

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

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FABC HOUSTON  
LEGAL

April 23, 2012

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

VIA REGULAR MAIL

**RE: Docket No. 458-12-3189; Texas Alcoholic Beverage Commission vs. 5110  
Washington LLC d/b/a Houston Brixx Bar**

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](http://www.soah.state.tx.us).

Sincerely,

  
\_\_\_\_\_  
REX A. SHAYER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

RAS/mr  
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- VIA REGULAR MAIL  
Ramona Perry, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W 20<sup>th</sup> Street, Suite 600, Houston, TX 77008- VIA REGULAR MAIL (with Certified Evidentiary Record and 1 hearing CD)  
Emily Helm, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA REGULAR MAIL  
Clyde Burluson and Michael Craig, Attorney for Respondent, 1533 W. Alabama, Suite 100, Houston, Texas 77006 - VIA REGULAR MAIL

Donna Shepherd, Westwood Grove Civic Association, Protestant, 5119 Nett Street, Houston, Texas 77007 -- VIA  
REGULAR MAIL  
Margaret Poissant, Protestant, 5102 Center Street, Houston, Texas 77007 -- VIA REGULAR MAIL



Houston, Texas, before ALJ Rex Shaver. Respondent appeared and was represented by attorneys Michael Craig and Clyde Bureson. Protestant Margaret Poissant appeared on her own behalf and as the attorney representing Protestant Westwood Civic Association. Protestant Donna Shepherd appeared on her own behalf. TABC Staff attorney Ramona Perry represented Staff, but Staff took no position on the Respondent's application. The record closed on February 17, 2012. Notice and jurisdiction were not contested and are addressed more completely in the Findings of Fact and Conclusions of Law.

## II. DISCUSSION

### A. Applicable Law

The sole basis raised for the denial of Respondent's renewal in the Notice of Hearing is for violation of Code Section 11.46(a)(8), which provides the Commission or Administrator may refuse to issue an original or renewal application if it finds that the place or manner in which Respondent conducts 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. Summary of Evidence

Joshua Johnson is an agent for the Commission. He testified that he was assigned to investigate the protest of the Respondent's renewal application. In the course of that investigation, he entered the premises and observed the operation. He determined that all of the employees had seller/server training as recommended by the Commission. He also performed surveillance from an unmarked vehicle at various locations near the licensed premises, and in the course of his general duties, he drove past the Brixx premises on a number of occasions. These observations were made on different days of the week and at times between 8:00 p.m. and 2:00 a.m. During his investigation, he observed no violations of the law or rules of the Commission

Agent Johnson also reviewed Houston Police Department (HPD) records relating to calls for service in the area of Brixx. His review of HPD records revealed that for the period 2008 to 2011 there were 14 calls for service in the blocks in the area of Brixx. Agent Johnson noted that Brixx is one of eight licensed premises on Washington Ave. between Shepherd and T.C. Jester, a distance of approximately 3 city blocks. Brixx is located next to two other licensed premises with no intervening businesses between the three. Of the 14 calls for service, four were attributable to Brixx licensed premises. The records indicated there were two calls for service regarding aggravated assault, one call for public intoxication, and one call for resisting arrest. No administrative action was taken by the Commission in relation to these calls and no administrative violations by Brixx are on record with the Commission. Because of the close proximity of the licensed premises to each other, the witness said it was impossible to determine from which premises a particular noise or sound originated. Agent Johnson related that he was aware of an HPD investigation of a death that either occurred at Brixx or began as an altercation at that location. He was unable to obtain access to that investigative report because it is an open investigation.

Ms. Shepherd testified that she lives on Nett and Rienerman streets approximately 1 and ½ blocks from the rear entrance to Brixx. She has lived at that address since 2005. She experienced no noise problems prior to Brixx opening in October 2009. Since the opening, she has heard the loud noise of amplified music from Brixx. This has been particularly loud from the patio area and after 1:00 a.m. To confirm that the noise she heard was from Brixx, and not one of the other bars in the area, she would walk or drive to the front of Brixx. After confirming her suspicions, she would call the HPD non-emergency number to complain of the noise. She has made such calls 25 to 30 times since Brixx opened.

Ms. Shepherd also gave public comment regarding increased crime, parking problems, and pedestrian traffic in the neighborhood. She related that she has seen three arrests in her neighborhood. At times, there is heavy Pedestrian traffic from persons walking from bar to bar and to and from their cars. She and her neighbors have found cans, bottles, and trash discarded in their yards. Ms. Shepherd acknowledged that she did not know if the pedestrian traffic and related problems were caused by patrons of Brixx. She has heard noise from other bars in the three -block

area including Brixx. Parking in the area does not seem adequate to her. She felt that HPD lacked the man power to enforce the noise ordinances and that the mayor's office was unhelpful. She has heard that the Commission has a "Good Neighbor Policy." She has been unable to obtain a copy of that policy.

Ms. Poissant gave public comment. Ms. Poissant stated that the cause of the most disturbing noise was the amplified music from the open air patio at Brixx. She believes that the management at Brixx receives a warning that the police are coming and turns down the volume until they have left the area. She believes that the City of Houston ordinance requires an inadequate number of parking spaces for the bars along Washington Ave. It is inadequate because there are "eight bars in a row." While not all the problems are caused by patrons of Brixx, she believes that these patrons contribute to the problem. She has seen patrons of the various bars moving from one bar to the next and jay-walking across Washington Ave. She has seen the HPD remove persons from bars on Washington Ave. She has also seen people leaving Brixx so intoxicated that they cannot open their car doors.

On one occasion Ms. Poissant and a manager or owner of Brixx (Mr. Lavullo) had a confrontation concerning her noise complaint. Both Mr. Lavullo and an HPD officer were at the rear of the premises with sound meters. Mr. Lavullo asked Ms. Poissant to call him with complaints and not the HPD. Ms. Poissant stated that she felt intimidated by his demeanor and the HPD officer intervened.

Ramon Perez testified that he is a police officer with the HPD. He has held that position for 10 years. He has worked an extra job as security at Brixx for 1 ½ years. He works weekends at Brixx from 11:00 p.m. until 2:30a.m. HPD has an extra employment division that does a background check before allowing an officer to work an extra job for a specific employer. If HPD determines that employer is in violation of the law, permission for an officer to work that extra job can be withdrawn. During the past 1 ½ years he has not observed any violations at Brixx. He has not observed any fights at Brixx or citations from the fire marshal. He has not seen Brixx employees "over serve" customers. He checks outside the building, including the rear parking lot, three or four times an evening. He believes that Brixx operates in a lawful manner. Based upon his experience,

crime in the area is less a problem now than it was 1½ years ago.

Officer Perez acknowledged that he was aware that a death had occurred at Brixx. It was his belief that an alleged burglar had entered the building after hours. An employee of Brix struggled with the alleged burglar. When the police arrived the suspect was dead. As far as he is aware, no charges have been filed as a result of that incident.

Cynthia Rose Jones testified that she is one of the owners of Brixx. She works there and stays until 2:00 a.m. two or three times as month. All of the Brixx employees are seller/ server trained per TABC guidelines. Brixx has hired seven police officers to provide security on the weekends. Two officers are paid directly by Brixx to work inside the building on Friday and Saturday evenings. In cooperation with nine other establishments, Brixx pays for a traffic control officer in the 5100 block of Washington Ave. and for 4 bicycle officers to patrol a 2 mile strip and a few blocks on each side of Washington Ave. She is aware that some people cross Washington Ave. in the middle of the block. She has not seen any accidents on Washington Ave.

Ms. Jones related that Brixx, in an attempt to respond to complaints about the noise level, raised the rear fence by 3 feet. No additional sound proofing has been undertaken. She is not aware of any noise citations being issued to Brixx.

### III. ANALYSIS

The Code provides that a Respondent may not operate in a manner that warrants refusal of a permit based on the general welfare, health, peace, morals, and safety of the people. In the Notice of Hearing, numerous specific allegations were set out. These included increase in criminal activity, failure to control intoxicated persons, failure to observe occupancy levels, failure to require employees to participate in alcohol service training, loud amplified music, trespass, trash, public urination, and failure to provide adequate parking. The ALJ acknowledges that the bass from amplified music can cause vibrations that can disrupt sleep and quiet enjoyment. The increase in automobile and foot traffic can cause problems of traffic congestion and control. The increased

number of people doing business in the area can result in an increase in trash in yards and criminal activity. However, with the exception of the complaint about amplified music, there was no evidence that the problems were the result of the manner in which Respondent conducts its business. ALJ does not believe the situation in this case rises to a level that warrants denial of the renewal application for several reasons.

Brixx is located in a part of Washington Avenue with a high concentration of TABC licensed premises. There are licensed premises immediately to the left and right of Brixx. In three blocks, there are nine licensed premises. While testimony established that on some occasions the noise complained of was coming from Brixx no proof was given of a finding of excessive noise against Brixx. TABC found only four calls for service at the address at which Brixx is located in the period 2008-2011. Whether these calls were all for one incident or were spread out over the three- year period was not established. Brixx has been in operation since October of 2009. Respondent has had no enforcement actions against it by TABC. The protest investigation did not reveal any violations of the law or the Code.

In regard to Protestants' complaints regarding an increase in automobile and pedestrian traffic as well as trash being thrown onto lawns, there was no evidence that these problems were in anyway the result of the manner in which Brixx conducts its business. No testimony linked a Brixx patron or employee with the trash, traffic or criminal activity in the neighborhood. The remaining allegations set out in the notice of hearing were not supported by any evidence. There is no proof of a final adjudication of a city code violation that would by itself warrant a suspension or civil penalty under the Code.

The evidence is insufficient to show that the manner in which Respondent operates warrants refusal of the renewal application. Therefore, the ALJ recommends this renewal application be granted.

#### IV. FINDINGS OF FACT

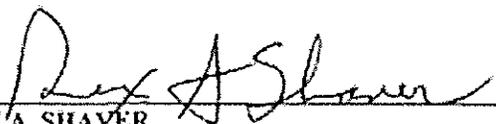
1. 5110 Washington LLC. D/B/A Houston Brixx Bar (Respondent/Brixx) has filed a renewal application with the Texas Alcoholic Beverage Commission (TABC) for its Mixed Beverage permit, Beverage Cartage permit, Food and Beverage permit and Mixed Beverage Late Hours permit MB734512, for premises located at 5110 Washington Ave., Houston, Harris County, Texas.
2. Protest to the application was filed by Westwood Civic Association, Donna Shepherd, and Margaret Poissant, based upon the general welfare, health, peace, morals and safety of the people and on the public sense of decency.
3. A Notice of Hearing dated December 12, 2011, was issued by TABC Staff notifying all parties that a hearing would be held on the renewal application and informing the parties of the time, place, and nature of the hearing.
4. ALJ Rex Shaver convened the hearing on February 17, 2012, in Houston, Texas. TABC Staff appeared at the hearing through its Staff Attorney Ramona Perry. Respondent appeared and was represented by attorneys Clyde Bureson and Michael Craig. Protestants, Westwood Civic Association, Donna Shepherd, and Margaret Poissant appeared. The record closed on February 17, 2012.
5. Respondent has had no enforcement actions against it by TABC.
6. Respondent has allowed amplified music at a volume that disturbed two nearby residents.
7. No proof of the decibel levels of the amplified music was presented.
8. None of the non- noise related charges were shown to be the result of Respondent's manner of operation or of actions committed by Respondent's patrons.

#### VI. 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. SOAH 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. There was insufficient evidence to demonstrate that renewal of the application would 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. Respondent's renewal application for its mixed beverage permit and mixed beverage late hours permit for the premises located at 55110 Washington Ave., Houston, Harris County, Texas, should be granted.

SIGNED April 11, 2012.

