

DOCKET NO. 626712

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
JEAN TAYLOR, AMANDA PAIGE, SAMEERA MAHENDRU, JENNIFER PIPKIN, A. DEWREE, JAMES NELSON, LESLIE HOLLAND AND MARIE L. CROZAT, Protestants	§	
	§	
	§	
VS.	§	ALCOHOLIC
	§	
ORIGINAL APPLICATION OF IL CIRCOLO DI ITALIA INC. D/B/A IL CIRCOLO DI ITALIA SOCIAL CLUB FOR N & PE PERMITS Respondent/Applicant	§	
	§	
	§	
	§	
	§	
	§	
	§	
HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-15-0214)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 16 day of April, 2015, 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 September 26, 2014, and the SOAH record closed on October 31, 2014. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on November 24, 2014. 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.

IT IS THEREFORE ORDERED that Respondent's application for a Private Club Registration Permit and Beverage Cartage Permit be **DENIED**.

This Order will become final and enforceable on the 12 day of May, 2015, unless a Motion for Rehearing is filed by the 11 day of May, 2015.

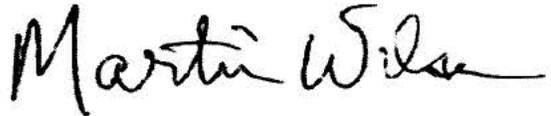
SIGNED this the 16 day of April, 2015, at Austin, Texas.



Sherry K-Cook, Executive Director
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 16 day of April, 2015.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Lindy Hendricks
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
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VIA FACSIMILE: (512) 322-2061

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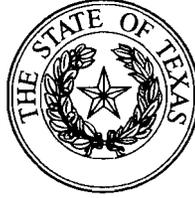
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Dolan Smith
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Ramona Perry
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: Ramona.perry@tabc.texas.gov

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

November 24, 2014

RECEIVED
DEC 01 2014
TABC HOUSTON
LEGAL

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

VIA REGULAR MAIL

RE: SOAH Docket No. 458-15-0214; Texas Alcoholic Beverage Commission vs. Il Circolo Di Italia Inc. d/b/a Il Circolo Di Italia Social 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 that reads "Lindy Hendricks".

Lindy Hendricks
Administrative Law Judge

LH/mr

Enclosure

xc Ramona Perry Texas Alcoholic Beverage Commission, 427 W. 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**
Norman E. Peters, Jr., Attorney for Applicant, Three Sugar Creek Center, Suite 100, Sugar Land, TX 77478 - **VIA REGULAR MAIL**
Ashish Mahendru, Attorney for Sameera Mahendru, The Litigation Group, 639 Heights Blvd, Houston, TX 77007 - **VIA REGULAR MAIL**

Angela Dewree, Protestant, P.O. Box 7866, Houston, TX 77270 – **VIA REGULAR MAIL**
Edward Bullock, Protestant, 609 Harvard, Houston, TX 77007 – **VIA REGULAR MAIL**
Dolan Smith, Protestant, 518 Harvard, Houston, TX 77007 – **VIA REGULAR MAIL**
Marie Louise Crozat, Protestant, 747 Beverly Street, Houston, TX 77007 – **VIA REGULAR MAIL**

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The hearing in this case was held on September 26, 2014, in Houston, Texas, before ALJ Lindy Hendricks. Applicant appeared in person and was represented by attorney Norman Peters. TABC's Staff (Staff) was represented by staff attorney Ramona M. Perry. The following individual homeowner and citizen Protestants appeared at the hearing: A. Dewree, Edward Bullock, Dolan Smith, Marie Crozat, Sameera and Ashish Mahendru (collectively, Protestants). Ms. Mahendru was represented by Mr. Mahendru. The hearing concluded on September 26, 2014, and the record remained open until October 31, 2014, for written closing arguments. Issues of notice or jurisdiction are set out in the proposed findings of fact and conclusions of law without further discussion here.

II. DISCUSSION AND ANALYSIS

A. Applicable Law

Protestants have the burden of proof to establish, by a preponderance of the evidence, that the permits should not be issued. 1 Tex. Admin. Code § 155.427. Texas Alcoholic Beverage Code § 11.46(a)(8) provides that an original permit may be denied if “the place or manner in which the applicant may conduct 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. Arguments and Evidence

1. Staff

TABC staff did not take a position on the application and appeared solely as a jurisdictional petitioner. It produced its records relating to the application.

2. Protestants

Protestants contend that the place or manner in which Applicant would operate Il Circolo would be against the general welfare, health, peace, morals, and safety of the community. Applicant currently operates an ice cream shop at the premises. The business is located at the corner of White Oak Drive and Harvard Street in the dry area of Houston Heights. Protestants contend that the business produces loud noise levels from voices emanating from patrons.

