

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 14, 2011

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

VIA REGULAR MAIL

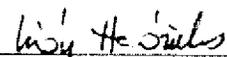
**RE: Docket No. 458-10-6019; Texas Alcoholic Beverage Commission vs.
Hereweareagain Inc. d/b/a The Penthouse Club**

Dear Mr. Steen:

Respondent's Exceptions to Proposal for Decision in the above-referenced case were timely filed on July 29, 2011. The Administrative Law Judge (ALJ) has reviewed Respondent's Exceptions, as well as Petitioner's Reply to Exceptions and Protestant's Response to Exceptions filed on August 30, 2011. The ALJ is of the opinion that Findings of Fact No. 2 in the Proposal for Decision should be amended to show TABC joined in the protest. The ALJ does not recommend any other changes to the Proposal for Decision.

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

Sincerely,



LINDY HENDRICKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

LH/mr

Enclosure

- xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Lisa Crissman, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W 20th 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**
James Decgear, Attorney at Law 5945 Broadway, San Antonio, TX 78209 -**VIA REGULAR MAIL**
Nirja Aiyer, City of Houston, P.O. Box 1562, Houston, TX 77251-1562 – **VIA REGULAR MAIL**
Barbara Lilly, Briargrove Property Owners, Inc, 1800 Augusta, Suite 200, Houston, TX 77057 – **VIA REGULAR MAIL**
Oliver Pennington, Council Member, District G, 900 Bagby, First Floor, Houston, TX 77002 – **VIA REGULAR MAIL**

DOCKET NO. 458-10-6019

TEXAS ALCOHOLIC BEVERAGE COMMISSION,	§	BEFORE THE STATE OFFICE
 Petitioner	§	
	§	
CITY OF HOUSTON, and BRIARGROVE PROPERTY OWNERS, INC.	§	
 Protestants	§	
	§	
VS.	§	OF
	§	
RENEWAL APPLICATION OF HEREWEAREAGAIN INC. D/B/A THE PENTHOUSE CLUB PERMIT NOS. MB519622, LB519623	§	
 Respondent	§	ADMINISTRATIVE HEARING

AMENDED PROPOSAL FOR DECISION

This Amended Proposal for Decision is issued to amend Findings of Fact No. 2 to show TABC joined in the protest. This is the only amendment to the original Proposal of Decision issued June 20, 2011.

Hereweareagain, Inc. d/b/a The Penthouse Club (Respondent or Penthouse) submitted a renewal application (Application) for its mixed beverage permit and mixed beverage late hours permit from the Texas Alcoholic Beverage Commission (TABC or Commission) for the premises located at 2618 Winrock, Houston, Harris County, Texas. The Commission’s Staff, the City of Houston (City), Briargrove Property Owners, Inc. (Briargrove), and Councilmember Oliver Pennington protested the renewal application. After considering the arguments and evidence presented by the parties, the Administrative Law Judge (ALJ) finds there is sufficient basis for denying the renewal of the permits and, therefore, recommends that the renewal permits be denied.

I. PROCEDURAL HISTORY

On March 31, 2011, a public hearing was convened in this matter in Houston, Texas, before ALJ Lindy Hendricks. TABC appeared and was represented by Lisa D. Crissman, staff attorney. Applicant appeared and was represented by attorney James O. Deegear. The City appeared and was represented by attorney Nirja Aiyer. Briargrove and Councilmember Pennington appeared. 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. The hearing concluded on March 31, 2011, and the record was closed on May 6, 2011, after additional evidence was offered and final arguments made.

Although TABC originally remained a neutral party in the protest, it later joined as a protestant in February. The City presented the case for Protestants. TABC presented no other evidence at the time of the hearing other than the pre-filed certified copies of TABC records and protest forms. The ALJ finds that Respondent was not surprised or harmed by TABC's position on the protest or by any undiscovered evidence.

Respondent's permit history shows violations involving drugs, solicitation, and public lewdness were adjudicated by TABC in 2007. In 2008 the City filed an injunctive action against Penthouse, alleging Penthouse was a common nuisance and sought declaratory judgment that Penthouse was ineligible for a sexually oriented business permit. On December 31, 2008, a Final Judgment was entered, finding Penthouse operated as a common nuisance, permanently enjoining Penthouse from operating a sexually oriented business, and closing the club for a year until September 2009. Therefore, the ALJ only gives full weight and consideration to evidence of incidents that occurred after December 31, 2008.

In August 2010, the City initiated a contempt action in district court, alleging Penthouse violated the Final Judgment by operating a sexually oriented business. A contempt hearing was held on February 10, 2011. At the time of this protest hearing, a final order had not been issued. Respondent argued that the City is collaterally estopped from relitigating the same issues and incidents in this protest hearing. The ALJ did not find Respondent's arguments persuasive for the

following reasons: TABC was not a party to the contempt action; there was not a full hearing to litigate a relevant disputed issue within the agency's jurisdiction, to-wit the denial of the renewal of the alcohol permits; the City could not have sought denial of Respondent's renewal application in district court; the applicable statute provides that protest hearings be heard by the Commission or SOAH for the denial or granting of alcohol permits; and no final order had been rendered in the contempt action. Therefore, the ALJ gives full weight and consideration to evidence of incidents that occurred after December 31, 2008, even those included in the City's contempt action.

II. DISCUSSION

A. Applicable Law

Petitioner and Protestants have alleged the following grounds for the protest:

1. The place or manner in which Respondent or Respondent's agent, servant, or employee, conducts his business warrants the refusal and/or cancellation or suspension of Respondent's permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.46(a)(8), 11.61(b)(2), 11.61(b)(7), and 16 TEX. ADMIN. CODE § 35.31(c)(16), to-wit: violated any law, regulation, or ordinance of the county or municipality in which the licensed premises is located by operating a Sexually Oriented Business/Enterprise (SOB) without a city SOB permit, violation of which is detrimental to the general welfare, health, peace, and safety of the people.

2. The place or manner in which Respondent or Respondent's agent, servant, or employee, conducts his business warrants the refusal and/or cancellation or suspension of Respondent's permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.46(a)(8), 11.61(b)(2), 11.61(b)(7), 104.01, and 16 TEX. ADMIN. CODE § 35.31(c), to-wit: engaging in or permitting conduct on the premises which is lewd, immoral, or offensive to the public decency.

B. Public Comment

City Councilmember Pennington opposes the Application.

C. Evidence

Barbara Lilly testified on behalf of Briargrove. She believes Respondent is operating a sexually oriented business and that criminal activities and violations of the Texas Alcoholic Beverage Code (Code) occur at the business. She testified that Respondent is located across a bayou and an 8-foot fence from the neighborhood playground. Ms. Lilly objects to the Penthouse's renewal because children are able to see the front door of Penthouse from the playground and, conversely, people from Penthouse can see children on the playground. In her opinion, Penthouse does nothing to shield itself from the neighborhood. Call logs made by Briargrove security were offered into evidence, showing calls for service made by its residents.

TABC Sergeant Wendy Shields testified to her investigation of the protest filed by the City on September 28, 2009. The basis of the protest was that Penthouse was a common nuisance and that the neighbors complained about criminal activities associated with the club.¹ In her investigation, Sgt. Shields reviewed administrative history which included four sales of narcotics in July and August 2007. Those violations were adjudicated in 2007 under TABC case number 570972. Sgt. Shields also checked calls for service between November 2007 and 2009. In 2008, a change of ownership was reported to TABC, whereby Vicent Cabella purchased the business.

Carl Smith testified he is an officer with the Houston Police Department Narcotics Division. In 2007, Officer Smith conducted investigations at Penthouse, resulting in charges of drugs and lewdness violations. These violations are part of the permit administrative history, and were the basis of the Permanent Injunction.²

¹ The basis of the protest submitted to TABC included nuisance and other allegations. Testimony was elicited at the hearing about possible false statements on the renewal application(s). This PFD examines only evidence related to the allegations set forth in the Second Amended Notice of Hearing, dated February 3, 2011, the grounds of which form the basis of this protest hearing. TABC did not allege nuisance or false statements in its notice.

² TABC Exh. 1. Respondent settled its administrative cases for violations dated 7/11-8/8/2007 under Case No. 570972 for a 60-day suspension or \$9,000 civil penalty.

Donald Miller is an officer with the Houston Police Department Vice Division. Officer Miller testified that on February 27, 2010, he entered Penthouse in an undercover capacity to conduct an investigation. After paying a fee to enter, Officer Miller was approached by an entertainer. They agreed to go to the Champagne Room, a private area, where the entertainer provided private dances. Officer Miller paid \$125 for the purchase of a bottle of champagne to enter the Champagne Room. He testified he received a few private dances. During the course of the dances, the entertainer sat on his lap. She then bent over and pulled her G-string to the side, exposing her vagina. She exposed herself on more than one occasion. According to Officer Miller, the entertainer also agreed to provide a specified sexual activity, masturbation, for a fee of \$300. He testified the entertainer masturbated on two occasions. Officer Miller testified he and seven undercover officers worked the investigation that night, and that four entertainers were arrested for prostitution. Based on the investigation and his observations, Officer Miller believes Penthouse was operating as a sexually oriented business.

Fidel Lopez is an officer with the Houston Police Department Vice Division. He testified that on February 27, 2010, he entered Penthouse in an undercover capacity to conduct an investigation. Officer Lopez and his partner paid a \$12 cover charge and were seated near the main stage. He approached the main stage where an entertainer, dressed in red lingerie, performed a strip-tease dance for him. The entertainer later joined Officer Lopez at his table. Officer Lopez engaged in a conversation with the entertainer and asked her for sexual activity. According to Officer Lopez, the entertainer said she could not give him a price because it would be prostitution. The entertainer told Officer Lopez that what she does to protect herself is indicate the number of dances as a way of stating a price. The entertainer then stated it would cost fifteen dances for 30 minutes in the Champagne Room. Officer Lopez understood each dance to be \$20, for a total cost of \$300. When Officer Lopez asked her the price again, the entertainer lifted up three fingers and then closed her fist twice. Officer Lopez asked if she meant \$300, and the entertainer nodded in the affirmative. Officer Lopez then inquired what he could get for the amount, pointing to her buttocks, vagina, and mouth. He understood from her nods that she agreed to oral and vaginal sex but not anal sex. The

entertainer then performed a private dance for Officer Lopez. He described the dance as a striptease in which she removed her clothing. According to Officer Lopez, the entertainer and Penthouse did not have a sexually oriented business permit for performing that that kind of dance.

On July 22, 2010, Officer Lopez returned to Penthouse in an undercover capacity and received a private dance from an entertainer. The entertainer removed her dress, wearing bottoms that exposed the top of her buttocks. The entertainer positioned herself on Officer Lopez's lap, moving back and forth and touching the officer's clothed genital area with her buttocks. Officer Lopez believed the dance was intended to arouse and stimulate sexual gratification because the dancer removed her clothes and was rubbing her buttocks back and forth over his genital area. After the dance he asked the entertainer if she provided "full service," a term he believes is commonly understood as sex in exchange for money. The entertainer stated she did not, but that she knew someone who did. After speaking with another entertainer, she returned and told Officer Lopez that the second entertainer agreed to have sex with him for \$300. When asked by Officer Lopez if he paid the cost to get into the Champagne Room, "then 300 to fuck," the second entertainer responded yes. Once in the Champagne Room, the second entertainer removed her dress to perform a private dance. Her breasts were less than completely covered by latex pasties, exposing the areola. She then placed her breasts on Officer Lopez's face, a violation of the sexually oriented business ordinance for erotic touching. She moved herself back and forth on Office Lopez, while moaning. In his opinion, the intent of the dance was to arouse when the entertainer removed her dress and moved back and forth on his lap, moaning. He believes the primary business of Penthouse is sexual entertainment.

Rob Tayler is the general manager of Penthouse. He testified Penthouse was closed from September 2008 to September 2009. He testified that the primary business of Penthouse is food and beverage which makes up 65% to 75% of their revenue. The remainder of their revenue comes from cover charges, house fees, and similar things. He explained the entertainers are independent contractors who pay a house fee to work at Penthouse. The entertainers control their own schedules and performances, and make their money from customer tips. According to Mr. Tayler, Penthouse has strict policies and procedures. Entertainers are required to read and adhere to these policies and procedures. In addition to the policies and procedures, entertainers go through an orientation with a

manager and receive further training from legal counsel. Any violation of the sexually oriented business ordinance may result in immediate termination. Depending on the night, there may be two to four managers on duty and 30 to 35 entertainers. Managers are responsible for monitoring all activities in the club. They look for possible violations such as fondling or erotic touching. They make certain entertainers are wearing full bottoms and covering their breasts with opaque latex and body paint. Mr. Tayler testified that any violation of the ordinance or state law is done without the consent or knowledge of Penthouse management. He stated no entertainment or alcohol is allowed outside club doors.

III. ANALYSIS

Protestants allege Respondent is engaging in or permitting conduct on the premises which is lewd, immoral, or offensive to the public decency. Section 104.01 of the Code describes such conduct to include the exposure of a person, permitting lewd or vulgar entertainment or acts, and permitting solicitations of persons for immoral or sexual purposes. Protestants also allege Respondent is operating a sexually oriented business without a sexually oriented business permit in violation of its ordinance and is a detriment to the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. Section 28.117 of the City of Houston Code (Houston Code) sets out the types of business considered as “sexually oriented businesses,” including “adult cabarets.” It defines “adult cabaret” as, “an enterprise whose primary business is the offering to customers of live entertainment which is intended to provide sexual stimulation or sexual gratification to such customers, and which is distinguished by or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities, or specified anatomical areas.” “Entertainment” includes a “dance, musical rendition or striptease, whether performed by employees, agents, contractors, or customers” and “shall also mean bartenders, waiters, waitresses, and other employees exposing specified anatomical areas or engaging in specified sexual activities in the presence of customers.” “Specified anatomical areas” include less than completely and opaquely covered human genitals, pubic region or pubic hair, buttock, or female breast or breasts or any portion thereof that is situated below a point immediately above the areola. “Specified sexual activities” include acts of human masturbation, fondling or other erotic touching of human genitals, buttock or female breast(s).

Respondent contends that its primary business is not an adult cabaret but rather the sale of alcoholic beverages because its primary source of revenue comes from alcohol sales. However, the definition of an adult cabaret does not examine how much or where a business derives its revenue but rather what type of entertainment is offered.

The credible evidence offered at the hearing demonstrated that Penthouse is operating a sexually oriented business without a sexually oriented business permit, and that Penthouse permitted conduct on the premises which is lewd, immoral, or offensive to the public decency. Evidence shows Penthouse no longer has a sexually oriented business permit with the City and that it is permanently enjoined from operating a sexually oriented business. However, the testimony evidence establishes that breasts and buttocks are exposed, erotic touching of human genitals occurs, acts of human masturbation and sexual intercourse are simulated on the licensed premises.

The evidence shows that on February 27, 2010, during the course of a striptease, an entertainer moved her panties to the side and exposed her vaginal area to an undercover officer. The same entertainer also masturbated in front of the officer. The exposure of the vagina, a specified anatomical area, and masturbation, a specified sexual activity, during a striptease dance were clearly intended to provide sexual stimulation or sexual gratification to its customer. On the same date, another entertainer agreed to have sex with an undercover officer for \$300.

The evidence shows on July 22, 2010, a Penthouse entertainer exposed her buttocks. A second entertainer exposed her breasts, touched her breasts to an officer's face, and simulated sexual intercourse by moving back and forth across the officer's genital area and moaning. This second entertainer also agreed to sex in exchange for money and thereby permitted solicitation of persons for immoral or sexual purposes. Such acts satisfy the definition of lewd conduct and the type of entertainment provided by a sexually oriented business.

When the Commission or Administrator is authorized to suspend a license or permit, a permittee shall be given an opportunity to pay a civil penalty.³ Section 11.641(c) of the Code

³ Code § 11.64.

provides that a civil penalty, including cancellation of a permit, may not be imposed on the basis of a criminal prosecution in which the defendant was found not guilty, the criminal charges were dismissed, or there has not been a final adjudication. Respondent offered evidence of dismissals, pleas, and a conviction resulting from approximately 22 of the 30 to 40 arrests made at Penthouse. Respondent argues that non-renewal of a permit is tantamount to cancellation. While denial of a renewal application may or may not have the same effect as a cancellation, the statute is clear and unambiguous that Section 11.641(c) only applies to a suspension or cancellation case. The Legislature did not include language granting statutory authority to consider alternatives to the granting or denial of an application. In this case, Staff and Protestants are seeking denial of the renewal application, therefore, the ALJ gives little weight to the criminal dispositions.

Based on the evidence, the ALJ finds Respondent engaged in or permitted the exposure of a person, permitted lewd or vulgar entertainment or acts, and permitted solicitations of persons for immoral or sexual purposes. The ALJ further finds Respondent is operating a sexually oriented business without a sexually oriented business permit. Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8) and the request of Petitioner, the ALJ recommends the denial of Respondent's renewal application.

IV. FINDINGS OF FACT

1. Hereweareagain, Inc. d/b/a The Penthouse Club (Respondent/Penthouse) has filed a renewal application with the Texas Alcoholic Beverage Commission (TABC) for its mixed beverage permit MB519622 and mixed beverage late hours permit LB519623, for a premises located at 2618 Winrock, Houston, Harris County, Texas.
2. Protests to the application were filed by the City of Houston and Briargrove Property Owners, Inc., and TABC joined in the protest, based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency, asserting that Respondent is operating a sexually oriented business in violation of Houston city code.
3. A Second Amended Notice of Hearing dated February 3, 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 March 31, 2011, a hearing began before ALJ Lindy Hendricks in Houston, Texas. TABC Staff appeared at the hearing through its Staff Attorney Lisa D. Crissman.

Respondent appeared and was represented by attorney James O. Deegear. The City appeared and was represented by attorney Nirja Aiyer. Briargrove Property Owners, Inc. appeared. The record closed on May 6, 2011.

5. Respondent does not have a sexually oriented business permit with the City.
6. On February 27, 2010, and July 22, 2010, activities of the entertainers at Penthouse include exposing breasts, buttocks, and vagina; erotic touching of human genitals; acts of human masturbation; simulated sexual intercourse; and solicitation for immoral or sexual purposes.

V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5, 11, and 28, 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. The place or manner in which Respondent conducts its business constitutes a sexually oriented business pursuant to Houston Code § 28.121, in violation of TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8) and 16 TEX. ADMIN. CODE § 35.31 (c)(16).
5. The place or manner in which Respondent conducts its business is lewd, immoral, or offensive to the public decency, in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.46(a)(8) and 104.01.
6. Respondent's renewal application of mixed beverage permit MB519622 and mixed beverage late hours permit LB519623 should be denied based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency pursuant to TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8) and 16 TEX. ADMIN. CODE § 35.31 (c)(16).

SIGNED September 14, 2011.



LEXDY UPDICKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 591791

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
CITY OF HOUSTON and BRIARGROVE PROPERTY OWNERS, INC., Protestants	§	
	§	
	§	
VS.	§	
	§	ALCOHOLIC
HEREWEAREAGAIN INC. D/B/A THE PENTHOUSE CLUB, Respondent	§	
	§	
	§	
PERMIT NOS. MB519622, LB519623	§	
	§	
	§	
HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-10-6019)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this **23rd** day of March, 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 Lindy Hendricks presiding. The hearing convened on March 31, 2011 and the SOAH record closed on May 6, 2011. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on June 23, 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. Exceptions were filed by Respondent, and replies were filed by Petitioner and by Protestant. On September 14, 2011, the ALJ filed an Amended Proposal for Decision, which changed one finding of fact to show that Petitioner joined in the protest.

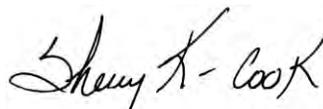
After review and due consideration of the Proposal for Decision, the Exceptions and Replies, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, 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 application for renewal of the above permits is hereby **DENIED**.

Unless a Motion for Rehearing is filed by the 17th of April, 2012, this Order will become final and enforceable on the 18th day of April, 2012.

SIGNED this the 23rd 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 23rd day of March, 2012.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Lindy Hendricks
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