on January 24, 2007, in the Webb County Courthouse Jury Room, 1110 Victoria, Laredo, Texas. The Applicant, Protestant, and Staff were represented at the hearing.
4. Applicant requires its seller-servers to complete in-house training about laws relating to alcohol sales.
5. Since 2004, Applicant has required its seller-servers to be TABC-certified.
6. When school students take a field trip to one of Applicant's locations, Applicant's Laredo area supervisor may decide to suspend the service of alcohol for the duration of the field trip.
7. Applicant's managers monitor alcohol consumption on the premises.
8. When a party is scheduled on the premises, a party host is assigned to the group for the duration of the party, and the party host monitors persons to be sure they do not become intoxicated.
9. Applicant's policies prohibit the sale of alcohol to intoxicated persons and to minors.
10. Applicant's employees are required to call a taxi cab for anyone who is intoxicated.

11. During a TABC minor-sting operation on October 21, 2006, at Applicant's San Dario location, Applicant's employee requested proof of the minor's age and refused to sell alcohol to the minor.
12. Applicant has no history of Texas Alcoholic Beverage Code (Code) violations.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this case. Code §§ 5.31, 5.33, 5.35, and 61.71.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law. Code § 5.43 and TEX. GOV'T CODE ANN. §§ 2003.021(b) and 2003.042(5).
3. Proper and timely notice of the hearing was provided as required in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the Findings of Fact and Conclusion of Law, there was insufficient evidence to demonstrate that Applicant operates its business in a manner that poses a risk of harm to the general welfare and health of children who go there.
5. Applicant's licenses should be renewed.

SIGNED February 14, 2007.



SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS