

DOCKET NO. 630981

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, Jurisdictional Petitioner	§	
	§	
WAYNE & PAM MORRIS, AMY	§	
OLMSTEAD, ANDREW BROWN AND	§	
JAMES CHIPMAN, SR., Protestants	§	
	§	
V.	§	
	§	
RENEWAL APPLICATION OF INFAMOUS	§	
BREWING COMPANY, LLC, D/B/A	§	ALCOHOLIC
INFAMOUS BREWING COMPANY,	§	
Applicant/Respondent	§	
PERMITS B829728, O	§	
	§	
	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-15-4445)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 16th day of December, 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 Shannon Kilgore presiding. The hearing convened on August 5, 2015 and the SOAH record closed that same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on September 18, 2015. 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 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 its permits be **GRANTED**.

This Order will become **final and enforceable** on the 9th day of January, 2016, **unless a Motion for Rehearing is filed by the 8th day of January, 2016.**

SIGNED this the 16th day of December, 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 16th day of December, 2015.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Shannon Kilgore
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
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VIA FACSIMILE: (512) 322-2061

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d/b/a Infamous Brewing Company
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VIA FIRST CLASS MAIL, CMRRR#70090960000121491407

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Judith Kennison
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: Judith.kennison@tabc.texas.gov

SOAH DOCKET NO. 458-15-4445

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Jurisdictional Petitioner	§	
&	§	
WAYNE AND PAM MORRIS &	§	
AMY OLMSTEAD &	§	
ANDREW BROWN &	§	OF
JAMES CHIPMAN, SR.,	§	
Protestants	§	
v.	§	
INFAMOUS BREWING COMPANY,	§	
LLC,	§	
Applicant	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Infamous Brewing Company, LLC (Applicant) has applied with the Texas Alcoholic Beverage Commission (Commission or TABC) for a renewal of Applicant's brewer's permit for the premises known as Infamous Brewing Company, located at 4602 Weletka Drive, Suites 100, 200, and 300, Austin, Travis County, Texas 78734.

Wayne and Pam Morris, Amy Olmstead, Andrew Brown, and James Chipman, Sr. (Protestants) protest the renewal, alleging that the place or manner in which Applicant may conduct its 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, in violation of Texas Alcoholic Beverage Code (Code) § 11.46(a)(8). The staff of the Commission (Staff) is a neutral party in this protest.

After considering the arguments and evidence presented by the parties, the Administrative Law Judge (ALJ) finds that there is an insufficient basis for denying the application and recommends that the permit be renewed.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There were no contested issues of jurisdiction, notice, 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.

On August 5, 2015, a hearing convened at the State Office of Administrative Hearings in Austin, Texas, before ALJ Shannon Kilgore. Applicant appeared and was represented by attorney Dewey Brackin. Protestants represented themselves. Staff was represented by attorney Judith Kennison. The record closed that same day.

II. APPLICABLE LAW

Pursuant to Code § 11.46(a)(8), the Commission may refuse to issue a renewal permit if it has reasonable grounds to believe and finds that the place or manner in which the applicant may conduct business is contrary to the general welfare, health, peace, morals, and the safety of the people and on the public sense of decency.¹ By rule, the Commission has set forth a series of criminal acts that per se constitute conducting the business in a manner “contrary to the general welfare, health, peace, morals, and the safety of the people and on the public sense of decency.” These acts must be committed by the permittee in the course of conducting the alcoholic beverage business or by any person on the permittee’s licensed premises if 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 offense. The crimes include various crimes involving violence, theft and fraud, disorderly conduct, public indecency, weapons, gambling, and drugs. The rule specifies, however, that the identified criminal offenses do not constitute the exclusive means by which § 11.46(a)(8) may be violated.²

¹ While Code § 11.61(b)(7) contains similar language, it applies to cancellations and suspensions of permits, not to renewal applications such as that involved in the instant case.

² 16 Tex. Admin. Code § 35.31.

III. EVIDENCE

Applicant's brewery has an associated outdoor beer garden. Protestants' complaints relate to the operation of the beer garden. It is undisputed that Applicant's location is outside of any municipality.

Protestants presented the testimony of Wayne Morris, Andrew Brown, and Pamela Morris. Mr. Morris lives across the street from Applicant's location. He testified that beer tastings, with outdoor music, are held until 10:00 or 11:00 p.m., disrupting the peace and sleep of neighbors. He stresses that he can hear the outdoor music even inside his house. Also, he stated, off-street parking is inadequate and cars associated with the establishment often park along both sides of the street. The parked vehicles, worries Mr. Morris, could impede emergency vehicles trying to get through, although he acknowledged that he has never actually seen such a problem occur. According to local realtors, said Mr. Morris, property values in the area have gone down.

Mr. Brown, who lives somewhat farther away and is therefore slightly less affected by the beer garden, nonetheless expressed concerns about the spillover of people and dogs from the establishment into the surrounding neighborhood. He, like Mr. Morris, noted the traffic and said that sometimes cars are parked up and down the street. People come onto his property to take pictures of bluebonnets in his yard. He must chase off loose dogs from establishment patrons. He said that he can sometimes hear the music even when he is inside his home. The beer garden is, he said, a nuisance.

Ms. Morris said that the beer garden has been operating since May 2014. At first, she stated, it was just not too frequent, but now it operates Thursday through Sunday. Bands play and there is amplification. She stated that she has called the Travis County Sheriff's Office on four occasions, she has approached the Travis County Commissioners, and she has gone directly to Applicant's owners to express her concerns. Ms. Morris described having to fend off dogs that wandered onto

her property from the establishment. She stated that the neighbors are concerned about the cars parked up and down the street. There are, she said, no more quiet weekends.³

Applicant presented several documents and the testimony of the following witnesses:

- Joshua Horowitz, Applicant's owner and founder;
- Charles (Chuck) Jones, a retired sheriff's deputy with Travis County;
- Randy Russell, a former business neighbor of Applicant;
- Matthew Bitsche, the head brewer for Applicant;
- Mark Moeller, a neighbor and customer of Applicant; and
- Tom Groll, a local engineer.

Mr. Horowitz testified that his business presently occupies three business suites in a small office park. One of the suites is used as a tasting room. He said that he tried to address the concerns of the neighbors who have raised complaints by limiting the number of days per week when there is music, ending the music at an early hour, placing barricades to control parking on the street, asking patrons to limit littering and not take beer off the premises,⁴ and personally walking around and collecting trash. He feels that many patrons take the exhortations to heart although, he noted, he cannot control their behavior. He stated that his business is outside the cities of Austin and Lakeway and is governed by Travis County. He lives only a quarter mile from the establishment himself, and, he said, putting up with various land uses is part of the trade-off of living in such a semi rural area. He emphasized that he tries to operate a safe, fun, family-friendly environment for the neighborhood, and asserted that most of the neighborhood wants his business to stay.

Mr. Jones, a retired Travis County sheriff's deputy, testified that he was not aware of any problems or citations associated with Applicant. Mr. Jones said that this is an area in which

³ Other neighbors have complained to the TABC, expressing similar concerns. See TABC Ex. 3.

⁴ A copy of a sign used by Applicant to ask patrons to refrain from being loud, littering, and blocking driveways is at Respondent (Applicant) Exhibit 14.

businesses and residences are located near each other, and he opined that Applicant has no adverse effect on public health, safety, or welfare.

Mr. Russell lives less than one mile from the premises and from 2010 to July 2015 was a business neighbor next door to Applicant. Mr. Russell described Applicant as a model neighbor. He acknowledged that he does not live near enough to be bothered by the parked cars and the music.

Mr. Bitsche, the head brewer, testified that Applicant has used barricades to try to control the parking, positions the tables and the music to minimize noise, and has used a decibel meter and never exceeded 85 decibels. He stated that the sheriff's office has come out a number of times but never issued a citation. He described the establishment as child-friendly and dog-friendly, and stressed that it is a part of the community, hosting charity events for cancer and lymphoma societies.

Mr. Moeller lives in Hudson Bend about one quarter to one half mile away from Applicant. He stated that he goes to the beer garden as a customer about twice per month with his wife and granddaughter. He appreciates the child-friendly business. He noted that the area is diverse and eclectic and the home to considerable economic diversity. He hopes that the renewal permit will be granted.

Approximately nine other persons were sworn in and expressed agreement with the testimony of the above witnesses called by Applicant who spoke in support of the application. About 70 additional persons signed a petition in support of the application.⁵ Another patron, Marty Romell, wrote a letter in support of the application, describing the establishment as a safe, fun, relaxed environment.⁶ TABC personnel has stated, "The preliminary investigation has not revealed any violations of the code, or public safety issues, based on Travis County Sheriff's Department service calls and TABC violation history."⁷

⁵ Respondent Ex. 1.

⁶ Respondent Ex. 3.

⁷ *Id.*

IV. DISCUSSION

Protestants argue that the renewal application should be denied pursuant to Code § 11.46(a)(8).⁸ Protestants' concerns are highly understandable. No one wants to contend with audible amplified music, trash, traffic, and loose dogs, and certainly not on a regular basis. However, the preponderance of the evidence fails to show that the statutory threshold—"contrary to the general welfare, health, peace, morals, and safety of the people and the public sense of decency"—has been met. No crime has been shown to have occurred in connection with the establishment. No safety issue has been established. The inconvenience and distress is mostly or entirely limited to a few immediate neighbors, and many persons derive benefit from the establishment. For these reasons, the ALJ recommends that the permit be renewed.

V. FINDINGS OF FACT

1. On January 8, 2015, Infamous Brewing Company, LLC (Applicant) applied with the Texas Alcoholic Beverage Commission (Commission) for a renewal of Applicant's brewer's permit for the premises known as Infamous Brewing Company, located at 4602 Weletka Drive, Suites 100, 200, and 300, Austin, Travis County, Texas 78734.
2. Wayne and Pam Morris, Amy Olmstead, Andrew Brown, and James Chipman, Sr. (Protestants) protest the renewal, alleging that the place or manner in which the applicant may conduct its 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, in violation of Texas Alcoholic Beverage Code (Code) § 11.46(a)(8). The staff of the Commission (Staff) is a neutral party in this protest.
3. On July 6, 2015, Staff issued a notice of hearing that included a statement regarding the time, place, and nature of the hearing; referenced the legal authority upon which the hearing would be held; cited the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.
4. On August 5, 2015, a hearing convened at the State Office of Administrative Hearings (SOAH) in Austin, Texas, before Administrative Law Judge Shannon Kilgore. Applicant appeared and was represented by attorney Dewey Brackin. Protestants represented

⁸ Code § 11.61(b)(7) does not apply in this case because it concerns cancellation or suspension of a permit that has already been granted.

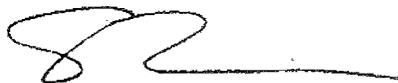
- themselves. Staff was represented by attorney Judith Kennison. The record closed that same day.
5. Applicant operates a beer garden at its establishment and features amplified music on some nights.
 6. Some of Applicant's patrons park on the roadway, litter neighbors' yards, allow their dogs to run loose on neighboring property, and walk on others' property.
 7. The music, trash, dogs, and trespassing are distressing to Applicant's immediate residential neighbors.
 8. Many persons support Applicant's continued operation and appreciate the family-oriented and dog-friendly nature of the business.
 9. No crime has been shown to have occurred in connection with Applicant's establishment.
 10. No safety issue in connection with Applicant's business has been established.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to chapters 1 and 5 and § 11.46 of the Code.
 2. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including 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 in accordance with Texas Government Code §§ 2001.051 and 2001.052.
 4. The hearing was conducted in accordance with Texas Government Code chapter 2001.
 5. Protestants had the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.
 6. Code § 11.61(b)(7) does not apply in this case.
 7. A preponderance of the evidence shows that there are no reasonable grounds to believe or find that the place or manner in which Applicant may conduct its business warrants the refusal of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. Code § 11.46(a)(8); 16 Tex. Admin. Code § 35.31.
-

8. Applicant's permit should be renewed.

SIGNED September 18, 2015.



SHANNON KILGORE
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 18, 2015

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

VIA INTERAGENCY MAIL

RE: SOAH Docket No. 458-15-4445; Texas Alcoholic Beverage Commission & Wayne and Pam Morris & Amy Olmstead & Andrew Brown & James Chipman, Sr. v. Infamous Brewing Company, LLC

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 Texas Administrative Code § 155.507(c), a SOAH rule which may be found at www.soa.state.tx.us.

Sincerely,

A handwritten signature in black ink, appearing to read "Shannon Kilgore".

Shannon Kilgore
Administrative Law Judge

SK/ap

Enclosure

xc Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA INTERAGENCY MAIL
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA INTERAGENCY MAIL (with 1 Hearing CD)
Dewey Brackin, Gardere Wynne Sewell, LLP, 600 Congress Avenue, Ste. 3000, Austin, TX 78701 - VIA REGULAR MAIL
Wayne and Pam Morris, 4505 Weletka Drive, Austin, TX 78734 - VIA REGULAR MAIL
Amy Olmstead, 4601 Weletka Drive, Austin, TX 78734 - VIA REGULAR MAIL
Andrew Brown, 4503 Weletka, Austin, TX 78734 - VIA REGULAR MAIL
James A. Chipman, Sr., 4700 Weletka Drive, Austin, TX 78734 - VIA REGULAR MAIL

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