Protestants offered photographs of the business. The main building faces White Oak Drive and is adjacent to residential homes on Harvard Street. Applicant has built an outdoor seating area in the backyard with a 3-foot open fence facing Harvard Street. The backyard includes five picnic tables, two patio tables with chairs, a bocce ball court, and a barbeque pit/smoker. The picnic and patio tables are aligned against the fence line, separating the business from residential homes.¹

Protestants stated that the noise from the business is disturbing. Residents can hear late night noise from patrons in front of the business from 10:00 p.m. until closing time at 11:00 p.m. One protestant lives 95 steps from the front door of the business. He is disturbed by the noise and no longer spends time on his front porch. Protestants argued that the noise will increase with more customers consuming alcohol in the outdoor patio.

3. Applicant

Kathlyn Curtis, Tom Stells, and Juzar Sulemanji appeared and supported the granting of the original application based on their belief that the proposed private club will have positive effect on the community.

Applicant argued that TABC approved his applications as did the City of Houston. He pointed out that the City approved his occupancy and parking permits. Applicant has complied with

¹ Protestants Exs. 6-9.

the TABC and City permitting process, and is not in violation of any distance requirements to a church or school.

C. Analysis

After considering the evidence, the ALJ concludes that the place or manner in which Applicant may conduct its business warrants the denial of the permits. Although the business faces White Oak Drive, Applicant constructed a 75-foot wide outdoor seating area in its backyard, extending the entire width of the building.² The area resembles a beer garden with five picnic tables, two patio tables and chairs, and a bocce ball court. A fence separates the beer garden from residences, which include two efficiency apartments. An establishment that will serve alcohol until 12:00 a.m. on weeknights and 1:00 a.m. Sunday morning with an outdoor seating area and bocce ball court is not consistent with the peace of the community's residents. Residents are disturbed by the existing noise from the patrons in front of the business. Presumably, there will be more patrons in the outdoor seating area which is adjacent to residences. The noise, even if such is only from customers drinking, holding conversations, and playing bocce ball in the back of the business, would reasonably be expected to be a nuisance to local residents.

Accordingly, the ALJ finds that the place or manner in which Applicant would conduct his business warrants the refusal of the permits based on the general welfare, peace, morals, and safety of the people, and recommends that the permits be denied.

III. FINDINGS OF FACT

1. Il Circolo di Italia Inc. d/b/a Il Circolo di Italia Social Club (Applicant) has filed an original application with the Texas Alcoholic Beverage Commission (TABC) for a Private Club Registration Permit and a Beverage Cartage Permit for the premises located at 3601 White Oak Drive in Houston, Texas.
2. Protests to the application were filed by Jean Taylor, Amanda Paige, Sameera Mahendru, Jennifer Pipkin, A. Dewree, James Nelson, Leslie Holland, and Marie L. Crozat.

² Applicant Ex. 2.

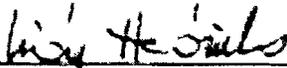
3. On September 15, 2014, TABC Staff issued a notice of hearing informing the parties of the time, date, and location of the hearing on the application; the applicable rules and statutes involved; and a short, plain statement of the matters asserted.
4. On September 26, 2014, a public hearing was convened in Houston, Texas. Administrative Law Judge (ALJ) Lindy Hendricks presided. Applicant was represented by attorney Norman Peters. TABC's Staff was represented by staff attorney Ramona M. Perry. The following individual homeowner and citizen Protestants appeared at the hearing: A. Dewree , Edward Bullock, Dolan Smith, Marie Crozat, Sameera and Ashish Mahendru (collectively, Protestants).
5. Il Circolo di Italia Social Club is located in the dry area of Houston Heights at the corner of White Oak Drive and Harvard Street.
6. Applicant's permit will allow it serve alcohol until 12:00 a.m. on weeknights and 1:00 a.m. Sunday morning.
7. The business has a 75-foot wide outdoor seating area in its backyard that extends the entire width of the building and resembles a beer garden with five picnic tables, patio tables and chairs, a bocce ball court, and a barbeque pit/smoker.
8. Patrons in the outdoor seating area will be adjacent to residences and two efficiency apartments, separated only by a fence.
9. Protestants are disturbed by the existing noise from patrons of the business.
10. The noise from customers drinking, holding conversations, and playing bocce ball in the back outdoor seating area of the business would reasonably be expected to be a nuisance to local residents.
11. An establishment that will serve alcohol until 12:00 a.m. on weeknights and 1:00 a.m. Sunday morning with an outdoor seating area and bocce ball court is not consistent with the general welfare and peace of the local residents.

IV. CONCLUSIONS OF LAW

1. Petitioner has jurisdiction over this case pursuant to Texas Alcoholic Beverage Code Chapters 1 and 5 and Sections 6.01, 11.41, 11.46, and 32.01.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the 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, Texas Government Code Sections 2001.051.-052.
4. Based on the proposed findings of fact, a preponderance of the evidence shows that the place in which Applicant proposes to conduct its 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. Tex. Alco. Bev. Code § 11.46(a)(8).
5. Based on the foregoing findings and conclusions, Applicant's the original application for a Private Club Registration Permit and a Beverage Cartage Permit should be denied.

SIGNED November 24, 2014



LINDY HENDRICKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS