

DOCKET NO. 615632

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, Protestant/Petitioner	§	
	§	
VS.	§	
	§	
ORIGINAL APPLICATION OF	§	
TMBJ INVESTMENTS, INC.	§	
D/B/A THE KEY CLUB	§	ALCOHOLIC
FOR PERMITS: MB, LB, PE,	§	
Applicant/Respondent	§	
	§	
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-13-2321)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 7th day of June, 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 (ALJ) Bennie Brown presiding. The hearing convened on March 8, 2013 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 April 29, 2013. 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. No exceptions were filed.

After review and due consideration of the Proposal for Decision, 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.

THEREFORE, IT IS ORDERED that the application of TMBJ Investments, Inc. d/b/a The Key Club for original Mixed Beverage, Mixed Beverage Late Hours, and Beverage Cartage Permits be **GRANTED**.

This Order will become **final and enforceable** on the 2nd day of July, 2013, **unless a Motion for Rehearing is filed by the 1st day of July, 2013.**

SIGNED this the 7th day of June, 2013, at Austin, Texas.



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 7th day of June, 2013.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Bennie Brown
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: (512) 322-2061

TMBJ Investments, Inc.
d/b/a The Key Club
APPLICANT/RESPONDENT
2618 Winrock Blvd.
Houston, Texas 77057
VIA FIRST CLASS MAIL, CERTIFICATION NO. 7007 1490 0000 3121 6560

Ronald Monshaugen

Albert Van Huff

ATTORNEYS FOR RESPONDENT

1225 North Loop West, Suite 640

Houston, Texas 77008

VIA FIRST CLASS MAIL, CERTIFICATION NO. 7007 1490 0000 3121 6553

AND VIA FACSIMILE: (713) 880-5297

Ramona Perry

ATTORNEY FOR PETITIONER

TABC Legal Division

VIA E-MAIL: ramona.perry@tabc.state.tx.us

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

April 29, 2013

RECEIVED

MAY 1 2013

TABC HOUSTON
LEGAL

Sherry Cook
Acting Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

RE: SOAH Docket No. 458-13-2321; Texas Alcoholic Beverage Commission v. The Key Club

Dear Ms. Cook:

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 black ink, appearing to read "B. Brown", written over a horizontal line.

BENNIE BROWN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

BB/dg

Enclosure

xc Ramona Perry, Texas Alcoholic Beverage Commission, 427 20th Street, Suite 600, Houston, TX 77008 -
VIA REGULAR MAIL
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX
78731- VIA REGULAR MAIL
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX
78731 - VIA REGULAR MAIL (with Certified Evidentiary Record and 1 Hearing CD/s)
Ronald Monshaugen and Albert Van Huff, 1225 North Loop West, STE 640 Houston, Texas 77008 -VIA
REGULAR MAIL

SOAH DOCKET NO. 458-13-2321

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner and Protestant	§	
V.	§	
IN RE ORIGINAL APPLICATION OF	§	OF
TMBJ INVESTMENTS INC.	§	
D/B/A THE KEY CLUB	§	
PERMIT: MB, LB, PE	§	
Applicant	§	
HARRIS COUNTY, TEXAS	§	
(TABC CASE NO. 615632)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

TMBJ Investments, Inc. d/b/a The Key Club (Applicant) filed an original application with the Texas Alcoholic Beverage Commission (TABC) for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit for the premises located at 2618 Winrock Boulevard, Houston, Harris County, Texas. Staff of the TABC protested the application based on the general welfare, peace, morals, and safety concerns of the people and alleged that Applicant will sell liquor in a manner contrary to law or will knowingly permit an agent, servant, or employee to do so.

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

Notice, venue, and jurisdiction were not contested and are discussed only in the proposed Findings of Fact and Conclusions of Law. The hearing was held on March 8, 2013, at the State

Office of Administrative Hearings (SOAH), 2020 North Loop West, Suite 111, Houston, Texas, before ALJ Bennie Brown. Staff was represented by attorney Ramona Perry. Applicant was represented by attorneys Ronald Monshaugen and Albert Van Huff. The record closed at the conclusion of the hearing that day.

II. DISCUSSION

A. Applicable Law

Staff protests the original application on the basis of Sections 11.46(a)(8) and (10) of the Texas Alcoholic Beverage Code (Code), which provide:

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;

(10) the applicant will sell liquor unlawfully in a dry area or in a manner contrary to law or will knowingly permit an agent, servant, or employee to do so.

In a protest hearing, the burden of proof is on the protesting party to show by a preponderance of the evidence that the permit(s) should not be issued.

B. Background Information

Applicant is seeking a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit for the premises located at 2618 Winrock Boulevard, Houston, Texas. This location was previously occupied by a nightclub/bar known as Caligula XXI, which later became The Penthouse Club. The Penthouse Club was owned by Hereweareagain, Inc.,

whose Director is Vincent Cabella. The Penthouse Club's mixed beverage permits expired in 2011 and were denied renewal based upon multiple violations of the Code including solicitation, and public lewdness.

C. Evidence

Tom Jones is the President of TMBJ Investments, Inc., which is the owner of The Key Club. Mr. Jones was employed as the Director of Operations with Hereweareagain, Inc., from October 2001 to April 2011.

Mr. Jones testified that during his employment at The Penthouse Club, he worked in the back of the house and did not supervise the managers or entertainers. His duties included advertising, inventory, payroll, accounts receivable, TABC taxes, and general bookkeeping. Mr. Jones testified that the managers did not report to him. They reported to the owner, Mr. Cabella. Mr. Jones explained that although The Penthouse Club was cited for several violations of the Code during his employment, he was not responsible for the violations as he did not manage the floor area or the staff.

Mr. Jones began operating The Key Club in July 2012 and leases the property from Mr. Cabella. Mr. Jones testified that he is not seeking the permits on behalf of Mr. Cabella.

The Key Club currently operates as a gentlemen's club and does not sell alcohol. Mr. Jones testified that the establishment is not disqualified from obtaining the requested permits and is located in an area of mixed commercial and residential use. The Key Club has not been cited for any violations by the TABC or the City of Houston since it has been in business.

Mr. Jones testified that he does not intend to operate as a sexually-oriented business and has taken several measures to ensure that he operates in accordance with the law. For example, Mr. Jones provides all employees with information packets containing dress code requirements and a list of prohibited conduct for dancers. Each employee must sign the packet and is subject

to suspension or termination if he or she violates any rule contained in the packet. Mr. Jones stated that he has a zero tolerance policy for drugs and requires all employees to give consent to search lockers, purses, bags, etc. Mr. Jones added that all employees will be TABC certified and will comply with the rules and regulations regarding the service of alcohol.

Mr. Jones is also President of TTL Investments, Inc., which holds a mixed beverage permit for Club Lust. There is no violation history for Club Lust, which has been in operation since October 2011.

D. Analysis

Staff argues that the requested permits should be denied because Applicant will operate its business in a place or manner that is contrary to the general welfare, peace, morals, and safety of the people. Staff relies upon Mr. Jones' affiliation with The Penthouse Club as the basis for their argument. Specifically, Staff argues that, as the Director of Operations for The Penthouse Club, Mr. Jones was responsible for the violations committed by The Penthouse Club. As a result, Staff reasons, Mr. Jones will operate The Key Club in the same manner as The Penthouse Club, which will negatively affect the general welfare, peace, morals, and safety of the people.

Staff has failed to prove its argument. The uncontroverted evidence indicates that Mr. Jones was not responsible for the violations at the Penthouse Club. Mr. Jones testified that he did not supervise the staff and the managers did not report to him. Staff offered no evidence linking Mr. Jones to the conduct that led to the Code violations. As a result, The Penthouse Club's violations cannot be attributed to Mr. Jones.

