

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge
January 9, 2012

RECEIVED

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FABC HOUSTON
LEGAL

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

VIA REGULAR MAIL

RE: Docket No. 458-12-1626, Texas Alcoholic Beverage Commission vs. D. Washington, L.L.C. d/b/a Level 3 (MB, LB)

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,

A handwritten signature in cursive script that reads "Lindy Hendricks".

**LINDY HENDRICKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

[LH/el]
Enclosure

xc Sandra Patton, Texas Alcoholic Beverage Commission, 427 West 20th Street, Suite 600, Houston, TX 77008 - VIA REGULAR MAIL (with Certified Evidentiary Record and Hearing CD/s)
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA REGULAR MAIL
Ronald Monshaugen, Attorney for Respondent, 1225 North Loop West, Ste. 640, Houston, TX 77008 - VIA REGULAR MAIL
City of Houston c/o Yolanda Woods, Senior City Attorney, Protestant, 900 Bagby Street, 3rd Floor, Houston, TX 77002- VIA REGULAR MAIL

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DOCKET NO. 458-12-1626

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
	§	
	§	
CITY OF HOUSTON, Protestant	§	
	§	
	§	
VS.	§	OF
	§	
ORIGINAL APPLICATION OF D. WASHINGTON PARK, L.L.C. D/B/A LEVEL 3 (MB, LB), Applicant	§	
	§	
	§	ADMINISTRATIVE HEARING

PROPOSAL FOR DECISION

D. Washington Park , L.L.C. d/b/a Level 3 (Applicant) filed an original application with the Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) for a mixed beverage permit and mixed beverage late hours permit, for the premises located at 2510 Washington Avenue in Houston, Harris County, Texas. The City of Houston (Protestant) protested the application based on the general welfare, peace, morals, and safety concerns of the people.

After considering the arguments and evidence presented by the parties, the Administrative Law Judge (ALJ) finds there is an insufficient basis for denying the application and recommends that the permits be issued.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There were no contested issues of notice, jurisdiction, or venue in this proceeding. Therefore, those matters are set out in the proposed Findings of Fact and Conclusions of Law without further discussion here.

On November 18, 2011, a public hearing was convened in this matter in Houston, Texas, before ALJ Lindy Hendricks. Petitioner was represented by attorney Sandra Patton. Applicant was represented by attorneys Ronald Monshaugen and Albert Van Huff. Protestant was represented by attorney Yolanda Woods. The record was closed the same day.

II. APPLICABLE LAW

The statutory foundation for the protest to this application is Tex. Alco. Bev. Code § 11.46(a)(8), which provides:

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 that any of the following circumstances exist:

- (8) the place or manner in which the applicant 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.

III. EVIDENCE

Pursuant to Texas Alcoholic Beverage Code (Code) Section 5.435, the public was provided a reasonable opportunity to appear and to speak on any issue related to the hearing. Mary Lawler, Donna Shepherd, and Margaret Poissant oppose the issuance of the application.

Protestant alleges that Applicant's officers Ali and Hassan Davari (Mssrs. Davari) have an extensive violation history which warrants denial of the application. The witnesses and evidence to be presented in this hearing are substantially the same as those in protest hearing *Texas Alcoholic Beverage Commission v. D. Washington, L.L.C. d/b/a Patio Pub*, SOAH Docket No. 458-11-5067 (October 28, 2011), held on August 19, 2011, with the exception of any criminal offenses and administrative violations that occurred or were settled since that hearing. The parties in this hearing, therefore, stipulated to the complete record of *Patio Pub*, including but not limited to the administrative and criminal history.

Staff presented its notice of the hearing issued to the parties, along with Applicant's protest investigation. As stated in its notice, Staff had no independent evidence to protest the issuance of the permits. Applicant has met all Commission requirements for issuance of the original permits, and has properly posted and/or published notice and complied with all Code requirements.

Protestant offered the testimony of Houston Police Officer Matthew Dexter and offense reports to show criminal offenses occurred at Mssrs. Davari's other businesses since the hearing on *Patio Pub*. On October 28, 2011, an investigation inside Treasures resulted in three arrests involving prostitution, violation of the Sexually Oriented Business Ordinance (SOB), and an intoxicated dancer. On October 20, 2011, an investigation at Cover Girls resulted in two arrests for prostitution and an arrest for SOB violation. Officer Dexter does not believe the criminal cases have been adjudicated, unless the dancers entered a plea agreement. The cases were submitted to TABC. He testified that all sexually-oriented businesses and gentlemen's clubs commit these offenses. According to Officer Dexter, Treasures is one of the largest sexually-oriented businesses and has more violations than any other sexually-oriented businesses in Houston.

Protestant presented the testimony of TABC Agent Robert Holloway. Agent Holloway conducted the protest investigation. He ran the calls for service and crime reports for the location and found no offense or crime reports. According to Agent Holloway, the proposed business is located in a highly commercial area. There is no church or playground, and only a few residences are located near the proposed business. Agent Holloway testified that there is nothing unusual about the location that warrants denial of the application. However, he believes that because Mssrs. Davari operate businesses with TABC violations, Applicant will continue to commit violations if granted the permits. He testified that there are no pending administrative cases against Applicant or Mssrs. Davari. Agent Holloway testified that Staff is not protesting this original application as part of the terms of a settlement agreement which allowed TABC to collect a fine.

Ali Davari testified on behalf of Applicant. Mr. Davari testified he would not operate a sexually-oriented business at the proposed location. He described the proposed business as a tri-level sports bar, discotheque, and martini bar. Mr. Davari paid \$4 million for the property. As

compared to the location of Patio Pub, the proposed business is located in a more commercial and less congested area of town. All his employees will be seller-server trained and his managers will attend a Manager's Awareness Program offered by TABC.

IV. ANALYSIS

Protestant bears the burden of proof in establishing that Applicant's business operations create an unusual condition or situation that is contrary to the general welfare, peace, morals, and safety of the people and on the public sense of decency. Protestant alleges Applicant's manner of operation, as indicated by an extensive violation history, creates an unusual circumstance which warrants denial of the application. Protestant argues that Applicant's history shows a pattern of violations that will most likely continue if Applicant is granted a new permit.

In addition to the evidence presented in *Patio Pub*, Protestant offered two additional offense reports. However, there is no evidence that these offenses have not been adjudicated criminally or administratively and, therefore, are given little weight by the ALJ.

Since the hearing on *Patio Pub*, TABC settled all open administrative cases against Applicant's officers. Specifically, TABC settled all pending violations against Treasures from December 5, 2008, to September 27, 2011. Among the provisions of the agreement, Treasures was assessed a suspension of 60 days with an opportunity to pay a civil penalty of \$1,700 per day for a total civil penalty of \$102,000. Applicant's officers agreed not to apply for any sexually-oriented businesses, gentlemen's clubs, or bikini bars for 2 years and waived any opportunity for hearing or appeal on the matter. TABC agreed to not join as a protestant in this hearing, while reserving its rights to seek cancellation or refusal of any permit for any public safety violations.

It was suggested that TABC settled the case in order to collect a fine. It bears noting that TABC has the authority to revoke, cancel, or suspend any permit for *any* violation. TABC has the authority to seek cancellation of the permit, refusal of the renewal application, or a suspension of the permit *without* an opportunity to pay a civil penalty for any prostitution offense. TABC is in the best

position to know Applicant and Msrs. Davari's complete administrative and criminal history and how they compare to other permitted businesses in the State of Texas. With full knowledge and authority, TABC knowingly and freely entered into the agreement, did not seek revocation or cancellation, and allowed Msrs. Davari to remain in business.

Msrs. Davari have operated seven other TABC-permitted premises in Texas for more than 21 years. All administrative violations, including adopted cases from Houston Police offense reports, were disposed by either written warning or suspension. None of the violations resulted in a permit revocation. Applicant has always been allowed to pay a civil penalty. Moreover, Applicant was granted an original permit to operate a bar with a mixed beverage permit and mixed beverage late hours permit in December 2010. There is no comparative evidence to show Applicant's violation history is more or less egregious than other similarly situated permitted businesses. More tellingly, TABC did not seek cancellation or revocation of any permit, or denial of this application. The ALJ finds that Applicant's prior permit history has not warranted cancellation or denial of a permit and does not warrant the denial of this new application.

As a result, Protestant's evidence was insufficient to establish that the place or manner in which Applicant will conduct his business warrants denial of Applicant's permit requests. The ALJ recommends that Applicant be granted the permits sought in this Application.

V. FINDINGS OF FACT

1. D. Washington Park L.L.C. d/b/a Level 3 (Applicant) has filed an application with the Texas Alcoholic Beverage Commission (TABC) for a mixed beverage permit and mixed beverage late hours permit, for premises located at 2510 Washington Avenue, Houston, Harris County, Texas.
2. Protest to the application was filed by the City of Houston, based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency.
3. A Notice of Hearing dated October 24, 2011, was issued by TABC Staff notifying all parties that a hearing would be held on the application and informing the parties of the time, place, and nature of the hearing.

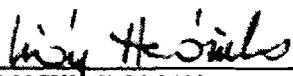
4. On November 18, 2011, a hearing began before ALJ Lindy Hendricks in Houston, Texas. TABC Staff appeared at the hearing through its Staff Attorney Sandra Patton. Applicant appeared and was represented by its attorneys, Ronald Monshaugen and Albert Van Huff. Protestant appeared and was represented by attorney Yolanda Woods. The record closed on November 18, 2011.
5. Mssrs. Davari have operated seven other TABC-permitted premises in Texas over a period of 21 years.
6. All administrative violations attributed to those seven operations have resulted in written warnings or suspensions with an opportunity to pay a civil penalty.
7. None of those violations resulted in a permit revocation.
8. Applicant was granted an original permit to operate a bar with a mixed beverage permit and mixed beverage late hours permit in December 2010.
9. Applicant has met all TABC requirements for holding the permits requested for the proposed licensed premises at this location.
10. The premises are located in a commercial area with no church or playground, and only a few residences are nearby.
11. No unusual conditions or situations exist that would warrant refusal of the permits.

VI. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under Tex. Alco. Bev. Code chs. 5, 11, 28, and 29, and §§ 6.01 and 11.46(a)(8).
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 ch. 2003.
3. Proper and timely notice of the hearing was provided to all parties pursuant to the Administrative Procedure Act, Tex. Gov't Code ch. 2001, and 1 Tex. Admin. Code § 155.401.
4. Issuance of the requested permits does not adversely affect the general welfare, health, peace, morals or safety of the people or violate the public sense of decency. Tex. Alco. Bev. Code §11.46(a)(8).

5. Applicant's application for a mixed beverage permit and mixed beverage late hours permit, for the premises located at 2510 Washington Avenue, Houston, Harris County, Texas, should be granted.

SIGNED January 6, 2012.



LINDY HENDRICKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TABC DOCKET NO. 604382

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
CITY OF HOUSTON, Protestant	§	
	§	
VS.	§	
	§	
ORIGINAL APPLICATION OF D. WASHINGTON PARK, L.L.C. D/B/A LEVEL 3 (MB, LB), Applicant/Respondent	§	ALCOHOLIC
	§	
	§	
	§	
	§	
HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-12-1626)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 12th day of April, 2012, 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) Lindy Hendricks presiding. The hearing convened on November 18, 2011 and the SOAH record closed on the same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on January 6, 2012. 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 were filed by the City of Houston on January 26, 2012, and the Applicant replied on February 10, 2012. On February 13, 2012, the ALJ responded to the Exceptions and Reply and recommended no changes to the Proposal for Decision.

After review and due consideration of the Proposal for Decision, the City's Exceptions, Applicant's Reply and the ALJ's Response, 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. 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.

IT IS THEREFORE ORDERED that the Original Application of D. Washington L.L.C. d/b/a Level 3 for the issuance of a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit be **GRANTED**.

This Order will become **final and enforceable** on the 8th day of May, 2012, **unless a Motion for Rehearing is filed by the 7th day of May, 2012.**

SIGNED this the 12th day of April, 2012, 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 12th day of April, 2012.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Honorable Lindy Hendricks
ADMINISTRATIVE LAW JUDGE
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