

**NORTH CAROLINA ALCOHOLIC BEVERAGE CONTROL
COMMISSION MINUTES
AUGUST 13, 2004**

The following narrative and summary highlights actions taken by the North Carolina Alcoholic Beverage Control Commission at its regular meeting on August 13, 2004. The meeting was tape-recorded and the tape is on file at the ABC Commission/Legal Division.

ROLL CALL

Chairman Douglas A. Fox was present for the meeting, along with Commissioner Ricky Wright and Commissioner Mike Joyner.

MINUTES OF JULY 9, 2004 MEETING

The Chairman asked Commission Member Ricky Wright and Commission Member Mike Joyner if they had any corrections or additions regarding the Commission minutes from the July 9, 2004, meeting. Neither Commissioner Wright nor Commissioner Joyner had any corrections or additions. The Chairman made a motion to approve and waive the reading of the minutes into the record. Seconded by Commissioner Wright. So Ordered.

EXECUTIVE ORDER REGARDING CONFLICTS OF INTEREST

As required by Executive Order Number One, the Chairman asked Commissioners Wright and Joyner if there were any known conflicts of interest or any conditions or facts that might create the appearance of a conflict of interest with respect to any matters on the Agenda. Commissioner Wright and Commissioner Joyner stated that they had no conflict of interest. The Chairman stated he had to recuse himself from the following 1st Offense cases #31 Kangaroo Express 440 and #32 Kangaroo Express 437.

I. HEARING CASES - 44

Assistant Counsel LoRita K. Pinnix gave some background information regarding contested case #1, Tiki Cabaret. Administrative Law Judge James L. Conner, II heard the case on February 26, 2004. Ms. K. Renee Cowick represented the ABC Commission and Mr. John Nieman, Jr. represented Tiki Cabaret. Ms. Cowick did file exceptions to the ruling. Mr. Nieman stated that he had seen the exceptions and didn't think that they would affect the final ruling. Ms. Cowick stated that she wasn't asking that the ruling be changed, only that there was some procedural and actual problems with the way the decision was written and was asking that it be amended to reflect what was actually in the transcript. The only purpose of the exceptions was to have the Final Agency Decision accurately reflect what is actually in the transcript. Ms. Cowick further stated there was an exception regarding the Alco Sensor reading and there is a statute that says it is not allowed in any administrative hearing. The issue stated by the

administrative law judge was 04 NCAC 02S .0212(a) and yet part of his Conclusions of Law reflected 04 NCAC 02S .0212(b), which he did not state as an issue so all of that relating to 04 NCAC 02S .0212(b) is not relevant to the issue of 04 NCAC 02S .0212(a)(3). Ms. Cowick requested that the Commission exclude all verbiage related to (b) the language related to the issue at fact as and leave it to the issue stated by the administrative law judge. The Chairman made a motion to adopt the order with Ms. Cowick's exceptions. Seconded by Commissioner Joyner. So Ordered.

Ms. Pinnix stated that there was five permittee's present to speak to the Commission regarding their cases.

Case #8, Rudders Seafood Grille – Helena Bonner-Gonzalez, owner of the business. Mrs. Gonzalez stated that she had gone out of town to be with her sick grandmother. She had trained a new employee to take care of her bar and the inventory. The employee didn't deface the empty mixed beverage bottles, but put them in the inventory log record room. Mrs. Gonzalez further stated that when they picked up their alcohol from the ABC retailer, the tax stamps got dislodged from the bottles. Commissioner Wright asked Mrs. Gonzalez if she had thought about going back to the ABC retailer where she had purchased the alcohol from to see if she could look at their sales slips or invoices to verify that it had been purchased there. Mrs. Gonzalez said that she did have copies of the receipts to show where she had purchased the alcohol. Mrs. Gonzalez asked the Commission to reduce the penalty, since it was her first ABC violation. The Chairman asked how the stamps get off the empty bottles that had not been defaced. Mrs. Gonzalez stated that the employee knew the procedures regarding the alcohol bottles, however she did not hear the part where she was suppose to deface the bottles and place the empty bottles in the inventory room to be logged in. The Chairman asked about the violation on July 2, 2003. Mrs. Gonzalez stated that her husband and his brother-in law had been on an outing; they had alcohol in a cooler, which was in the back of the truck. The cooler had then been taken out of the back of the truck and placed outside on the ground behind the building. It had been raining and one of the employees brought the cooler into the restaurant. The ALE Agent had come in and found the cooler there. Commissioner Joyner asked how long they had their ABC permits. Ms. Pinnix stated that they had held ABC permits since December 2001. Commissioner Wright made a motion to ratify the offer. Seconded by the Chairman. So Ordered.

Case #10, Stocks Food Store – Ertle Richard Lewis, owner of the business, stated that he had been in business for approximately 28 years. He went on to state that in the first 25 years he had only received a warning. Mr. Lewis stated that as he got older he had started to hire more employees and shift some of the responsibilities to them. He said that his business is just recovering from the 9/11 slump. He further stated that if he couldn't sale alcohol for 5 days, it would further hurt his business. Mr. Lewis said that he has reinforced the ABC rules and has made all his employees attend the BARS meetings and he has had his own meetings. Mr. Lewis asked the Commission not to give him active suspension. The Chairman asked Mr. Lewis how many people were in his employment. Mr. Lewis stated that he had 18 employees. Commissioner Wright

made a motion to suspend the 5 days suspension and only have \$3,000.00 penalty, due to the fact that he had been in business for 25 years. The Chairman amended the motion and included that Mr. Lewis contact the local ALE and have an ALE Agent come out and conduct a BARS class or a TIP program and have him get back with the Commission within the next 30 days, showing that the program had been successfully completed. Seconded by Commission Wright. So Ordered. Mr. Lewis asked if he needed to contact Ms. Cowick with that information. The Chairman told him that the ALE Agent should give him a certificate of completion and have the Agent get a copy of it to Ms. Cowick.

Case #21, New Dixie Mart 20 – Mr. T. Scott Amand stated that his employees are trained and tested verbally and orally. All employees are required to go through an intensive training program on a quarterly basis and sometimes more frequent than that. They work closely with ALE Agent Brent Massey. Mr. Amand had asked Agent Massey to speak to the Commission today, but he was unable to be present. Mr. Amand went on to further state that Agent Massey had responded via email to Ms. Pinnix. He went on to read the email to the Commission. Per Agent Massey's email, he stated that since he has been serving in that county for the past 9 years, New Dixie Oil Corporation had the most pro-active training program for the responsible sales and service of age restricted products. He went on to state that after conducting a training program to the employees, an employee went on to sale to an underage person. Agent Massey also stated that he had spoken with Mr. Amand about the violations. Mr. Amand stated that the court system do is very little to the employees. Commissioner Joyner asked what Mr. Amand was requesting of the Commission. Mr. Amand asked the Commission take in consideration that they were a very pro-active company, with strong training programs. He asked the Commission to suspend the 5 days active time. Commissioner Joyner asked how many stores they had. Mr. Amand stated that they had 15 stores in North Carolina and 2 stores in Virginia. The Chairman asked if the employee was still employed at that store and when she was hired. Mr. Amand said that she was fired the day the violation accrued and hired 8/23/02. The Chairman stated that he sympathized with him, but couldn't change the offer in compromise. The Chairman made a motion to ratify the offer. Seconded by Commissioner Wright. So Ordered.

Case #30, Zingo Mart 2 – Mr. John Smith, owner of the business stated that they had 5 locations and the manager's work very closely with the cashiers. He went on to state that the employees go to court and they get community service and the retailer is penalized. Mr. Smith stated that he had suggested some educational programs and maybe have some presentations at the local high schools. He went on to state that he and his son race cars and on his car is Be 21. He wants to create awareness for the legal drinking age of alcohol in North Carolina. Mr. Smith said that they are televised on Speed Vision and he has connections with a syndicated radio show out of Charlotte, which goes all over the southeast. Mr. Smith stated that they are guilty and will pay the fine, but he is concerned and they all share the command goal. Mr. Smith asked what more could he do. The Chairman stated that he would get him Danny Sellars, Director of ABC Education; card, so that he could talk with him. The Chairman asked if the employee was still working there. Mr. Smith stated that he was still employed there, he

felt like he had learned his lesson and he doesn't take the zero tolerance approach. The Chairman made a motion to ratify the offer. Seconded by Commissioner Wright. So Ordered.

Case #41, Melting Pot – Mr. Mike Godfrey, owner of the business asked the Commission for reconsideration of the monetary penalty. He stated three issues that he wanted the ABC Commission to consider. He said that the Buncombe County ABC Board requires all alcohol beverage orders to be placed prior to noon and must be picked up by 5:00 p.m. He went on to state that the Commission seems to have a standard practice of negotiating with the employee of the permits vs. negotiating with the permittee. Mr. Godfrey also stated that he questioned the amount of the fine and found it onerous and disproportionate for failure to pay \$15 worth of taxes. Mr. Godfrey made 3 suggestions:

1. *There should be a set standard of operational policies and procedures that every local ABC Board must agree to abide by in order to receive the benefits from the sale and taxation of alcoholic beverages.*
2. *The Commission should always have to speak to the holder of the permit vs. an employee.*
3. *Asking for the Commission to waive the penalty and a written warning be issued.*

Ms. Pinnix stated that when a violation accrues, notification is sent to the business address provided by the applicant when they first apply for permits. The manager called the Commission and negotiated a better offer, which was very generous and alleviate the active suspension. It is not unusual for the Commission to deal with managers; sometime we deal with corporate personnel as well, but we do get in contact with someone based on what is given on the application. Commissioner Joyner stated that he was really uncomfortable with his argument where he separates himself from his manager. He went on to state he hired him to help run the business. Mr. Godfrey stated that he wasn't separating himself from the manager, but he thought he was a responsible person. Commissioner Wright stated that he felt that the Legal Division had already shown as much leniency as they could. Commissioner Wright made a motion to ratify the offer. Seconded by Commissioner Joyner. So Ordered.

The Chairman stated that #1 Confetys, #36 Humble Pie Bakery and #46 Dominic's Downtown all came before the Commission on July 9, 2004 and they did not receive their Final Agency Decisions. The Chairman made a motion to amend the Final Agency Decisions to reflect the August 13, 2004 compliance dates and to have ALE to serve the orders. Seconded by Commissioner Wright. So Ordered.

Ms. Pinnix stated that case #44, Mingles, was an add-on for cancellation.

The Chairman made a motion to ratify all remaining offers in compromises. Seconded by Commissioner Wright. So Ordered.

Commissioner Wright made a motion to ratify 1st Offense cases #31 Kangaroo Express 440 and #32 Kangaroo Express 437. Seconded by Commissioner Joyner. So Ordered.

The Chairman stated that he had reviewed the first offense cases as per the resolution and made a motion to adopt the remaining orders that had not already been previously ratified as signed. Seconded by Commissioner Wright. So Ordered.

II. The following is a list of first offense violation cases, in which Orders were signed by the Chairman on August 11, 2004 pursuant to the Commission's authorizing resolution dated November 8, 2002:

Bi Lo 405 - 3915 Ramsey Street, Fayetteville, NC 28311
Boulevard Amoco – 3310 Bragg Boulevard, Fayetteville, NC 28303
Brixx Wood Fired Pizza – 16915 Birkdale Commons Parkway
D P Mini Mart – 839 Rauhut Street, Burlington, NC 27217
Dee's Country Store – 3009 Highway 15, Creedmoor, NC 27522
Eckerd Drugs 1059 – 2832 North Elm Street, Lumberton, NC 28358
Eckerd Drugs 2729 – 7440 Creedmoor Road, Raleigh, NC 27613
Eno B P – 5292 Roxboro Road, Durham, NC 27704
Exprezit Convenience Store 126 – 1003 East 4th Avenue, Highway 211, Red Springs, NC 28377
Exxon Shop 7 – 2801 Roberts Avenue, Lumberton, NC 28358
Fuddruckers – 16625 Statesville Road, Charlotte, NC 28078
Fuel Doc 14 – 1200 South Tarboro Street, Wilson, NC 27893
Gazz Up High School – 3801 Fayetteville Road, Lumberton, NC 28358
Hair's Grocery 1 – 801 East 4th Avenue, Red Springs, NC 28377
Han Dee Hugos 16 – 1012 Halstead Boulevard, Elizabeth City, NC 27909
Han Dee Hugos 59 – 2201 West Millbrook Road, Raleigh, NC 27612
Jiffy Stop – 1101 West Third Avenue, Red Springs, NC 28377
K J's Express – 800 South Main Street, King, NC 27021
P J's Convenient Mart – 801 East Second Street, Lumberton, NC 28358
Pit Stop – 6283 South Highway 301, Hope Mills, NC 28348
Pit Stop – 14601 Statesville Road, Huntersville, NC 28078
Plaza Garibaldi – 1940 Roberts Avenue, Lumberton, NC 28358
Safeway Market – 211 West Saunders Street, Maxton, NC 28364
Sam's Mart 18 – 12906 Rosedale Hill Avenue, Huntersville, NC 28078
Short Stop Food Mart 43 – 601 South Main Street, Hope Mills, NC 28348
Wal Mart Supercenter 1155 – 5070 Fayetteville Road, Lumberton, NC 28358
Yoshi's Grill – 9905-B Rose Commons Drive, Huntersville, NC 28078
Marshall's – 410 Carbon City Road, Morganton, NC 28655
Truffles – 247-8 Mount Jefferson Road, West Jefferson, NC 28694
Food Lion 1622 – 1363 North Raleigh Street, Angier, NC 27501
Kangaroo Express 440 – 6306 Carolina Beach Road, Wilmington, NC 28409

III. OTHER BUSINESS

ABC STORE LOCATION –RECONSIDERATION, GREENSBORO ABC BOARD

Mr. Jeff Gray, attorney for Greensboro ABC Board stated that Mayor Keith Holiday, City of Greensboro was present to speak to the Commission. Mayor Holiday presented the Commission with a letter of Resolution from the Greensboro City Council. He went on to state that this new location would be beneficial to the community. Mr. Gray asked the Commission if they would like to hear more evidence on the behalf of the City of Greensboro, if not he wanted to renew the motions that had already previously been stated. Mr. Gray asked that the Commission approve this store location. The Chairman stated that this matter was continued the last time in order to allow Commissioner Joyner time to read the transcript and review the maps of the area in which the proposed store would be located. The Chairman asked Commissioner Joyner if he had done that. Commissioner Joyner stated that he had. The Chairman went on to state that since this matter was on the agenda last time, he had taken the opportunity to visit the site along with Administrator Michael Herring and Pricing Division Supervisor Guy Potts.

The Chairman further stated that before the Commission takes any further action on this matter, there were several matters he felt that Mr. Gray proposed that the Commission should address.

I. First, Mr. Gray proposed that the Commission could not consider protest or objections from either High Point or Forsyth County in regards to the location or opening of the proposed Greensboro store (T.p2.L 17-20).

With all due respect, we disagree:

ABC Commission Rule 2R.1202 states “The Commission will consider objections to the opening of new ABC stores or the continuance of existing store, but only upon showing that the local board concerned has either considered and overruled or ignored such objections.

It seems obvious from Mr. Gray’s presentation that Greensboro was well aware of the protests from High Point and Forsyth County to the proposed store; therefore, their protests were either ignored or overruled. Furthermore, the rule does not say the Commission cannot listen to such objections, but only should not consider them. However, there is no timetable set by rule or statute when the proposer of a new store cannot listen to, overrule or ignore objections by anyone. It may be that a board can purposely be deaf to everything except its own agenda and therefore the only forum to air objections to the opening of stores is a Commission meeting.

The Commission, pursuant to ABC Commission Rule 2R.1202, did not consider the objections to proposed Greensboro on June 14, 2004, but allowed these boards to

air their objections in a public forum so that the Commission could be satisfied that Greensboro had considered objections to the new store.

The Chairman asked Mr. Gray if Greensboro had considered the objections of High Point and Forsyth County to the proposed store location. Mr. Gray stated that they have considered the objections. The Chairman thanked them and said that now we can consider their objections.

II. Second, Mr. Gray proposed that efficiency within the control system is not a proper consideration for the Commission in deciding whether to approve or disapprove a new store (T.p5., L8, 9).

With all due respect, we disagree:

To begin, G.S. 18B-801(a) says the following:

Number of stores – Each local board shall have the authority and duty to operate one ABC store. Additional stores may be operated with the approval of the Commission.

G.S. 18B-801(b) has to do with location of stores.

It is elementary that each store must be located somewhere. The one store that each board shall have the authority and duty to operate must have its location approved by the Commission pursuant to G.S. 18B-801(b).

Obviously, “additional stores” must also have their locations approved by the Commission pursuant to G.S. 18B-801(b).

In the approval of store locations, the Commission may consider the following:

G.S.18B-801(b)(1)

- (1) Whether the health, safety or general welfare of the Community will be adversely affected; and
- (2) Whether the citizens of the community or city in which the proposed store is to be located voted for or against ABC stores in the last election on the question.

In approving “additional stores”, G.S. 18B-801(a) is silent, only that additional stores may be operated with the approval of the Commission.

So, again, we must look at ABC Commission Rule 2R.1202.

The Commission will consider objections to the opening of new ABC stores or the continuance of existing stores, but only upon showing that the local board concerned has either considered and overruled or ignored such objections.

Mr. Gray has offered that efficiency is not a proper consideration for disapproval of new stores and that the Commission lacks authority to do such. However, pursuant to ABC Commission Rule 2R.1202, the Commission will consider objections to new stores. The rule is not limiting to what kind of objection the Commission can consider. High Point and Forsyth County object because of efficiency. We find that is a proper objection as to additional stores.

Furthermore, pursuant to G.S. 18B-203(b) under implied powers:

The Commission shall have all other powers which may be reasonably implied from the granting of the express powers stated in subsection (a) or which may be incidental to, or convenient for, performing the duties given to the Commission.

G.S. 18B-203(a)(11) reads as follows:

(a) The Commission shall have the authority to:

(11) Approve or disapprove the opening and location of ABC stores as provided in Article 8.

We disagree with Greensboro that the Commission needs a statute change to consider efficiency as an objection to the approval of additional stores.

ABC Commission Rule 2R.1202 allows the Commission to consider any objections as to the opening of new stores. The implied powers granted pursuant to G.S.18B-203(b) gives the Commission the authority to act upon objections to approve additional stores.

Therefore, to address the two motions or arguments by Greensboro we find the following:

- (1) That as of this meeting, the Commission may now consider objections by High Point and Forsyth County to the proposed store by Greensboro.
- (2) That the efficiency of the store or system operations is a proper consideration or objection as to additional stores.
- (3) That the Commission has the authority to disapprove additional stores if it finds that store would be inefficient or cause any other store to be inefficient.

Administrator Michael Herring stated that he had visited the proposed store location and presented the Commission with a map of the area to refresh the Commission's memory of the proposed location. Mr. Herring went on to state that after having visited the proposed location, he could not find where this proposed location would be inefficient or cause any stores in the general vicinity to be inefficient. Mr. Herring recommended that the Commission approve the proposed location.

The Chairman stated that based upon the review of the evidence presented by Mr. Gray, visiting the proposed location and the stores there, he made a motion to approve the store location. Seconded by Commissioner Joyner. So Ordered.

IV. COMPENSATION ADJUSTMENT REQUEST FROM LB&B

Administrator Michael Herring stated that LB&B had requested a compensation adjustment to the ABC warehouse contract. Mr. Herring went on to state that he had met with LB&B representatives to see if an adjustment could be negotiated. He presented a summary of the adjustment request to the Commission. Mr. Herring stated that the original adjustment request totaled near \$500,000. LB&B is looking for adjustments in three areas: fuel cost increase, salaries adjustments and increased staff. LB&B was requesting an adjustment of \$101,298.00; Mr. Herring recommended an adjustment of \$43,818.00 for fuel cost. The salary adjustments were based on the percent of cases shipped from the warehouse and LB&B was asking for an adjustment of \$222,664.00; Mr. Herring recommended an adjustment of \$152,944.00. Finally LB&B is asking for an adjustment of \$146,986.00 for increased staff; Mr. Herring recommended an adjustment of \$129,870.00. The adjustments totaled \$326,632.00. Mr. Herring presented information showing the Commission how he came up with the figures for the adjustments. Mr. Herring stated that there has been an increase in the shipment of cases and additional staff will need to be hired in order to help maintain. LB&B has planned an investment of \$290,00.00 in computer upgrades. They have purchased 11 trucks with an investment of \$519,969.00. Additional equipment totaling about \$20,000.00 will be purchased. Mr. Herring further stated that there is no profit built into these adjustments; the monies will go straight to these areas. Mr. Herring pointed out the summary of the warehouse contract dating back to 1987. Mr. Herring recommended that the Commission approve the adjustment request. The Chairman asked if the \$326,632.00 could be cut to around \$306,000.00. Mr. Herring stated that it was possible.

The Chairman asked Mr. Morse where the assignment of contract of JA Jones was. Mr. Morse stated that the materials that were delivered to him, was reviewed and a ballot was supplied to us. Mr. Morse stated that it was unclear as to whether or not we needed to, but as it turns out, we didn't. The whole bankruptcy package will be closed up on August 18, 2004. Our contract was sold outside of and before this final proceeding.

Thomas Scanlon, vice present of L B&B Associates, stated that about 83% of the increase that they are asking for will go to problematic areas like drivers, forklift

operators and material handlers; keeping these areas staffed is a problem. The Chairman asked if there was a set number on the number of employees to be hired yet. Mr. Scanlon stated he didn't have a set number. Commissioner Wright stated that he had a lot of questions, but he would have to have some time to review the information that Mr. Herring provided. The Chairman stated that he would like to see where the adjustments are going specifically. Mr. Scanlon stated that he would provide that to the Commission. The Chairman made a motion to continue this matter to the September 17, 2004 Commission. Seconded by Commissioner Wright. So Ordered.

With no further business, the meeting adjourned.

Douglas A. Fox
N.C. Alcoholic Beverage Control Commission

Respectfully submitted by

Tiffany C. Goodson, Legal Division