

Revised January



TABC

TEXAS ALCOHOLIC BEVERAGE COMMISSION

service ★ courtesy ★ integrity ★ accountability

2017

County Judge's Guide

Revised January



TABC

TEXAS ALCOHOLIC BEVERAGE COMMISSION

service ★ courtesy ★ integrity ★ accountability

2017

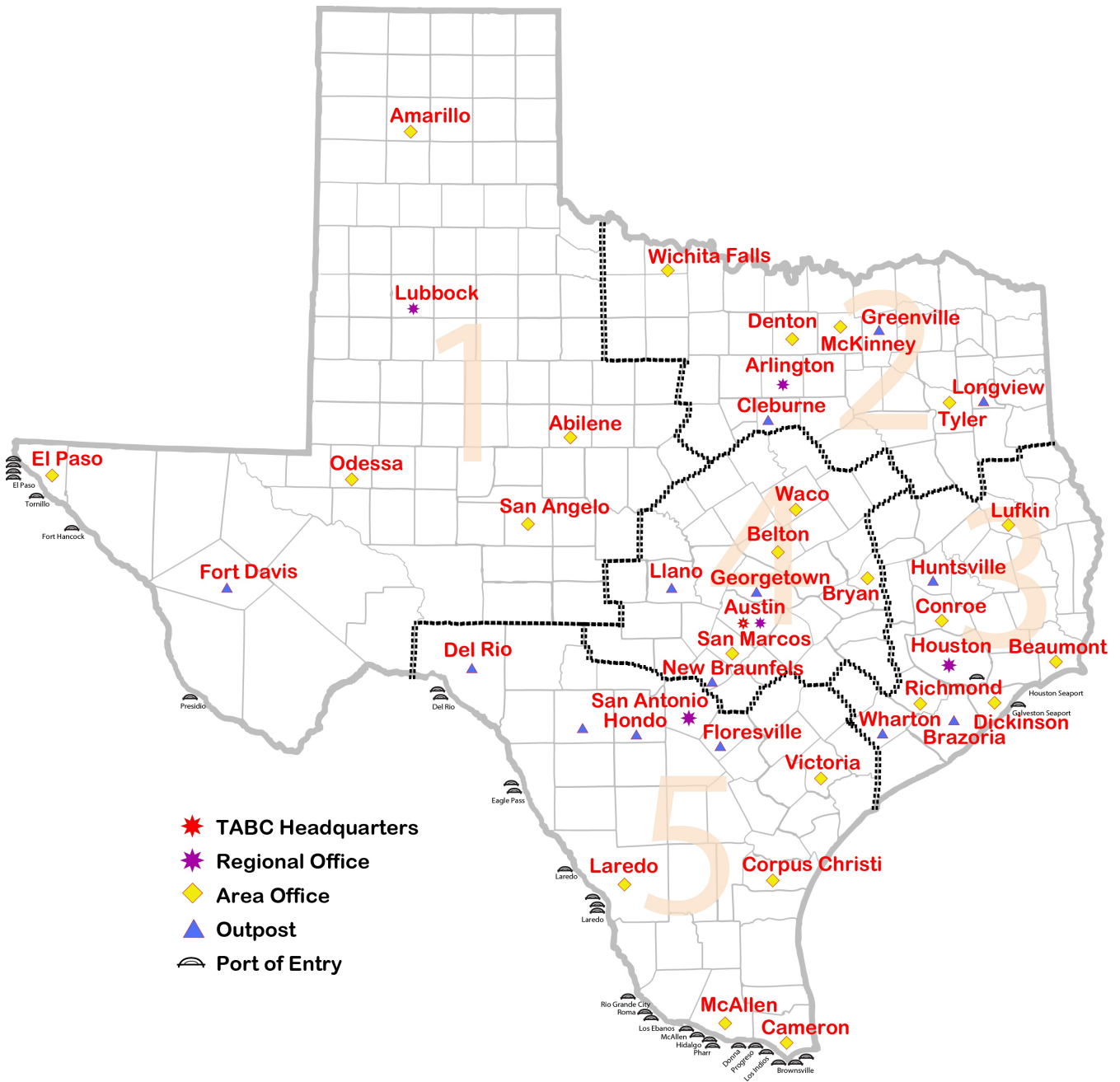
County Judge's Guide

The statements in this material have not been approved by the Commissioners and do not constitute statements of general applicability that implement, interpret or prescribe law or policy. Nor do the statements in this material constitute statements of general applicability that describe the procedure or practice requirements of TABC.

The material should not be considered as legally binding either the TABC or anyone subject to TABC's regulation. Industry members are bound by and are responsible for adhering to the Texas Alcoholic Beverage Code and the Texas Alcoholic Beverage Commission Administrative Rules, both of which may be found on the TABC website at:

<http://www.tabc.texas.gov/laws/index.asp>

TABC OFFICE LOCATIONS



TABC LICENSING OFFICE LOCATIONS / PHONE NUMBERS

Abilene (325) 672-8111	Amarillo (806) 353-1286	Arlington (817) 652-5912
Austin - District Office (512) 451-0231	Austin - Headquarters (512) 206-3360	Beaumont (409) 838-9040
Belton (254) 933-5380	Bryan (979) 260-8222	Conroe (936) 756-0050 ext 1386
Corpus Christi (361) 851-2531	Dickinson (281) 337-5611	Houston (713) 426-7900
Lubbock (806) 793-3221	McAllen (956) 687-5141	Odessa (432) 367-0760
Richmond (281) 239-2607	San Antonio (210) 731-1720	San Marcos (512) 393-7744
Uvalde (830) 278-3415	Victoria (361) 575-4776	Waco (254) 776-7626
Wichita Falls (940) 322-8606 ext 2786		

TABLE OF CONTENTS

Introduction.....	1
Section 1: What Happens Before the County Judge Gets the Application for a Beer License	3
Section 2: Authority of County Judge Under the Alcoholic Beverage Code	6
Section 3: Procedural Requirements.....	8
Section 4: Discovery or the Orderly Exchange of Information	10
Section 5: Evidence in an Administrative Hearing	12
Section 6: Control of the Hearing.....	13
Section 7: Mandatory Grounds for Refusal.....	14
Section 8: Discretionary Grounds for Refusal.....	17
Section 9: Drafting Findings of Fact and Conclusions of Law and Entering an Order.....	19
Section 10: Creating a Record	20
Section 11: Common Nuisance	21
Section 12: Section 11.37(d) Hearings	22
Appendix A: Sample Letter To Request Hearing.....	23
Appendix B: Sample Notice of Hearing.....	24
Appendix C: Sample Order Granting Permit/License	26
Appendix D: Sample Order Denying Permit/License	27

INTRODUCTION

The Texas Alcoholic Beverage Code (Code) provides the Texas Alcoholic Beverage Commission (Commission or TABC) with the authority to regulate all aspects of alcoholic beverage manufacture, distribution, and consumption in the State of Texas. The Code allows local communities (county, city and justice precinct) the right to determine the kind of alcohol sales within their communities—both what type of beverage and how it may be sold.

The Code delegates authority to the County Judge to make a determination of whether the State of Texas should grant a person or business a license to sell beer in that county. The County Judge also has the authority to approve or disapprove a *renewal* application for a beer license when the application is refused by the Commission and returned to the County Judge to be heard in the same fashion as an original.

The County Judge acts on behalf of the Commission, in an administrative rather than a judicial capacity, certain procedural rules that apply to the Commission's actions also apply to the County Judge's actions on a license application.

The 83rd Legislature, Regular Session, passed Senate Bill 1035 (Effective, September 1, 2013) amending the Code Section 61.31; "Application and Issuance of Licenses", and the authority granted the County Judge. An application for a license to sell beer shall be filed with the Commission. The authority of the County Judge to determine the granting of a license to sell beer in a county is now limited to only those applications that have a protest filed against them and in which the Commission or administrator has determined that reasonable grounds exist for the protest. Those applications shall then be rejected and filed with the County Judge to submit to a hearing.

This guide does not answer every question that may arise. This guide is for informational purposes only. It is designed to attempt to explain the most commonly requested information and to explain the regulatory provisions of the Code and procedural rules that apply to the County Judge. The information contained in this guide is current as of September 1, 2013 but is subject to change at any time. The guide should not be considered as legally binding either the TABC or anyone subject to TABC's regulation. If the County Judge needs more information, or requires additional guidance, do not hesitate to contact the legal staff for the Commission at (512) 206-3490 in Austin, or (713) 426-7900 in Houston.

The Alcoholic Beverage Code is available online either through the TABC Website or the State of Texas Website. Other Codes and Rules may also be accessed online through the State of Texas Website.

State of Texas:

www.texas.gov

TABC:

www.tabc.texas.gov

Alcoholic Beverage Code:

www.tabc.texas.gov/laws/code_and_rules.asp

Government Code—Administrative Procedure Act:

www.statutes.legis.state.tx.us/Docs/GV/htm/GV.2001.htm

SOAH Procedural Rules, Chapter 155:

[http://info.sos.state.tx.us/pls/pub/readtac\\$ext.ViewTAC?tac_view=4&ti=1&p=155](http://info.sos.state.tx.us/pls/pub/readtac$ext.ViewTAC?tac_view=4&ti=1&p=155)

TABC Rules:

[http://info.sos.state.tx.us/pls/pub/readtac\\$ext.ViewTAC?tac_view=3&ti=16&pt=3](http://info.sos.state.tx.us/pls/pub/readtac$ext.ViewTAC?tac_view=3&ti=16&pt=3)

OR <http://www.tabc.texas.gov/laws/other/TABCRules.pdf>

Protest Policy:

<http://www.tabc.texas.gov/faq/protests.asp>

SECTION 1: WHAT HAPPENS BEFORE THE COUNTY JUDGE GETS THE APPLICATION FOR A BEER LICENSE

1.1. APPLICATION FOR LICENSE OR PERMIT. Before a County Judge receives an application for a beer license or permit, the Applicant must complete the application required by the Commission, pay the necessary fees and obtain the necessary certifications. These requirements are contained in the Commission rules in 16 Texas Administrative Code, Chapter 33, Licensing.

1.2. CERTIFICATION OF WET OR DRY STATUS. Code Section 61.37 requires the county clerk of a county, the city secretary, clerk of a city for the county, or city to certify whether the location or address for which a license or permit is sought is “wet” for the type and alcohol content of the alcoholic beverages that will be sold, served or delivered by the applicant. The determination of whether a location is “wet” or “dry” status is made through local option elections. (See Chapter 501 of the Election Code.)

1.3. SALE IS LEGAL. The city secretary or county clerk must also certify that the sale of alcoholic beverages is not prohibited by charter or ordinance. These local ordinances may be zoning, special use, or distance requirements from schools, churches or hospitals. See Code §109.31, et seq.

If the city or the county refuses to issue the certification, the applicant is entitled to hearing before the county judge to contest the refusal.

Code Sections 11.37(d) and 61.37(d)

(d) Notwithstanding any other provision of this code, if the county clerk, city secretary, or city clerk certifies that the location or address given in the application is not in a wet area or refuses to issue the certification required by this section, the applicant is entitled to a hearing before the county judge to contest the certification or refusal to certify. The applicant must submit a written request to the county judge for a hearing under this subsection. The county judge shall conduct a hearing required by this subsection not later than the 30th day after the date the county judge receives the written request.

1.4 NOTICE OF APPLICATION (Code §61.38, as amended by 83rd Legislature, Regular Session Effective September 1, 2013.)

1.4.1 Code Sec 61.38(a) Every original applicant for a license to manufacture, distribute, or sell beer at retail shall give notice of the application by electronic or non-electronic publication at the applicant's own expense in two consecutive issues of a newspaper of general circulation published in the city or town in which the applicant's place of business is located. If no newspaper is published in that city or town, the notice must be published in a newspaper of general circulation published in the county where the applicant's business is located. If no newspaper is published in that county, the notice must be published in a qualified newspaper published in the closest neighboring county and circulated in the county where the applicant's business is located.

(b) The notice must be printed in 10-point boldface type and must include:

- (1) the type of license applied for;
- (2) the exact location of the business for which the license is sought;
- (3) the name of each owner of the business and, if the business is operated under an assumed name, the trade name together with the name of each owner; and
- (4) if applicant is a corporation, the names and titles of all officers.

1.4.2 NOTICE BY SIGN. If the application is at a location not previously licensed for on premise consumption, the applicant is required to prominently post an outdoor sign at the location, stating that alcoholic beverages are intended to be served on the premises, the type of license sought, name of the business and the address of the applicant. Code §61.381.

1.4.3 NOTICE BY MAIL. An applicant for an original license for on premises consumption that will not also hold a food and beverage certificate is required to provide written notice by mail to each residential address and established neighborhood association located within 300 feet of the property line of the premises for which the license is sought. The notice must be mailed at the applicant's expense and be in the form and content required by Code §61.382.

1.4.4 Section 11.52 of the Code requires that in municipalities with a population of 1.5 million or more an applicant must give notice to all tenants and property owners if any point on the property line of the premise is less than 300 feet from the nearest point on a property line of a residence, church, school, hospital, day care facility, or social services facility as measured in a straight line, and 75% or more of the actual or anticipated sales will be from alcoholic beverages. This notice must be provided within 5 days after the application is first filed, or at least 30 days before the expiration date for a renewal permit.

1.4.5 If an applicant does not meet the minimum requirements required for the license for which they are submitting an application, the case will never become a contested case.

1.5 WHO MAY CONTEST AN APPLICATION? Code Section 61.39 provides that any person may contest the facts stated in an application to distribute, manufacture, or sell beer at retail, or the applicant's right to secure a license. A person contesting the application is not required to pay security for costs in a contest if the case is decided in favor of the applicant. This section along with §§5.435 and 11.52 provide the legal or justiciable basis that will result in a hearing before the County Judge on a beer license or permit.

SECTION 2: AUTHORITY OF COUNTY JUDGE UNDER THE ALCOHOLIC BEVERAGE CODE

2.0. BEER LICENSE OR PERMIT.

Section 61.31 of the Code was amended by the passage of Senate Bill 1035 by the 83rd Legislative Regular Session Effective September 1, 2013. The County Judge's authority to decide whether a person will be allowed to sell beer in that county is granted only when a protest has been filed against the application and only if the Commission or administrator finds reasonable grounds exist for the protest.

The following licenses and permits fall within this authority:

<u>License or Permit type</u>	<u>Code sections</u>
Wine & Beer Retailer's Permit ("BG")	§§ 61.31, 25.05
Wine & Beer Retailer's Off-Premise Permit ("BQ")	§ §61.31, 26.03
Retail Dealer's On-Premise License ("BE")	§§ 61.31, 69.05
Retail Dealer's On-Premise Late Hours License ("BL")	§§ 61.31, 69.05
Retail Dealer's Off-Premise License ("BF")	§§ 61.31, 71.01
Branch Distributor's License ("BC")	§ 66.01
General Distributor's License ("BB")	§ 64.01
Importer's License ("BI")	§ 67.01
Importer's Carrier's License ("BJ")	§ 68.01
Local Distributor's License ("BD")	§ 65.01
Manufacturer's License ("BA")	§ 62.01
Manufacturer's Warehouse License ("MW")	§ 62.01
Resident Manufacturer's License ("BS")	§ 63.01
Brewpub License ("BP")	§ 74.01

2.1. AUTHORITY OF COUNTY JUDGE TO DELEGATE AUTHORITY

Upon filing an Order with the county Commissioner's court the County Judge can delegate the authority to hear beer license applications to another county official, including county court at law judges or justices of the peace. See Code §§ 61.312, 26.07, and 25.052.

In a county with a population of more than 1.3 million, the County Judge can appoint a master to hear a beer license application. The judge's order may specify or limit the power of the master, and the referring judge is not bound by the decision of the master. However, an applicant has a right to a hearing before the County Judge, but the applicant may waive this right and proceed with the hearing before the master. See Code §§ 61.311, 25.051, 26.06.

2.2. AUTHORITY TO CONDUCT THE HEARING ON A BEER LICENSE OR PERMIT

The County Judge has authority to conduct the hearing on the protested application to determine if all facts stated in the application are correct and whether there is a legal basis to deny the application. The County Judge then must issue an Order certifying the Court's findings of facts and conclusion of law. See Code §61.32; PROTEST HEARING BY COUNTY JUDGE and Texas Govt. Code § 2001.141.

According to Section 11.41 of the Code, the County Judge may give consideration to the recommendations made by:

- A representative of the Commission;
- The state senator or representative;
- The county Commissioner;
- The sheriff;
- The county or district attorney;
- The mayor;
- A city council member or Commissioner; or
- The chief of police.

The Code also provides the public with a reasonable opportunity to appear and be heard in a hearing in the licensing process, and requires that the party conducting the hearing consider the testimony in making a decision. See Code §§5.435, 11.52 and 61.39.

SECTION 3: PROCEDURAL REQUIREMENTS

3.0. A HEARING ON AN APPLICATION IS REQUIRED WHEN:

One of the following conditions exist:

1. There is reason to believe that all facts stated in the application are not true, or incorrect;
2. There is a legal ground to refuse the license; or
3. The Commission or administrator notifies the Court that it finds that reasonable grounds exist for a protest and warrants a hearing.

3.1. PROCEDURE

The Administrative Procedure Act (Section 2001 of the Government Code) has adopted these processes for conducting administrative hearings statewide.

For purposes of a beer licensing hearing there are certain essential steps:

1. An adequate Notice of Hearing to all interested persons (or representative of large groups).
2. A fair exchange of information (“Discovery”), if requested.
3. An orderly presentation of facts at hearing.
4. Findings of Fact—weighing the evidence or fact presented.
5. Reaching a Conclusion of Law—making a decision based on the application of facts to law.

The Commission will provide materials and documents to the court to initiate the process, see Appendix A.

3.2. WHEN CODES ARE IN CONFLICT: ALCOHOLIC BEVERAGE CODE VS. TEXAS GOVT. CODE SECTION 2001 (“Administrative Procedure Act”)

The Alcoholic Beverage Code contains several procedural provisions relating to conducting the hearing on a beer license. The procedural provisions of the Code have, for the most part been superseded by the Administrative Procedure Act with its enactment in 1993. The APA provisions should be followed *only if there is a conflict* between the two Codes and only if another section of the Code fails to reconcile the two. This choice of law applies *only* to procedural rules, not to substantive rights of an applicant or duties of the Commission or County Judge. An example of the conflict in Codes is the amount of required notice discussed below.

3.3. NOTICE OF HEARING.

Section 61.31 of the Code requires that the County Judge to set the application for hearing to be held not less than 5 nor more than 10 days after the application is filed. However, if a

protest is filed against granting the license/permit at least 10 days notice of the hearing must be provided to the applicant and protestants to comply with the APA.

Section 2001.051 of the APA also requires that in a contested case each party is entitled to a hearing after reasonable notice of at least ten (10) days. Consequently, in this conflict, the APA must be followed - at least ten (10) days notice to all parties, including The Commission.

3.3.1 Code Section 2001.052 provides a Notice of Hearing must contain the following information:

- (1) a statement of the time, place, and nature of the hearing;
- (2) a statement of the legal authority and jurisdiction under which the hearing is to be held;
- (3) a reference to the particular sections of the statutes and rules involved; and
- (4) a short, plain statement of the matters asserted.

(b) If a state agency or other party is unable to state matters in detail at the time notice under this section is served, an initial notice may be limited to a statement of the issues involved. On timely written application, a more definite and detailed statement shall be furnished not less than three (3) days before the date set for the hearing.

3.3.2 A sample of a Notice of Hearing is included in Appendix B to this Guide for future use. If a more definite or detailed a statement is requested, how specific the allegations must be in the Notice will depend on the details provided in the protest or protest investigation.

3.3.3 It is the responsibility of the County Judge to send the Notice of Hearing to all interested persons as received. Interested parties include the applicant, any person who has protested the application, local officials and the Commission. Section 25.05 of the Code, for example provides that the County Judge must give notice to the Commission, the sheriff, and the chief of police in the incorporated city nearest to or in which the premises is located.

Note: In advance of a protest hearing, it is recommended that the County Judge contact these local officials, determine whether these local officials wish to receive notice of hearing, and if so, to which contact person the Notice of Hearing should be directed.

3.4. PROCEDURAL RULES—TABC ADOPTS THE APA AND SOAH RULES.

Section 5.435 of the Code authorizes the Commission to adopt rules to provide for public participation in hearings. These rules adopted by the Commission governing county court hearings are found at 16 Texas Administrative Code (TAC) §37.2—Contested Case. The procedural rules adopted by the State Office of Administrative Hearing (“SOAH”) are located in 1 Texas Administrative Code, Chapter 155.

If the County Judge decides that the application for the license/permit should be granted, the persons who protested (protestants) the application have no right to appeal to the District Court under the Code. The right to appeal under §11.67 and 61.34 is from an order denying the application. There is no right to appeal the issuance or granting of a license or permit.

3.5. RIGHT TO BE REPRESENTED BY COUNSEL.

Section 2001.053 of the APA provides the right to be represented by counsel prior, during and after a hearing. This right may be waived by any party.

3.6. DOES THE COUNTY JUDGE NEED LEGAL COUNSEL?

The County Judge may wish to have the county or district attorney available to assist in the hearing. In most hearings before the County Judge, due to limited resources a TABC attorney may not be present, unless TABC has “joined” in the protest or is the sole protestant.

SECTION 4: DISCOVERY OR THE ORDERLY EXCHANGE OF INFORMATION

4.1. The APA and SOAH’s rules under Texas Administrative Code, Title 1, Part 7 §155, both provide for the orderly exchange of information (known as “discovery”) in an administrative hearing. and they generally follow the Texas Rules of Civil Procedure (TRCP) and the Texas Rules of Evidence (TRE). The TRCP and the TRE are accessible online through the Texas Courts Online website. The website address is www.courts.state.tx.us.

4.2. A party may obtain discovery on any matter that is not privileged or exempted from discovery. All discovery must be relevant to the subject matter of the hearing, meaning whether the license/permit should be granted and whether the applicant is legally entitled to be granted this privilege. The Texas Rules of Civil Procedure require parties to voluntarily exchange discovery. To the extent the County Judge can encourage parties to comply with this requirement, the fewer disputes regarding the scope of discovery may arise.

4.3. Documents that are confidential by law are not subject to discovery, unless ordered by a judge to be produced. Code §5.48 provides that all documents required to be submitted by a permittee other than the name, proposed location, and type of permit or license sought are a private record. The reason for this protection is to ensure that the Commission can obtain the information it needs during the licensing process, while protecting the confidential information of an applicant. Application forms can be distributed among public officials, including a County Judge without losing the protection, but information introduced into a hearing loses its protection under this section of the Code.

If the content of the application file is an issue at the hearing, the County Judge can examine the information *in camera*, and determine which parts are necessary to be introduced or disclosed during discovery and which parts should not be disclosed. Obviously, if the allegation relates to a false statement or misstatement in the application, this information will be necessary, but the scope should be limited to the information necessary to prove or disprove a fact.

If a public information request, made pursuant to the Texas Government Code, is received by the Court while a case remains open, notify all interested parties of the request and give them an opportunity to assert exceptions to disclosure. Never release social security numbers, driver's license numbers or personal email addresses. In addition, the County Judge may order a record sealed at the end of a hearing to prevent the disclosure of otherwise protected information.

4.4. "Discovery wars" can become quite contentious and discovery abuse can easily overtake the resources of a County Judge—or any court. The Judge should make good use of his/her ability to control the conduct of the parties by implementing rules of conduct. These rules can be borrowed from the local rules of the county or district courts. The Judge may also issue a Discovery Control Plan. See SOAH rules at §155.251. A Level 1 Discovery Control Plan under TRCP §190.02 will be sufficient in most contested cases.

SECTION 5: EVIDENCE IN AN ADMINISTRATIVE HEARING

- 5.1. The rules of evidence applicable to non-jury trials apply to license application hearing.
- 5.2. As the fact-finder, the County Judge may ask any witness a reasonable question, request an explanation or clarification. A County Judge, on his/her, own objection, exclude a witness or a statement of a witness, document or record.
- 5.3. However, even in a non-jury trial, the Judge will be called upon to make decisions about inclusion or exclusion of evidence. This decision must be made to “preserve error” if there is an appeal. In a non-jury hearing, it may be appropriate to note the objection and make a ruling later. In making the Court’s findings of fact and conclusions of law, the County Judge may wish to specify the evidence or testimony that was considered or excluded in the Order.
- 5.4. If parties are represented by counsel, the Judge may require them to submit written briefs to explain or support an objection to evidence or testimony, or their position. A review of these briefs should be conducted prior to making a ruling or decision.
- 5.5. The APA provisions relating to evidence apply to a license application hearing. See APA §§2001.081—2001.088. Section 200.081 specifically gives the County Judge discretion to consider some evidence that would not generally be admissible under the Texas Rules of Evidence. The SOAH rules in Chapter 155 can assist the Court in managing evidence.

SECTION 6: CONTROL OF THE HEARING

6.0. NOT A PUBLIC HEARING. Although the presence of the public may not be excluded, an administrative hearing is not a public hearing, community forum or an open meeting. The purpose of the hearing is to gather factual evidence to make findings of fact on the issue of whether there is a legal basis for denying a license. It is not an open forum to express personal opinions, make speculations, or vent disagreements that have no relevancy to the issues being heard.

There are going to be some members of the community that are simply opposed to the sale or consumption of alcoholic beverages--period. That opposition is not a legal basis to deny the permit or license. That public sentiment was heard and decided when the local option election was held to consider whether to make an area wet or dry.

The procedures that apply to judicial proceedings can be used to control the presentation of testimony and introduction of other evidence.

6.1. WITNESS CONTROL. It is recommended that the Court prepare a written document explaining the rules of conducting a hearing, the procedures that will apply, the order of testimony and the expectations of conduct. It could be sent to the parties along with the Notice of Hearing. A sample of these procedures and rules can be found at www.co.travis.tx.us/courts/files/documents_forms/rules_civilcriminalcounty.pdf. A County Judge's discretionary requirements include:

- All parties to provide a list of all witnesses and the facts upon which they will be asked to testify.
- All parties to provide the Judge with all written evidence or records in advance.
- All parties to stipulate to facts not in dispute and not allow testimony on undisputed matters.
- To avoid repetitive testimony, require this testimony to be reduced to sworn statements or limit the time allowed for their testimony.
- Ask the Protestants to select the person who has the best knowledge of the facts and can speak on behalf of others with the same or similar knowledge or facts—for example, a neighborhood representative may be asked to speak for each of the residents.
- If a witness does not or cannot have personal knowledge upon which to testify, exclude the witness after asking them a few questions to determine the basis of their testimony.
- All persons are to conduct themselves in a respectful manner to each other and to the Court, and if they fail to do so the Court may exclude them.

SECTION 7: MANDATORY GROUNDS FOR REFUSAL

7.0. Code Sections 25.06 and 69.06 provide the grounds that require a County Judge to deny an application for an original or renewal license/permit. Code Section 25.06, applies to a wine and beer retailer's permit (BG) and Section 69.06 applies to a beer retailer's on-premise license (BE). Provisions in §25.06 and 69.06 that are mandatory for wine and beer retailer's and beer retailer's on-premise are also included in §61.42 which applies to beer licenses generally.

§ 25.06. DENIAL OF ORIGINAL APPLICATION.

(a) The County Judge shall deny an original application for a wine and beer retailer's permit if he finds that the applicant, or the applicant's spouse, during the five years immediately preceding the application, was finally convicted [See TABC Rules at 16 TAC §33.1] of a felony or one of the following offenses:

- (1) prostitution;
- (2) a vagrancy offense involving moral turpitude;
- (3) bookmaking;
- (4) gambling or gaming;
- (5) an offense involving controlled substances as defined in Chapter 481, Health and Safety Code or other dangerous drugs;
- (6) a violation of this code resulting in the cancellation of a license or permit, or a fine of not less than \$500;
- (7) more than three violations of this code relating to minors;
- (8) bootlegging; or
- (9) an offense involving firearms or a deadly weapon.

(b) The County Judge shall also deny an original application for a permit if he finds that five years have not elapsed since the termination of a sentence, parole, or probation served by the applicant or the applicant's spouse because of a felony conviction or conviction of any of the offenses described in Subsection (a) of this section.

(c) The Commission shall refuse to issue a renewal of a wine or beer retailer's permit if it finds:

(1) that the applicant, or the applicant's spouse, has been convicted of a felony or one of the offenses listed in Subsection (a) of this section at any time during the five years immediately preceding the filing of the application for renewal; or

(2) that five years have not elapsed since the termination of a sentence, parole, or probation served by the applicant, or the applicant's spouse, of a felony conviction or conviction of any of the offenses described in Subsection (a) of this section.

(d) In this section the word "applicant" includes the individual natural person holding or applying for the permit or, if the holder or applicant is not an individual natural person, the individual partner, officer, trustee, or receiver who is primarily responsible for the management of the premises.

7.1. Code Section 61.42 applies to distributors and retailer of beer and adds additional **mandatory** grounds for denying a license.

§ 61.42. MANDATORY GROUNDS FOR REFUSAL: DISTRIBUTOR OR RETAILER.

(a) The County Judge shall refuse to approve an application for a license as a distributor or retailer if he has reasonable grounds to believe and finds that:

(1) the applicant is a minor;

(2) the applicant is indebted to the state for any taxes, fees, or penalties imposed by this code or by rule of the Commission;

(3) the place or manner in which the applicant for a retail dealer's license may conduct his business warrants a refusal of a license based on the general welfare, health, peace, morals, safety, and sense of decency of the people;

(4) the applicant is in the habit of using alcoholic beverages to excess or is mentally or physically incompetent;

NOTE: *TABC is enjoined from enforcing the Texas state residency and Texas state citizenship requirements in Section 61.42(a)(5).*

(5) the applicant is not a United States citizen or has not been a citizen of Texas for a period of one year immediately preceding the filing of his application unless he was issued an original or renewal license on or before September 1, 1948;

(6) the applicant was finally convicted of a felony during the five years immediately preceding the filing of his application;

(7) the applicant is not of good moral character or his reputation for being a peaceable, law-abiding citizen in the community where he resides is bad; or

(8) as to a corporation, it is not incorporated under the laws of this state, or at least 51 percent of the corporate stock is not owned at all times by persons who individually are qualified to obtain a license, except that this subdivision does not apply to a holder of any renewal of a distributor's license which was in effect on January 1, 1953, or to an applicant for a beer retailer's on-premise license for a railway car.

(b) The County Judge, Commission, or administrator shall refuse to approve or issue an original retail dealer's or retail dealer's on-premise license unless the applicant for the license files with the application a certificate issued by the comptroller of public accounts stating that the applicant holds, or has applied for and satisfies all legal requirements for the issuance of, a sales tax permit for the place of business for which the license is sought.

(c) The County Judge, Commission, or administrator shall refuse to approve or issue for a period of one year a retail dealer's on-premise license or a wine and beer retailer's permit for a premises where a license or permit has been canceled 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.

7.2. MANDATORY GROUNDS—MANUFACTURER. Section 61.46 provides that a County Judge shall refuse an application for a manufacturer's license if he has reasonable grounds to believe that the applicant, or corporate officer of the applicant, failed to state under oath that it will engage in the business of brewing and packaging beer in this state and within three years after the original license is issued produce sufficient quantities of beer to make its operation a bona fide brewing manufacturer.

SECTION 8: DISCRETIONARY GROUNDS FOR REFUSAL

8.0 Code Sections 61.43, 61.44, 61.45 contain the provisions that allow a County Judge to deny or refuse a beer license submitted by a distributor or retailer. These sections address disqualifications, and prohibited interest in another permit type, or another tier of the alcoholic beverages industry.

8.1 Code Section 61.43 applies to distributors and retailers and provides that

(a) The County Judge may refuse to approve an application for a license as a distributor or retailer if the County Judge has reasonable grounds to believe and finds that:

- (1) the applicant has been finally convicted in a court of competent jurisdiction for the violation of a provision of this code during the two years immediately preceding the filing of an application;
- (2) five years has not elapsed since the termination, by pardon or otherwise, of a sentence imposed for conviction of a felony;
- (3) the applicant has violated or caused to be violated a provision of this code or a rule or regulation of the Commission, for which a suspension was not imposed, during the 12-month period immediately preceding the filing of an application;
- (4) the applicant failed to answer or falsely or incorrectly answered a question in an original or renewal application;
- (5) the applicant for a retail dealer's license does not have an adequate building available at the address for which the license is sought before conducting any activity authorized by the license;
- (6) the applicant or a person with whom the applicant is residentially domiciled had an interest in a license or permit which was cancelled or revoked within the 12-month period immediately preceding the filing of an application;
- (7) the applicant failed or refused to furnish a true copy of the application to the Commission's district office in the district in which the premises sought to be licensed are located;

(8) the premises on which beer is to be sold for on-premises consumption does not have:

(A) running water, if it is available; or

(B) separate free toilets for males and females, properly identified, on the premises for which the license is sought or, if the premises is a restaurant that derives less than 50 percent of its gross revenue from the sale of alcohol, is 2,500 square feet or less, and has an occupancy rating of 50 persons or less, at least one toilet, properly identified, on the premises for which the license is sought;

(9) the applicant for a retail dealer's license will conduct business in a manner contrary to law or in a place or manner conducive to a violation of the law; or

(10) the place, building, or premises for which the license is sought was used for selling alcoholic beverages in violation of the law at any time during the six months immediately preceding the filing of the application or was used, operated, or frequented during that time for a purpose or in a manner which was lewd, immoral, offensive to public decency, or contrary to this code.

(b) Subsection (a)(8) does not apply to an application under this section if the premises for which the application is submitted is part of a larger business complex with multiple tenant or commercial spaces, including a mall, that is open to the public and that offers the facilities required by Subsection (a)(8).

8.2. Code Section 61.44(b) and 61.45 relate to intra-industry relations and provides that the County Judge may deny or refuse to approve a license if he has reasonable grounds to believe and finds that the applicant for a retail dealer's license has an interest in the business or premises of the holder of a manufacturer's or distributor's license, or the premises for which the retailer's license is sought is owned in whole or in part by a holder of a manufacturer's or distributor's license.

SECTION 9: DRAFTING FINDINGS OF FACT/ CONCLUSIONS OF LAW AND ISSUING AN ORDER

9.0. After the record is closed, the County Judge must determine what facts were admitted into evidence and which facts affected the Court's decision in the matter. Facts or evidence that either support or refute the allegations made in the protest should be reviewed. If the Court excludes evidence because of an objection of a party, or upon the Court's own motion, the ruling may be included in the Order or in a separate order specifically addressing evidence or procedural matters.

9.1 To produce a valid, effective Order, the County Judge must also include conclusions of law connecting the facts the Court found credible and relevant to which the protest was made. Connect each of the important facts found with the law that it either supports or refutes. If there is no connection between a fact and any of the laws, either the fact is irrelevant, or the allegation under the law is unsupported by the facts.

9.2 Proposals for Decision (PFDs) from SOAH may be used as examples for County Judge's Orders. The PFDs contain findings of fact and conclusions of law made by SOAH administrative law judges may be found on the SOAH website at: <http://www.soah.state.tx.us/PFDSearch/Search.asp>.

Sample Orders are included in this guide at Appendix C and D.

SECTION 10: CREATING A RECORD

10.0. The appeal of an Order of a County Judge to deny a permit or license is to the district court of the county in which the applicant resides or where the premises is located. This appeal is under the substantial evidence rule, which means the review is of the record made of the hearing on the license. (See TABC §§11.67 and 61.81) Section 2001.145 of the APA requires the timely filing of a Motion for Rehearing as a prerequisite for appeal. Because the Commission has adopted the APA, this is a requirement for an appeal from the county court Order. (Section 2001.146 of the APA and SOAH rules provides guidance through the Motion for Rehearing requirement.)

10.1. Section 2001.060 of the APA provides that the Record in a contested case include:

- (1) each pleading, motion, and intermediate ruling;
- (2) evidence received or considered;
- (3) a statement of matters officially noticed;
- (4) questions and offers of proof, objections, and rulings on them;
- (5) proposed findings and exceptions;
- (6) each decision, opinion, or report by the officer presiding at the hearing; and
- (7) all staff memoranda or data submitted to or considered by the hearing officer or members of the agency who are involved in making the decision.

10.2. The SOAH rules on creating a Record at the hearing should be followed if the Court does not have a court reporter or other means of making a record. These rules are found at 1 TAC §155.423. Instead of a court reporter, the County Judge can make an audio recording of the proceedings, from which a transcript can be made. Ensure that the equipment is in good operating order prior to the hearing. Assign personnel to monitor the equipment to ensure that the entire proceeding is recorded.

10.3. TABC's rule at 16 TAC §37.1 provides that the party seeking judicial review of a Commission order shall pay all costs for the preparation of the record required to be sent to the reviewing court.

10.4. Any questions about procedures or timelines may be referred to the Legal division of TABC at 512-206-3490 (Austin) or 713-426-7900 (Houston).

SECTION 11: COMMON NUISANCE

11.0. This chapter applies to the on-premise retail sale or service of alcoholic beverages permit or license holders who do not also hold a food and beverage certificate. Because it applies to service, not just sale, it also applies to private clubs.

11.1. It authorizes the district, county, or city attorneys or the state senator or state representative for the area in which a applicant or permit or license holder is located to provide information to TABC or the County Judge regarding allegations that the permit or license holder or applicant has engaged in activity or allowed others to engage in activity that constitutes a common nuisance.

11.2. Code Section 81.006 gives the Commission or the County Judge, after notice and hearing, the authority to impose conditions on a license or permit that will abate a public nuisance.

11.3. Code Section 81.007 allows the Commissioner, administrator or County Judge, if there is evidence showing a reasonable likelihood that a common nuisance exists, to enter an order imposing any condition on the permit holder that is reasonably necessary to abate a common nuisance on the premises. This order is effective until the time for appealing a decision after a hearing has expired or until all appeals are finally decided.

11.4. The temporary order can be issued on the County Judge's own motion or the motion of the district, city or county attorney, or for an original or renewal application, any individual entitled to protest the issuance of a license or permit. If the motion is filed by a protestant, a hearing must be set *before* an order can be entered.

11.5. The County Judge may impose any sanction necessary to secure compliance with an order on a person who violates an order under this section.

11.6. A hearing on a temporary order must be held not later than the 10th day after the notice is served on all parties, but failure to hold the hearing does not invalidate the order.

11.7. A person who requests a temporary order is not required to post security for costs in connection with the application or he hearing on the application.

SECTION 12: A “SECTION 11.37(d)” HEARING

12.0. Section 11.37(d), of the Code requires the County Judge, upon submission of a written request to hold a hearing if the county clerk, city secretary, or city clerk certifies the location or address given in the application is not in a wet area or refuses to issue the certification that the sale of alcohol is lawful under any valid ordinance.

12.1. The hearing must be held within thirty (30) days from the date the County Judge receives the request.

12.2. There is no provision for the substantive requirements of the request or requisite notice requirements. It may be inferred that the standard requirements of the APA would be applicable in these hearings as well.



TABC

TEXAS ALCOHOLIC BEVERAGE COMMISSION

service ★ courtesy ★ integrity ★ accountability

José Cuevas, Jr.

Presiding Officer-Midland

Steven M. Weinberg, MD, JD

Member-Colleyville

Melinda S. Fredricks

Member-Conroe

Sherry Cook

Administrator

DATE

The Honorable _____
_____ County Judge

ADDRESS
_____, TX

Re: Protest of Original Application for _____
TABC Docket No. _____

TO THE HONORABLE JUDGE:

Pursuant to Section 61.32 of the Texas Alcoholic Beverage Code (“Code”), the Texas Alcoholic Beverage Commission is requesting your office to conduct a hearing on the above referenced application. The TABC will remain neutral in this case. [Or, TABC will join in the protest.]

When setting a hearing, please allow for at least ten (10) days notice to all parties in accordance with the Texas Government Code. Please forward a copy of the Notice of Hearing to everyone listed on the attached mailing list, including TABC. Also, please ensure that the hearing is recorded; either by a court reporter or audio recording.

Be advised, effective September 1, 2013, pursuant to an amendment of the Code Section 61.31, an applicant is required to pay to the Court a hearing fee of \$25.

If you have any questions, need samples or any further assistance, please do not hesitate to contact me at the number below.

Sincerely,

Judith L. Kennison, Deputy General Counsel
Texas Alcoholic Beverage Commission
P.O. Box 13127
Austin, Texas 78711
Phone: (512) 206-3490
Fax: (512) 206-3498

APPENDIX B

SAMPLE NOTICE OF HEARING

CASE NO. _____

IN RE ORIGINAL APPLICATION OF _____ D/B/A _____	§ § § §	BEFORE THE COUNTY JUDGE OF
	§	
	§	
	§	
_____ COUNTY, TEXAS	§	_____ COUNTY, TEXAS
(TABC DOCKET NO. _____)	§	

NOTICE OF HEARING

The Texas Alcoholic Beverage Commission (Commission), Petitioner, is the state agency with authority to administer and enforce the Texas Alcoholic Beverage Code (“Code”) and the administrative rules, 16 Tex. Admin. Code § 31.1 et seq., (“Rules”) adopted by the Commission to implement the Code. The manufacture, sale, distribution, transportation, and possession of alcoholic beverages are governed exclusively by the Code, except where the Code provides otherwise. (Code §§ 1.06, 5.01, and 5.31) The County Judge is authorized to conduct hearings and issue orders for beer licenses and permits under Chapters 25, 26, 61 and 69 of the Code.

Jurisdiction before the County Judge is established at §61.32 of the Code. The procedural rules of the State Office of Administrative Hearings apply to this hearing. (1 Tex. Admin. Code, Chapter 155) The local rules of this court also apply to this hearing.

This action relates to an application for a license or a permit for [type of permit applied for in this county].

[name], Applicant, has filed an application for a Wine and Beer Retailer’s On Premise Permit, for the premises to be operated as [tradename], located at [address. City, county, Texas, ZIP]

A protest has been filed against the applicant’s right to secure a license. This protest alleges that the Applicant [has engaged in conduct that is prohibited and/or in violation of the Code and/or Rules or has made a false statement in the application, etc.] as follows:

Allegation 1

Example: On or about December 15, 2006, Respondent, or Respondent’s agent, servant or employee, conducted the Respondent’s business against the public’s general welfare, health, peace, morals, safety, and sense of decency. Respondent’s agent, servant or employee, with criminal negligence impeded, interrupted, disrupted and/or interfered with a peace officer performing a duty or exercising authority imposed or granted, and/or aided another to avoid a lawful arrest, in violation of Code §§ 11.61(b)(7), 61.71(a)(17), Rules § 35.31(c)(10), and Tex. Penal Code §§38.15(a)(1) and 38.05(a)(2).

APPENDIX B

On _____, at 10:00 a.m., a hearing will be held by the County Court of County Texas, address, room, number, city state zip. The purpose of this hearing will be to determine if the above allegations are true. If the allegations are found to be true, the above referenced permit or license, may be denied, refused or not renewed.

You may appear at the hearing and have witnesses testify for you. You have the right to an attorney. You may waive this right and represent yourself. **If you fail to appear at the hearing, the allegations in this notice will be deemed admitted as true, and the other side's requested relief (i.e., application granted or denied) may be granted by default.**

County Judge

Service List

APPLICANT

PROTESTANTS

LOCAL OFFICIALS (include the county sheriff and closest local police chief of the nearest incorporated city, see Texas Alcohol & Beverage Code § 25.05).

TABC

APPENDIX C

No. _____

IN THE MATTER OF THE ORIGINAL APPLI- CATION FOR _____, Applicant	§ BEFORE THE HONORABLE §
	§ COUNTY COURT §
	§
	§ _____ COUNTY, TEXAS §

ORDER GRANTING PERMIT/LICENSE

On _____, 2012, the Honorable Judge, after due consideration of the evidence submitted makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. A Citizen’s Protest of the granting _____ original application for a beer retailer’s permit for the LICENSE AND ADDRESS, was heard on this day, _____2012, before the Honorable _____, _____ County Judge and duly recorded.

2. Applicant and Protestants were given proper notice of the hearing and appeared in person.

3. The Applicant was _____. The Protestant was _____.

4. Applicant was represented by counsel, _____, and Applicant also provided testimony. Applicant also called witnesses and provided documentary evidence.

5. The basis of the protest involved allegations of [excessive noise, traffic and parking problems, trash on premises and/or county property, and lewd behavior, and use of county property by the establishment for parking and dumpster facilities.]

6. The evidence does not reflect that the Applicant will operate the location in a place or manner that is detrimental to the general welfare, health, peace morals, safety and sense of decency of the people in violation of the Texas Alcoholic Beverage Code §61.71.

CONCLUSIONS OF LAW

1. Proper and timely notice was provided in accordance with TEX.GOV’T CODE ANN. §§2001.051 and 2001.052.

2. Pursuant to §61.42 of the Texas Alcoholic Beverage Code, since the evidence does not reflect that the Applicant will operate the location in a place or manner that is detrimental to the general welfare, health, peace morals, safety and sense of decency of the people in violation of the Texas Alcoholic Beverage Code §61.71, there is no basis to refuse the application.

IT IS THEREFORE ORDERED THAT THE PERMIT/LICENSE BE GRANTED.

SIGNED on _____, 20__.

THE HONORABLE COUNTY JUDGE

APPENDIX D

CASE NO. _____

IN RE ORIGINAL APPLICATION OF _____ D/B/A _____	§ § § §	BEFORE THE COUNTY JUDGE OF
	§	
	§	
	§	
_____ COUNTY, TEXAS	§	_____ COUNTY, TEXAS
(TABC DOCKET NO. _____)	§	

ORDER DENYING PERMIT/LICENSE

Came to be heard this ____ day of 20__, the forgoing Original Application (Application) for a Wine and Beer Retailer’s Off-Premise Permit submitted by _____ (Applicant), located at _____ County, Texas, before the Honorable ____, _____ County Judge, presiding, who finds that due and legal notice was given as required by law and evidence was presented. After considering the testimony and evidence for this matter, the Court finds as follows:

I. JURISDICTION IS PROPER

The Texas Alcoholic Beverage Commission (TABC) and the ____ County Tax Office protested this Application. It is proper to consider this protest, pursuant to Texas Alcoholic Beverage Code (Code) §61.31.

II. NOTICE IS PROPER

The Applicant received proper notice of the proceeding pursuant to Section 2001.051 of the Administrative Procedure Act.

Protestants contend that Applicant’s Application for a license/permit be denied on the following grounds: 1) The place or manner in which Applicant conducts business warrants refusal of a license based on the general welfare, health, peace, morals, safety, and sense of decency in violation of Code Section 61.42(a)(3), to wit: nonpayment of 2009 business personal property taxes; and 2) The Applicant will conduct business in a manner contrary to law or in a place or manner conducive to a violation of the law in violation of Code Section 61.43(a)(9).

APPENDIX D

III.

FINDINGS OF FACT

This Court finds the following regarding (Applicant) _____ located at (Address), the place for which the original permit is requested.

1. A hearing was held on _____. The Applicant did not appear, nor otherwise answer.
2. The Applicant's location is on a dangerous road and would threaten the safety of the public.
3. Applicant has previously been convicted of two prior misdemeanors – driving while intoxicated.

IV.

CONCLUSIONS OF LAW

1. The County Judge has jurisdiction over this matter pursuant to the Texas Alcoholic Beverage Code Section 61.31.

2. Under Code Section 61.42(a)(3), the County Judge shall refuse to approve an application for a license if he has reasonable grounds to believe and finds that the place or manner in which Applicant conducts business warrants refusal of a license based on the general welfare, health, peace, morals, safety, and sense of decency.

3. Based on the foregoing, this Court finds that the evidence is sufficient to determine that the manner in which Applicant will conduct his business warrants a refusal of Application based on the general welfare, health, peace, safety and sense of decency of the people.

4. Under Code Section 61.43(a)(9), the County Judge shall refuse to approve an application for a license if he has reasonable grounds to believe and finds that the Applicant will conduct its business in a manner contrary to law or in a place or manner conducive to a violation of law.

5. Based on the above Findings of Fact, the Court concludes that the Applicant will conduct its business in a manner contrary to law or in a place or manner conducive to a violation of law.

For these reasons, it is the decision of this Court that the Application should be refused. **THEREFORE, IT IS ORDERED** that the Application for a Wine and Beer Retailer's Off-Premise Permit for (Applicant) ____ is hereby refused.

APPENDIX D

SIGNED AND ENTERED THIS _____ DAY OF _____, 20__.

County Judge

NOTE: THIS ORDER WILL BECOME FINAL AND EFFECTIVE 20 DAYS FROM THE DATE THE ORDER IS MAILED UNLESS A MOTION FOR REHEARING IS FILED.

TO:

(Service list)



Save a Life™

Texas Department of Transportation