  
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REX A. SHAYER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**DOCKET NO. 606588**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner</b>	§	<b>BEFORE THE TEXAS</b>
	§	
	§	
<b>WESTWOOD GROVE CIVIC ASSOCIATION, DONNA SHEPHERD, AND MARGARET POISSANT, Protestants</b>	§	
	§	
	§	
<b>VS.</b>	§	<b>ALCOHOLIC</b>
	§	
<b>5110 WASHINGTON LLC. D/B/A HOUSTON BRIXX BAR, Applicant/Respondent</b>	§	
	§	
	§	
<b>PERMITS NO. MB734512, LB, FB &amp; PE</b>	§	
	§	
<b>HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-12-3189)</b>	§	<b>BEVERAGE COMMISSION</b>

**ORDER**

**CAME ON FOR CONSIDERATION** this 22<sup>nd</sup> day of March, 2013, 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 Rex A. Shaver presiding. The hearing convened on February 17, 2012 and the SOAH record closed the same date. The Administrative Law Judge signed a Proposal for Decision containing Findings of Fact and Conclusions of Law on April 11, 2012, and it was filed on April 23, 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 Westwood Grove Civic Association and Donna Shepherd on May 11, 2012. The Administrative Law Judge responded to the exceptions by order dated June 8, 2012, recommending that no changes be made to the Proposal for Decision. Supplemental Exceptions were filed by the Westwood Grove Civic Association and Donna Shepherd on June 11, 2012 asking the Administrative Law Judge to reconsider the Proposal for Decision.

After review and due consideration of the Proposal for Decision, the Exceptions, the Administrative Law Judge's Response and the Supplemental Exceptions, and with the exception of 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.

**Conclusion of Law No. 5 is modified to read:**

Respondent's renewal application for its mixed beverage permit, mixed beverage late hours permit, beverage cartage permit and food and beverage certificate for the premises located at 5110 Washington Ave., Houston, Harris County, Texas should be granted.

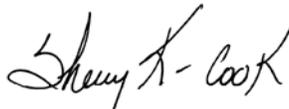
Conclusion of Law No. 5 is modified to correct the address of the premises and to include all of the permits applicable to the premises.

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 of 5110 Washington LLC. d/b/a Houston Brixx Bar for renewal of Mixed Beverage Permit No. MB734512, and the associated Mixed Beverage Late Hours Permit, Beverage Cartage Permit and Food and Beverage Certificate for the premises located at 5110 Washington Ave., Houston, Harris County, Texas is **GRANTED**.

This Order will become **final and enforceable** on the 15<sup>th</sup> day of April, 2013, **unless a Motion for Rehearing is filed by the 14<sup>th</sup> day of April, 2013.**

**SIGNED** this the 22<sup>nd</sup> day of March, 2013, at Austin, Texas.



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Sherry K-Cook, 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 22<sup>nd</sup> day of March, 2013.



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Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Rex A. Shaver  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
2020 North Loop West, Suite 111  
Houston, Texas 77018  
**VIA FACSIMILE: 512.322.0474**

5110 Washington L.L.C.  
d/b/a Houston Brixx Bar  
**RESPONDENT**  
PO Box 570427  
Houston, Texas 77257  
**VIA REGULAR MAIL**  
**AND VIA CMRRR# 70120470000133005742**

Michael Craig & Clyde Burleson  
**ATTORNEYS FOR RESPONDENT**  
1533 W. Alabama, Suite 100  
Houston, Texas 77006  
**VIA REGULAR MAIL**  
**AND VIA CMRRR#70120470000133005766**

Donna Shepherd  
Westwood Grove Civic Association  
**PROTESTANTS**  
5119 Nett Street  
Houston, TX 77007

Margaret Poissant  
**PROTESTANT**  
5102 Center Street  
Houston, TX 77007

Ramona Perry  
**ATTORNEY FOR PETITIONER**  
TABC Legal Division  
**VIA EMAIL AT:**  
[ramona.perry@tabc.state.tx.us](mailto:ramona.perry@tabc.state.tx.us)