DOCKET NO. 619869

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner/Protestant	§	**BEFORE THE TEXAS**
VS.	§	
EL KUMBION LLC D/B/A LA KUMBIA SPORTS GRILL & BAR, Applicant/ Respondent	§	**ALCOHOLIC**
ORIGINAL APPLICATION FOR MB & LB PERMITS	§	
LUBBOCK COUNTY, TEXAS (SOAH DOCKET NO. 458-14-1760)	§	**BEVERAGE COMMISION**

ORDER

CAME ON CONSIDERATION this **29th** day of **August, 2014**, 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 B. L. Phillips presiding. The hearing convened on February 25, 2014 and the SOAH record closed on the same day. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on April 1, 2014. The Proposal for Decision was properly served on all parties, who were given an opportunity to file exceptions. 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 Fact 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 Mixed Beverage Permit and a Mixed Beverage Late Hours Permit be **DENIED**.

This Order will become final and enforceable on the 23rd day of September, 2014, unless a Motion for Rehearing is filed by the 22nd day of September, 2014.

SIGNED this the **29th** day of **August, 2014**, at Austin, Texas.

Sherry K-Cook

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 **29th** day of **August, 2014**.

Martin Wilson

Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

B. L. Phillips
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Upload Date: 20140402161617 Account Number: 37 Upload Description: PROPOSAL FOR DECISION

SOAH DOCKET NO. 458-14-1760

TEXAS ALCOHOLIC BEVERAGE COMMISSION Petitioner	§	BEFORE THE STATE OFFICE
v.	§	OF
ORIGINAL APPLICATION OF EL KUMBION LLC D/B/A LA KUMBIA SPORTS GRILL & BAR Applicant	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission's Staff (Staff/TABC or Commission) brought this protest action against the Original Application of Lidia Aguilera (Applicant) on behalf of El Kumbion LLC dba La Kumbia Sports Grill & Bar for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for the premises known as La Kumbia Sports Grill & Bar. Staff alleged in the protest that: (1) Applicant, or Applicant's agent, servant or employee, may conduct the Applicant's business against the public's general welfare, health, peace, morals, safety, and general sense of decency, in violation of the Texas Alcoholic Beverage Code (Code) §§ 11.46(a) (8) and/or 11.61(b)(7); and/or (2) the Commission or Administrator shall refuse to issue a license or permit for a period of one year after cancellation of a mixed beverage permit for a premises where a license or permit has been cancelled during the preceding 12 months as a result of an offense involving drugs. Based on the evidence, the Administrative Law Judge (ALJ) recommends protest be upheld and the Application denied.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, those matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

On February 25, 2014, a hearing convened before the State Office of Administrative Hearings (SOAH), 8212 Ithaca, Suite W3, Lubbock, Texas, Administrative Law Judge (ALJ) B. L. Phillips presiding. Staff appeared at the hearing and was represented by Judith L. Kennison, attorney. Applicant Lidia Aguilera appeared at the hearing and was represented by William C. Dufour and Gerald Anderson, attorneys. After presentation of evidence and argument, the hearing concluded and the record was closed.

II. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to the Code §§ 11.46(a)(8) and 11.61(b)(7), the TABC may deny an original application for a Mixed Beverage and Mixed Beverage Late Hours Permit if it is found that the Applicant may conduct her business against the public's general welfare, health, peace, morals, and safety and sense of decency.

Pursuant to the Code § 11.46(c), the Commission or Administrator shall refuse to issue for a period of one year after cancellation a mixed beverage permit for a premises where a license or permit has been cancelled during the preceding 12 months as a result of a shooting, stabbing, or other violent act, or as a result of an offense involving drugs, prostitution, or trafficking of persons.

Pursuant to the Code §§ 11.03 and 6.01(b), a license or permit issued under the Code is a purely personal privilege and is subject to revocation. It is not property, is not subject to execution, does not pass by descent or distribution, and except as otherwise provided in the Code, ceases on the death of the holder. Pursuant to Code § 11.05, no permittee may consent to or allow the use or display of his permit by a person other than the person to whom the permit was issued.

Pursuant to Code § 109.53, it is the intent of the legislature to prevent subterfuge ownership of or unlawful use of a permit or the premises covered by such permit, and all provisions of the Code must be liberally construed to carry out this intent. The Commission or Administrator must strictly adhere to the general policy of preventing subterfuge ownership and

related practices declared to constitute unlawful trade practices. Every permittee shall have and maintain exclusive occupancy and control of the entire licensed premises in every phase of the storage, distribution, possession, and transportation and sale of all alcoholic beverages purchased, stored or sold on the licensed premises. Any device, scheme or plan which surrenders control of the employees, premises or business of the permittee to persons other than the permittee shall be unlawful.

III. DISCUSSION AND ANALYSIS

A. Background

The following facts were not disputed at the hearing. The premises which Applicant seeks a permit for is known as La Kumbia Sports Grill & Bar, located at 5001 Avenue Q, Suite C, Lubbock, Lubbock County, Texas. Applicant's ex-husband, Nikos Antonios Kouris, previously held a Mixed Beverage Permit, which included a Mixed Beverage Late Hours Permit and Caterer's Permit, for the same location. That permit was cancelled for cause on July 30, 2013, after Mr. Kouris signed a Settlement Agreement and Waiver regarding allegations of violations of the Code on the licensed premises. The Code violations included: (1) on or about May 5, 2013, the permittee allowed a breach of the peace on the premises that was not beyond the permittee's control and resulted from the permittee's improper supervision of persons on the premises; permittee or his agent, servant, or employee rudely displayed or permitted a person to rudely display a pistol or other deadly weapon in a manner calculated to disturb persons in the retail establishment; and permittee or his agent, servant, or employee possessed or permitted others to possess a narcotic on the licensed premises; and (2) on or about May 18, 2013, the permittee, or his agent, servant, or employee sold or permitted others to sell a narcotic on the license premises. During the period up to and including the period of the violations, Applicant and Mr. Kouris were in the process of getting a divorce.

B. Staff's Evidence and Contentions

Staff presented the testimony of TABC Captain Mark Menn and extensive documentary

evidence. Captain Menn testified that he is the TABC Captain in charge of a district comprising 88 counties including Lubbock County. He became aware during the divorce proceedings between Applicant and Mr. Kouris that the divorce court had approved a management agreement between the parties allowing Applicant to control the licensed premises which was subject to the permit issued by TABC to Mr. Kouris. Captain Menn stated that a permit must remain under the control of the original permittee pursuant to the Code and cannot be transferred to another person. Because Mr. Kouris was the sole permittee for the licensed premises at the time of the violations, Mr. Kouris was legally entitled under the Code to sign the Settlement Agreements and Waivers regarding the violations. On August 15, 2013, Captain Menn was served with a Final Divorce Decree from the District Court which included language to the effect that Mr. Kouris' actions in settling the Code violations and allowing his permit to be cancelled were null and void under the divorce settlement. Captain Menn testified that the District Court did not have the authority to overrule matters governed by the Code and that the cancellation of the permit pursuant to the settlement signed by Mr. Kouris was valid.

Regarding the Application for a Mixed Beverage and Mixed Beverage Late Hours Permit filed with TABC by Applicant, Captain Menn testified that the application should be denied because her operation of the licensed premises was in a manner that was a detriment to the public. Specifically, Captain Menn believes that the Applicant had actual control of the licensed premises during the period that the violations occurred and not Mr. Kouris. His belief stems from the management agreement between the parties that was included in the temporary orders of the divorce court. According to Captain Menn, there was every indication that Mr. Kouris had no control of the business at the time of the violations. He testified that the Applicant appeared in his office before Mr. Kouris signed the settlement papers and attempted to pay a fine in lieu of a suspension of the permit in order to settle a violation. Captain Menn also relied on a statement taken from Mr. Kouris by another TABC agent in which Mr. Kouris stated that he had no control of the business operations of the licensed premises.

C. Applicant's Evidence and Contentions

The Applicant testified on her own behalf and stated that, prior to the temporary divorce orders, she would occasionally run errands on behalf of the licensed premises. She stated that Mr. Kouris asked her to drop a check off at TABC and that her sister, who was the manager of the licensed premises, gave her the check. She denied that she ever took over operations of the licensed premises, even after the management agreement giving her control was issued under the temporary divorce orders. Mr. Kouris continued to control the business and the manager continued in that position until the business was closed. Applicant stated that she was not allowed by Mr. Kouris to control anything relating to the licensed premises despite the management agreement and that he was found in contempt of court for violating the temporary divorce orders. She specifically denied that she had any control over the operation of the licensed premises during the period when the violations occurred, and she also said that Mr. Kouris and her sister continued the operations as before.

Applicant also argued that Mr. Kouris violated a temporary divorce decree in which the court awarded her management rights to the operation of the licensed premises by failing to surrender control of the business to her. She provided evidence of the temporary divorce decree with the Management Agreement giving her full authority to open and operate La Kumbia night club under the then current liquor license and ordering Mr. Kouris to assist in all things necessary to keep the club operating to protect the community assets derived from the operation of the night club. She testified that Mr. Kouris violated this provision of the management agreement when he settled claims against the permittee which allowed TABC to cancel the permit and prevent issuance of another permit at the same location for one year. The Final Decree Of Divorce was entered into evidence, and it states that any action taken by Mr. Kouris to effect the cancellation, revocation, surrender or denial of the liquor license of La Kumbia is declared null and void since the conduct was prohibited by the temporary orders and temporary injunction in effect during the divorce proceedings.

D. Analysis

After considering the evidence, the ALJ concludes that the protest should be upheld and Applicant's application for a Mixed Beverage Permit be denied. The evidence proves that Applicant seeks to utilize the premises, which were previously closed because of an action by TABC against the previous permittee, for the proposed licensed premises for the permit she seeks. The cancellation of the previous permit arises from violations on the licensed premises as a result of a violent act by display of a weapon and offenses involving drugs. Pursuant to the Code, the TABC shall refuse to issue a permit for a period of one year after cancellation of a mixed beverage permit for premises where the permit has been cancelled under such circumstances. Mr. Kouris, the permittee at the time of the violations, was the sole permittee under the Code and therefore had authority to settle the claims against the licensed premises. Any attempt by the permittee to cede control of and allow Applicant to operate the licensed premises under the permit issued to him would have been prohibited as a subterfuge under the Code.

On the other hand, Staff did not prove that the Applicant may conduct her business against the public's general welfare, health, peace, morals, safety, or sense of decency. The evidence proves that any attempt to vest control in the licensed premises in Applicant under the temporary divorce orders failed. The permittee, Mr. Kouris, continued to control the licensed premises under the same management which existed before the management agreement. Applicant did not have any operational or management control of the licensed premises when the violations of the Code occurred, and there is no evidence that she would operate her new club in violation of the Code.

IV. RECOMMENDATION

Having reviewed all the evidence, the ALJ finds that the evidence proves that Applicant is applying for a permit at a location previously covered by a mixed beverage permit which was cancelled during the preceding 12 months due to violations as a result of a violent act involving a gun and involving drugs. The ALJ finds that the evidence did not prove that Applicant would

conduct her business in a manner which is a violation of the general welfare, health, peace, morals of the people and public sense of decency, in violation of Code §§ 11.46(a)(8) and/or11.61(b)(7). The ALJ recommends that Applicant's original application for a Mixed Beverage Permit and Mixed Beverage Late Hours Permit be denied.

V. FINDINGS OF FACT

1. Lidia Aguilera (Applicant) seeks a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for the premises known as La Kumbia Sports Grill & Bar located at 5001 Avenue Q, Lubbock, Lubbock County, Texas.

2. Applicant received proper and timely notice of the hearing on a protest against her application for a permit filed by the Staff of the Texas Alcoholic Beverage Commission (TABC or Commission) in a notice of hearing dated January 21, 2014.

3. The hearing on the merits convened February 25, 2014, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Texas. Staff was represented by attorney Judith Kennison. Applicant was represented by attorneys William C. Dufour and Gerald Anderson. The record closed on the same day.

4. The previous permittee for the proposed location of Applicant's licensed premises was Nikos Kouris, Applicant's ex-husband.

5. Mr. Kouris previously held a Mixed Beverage permit, including a Mixed Beverage Late Hours permit and Caterer's permit, for the same location.

6. On or about May 5, 2013, the Mr. Kouris (Permittee), or his agent, servant or employee, rudely displayed or permitted a person to rudely display a pistol or other deadly weapon in a manner calculated to disturb persons on the licensed premises in violation of the Code §§ 104.01(3), 11.61(b)(2) and/or 61.71(a)(1).

7. On or about May 5, 2013, the permittee, or his agent, servant or employee, possessed or permitted others to possess a narcotic on the licensed premises in violation of the Code §§ 104.01(9), 11.61(b)(2) and/or 61.71(a)(1), and 16 Texas Administrative Code § 35.41(2).

8. On or about May 18, 2013, the permittee, or his agent, servant or employee, sold or permitted others to sell a narcotic on the licensed premises in violation of the Code §§ 11.61(b)(2) and/or 61.71(a)(17)), and 16 Texas Administrative Code § 35.41(2).

9. TABC cancelled the previous permit for cause on July 30, 2013, pursuant to a Settlement Agreement and Waiver signed by the permittee.

10. During the period when the violations occurred, Applicant did not exercise management control of the licensed premises despite a temporary divorce decree awarding her management of the licensed premises under Mr. Kouris permit.

11. Mr. Kouris was the sole permittee at the time of the violations and therefore had authority to settle any violations under the Code.

12. The violations that were settled by Mr. Kouris included an offense involving a violent act using a weapon and an offense involving drugs.

13. There was no evidence that Applicant may conduct her business against the public's general welfare, health, peace, morals, safety, or sense of decency.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code).

2. SOAH has jurisdiction over all matters relating to the conduct of 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 ch. 2001.

3. Notice of the hearing was provided as required by the Texas Government Code §§ 2001.051 and 2001.052.

4. TABC is required to refuse to issue for a period of one year after cancellation a mixed beverage permit for premises where a license or permit has been cancelled during the preceding 12 months as a result of a shooting, stabbing, or other violent act, or as a result of an offense involving drugs.

5. Applicant's original application for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for the premises known as La Kumbia Sports Grill & Bar, located at 5001 Avenue Q, Lubbock, Lubbock County, Texas, should be denied.

Signed APRIL 1, 2014

B.L. PHILLIPS
ADMINISTRATIVE LAW JUDGE
STATE OFFICEOF ADMINISTRATIVE HEARINGS