Staff's speculation that Mr. Jones will operate The Key Club in the same manner as The Penthouse Club is also unfounded. Mr. Jones testified that he does not intend to operate The Key Club as a sexually-oriented business and provided examples of measures he has taken to ensure the business operates in accordance with the law. Moreover, The Key Club has not been cited for any violations by the TABC or the City of Houston since it began operation in

July 2012. In addition, there is no violation history for Club Lust, another business owned by Mr. Jones, which began operation in October 2011. As a result, there is insufficient evidence that Applicant will operate its business in a manner contrary to the general welfare.

Staff also alleges that Applicant will sell liquor in a manner contrary to law or will knowingly permit an agent, servant, or employee to do so by unlawfully operating an enterprise¹ without a permit as required by the City of Houston's Code of Ordinances Section 28.112. For the reasons discussed above, Staff failed to prove that Applicant will operate The Key Club in the same manner as The Penthouse Club or as a sexually-oriented business.

Finally, Staff alleges that Applicant will sell liquor in a manner contrary to law or will knowingly permit an agent, servant, or employee to do so by operating an enterprise in a location that is prohibited.² Staff offered no evidence to support this allegation.

For these reasons, the ALJ finds there is an insufficient basis for denying the application and recommends that the permits be issued.

III. FINDINGS OF FACT

1. TMBJ Investments Inc. d/b/a The Key Club (Applicant), filed an original application with the Texas Alcoholic Beverage Commission (TABC) for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit for the premises located at 2618 Winrock Boulevard, Houston, Harris County, Texas.
2. TABC's Staff contested the issuance of the permits on the basis that the manner in which Applicant may conduct its business warrants the refusal of the permits based upon the general welfare, health, peace, morals, and safety of the people and the public sense of

¹ See City of Houston's Code of Ordinances Section 28.121 which defines "enterprise," in relevant part, as an adult cabaret or any establishment whose primary business is the offering of a service or the selling, renting or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to its 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.

² See City of Houston's Code of Ordinances Section 28.125.

decency and that Applicant will sell liquor in a manner contrary to law or will knowingly permit an agent, servant, or employee to do so.

3. A Notice of Hearing dated February 6, 2013, was issued by TABC Staff informing the parties that a hearing would be held on the application and notifying the parties of the date, time, and location of the hearing.
4. On March 8, 2013, a hearing was convened in Houston, Texas. Administrative Law Judge (ALJ) Bennie Brown presided. Staff was represented by attorney Ramona Perry. Applicant was represented by attorneys Ronald Monshaugen and Albert Van Huff. The hearing concluded and the record closed the same day.
5. Tom Jones is the President of TMBJ Investments, Inc., which is the owner of The Key Club.
6. The Key Club has not been cited for any violations by the TABC or the City of Houston since it began operation in July 2012.
7. Mr. Jones was employed by Hereweareagain, Inc., as the Director of Operations for The Penthouse Club from October 2001 to April 2011, at the Key Club's current location.
8. Mr. Jones did not manage the staff and was not responsible for the violations incurred by The Penthouse Club.
9. Mr. Jones is also President of TTL Investments, Inc. which holds a mixed beverage permit for Club Lust. There is no violation history for Club Lust, which has been in operation since October 2011.
10. There is insufficient evidence that Applicant will operate its business in a manner that would warrant refusal of the permits.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Texas Alcoholic Beverage Code chapters 1 and 5 and Sections 11.46(a)(8) and (10).
2. The State Office of Administrative Hearings (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 Texas Government Code Chapter 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act and Texas Government Code Sections 2001.051 and 2001.052.

4. Based on the foregoing findings of fact, a preponderance of the evidence does not show that the manner in which Applicant proposes to conduct its business warrants the refusal of the permits based on the general welfare, peace, morals, and safety of the people or that Applicant will sell liquor in a manner contrary to law.
5. Based on the foregoing findings and conclusions, the original application for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit should be granted.

SIGNED April 29, 2013.



BENNIE BROWN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS