

DOCKET NO. 625173

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, Petitioner	§	
	§	
CITY OF HOUSTON, Protestant	§	
	§	
VS.	§	
	§	
	§	
	§	
RENEWAL APPLICATION OF MCGOWEN	§	
COMMUNITY INC., D/B/A	§	ALCOHOLIC
COMMUNITY FOOD MARKET, Respondent	§	
	§	
PERMIT NOS. Q490361, BF 490362	§	
	§	
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-14-3829)	§	
	§	
	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 23rd 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 July 11, 2014 and the SOAH record closed on that same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on September 4, 2014.

The Proposal for Decision was served on all parties, who were given an opportunity to file exceptions and replies as part of the record herein. The Proposal for Decision was not received by Protestant until September 10, 2014. The Protestant filed exceptions to the Proposal for Decision on September 25, 2014, and the Respondent filed a reply on October 9, 2014. The exceptions filed by the Protestant were initially not considered timely filed by the Administrative Law Judge, and were not considered. The Protestant filed a Motion for Reconsideration of Its Exceptions to the Proposal for Decision on October 31, 2014. The Administrative Law Judge filed a letter on November 7, 2014 finding that Protestant's exceptions were timely filed but recommending no changes to the Proposal for Decision.

After review and due consideration of the Proposal for Decision, Protestant's exceptions and Respondent's reply thereto, and the Administrative Law Judge's November 7, 2014 letter, 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 renewal application for Wine Only Package Store Permit No. Q490361 and Beer Retailer's Off-Premise License No. BF490362 be **GRANTED**.

This Order will become **final and enforceable** on the 19th day of May, 2015, **unless a Motion for Rehearing is filed by the 18th day of May, 2015.**

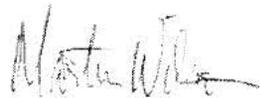
SIGNED this the 23rd day of April, 2015, at Austin, Texas.



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 23rd 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
Houston, TX 77018
VIA FACSIMILE: (512) 322-2061

McGowen Community Inc.
d/b/a Community Food Market
RESPONDENT/APPLICANT
2618 McGowen Street
Houston, Texas 77004
VIA FIRST CLASS MAIL, CMRRR # 70120470000133035251

John Vong
ATTORNEY FOR RESPONDENT/APPLICANT
2900 Woodridge Drive, Suite 307
Houston, TX 77087
VIA FIRST CLASS MAIL, CMRRR # 70120470000133035268

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
September 4, 2014

RECEIVED
SEP 5 2014

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

VIA REGULAR MAIL

RE: SOAH Docket No. 458-14-3829; Texas Alcoholic Beverage Commission vs. McGowen Community Inc, d/b/a Community Food Market

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
John Vong, Attorney at Law, 2900 Woodridge Drive, Suite 307, Houston, TX 77087 - VIA REGULAR MAIL

Staff Attorney, Ramona Perry. However, Staff took no position regarding the renewal application. 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 July 11, 2014, and the record was closed on that same day.

II. REASONS FOR DECISION

A. Applicable Law

The City has alleged the following grounds for the protest:

1. 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. Texas Alcoholic Beverage Code (Code) § 11.46(a)(8).
2. The applicant did not provide an adequate building available at the address for which the permit is sought before conducting any activity authorized by the permit, in violation of Code § 11.46(a)(12).
3. The applicant will sell liquor in a manner contrary to law or will knowingly permit an agent servant, or employee to do so, in violation of Code § 11.46(a)(10).

B. Summary of Evidence

1. TABC Agent Mirasol Barrera

Agent Barrera testified she inspected McGowen on March 14, 2014, accompanied by Houston Police Department (HPD) Officer John Guerra. She observed ten people loitering outside the store. Inside the store, a wrought-iron gate prevented customers from entering the aisles of the convenience store. According to Agent Barrera, customers placed orders at the gate and employees

took the products to them. The owner of the business, Timothy Dinh, was present during the inspection.

During her inspection, Agent Barrera found two packages of “Kush” in bubble gum containers at the front of the store and turned the substance over to Officer Guerra. She stated that Kush is a synthetic form of marijuana. Agent Barrera also located eight bottles containing snakes and scorpions in what she believed was alcohol. The bottles were seized for illegal labeling and packaging.

On cross-examination, Agent Barrera testified that the bottles were not tested, and she did not know whether they contained any alcohol. She also did not know if the Kush was tested. Agent Barrera reviewed a Department of State Health Services Amendment to the Schedules of Controlled Substances,¹ dated May 6, 2014, and effective 21 days later. She testified that, because Kush was not listed as a controlled substance until May, the packages of Kush seized in March contained no illegal substance.

2. HPD Officer Guerra

Officer Guerra is an officer with HPD and has been employed with the Narcotics Division for a year. Prior to that, Officer Guerra worked for five years as part of the South Central Response Team. He testified that the Kush was analyzed and shown to contain AB-FUBINACA, which is listed as a controlled substance under Federal Schedule I (of the U.S. Controlled Substances Act), effective February 10, 2014.² Officer Guerra filed a Misdemeanor A charge against Mr. Dinh for Possession of Miscellaneous Substance.³

Officer Guerra inspected McGowen for violations of the City’s Code of Ordinances (City Ordinance). He found violations of the convenience store ordinance requiring owners to execute and

¹ Resp. Ex. R16.

² City Ex. G.

³ Resp. Ex. R16.

post a trespass affidavit.⁴ McGowen posted its trespass affidavit on the glass window at the clerk station. Officer Guerra testified that the posting was and is not prominent and does not deter trespassing. He stated that he repeatedly told the owner to post the notice on the front window.

During his patrol, Officer Guerra observed people loitering near the side and back of the building and near the dumpster. He stated that, where they were, the loiterers could not be seen from inside the store. Officer Guerra testified he made numerous arrests for trespassing which were not prosecuted. He believes the lack of prosecution was due to Mr. Dinh not cooperating with prosecutors. Officer Guerra testified that Mr. Dinh made no calls for service for trespassing or loitering. He further believes that Mr. Dinh should leave his "cage" and shoo people away.

According to Officer Guerra, McGowen is not in compliance with City Ordinances related to Chapter 10 minimum standards and fire safety, and Chapter 20 food establishments. He testified that he issued over 100 citations for exposed electrical wiring, electrical alterations without permits, fire safety and food establishment code violations, and trash, urine, feces on the property. Forty-six of those citations were issued on June 19, 2014. Fines of \$90,520 are due for the fines if all citations are proven, but the citations are still pending adjudication. Among its exhibits, the City offered copies of the citations, documenting 227 violations. Officer Guerra stated that he explained the violations to the owner. He also testified that he issued multiple tickets for the same violation in order to be specific as to the location.

Officer Guerra testified that 125 criminal violations occurred at the premises, including prostitution, drugs, and aggravated assaults. He had been to the location on more than 50 occasions, primarily because of trespassing. On one occasion, he took a confidential informant to the business. The informant was able to buy crack cocaine in front of the store. Officer Guerra also observed an individual loitering near the business. That individual stated he worked for the owner by cleaning trash around the dumpster. He was later found with a crack pipe in his possession.

⁴ City Ordinance § 28-404. Trespass Affidavit. The owner of a convenience store shall execute a trespass affidavit as promulgated by the police department in order to enforce all applicable trespass laws on the owner's behalf at such property. A true and correct copy of the trespass affidavit shall be posted at the convenience store at all times in a conspicuous place accessible at all times to the public.

3. Mr. Dinh

Mr. Dinh testified that he became the owner of McGowen on December 30, 2013. On January 2, 2014, Mr. Dinh went to American Tax, a licensing company, and hired them to file the necessary paperwork to reflect the change of ownership. When he renewed his application in March, Mr. Dinh learned that the application had not been filed with TABC. On May 12, 2014, he submitted his "Business Packet for Reporting Changes to TABC."⁵

As to the issue of loitering, Mr. Dinh testified that he tells people to leave the store. If they do not leave, he calls the police. According to Mr. Dinh, he leaves the clerk station about five times a day to tell people to leave. Mr. Dinh recently hired an armed security officer to patrol the store 8 hours a day. The business is open from 8 A.M. to 8 P.M., seven days a week.

Mr. Dinh testified that he was not given any explanation about the citations. On June 19, 2014, he was asked by Officer Guerra for his driver's license. Mr. Dinh testified that, two weeks later, he received 46 citations in the mail. He stated he cannot understand the citations because they are not detailed. Nevertheless, he said he has corrected every alleged violation by changing lights, installing an HD video, and cleaning the microwave. Mr. Dinh also purchased a new dumpster, installed a new fence, and hired people to pick up trash in the parking lot. He testified he is getting citations for people urinating or defecating outside. Mr. Dinh stated the outside is cleaned of trash, urine and feces daily, but he is still getting citations for the violation.

After hearing Officer Guerra's testimony, Mr. Dinh stated he would post the trespass affidavit on the front window. However, Mr. Dinh testified that when he previously posted the sign on the front glass, he was cited before for obstructing the view.⁶ He stated that since he was not told exactly where to post the affidavit, he had to go online and look at other stores to determine an appropriate location. Mr. Dinh testified he is scared Officer Guerra will come by every day if he does not correct the alleged violations. He stated he was told the citations would be dismissed with the corrections.

⁵ TABC Ex. 3.

⁶ City Ex. F.

However, only two days after Officer Guerra issued citations, he returned and issued new tickets. Mr. Dinh testified he did not have time to make the corrections. According to Mr. Dinh, two city inspectors conducted an inspection at McGowen a week after he was issued the citations and found no problems.

III. ANALYSIS

The City protested the renewal application based on three allegations: place or manner, inadequate building, and sale of liquor in a manner contrary to law.

A. Place or manner

In § 11.46(a)(8), the Code provides that a Respondent may not operate in a place or manner that warrants refusal of a permit based on the general welfare, health, peace, morals, and safety of the people, and on the public sense of decency. The City alleged Respondent operated his business in a manner that resulted in City Ordinance violations and criminal offenses such as prostitution, drugs, and aggravated assaults at the licensed premises.

1. City Ordinance Violations

The City argued that Respondent operated its business in a place or manner that resulted in violations of the City Ordinance.⁷ The citations appear to cover violations of Minimum Standards,⁸ Neighborhood Nuisance,⁹ Fire Hazards,¹⁰ and Food Establishment.¹¹ The City Ordinance requires notice or warning and a reasonable opportunity to come into compliance.

⁷ No specific chapter or provision was provided. The ALJ had to review the entire Code of Ordinances to determine which ordinances were allegedly violated.

⁸ City Ordinance, Chapter 10, Section 10-366. A citation may be issued *only after* a written warning and a reasonable opportunity to cure the violation were provided.

⁹ City Ordinance, Chapter 10, Section 10-452 and 10-453. A property owner must be provided written notice by the neighborhood protection official, by personal service, 7 days before a municipality may conduct work or improvements at the owner's expense. Any required notice shall be given in compliance with the applicable provisions of section 342.006 or section 342.008 of the Texas Health and Safety Code. The notice must provide the owner with the manner in which

The ALJ finds that requirements of the City Ordinances were not met. Mr. Dinh was not provided a written warning, proper notice, or reports or explanations on how to cure the violations. The citations were issued by the Houston Police Department. There was no report of an inspection from a building or permitting official, health officer, neighborhood protection official, fire marshal or other city inspector. According to the referenced City Ordinances, inspection by one of these officials appears to be required before a citation can be issued.

The ALJ finds Respondent was also not provided a reasonable opportunity to cure the violations. On November 4, 2013, Respondent (through its previous owner) was cited with 68 violations. Less than 24 hours later, Respondent was cited another 51 violations. Citations continued to be issued the following two weeks. In two-week's time, Respondent was cited with 163 violations. On January 2, 2014, Respondent was cited for 16 violations, and on June 19, 2014, was cited for 46 violations. None of the 225 citations have been adjudicated.

Twenty-four hours, even two weeks, was an unreasonable amount of time to come into compliance given the volume and scope of the alleged violations on November 4 and 5, 2013. Respondent testified he could not understand the citations, and there is no evidence he was provided

the nuisance is to be removed or abated and the time within which it must be done before a reinspection by the neighborhood inspection official.

Texas Health and Safety Code, Section 342.006 requires notice of a violation to be given 7 days before a municipality may conduct work or improvements at the owner's expense. Notice must be given by personal service before alternative service is acceptable.

¹⁰ City Ordinance, Chapter 10, Section 10-300. Notice to owner.

(a) The fire marshal shall give notice to the owner of the building placarded in accord with section 10-299 of this Code that the same constitutes a fire hazard, stating substantially what conditions exist giving rise to same and substantially what measures should be taken to abolish the hazard. Such notice shall normally be given in writing by mail or delivery, but may be given orally if the circumstances are urgent and delay would endanger life.

(b) The fire marshal shall find and determine from the existing facts what maximum amount of time may be safely permitted the owner to abolish the fire hazard, without materially increasing the danger of life, and shall specify in his notice to the owner the extent of such time limit.

¹¹ City Ordinance, Chapter 20, Section 20-19. A health officer is required to inspect a food establishment annually. If the health officer finds problems, deficiencies are recorded on an inspection report. The health officer must explain the public health rationale and demonstrate the correct way to safely prepare food and protect it from contamination.

any inspection reports. The citations did not show what ordinances were allegedly violated or how the violations were to be cured.

Finally, when asked if he had discretion in writing duplicate violations, Officer Guerra testified that he wrote the same violation multiple times in order to be “specific.” On the other hand, Respondent testified that he could not understand the violations because they were not specific and he did not get an explanation of the violations. After reviewing the evidence, the ALJ finds that the duplicate violations do not clarify or delineate any deficiency, nor do they shed light on a specific location or area of the violation. Citing 7 duplicate violations on the same day for feces or urine accessible to the public or 11 violations for failing to maintain light fixture does not help “specify” the location or nature of the violation. If anything, the volume, duplicate nature, and frequency of the citations appear excessive, unreasonable, and punitive. Citing 119 of the same or similar violations in 24 hours disregards City requirements of notice and opportunity for compliance.

For these reasons, the ALJ finds the greater weight of the evidence shows Respondent was not given notice, warning, or reasonable opportunity to comply. Without the requisite reports and explanations, Respondent was not provided information required by the very ordinances Respondent was alleged to have violated so that he could understand and correct the violations. Furthermore, the violations have not been adjudicated. Therefore, the ALJ finds that these violations cannot be fairly attributed to Respondent to warrant a refusal of the renewal application.

2. Criminal Offenses

The City argued that Respondent operated its business in a place or manner that resulted in criminal offenses being committed on the licensed premises. Pursuant to Code §11.46(a)(8) and 16 Texas Administrative Code 35.31, the City must show that the criminal offenses were committed by the permittee in the course of conducting his alcoholic beverage business or by a person on the permittee’s licensed premises; and the permittee knew or, in the exercise of reasonable care, should have known of the offense or the likelihood of its occurrence and failed to take reasonable steps to prevent the offenses.

Officer Guerra testified that, on March 14, 2014, Mr. Dinh possessed a controlled substance, whereas, Officer Barrera testified that Mr. Dinh did not possess any illegal substance. The package of Kush contained a substance known as AB-FUBINACA. On February 10, 2014, AB-FUBINACA was listed as a controlled substance under Federal Schedule I of the U.S. Controlled Substances Act.¹² However, it was not placed into Schedule I of the Texas Controlled Substances Act until May 6, 2014.¹³ Additionally, there has been no adjudication of the criminal offense. The ALJ finds the evidence is inconclusive to show that Mr. Dinh committed a criminal offense on March 14, 2014.

As to criminal offenses that allegedly occurred on the licensed premises, Officer Guerra testified that 125 criminal violations occurred at McGowen but evidence of only 14 incidents was offered through the offense reports dated July 22, 2013, to July 9, 2014. The reports show the arrests of people in the parking lot or behind the business for criminal trespassing, evading arrest, unlawful possession of a firearm, or possession or delivery of a controlled substance. There is no evidence of prostitution, aggravated assaults, or any of the other 111 other criminal violations that allegedly occurred on the premises. The offenses were committed by persons on the licensed premises other than the permittee. Therefore, the ALJ must determine whether the evidence shows that the permittee knew or, in the exercise of reasonable care, should have known of the offense or the likelihood of its occurrence and failed to take reasonable steps to prevent the offenses.

In some instances, it is reasonable to believe that Mr. Dinh was unaware of the loiterers. Officer Guerra testified that people standing behind the store and near the dumpster could not be seen from inside the store. On the other hand, when Mr. Dinh was aware of people in his parking lot, the evidence shows that he would go outside, tell the people to leave, and call the police for assistance. Additionally, he hired armed security at his store.

Contrary to Mr. Dinh's testimony, the City argued and Officer Guerra testified that Mr. Dinh did not make a single call for service or assist in the prosecution of trespassers. Officer Guerra testified that the trespass affidavit did not comply with regulations and that it was not posted in a

¹² 79 Fed. Reg. 7577.

¹³ 39 Tex. Reg. 4031.

prominent location.¹⁴ According to the offense reports, however, Mr. Dinh is listed as the complainant on at least three occasions and HPD officers made arrests for criminal trespassing after they observed that the No Trespass/No Loitering signs were posted prominently.

On the October 8, 2013 offense report, Mr. Dinh is listed as the complainant. He advised officers that “he does not want people loitering in and around his store.” The report also stated that “No Trespassing” signs are posted on premises and an individual was arrested for trespassing.

According to the January 2, 2014 offense report, Officers Guerra and Marroquin were conducting a trespass check in response to neighborhood and business owner complaints of prostitution and drug activity. Mr. Dinh is listed as the complainant. The report states that “complainant stated he is the store owner and has asked the [two] suspects to leave his property several times. Complainant stated he wishes to pursue charges.” The report further describes the store as having “No Trespassing signs in front of the store as well as No Loitering posted prominently at the front entrance.” Consequently, two men were arrested for trespassing.

On April 10, 2014, Officer Guerra wrote in his offense report that he observed trespassers even though McGowen “has no trespassing/no loitering signs in clear bold white and blue contrasting letters on both sides close to the entrance of the store. The store owner Mr. Timothy Dinh has complained to officers that he tells the trespassers and loiters outside to leave but they refuse. Mr. Dinh has large signs posted on the outside of the store stating ‘no trespassing,’ ‘no loitering’ on two sides of the store.” Mr. Dinh told officers that he wished to pursue criminal trespass charges. Consequently, an individual was arrested for trespassing.

The ALJ finds that Respondent posted the trespass affidavit in a conspicuous place accessible at all times to the public, thereby allowing officers to make arrests for criminal trespassing. Additionally, the ALJ finds that the preponderance of the evidence shows that Respondent took

¹⁴ Adopted on March 26, 2008, Chapter 13, Article XIII of the City Ordinance states that the owner of a convenience store shall execute a trespass affidavit as promulgated by the police department in order to enforce all applicable trespass laws on the owner’s behalf at such property. A true and correct copy of the trespass affidavit shall be posted at the convenience store at all times in a conspicuous place accessible at all times to the public.

reasonable steps to prevent the offenses. The business is located in an area that is not necessarily safe and where people loiter. The clerk and even the store merchandise are secured behind a gate and/or enclosed glass station. Customers cannot enter the convenience store to pick up merchandise but rather place their orders to be filled. Despite the safety concerns and in addition to the posting the No Trespassing/No Loitering signs, Mr. Dinh left the secured area five times a day and asked people to leave the premises. The evidence further shows that he complained to the police about trespassers and agreed to pursue criminal trespassing charges. Mr. Dinh also hired armed security to patrol the store 8 hours a day on a weekly basis.

The City argues that, because of the loiterers, McGowen is not a “community mart” that people would not feel safe to go and buy groceries. The convenience store has been permitted for 13 years. However, not a single resident from the community protested its renewal application out of concern for the general welfare, health, peace, morals, and safety of the people, and on the public sense of decency.

Since beginning its operations on March 28, 2001, McGowen has one administrative case that resulted in a suspension or civil penalty. TABC did not consider these administrative violations to be sufficient cause to deny the renewal application and remained neutral on the protest. For these reasons, the ALJ finds the evidence is insufficient to show that the place or manner in which Respondent operates warrants refusal of the renewal application.

B. Inadequate Building

The City alleges that the applicant failed to provide an adequate building at the address for which the permit is sought because municipal violations have not been corrected. Code § 11.46(a)(12) provides that an adequate building must be available at the address for which the permit is sought *before conducting any activity authorized by the permit*. This section applies to a location that has yet to be permitted.¹⁵ The ALJ finds the provision does not apply in this case

¹⁵ See SOAH dockets 458-03-0453, 458-07-3312, 458-97-0545, and 458-10-2007.

because McGowen has been permitted and authorized to sell alcohol for more than 13 years. As for any argument that building code violations may show an inadequate building, the ALJ has addressed municipal violations under the place or manner allegation. Therefore, the ALJ finds the evidence insufficient to show Respondent failed to provide an adequate building to warrant the refusal of the renewal application.

C. Sell Liquor In A Manner Contrary To Law

The City argued that Respondent's renewal application should be denied because Mr. Dinh failed to timely notify the TABC of the change of ownership and he operated under the prior owner's permit. TABC's exhibit, the "Business Packet for Reporting Changes received on May 12, 2014," (Business Packet) reflects a change of ownership on December 30, 2013.¹⁶

TABC is responsible for reviewing, processing, and investigating any application for possible violations of the Code.¹⁷ TABC is in the best position to determine whether Respondent failed to comply with any licensing regulation or procedure. After reviewing the Business Packet for Reporting Changes and the renewal application, TABC did not protest the renewal application or change of ownership. Although the City asserts the documents were filed late, the ALJ finds Respondent did not violate any TABC procedure or Code provision that would warrant a refusal of the renewal application. The Code and Rule do not provide a deadline for filing a change of ownership or control as it relates to a wine only package store permit or beer retailer's off-premise license. The Business Packet for Reporting Changes properly reflected the date of the change of ownership. The ALJ finds Respondent did not provide any false statement nor did it attempt to conceal or create a subterfuge ownership.

For these reasons, the ALJ finds that the preponderance of the evidence did not show that the place or manner in which Respondent may conduct its business warrants the refusal of the permits based on the general welfare, health, peace, morals, and safety of the people and on the public sense

¹⁶ TABC Ex. 3.

¹⁷ Code §§ 5.31, 5.33, 5.35, 5.36, 11.32, and 61.31; and Rule 33.2.

of decency. Additionally, the ALJ finds the evidence insufficient to show Respondent failed to provide an adequate building or that Respondent will operate in a manner contrary to law. Therefore, Respondent's renewal application should be granted.

IV. FINDINGS OF FACT

1. McGowen Community Inc. d/b/a Community Food Market (Respondent/McGowen) has filed a renewal application with the Texas Alcoholic Beverage Commission (TABC) for its Wine Only Package Store Permit and Beer Retailer's Off-Premise License for the premises located at 2618 McGowen Street, Houston, Harris County, Texas 77004.
2. The City of Houston (City) protested the application, alleging that the place or manner in which the applicant may conduct his business warrants a refusal of a permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. The protest also alleged an inadequate building and that Respondent will sell liquor in a manner contrary to law.
3. A Notice of Hearing dated May 29, 2014, 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 July 11, 2014, a hearing began before ALJ Lindy Hendricks in Houston, Texas. TABC Staff appeared as a jurisdictional petitioner and was represented by Staff Attorney Ramona Perry. Respondent appeared and was represented by Attorney John Vong. City appeared and was represented by Attorney Yolanda Woods. The record closed that same day.
5. Respondent has had one administrative case from TABC since the initial license was issued March 28, 2001.
6. Though issued citations for violating City Ordinance, Respondent was not provided written warning, proper notice, reports or explanations on how to cure the violations as required by the City ordinances.
7. Respondent was not provided a reasonable opportunity to come into compliance as required by the City Ordinance when he was issued 119 violations in 24 hours, and a total of 163 violations in two weeks.
8. None of the 225 City Ordinance citations issued against Respondent have been adjudicated.

9. Although police officers said they found “Kush,” a synthetic form of marijuana, on Respondent’s premises, the evidence was inconclusive to show that the packages of Kush seized on March 14, 2014, contained any illegal substance at the time.
10. Mr. Dinh’s misdemeanor charge for possession of miscellaneous substance related to the Kush has not been adjudicated.
11. Respondent took reasonable steps to prevent the offenses committed by persons on its licensed premises.
12. Respondent executed and posted the trespass affidavit in a conspicuous place accessible at all times to the public.
13. Respondent asked people to leave, complained to the police when people loitered, and agreed to pursue criminal trespass charges.
14. Respondent hired armed security to patrol the store 8 hours a day.
15. No resident from the community protested the renewal application.
16. The evidence was insufficient to show Respondent failed to provide an adequate building at the address for which the permit is sought before conducting any activity authorized by the permit.
17. Mr. Dinh became Respondent’s owner on December 30, 2013.
18. On May 12, 2014, Respondent submitted its Business Packet for Reporting Changes to the TABC.
19. TABC’s Staff did not protest the renewal application or the timeliness of the change of ownership packet.
20. Respondent did not provide a false statement or attempt to conceal or create a subterfuge ownership.

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).
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. chs. 2003.

3. Proper and timely notice of the hearing was provided to all parties pursuant to the Administrative Procedure Act Tex. Gov't Code chs. 2001 and 1 Tex. Admin. Code § 155.401.
4. Respondent does not conduct its business in a place or manner that warrants the refusal of a permit based on the general welfare, health, peace, morals, or safety of the people or on the public sense of decency. Tex. Alco. Bev. Code § 11.46(a)(8).
5. Respondent did not fail to provide an adequate building at the address for which the permit is sought before conducting any activity authorized by the permit. Tex. Alco. Bev. Code § 11.46(a)(12).
6. There was insufficient evidence to demonstrate that Respondent will sell liquor in a manner contrary to law. Tex. Alco. Bev. Code § 11.46(a)(10).
7. Respondent's renewal application for its Wine Only Package Store Permit Q490361 and Beer Retailer's Off-Premise License (BF490362) for the premises located at 2618 McGowen Street, Houston, Harris County, Texas, should be granted.

SIGNED September 3, 2014.



LINDY HENDRICKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS