

At page 7 of the Corrected PFD, the ALJ states:

If Applicant's prior permit history has not warranted cancellation or denial of a permit, it also does not warrant the denial of this new application.

I interpret this as the ALJ's *factual* determination, based on a review of the record in this case, that this applicant's violation history does not merit denial of this permit application. Standing alone, this sentence does not accurately state a *legal* requirement or standard. It also does not accurately state the *policy* of the Texas Alcoholic Beverage Commission. There are many factors that influence whether an agency even requests cancellation or denial of a permit. Likewise, there are many reasons why an agency's attempt to cancel or deny a permit in any particular situation may be unsuccessful. In any event, it is clear that sheer longevity in the business does not by itself warrant approval of an application or denial of an attempt to cancel. Just because a problematic permittee has been tolerated in the past does not mean that an attempt to address the problem now should be dismissed out of hand.

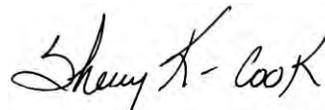
With this understanding of the ALJ's factual determinations and after review and due consideration of both the original and corrected Proposals for Decision, as well as the City of Houston's Exceptions, Applicant/Respondent's Reply and Petitioner's Motion, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the December 31, 2011 Corrected 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 Patio Pub 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 20th day of April, 2012, **unless a Motion for Rehearing is filed by the 19th of April, 2012.**

SIGNED this the 27th day of March, 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 27th day of March, 2012.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Honorable Lindy Hendricks
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
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VIA FACSIMILE: (512) 322-0474

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PROTESTANT
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PROTESTANT
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VIA REGULAR MAIL

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APPLICANT/RESPONDENT
5335 Washington Ave.
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VIA REGULAR& CERTIFIED MAIL: 7006 2760 0004 7904 2176

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State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

December 13, 2011

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DEC 14 2011

TABC HOUSTON
LEGAL

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

VIA REGULAR MAIL

RE: Docket No. 458-11-5067; Texas Alcoholic Beverage Commission vs. Original Application of D. Washington, LLC. d/b/a Patio Pub

Dear Mr. Steen:

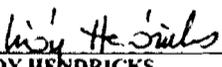
Petitioner filed a Motion for Order Nunc Pro Tunc and Correcting the Proposal for Decision on 11/8/2011. The City of Houston's Exceptions to Proposal for Decision were timely filed on November 10, 2011. Respondent filed its Reply on November 23, 2011. The Administrative Law Judge (ALJ) has reviewed Petitioner's Motion, the City's Exceptions, as well as Respondent's Reply.

Based on Petitioner's Motion, the ALJ has corrected the Proposal for Decision issued October 28, 2011, to reflect a hearing date of August 19, 2011, and to show the correct violation dates for Treasures.

The ALJ does not recommend any other changes to the Proposal for Decision.

Please find enclosed the Corrected Proposal for Decision in this case.

Sincerely,



LINDY HENDRICKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

2020 North Loop West Suite 111 Houston, Texas 77018
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[LH/ell]

Enclosure

xc Ramona Perry, Texas Alcoholic Beverage Commission, 427 West 20th Street, Suite 600, Houston, TX 77008 - **VIA REGULAR MAIL** (with Certified Evidentiary Record)
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 Nirja Aiyer, Senior City Attorney, Protestant, 900 Bagby Street, 3rd Floor, Houston, TX 77002-
VIA REGULAR MAIL
Westwood Civic Assn. c/o Donna Shepherd or Jake Parsons, Protestant, 5119 Nett Street, Houston, TX 77007- **VIA REGULAR MAIL**

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 August 19, 2011, a public hearing was convened in this matter in Houston, Texas, before ALJ Lindy Hendricks. Petitioner was represented by attorney Ramona Perry. Applicant was represented by attorneys Ronald Monshaugen, Albert Van Huff, and Paul Nugent. The City was represented by attorney Nirja Aiyer. The record remained open until September 9, 2011, so the parties could file written closing arguments.

II. APPLICABLE LAW

The statutory foundation for the protest to this application is TEX. ALCO. BEV. CODE ANN. § 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.

Protestants specifically allege that 1) the premises where the Applicant seeks a permit is in close proximity to residences, a church, and a children's playground, and that 2) Applicant has an extensive violation history which warrants denial of the application.

III. PUBLIC COMMENT

Rich Weber, Jane West, Mark Kirschke, Ray Hill, and Reagan Champagne oppose the original application.

IV. EVIDENCE

Staff presented the testimony of TABC Agent Robert Holloway. Agent Holloway testified that D. Washington, L.L.C. is seeking a mixed beverage permit and mixed beverage permit for the location at 5335 Washington Avenue in Houston, Texas. According to Agent Holloway, and as reflected in the original application, Ali and Hassain Davari are officers of D. Washington, L.L.C. The original application states that the business would be a bar.

Agent Holloway said that Staff is protesting this original application because Messrs. Davari are the holders of other permits issued by TABC, and Messrs. Davari have an extensive violation history. Evidence was presented that Messrs. Davari are sole officers or managers of Centerfolds, Gold Cup, Cover Girls, The Splendor, Trophy Club Gentlemen's Restaurant & Bar, Treasures, and Pub XS. With the exception of Pub XS, the businesses are gentlemen's club.

Documentary evidence shows that Centerfolds obtained its permits in August 1990. This establishment has incurred 11 violations including six sexual contacts and two solicitations for prostitution.¹

Gold Cup obtained its permits in October 1991. Its administrative history shows 10 violations occurred, including four sexual contacts, one solicitation for prostitution, and one failure to report breach.

¹ The number of violations was determined by reviewing all the Waiver Agreements and Orders. The summary provided by the Public Inquiry Screen does not correctly reflect the Waiver Agreements and Orders in type or number of violations. Written warnings were not included.

Cover Girls obtained its permits in January 1999 and incurred three violations.

The Splendor obtained its permits in January 2000. This establishment has incurred eight violations, including three sexual contacts.

Trophy Club Gentlemen's Restaurant & Bar obtained its permits in June 2001. The violation history shows there was a total of six violations, including two sexual contacts and one solicitation for prostitution.

Treasures obtained its permits in July 1995. There have been a total of 30 violations, 20 of which occurred in 1996.

Pub XS obtained its permits in December 2010 and has incurred no violation.

According to the documentary evidence, all of the violations have been disposed by either a suspension or civil penalty.

Applicant offered the deposition of Richard Wills, TABC Regional Supervisor of Licensing for Region 3 East Texas.

Mr. Wills and Agent Holloway testified that Messrs. Davari are qualified to obtain a permit. However, because of Messrs. Davari violation history Agent Holloway speculated they would not be law-abiding at the new business.

Mr. Wills and Agent Holloway also testified that the location is qualified to have a permit. There are no schools, churches, or daycares within 300 feet of the proposed business. According to Agent Holloway there are many other permitted businesses located closer to the daycare and church than Applicant's proposed business. Mr. Wills and Agent Holloway described the area as an entertainment district with mixed commercial and residential use. According to Mr. Wills, Washington Avenue is similar to 6th Street in Austin, Texas, in that it has a high concentration of

permits, approximately 62 permits. Agent Holloway stated that it is not unusual to issue a new permit to an area with numerous permitted businesses. Mr. Wills testified that the fact that neighbors do not want a particular business in the vicinity of their neighborhood is an insufficient basis to deny an application for an otherwise qualified applicant in a qualified location.

Agent Holloway testified that the roads are jammed with traffic on Friday nights between the 5700 and 2500 block of Washington Avenue. He is concerned that adding a club to an area saturated with clubs would exacerbate existing traffic and parking issues. On the other hand, Mr. Wills explained that businesses along Washington Avenue are working with TABC, the Houston Police Department, the City parking directors, and neighbors to address traffic, parking, and noise with a Good Neighbor Policy (Policy). As part of the Policy, businesses hire Houston Police officers for bike patrol, keep the music volume down, change the location of speakers, and insulate fences where they back up to residential neighborhoods. The City enforces their parking code while HPD officers act as traffic control. Since the implementation of the Policy, between July 2010 and 2011, there was a 90% decrease in criminal activity in that area.

Donna Joyce Shepherd resides at the corner of Nett and Reinerman Street, three blocks from the proposed location. She testified in opposition of the original application. She has observed intoxicated people fighting and a person sleeping in her front yard. Large boulders were removed from her property. Her flowerbeds have been destroyed and a glass was thrown through her window. She attributes these activities to patrons of nearby bars because they occur between 10:00 pm and 2:30 am when the bars open and close.

Margaret Poissant is the president of Westwood Civic Association. She testified in opposition of the original application. Because Messrs. Davari operate sexually oriented businesses, Ms. Poissant is concerned that they may open a sexually oriented business at the proposed location. She is also concerned that the proposed business would increase crime, traffic, and noise.

The City of Houston presented the testimony of Houston Police Officer Matthew Dexter. Officer Dexter is familiar with Messrs. Davari's other businesses. He believes some of those businesses, known as "bikini bars," are actually operating illegally as sexually oriented businesses. He believes the term "bikini bar" is a moniker for a sexually oriented business. Officer Dexter believes Messrs. Davari are not telling the truth when, through their attorney, they said they are operating "legally" as a "bikini bar." Because he believes Messrs. Davari are untrustworthy and that their other businesses have incurred violations, he does not believe they will operate a regular bar or comply with state law or city ordinances. Officer Dexter believes the proposed business will eventually be a "bikini bar."

Ali Davari testified on behalf of Applicant. Mr. Davari testified he would not operate a sexually oriented business or bikini bar at the proposed location. As stated in his application and supporting affidavit, Mr. Davari testified the business would be a bar. The bar would sell food, shows sporting events on television, and provide music for patrons. He testified that unlike other bars in the area, he does not lease the property. Mr. Davari invested \$5 million and purchased four properties on Washington Avenue, with the intent of diversifying into the bar business and away from gentlemen's clubs. He testified he would participate in the Good Neighbor Policy and require all his employees to be seller-server certified.

V. ANALYSIS

Protestants allege that the premises where the Applicant seeks a permit is in close proximity to residences, a church, and a children's playground, which warrants denial of the application. Protestants bear 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.

In this instance, Applicant is fully qualified to obtain its requested TABC-issued permits. The Houston City Secretary and Harris County Clerk certified Applicant's location as being within a "wet area" for a mixed beverage permit, with a late hours permit, in Houston, Harris County, Texas.

Mr. Wills and Agent Holloway confirmed that the Applicant is qualified to hold an alcoholic beverage permit and the location is not disqualified based on any distance requirements from schools or churches. The evidence shows the area is comprised of a mixed commercial and residential use. Numerous permitted businesses exist and are located closer to the residences, school, and daycare than Applicant's proposed business. The location of the proposed business does not create an unusual situation or circumstance that warrants denial of the application.

Residents in the neighborhood believe that, because Applicant operates other sexually oriented businesses, the proposed business will also be a sexually oriented business. Similarly, the City believes that because Messrs. Davari operate sexually oriented businesses that the proposed business will also be a sexually oriented business or gentlemen's club. Ali Davari testified that he will not operate the proposed business as sexually oriented business or "bikini bar." The concerns of the City and residents are purely speculative. There is no evidence that Applicant will operate a sexually oriented business at the proposed location. To the contrary, the evidence indicates Applicant will operate a bar without a sexually oriented business permit issued by the City.

Protestants further allege Applicant has an extensive violation history which warrants denial of the application. The City and Staff believe that an inference can be made from Applicant's violation history. It is their position that Applicant's permit history shows numerous violations, and this history shows a pattern of violations that will most likely occur at Applicant's new place of business.

According to the documentary evidence, Mssrs. Davari operate seven other TABC-permitted premises in Texas. In total, there have been 68 violations attributed to those seven operations over a period of 21 years. All of the violations have been disposed by either written warning or suspension. None of those 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. Since the issuance of that last permit, Applicant received only one new, unadjudicated violation. If Applicant's prior permit history has not warranted cancellation or denial of a permit, it also 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.

VI. FINDINGS OF FACT

1. D. Washington L.L.C. d/b/a Patio Pub (Applicant) has filed an application with the Texas Alcoholic Beverage Commission (TABC) for a mixed beverage permit and mixed beverage late hours permit, for a premises located at 5335 Washington Avenue, Houston, Harris County, Texas.
2. Protests to the application were filed by TABC Staff, City of Houston, Westwood Civic Association, and concerned residents, 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 May 20, 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 August 19, 2011, a hearing began before ALJ Lindy Hendricks in Houston, Texas. TABC Staff appeared at the hearing through its Staff Attorney Ramona Perry. Applicant appeared and was represented by its attorneys, Ronald Monshaugen, Albert Van Huff, and Paul Nugent. The City appeared and was represented by attorney Nirja Aiyer. Westwood Civic Association and residents appeared. The record closed on September 9, 2011.
5. Mssrs. Davari operate seven other TABC-permitted premises in Texas.
6. In total, there have been 68 violations attributed to those seven operations over a period of 21 years.
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. No unusual conditions or situations exist that would warrant refusal of the permits.

VII. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5, 11, 28, and 29, and §§ 6.01 and 11.46(a)(8). TEX. ALCO. BEV. CODE ANN. § 1.01 *et seq.*
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 ANN. 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 ANN. 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 ANN. § 11.46(a)(8).
5. Applicant's application for a mixed beverage permit and mixed beverage late hours permit, for the premises located at 5335 Washington Avenue, Houston, Harris County, Texas, should be granted.

SIGNED DECEMBER 13, 2011.



LINDY HENDRICKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS