

**NORTH CAROLINA ALCOHOLIC BEVERAGE CONTROL  
COMMISSION MINUTES  
MARCH 20, 2013**

The following narrative and summary highlights action taken by the North Carolina Alcoholic Beverage Control Commission at its meeting on March 20, 2013, beginning at 10:00 AM. The meeting was recorded and the disc is on file at the ABC Commission in the Legal Division.

**ROLL CALL**

Chairman James C. Gardner, Commissioner Joel L. Keith and Commissioner Kevin M. Green were present at the meeting. Chairman Gardner called the meeting to order, introducing and welcoming the new commissioners.

**MINUTES OF JANUARY 16, 2013**

Chairman Gardner asked for a motion to waive the reading of the minutes of the January 16, 2013 meeting into the record. Commissioner Keith made a motion to waive the reading of the minutes from the January 16, 2013 meeting. Commissioner Green seconded the motion. Motion Passed. Chairman Gardner asked for a motion to approve the minutes of the January 16, 2013 meeting. Commissioner Green made a motion to approve the minutes from the January 16, 2013 meeting. Commissioner Keith seconded the motion. Motion Passed.

**CONFLICTS OF INTEREST**

As required by North Carolina General Statute 138A-35, Chairman Gardner asked Commissioner Green and Commissioner Keith if there were any 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 Green stated he had found no conflicts of interest. Chairman Gardner stated he had found no conflicts of interest. Commissioner Keith stated he would recuse himself from hearing cases 5, 11, 14, 26, 31, 34, 39, 41, 42, 53, 70 and 72, as they involved Wake County ABC Law Enforcement.

**I. OTHER BUSINESS – STOUT BREWING COMPANY, KINGS MOUNTAIN, NC –  
PRODUCT APPROVAL**

Administrator Michael Herring stated Stout Brewing Company of Kings Mountain, North Carolina submitted to the NC ABC Commission five flavored malt beverages for consideration and approval to be sold in this state. These flavored malt beverages do not have the typical characteristics of a malt beverage, such as taste and color and are being marketed in 3-oz., non-traditional, metal, shooter-style containers.

Mr. Herring stated these malt beverages are designed mainly to be sold in businesses that hold off premise malt beverage permits, such as convenience stores, quick marts and grocery stores. ABC staff reviewed the products which have an alcohol content of 15% alcohol by volume or 30 proof.

On February 25, 2013, the NC ABC Commission staff disapproved the five flavored products due to the container shape and size, which were found to be contrary to the public interest. On March 6, 2013, official notice of disapproval was sent to Stout Brewing Company

Attorneys with the Parker Poe Law Firm in Charlotte representing Stout Brewing Company were present with other representatives to appeal the NC ABC Commission staff's rejection of the malt beverage shooter products.

Michael G. Adams of Parker Poe Adams & Bernstein, LLP introduced Cody Sommer, founder and CEO of Stout Beverages, LLC.

Mr. Sommer thanked the Commission for the opportunity to speak. Mr. Sommer stated Stout 21 had interests similar to the NC ABC Commission and its goal was to inform customers on responsible drinking practices. Mr. Sommer stated Ricky Murphrey, the mayor of Kings Mountain and attorney, Tim Moore were present, as well as attorneys, James N. Greene, III and R. Bruce Thompson of Parker Poe.

Mr. Adams stated that they were present to speak to the Commission not about the ability to sell a 15% alcohol by volume malt beverage as that is allowed by the State, but the container itself. Mr. Adams presented a PowerPoint presentation, including a brief history of Stout Brands, Stout Brewing Company, the Stout 21 products, the founder and other officers. Mr. Adams' presentation included photographs of the facility, employees and production. Mr. Adams outlined Stout 21's efforts to obtain product approval and permits. Stout 21's impact on their community in Cleveland County, NC was described by Mr. Adams.

Mr. Adams stated that Stout 21 products remain in some stores; however, all distribution to wholesalers has been stopped since the disapproval notice was received. Currently, the products are not sold anywhere outside of North Carolina, but permits are being applied for in Florida.

Samples of other malt beverages and their packaging, as found in convenience stores in North Carolina, were displayed by Mr. Adams, as well as photographs of spirituous liquor labels and packaging. Mr. Adams depicted Stout 21's packaging as being responsible by comparison. Mr. Adams stated the consumer can regulate the amount of alcohol consumed by drinking from such small containers. Mr. Adams compared the amount of alcohol in Stout 21 products to the amount of alcohol in various other malt beverages available on the market.

Mr. Adams stated that Mr. Sommer and Mr. Green met with ABC Deputy Administrator Robert Hamilton and Chief Counsel Fred Gregory on November 16, 2012 and showed them Stout 21 product samples. At this time, Stout 21 was still in the process of obtaining a permit from the TTB and distribution contracts. In February 2013, Stout 21 submitted the product for approval.

Mr. Adams again compared Stout 21 to products currently available to the public. It was conceded that the product itself was not an issue, but the issue was the container. Mr. Adams stated that the company's manufacturing plant was set up to only package in the 3-oz. metal container and the product could not be repackaged.

Mr. Adams referenced the statutes and rules regarding advertising, stating Stout 21 complies with the rules and statutes as stated, and the statutes regarding container size do not apply to Stout 21. Mr. Adams stated that a smaller container is more responsible than a large container and unlikely to support underage drinking. Documentation was shown stating higher price points and flavored malt beverages reduce underage drinking. Mr. Adams also stated the price point would be comparable to other products on the market at around \$2.00-\$3.00 per container, but Stout 21 products would be a smaller serving.

Mr. Adams demonstrated how easy it was to put other alcoholic beverage containers in his pockets, if he chose to do so. Mr. Adams stated the container shape for the Stout 21 products was selected to distinguish

them from others, to brand them and make them more attractive. Mr. Adams said Stout 21 thought people would like them, and the Stout 21 products are responsible alcoholic products.

Mr. Tim Moore, an attorney for Stout 21, stated that businesses establishing in North Carolina should have knowledge of regulations in order to make investments. Mr. Moore also stated that the company has employees in North Carolina manufacturing the product and creating safe, responsible products creates North Carolina jobs. All investment in the company is based on this product as it is their initial product. Mr. Moore stated that the company should be able to sell their product in North Carolina so that they can continue to manufacture in North Carolina as a local company for jobs and economic reasons. When asked by the Commission who was the target market, Mr. Sommer responded the product is being targeted to 21 – 35 year old males and females. Mr. Moore stated the name itself would suggest that the product is being marketed to those over 21 years of age.

Commissioner Green asked how the products would be sold. Mr. Sommer stated the Stout 21 products will be sold either at the counter, in a custom fridge or with suction displays that will put their items at the front of refrigeration units by adhering inside the glass doors. Mr. Sommer said they had never considered packaging the beverage in a traditional can and wants to keep it in the 3-oz. container. Mr. Sommer further stated that the ingredients in his product are different than those in other malt beverages. Mr. Sommer stated the only spirits in his products come from the flavorings and the alcohol is created only during the fermentation process. Mr. Sommer stated producing his product is similar to beer manufacturing and he is not aware of any distilled spirits in his products.

Mr. Herring returned to the podium to state, the Commission has a long standing policy of disapproving non-traditional containers for beer and wine products. In 2005, officials with Mango Bottling Company in Florida flew to Raleigh to present a product called tooters, which are similar in alcohol content to Stout 21 and came in colorful test-tube, shooter-style containers. The ABC Commission staff in their meeting on February 11, 2005, considered and disapproved these tooter products because of similar concerns as those regarding the Stout 21 products.

Mr. Herring stated since 2005 the Commission has seen and disapproved other similar products such as, jello shooters (fruit-flavored gelatin cups that contain 12% alcohol and referred to as “lunch box liquor”) and suck&blow (a 13% flavored alcohol which comes in a tube container). More recently, the Commission disapproved a product called, “Big shots” which is a 16% wine-based shooter. Mr. Herring exhibited samples of these products. Mr. Herring stated these products were disapproved because of concerns the package would be marketed to and appeal to underage consumers and promote reckless consumption.

Mr. Herring stated the Stout container is designed solely to provide a quick 3-oz. infusion of alcohol. Once uncapped, it is not possible to put the Stout 21 container down without spilling the contents or recapping it. Clearly, it is not in a container, sized or shaped, to suggest it is a beverage to be enjoyed responsibly.

Pouring a container of the Stout 21 product in a cup, Mr. Herring showed that the container holds only a very small amount of liquid which is a higher proof than a regular malt beverage. In a matter of a minute, a person could swallow or gulp four Stout tubes, and have consumed the equivalent of four high proof 12 oz. malt beverages. A minute later, Mr. Herring stated, the same person could do it again and would have consumed eight high proof malt beverages.

Mr. Herring stated, studies have found these type containers would most likely appeal to the underage, particularly girls and binge drinkers, where irresponsible consumption of alcohol can lead to extreme intoxication and even alcohol poisoning.

Mr. Herring added the non-traditional shape makes it difficult to identify the product as an alcoholic beverage. It looks like a cigar case and could be easily concealed in a pocket or backpack. Sales clerks, parents and even law enforcement would not immediately recognize a Stout shooter as an alcoholic beverage.

Chairman Gardner asked Mr. Herring if, during the earlier meetings at the ABC Commission, the Stout 21 representatives were given any indication that other products of this type were not given approval. Mr. Herring stated he was not present at the meeting, but the staff did tell the representatives that any approval on the Stout 21 products would have to come from Mr. Herring's office. Mr. Herring stated that after a meeting, Mr. Gregory showed him the proposed product and Mr. Herring told Mr. Gregory that the Commission would not approve the product. Chairman asked if Stout 21 was notified, and Mr. Herring stated they were not notified at that time and did not know why they were not notified. Mr. Herring believed they were still going through the approval process with the federal government. Once the federal process was complete and the products were submitted to the ABC Commission for approval, Mr. Gregory disapproved the Stout 21 products.

Mr. Herring stated members from the health community and the public were present to address the Commission regarding this product's approval.

Mark Ezzell, Executive Director of Addiction Professionals of NC, was present to address the Commission. Mr. Ezzell stated he represented the interests of 6,000 substance abuse professionals. His organization is concerned about the public health aspect and the packaging of this product. Flavored alcoholic beverages have gained a great deal of popularity in the market. When asked, two-thirds of underage drinkers reported that within the past thirty days, they had consumed a flavored alcoholic beverage. Fewer consumers in the 18-30 year old market reported drinking flavored alcoholic beverages, less than one-fourth. Mr. Ezzell stated the packaging does not resemble any other alcoholic beverages, but more resembles packaging for cigars, candy and energy drinks. Mr. Ezzell stated the product is contrary to public health and has the potential to exacerbate underage drinking.

Judge Ron Bogle, a retired Superior Court Judge from North Carolina was present to speak about his concerns regarding the Stout product. Judge Bogle stated he works with coalitions across the country regarding underage drinking. Judge Bogle stated flavored alcoholic beverages are the most favored beverage of teen girls and the least favored among adult females over the age of 21. Judge Bogle stated many researchers believe the FAB's, flavored alcoholic beverages, are responsible in part for the dramatic rise in underage drinking among young women. Judge Bogle stated on average today, children are 12 years of age when they take their first drink of an alcoholic beverage. In addition, Judge Bogle stated that the highest rate of addiction is among 18-20 year olds, creating a public health crisis. This public health crisis has cost North Carolina \$1.5 billion for the behavioral and public health harms caused by underage drinking and the nation more than \$62 billion. Judge Bogle stated, for the first time in our history, the majority of alcoholics in this country are not old people, but preteens through those 26 years of age. Furthermore, shooters lead to the worst type of consumption, binge drinking.

Karen Webb of Alamance County was present to represent public groups, such as parents, school personnel, law enforcement, health and human service personnel, and faith communities, concerned with underage drinking and substance abuse. Ms. Webb stated that their primary concern regarding the Stout 21 products was to whom they were being marketed? Ms. Webb asked the Commission to consider, "Is it good for the children?"

Wanda Boone, the founder of "Together for Resilient Youth" of Durham, was present to express her concern for the Stout product being sold in local convenience stores. Her members come from all sectors

of her community. An addition such as the Stout 21 products to the convenience stores offerings would be detrimental to her community. Ms. Boone stated, when she asked a group of 14-17 year olds about the products, they said they reminded them of the shots depicted on television in clubs and remarked on how easy it would be to conceal the items. The availability to young people in the community was her main concern.

Mayor Rick Murphrey of Kings Mountain, Cleveland County, NC was present to speak on behalf of Stout Brewing Company. Mayor Murphrey stated the local unemployment rate was 10.6% and Stout Brewing Company was a valuable employer in the community and an excellent corporate citizen.

Mr. Herring stated to Chairman Gardner and Commissioners Keith and Green, the ABC Statutes give them the authority to determine what brands of alcoholic beverages may be sold in the state. The Statutes additionally give them the authority to prohibit any marketing of alcohol beverages which may be contrary to the public's health and safety. There are over 80 breweries in the state, all, except for Stout Brewing Company, are brewing beers that are sold in traditional bottles or containers, or sold by the glass at a restaurant or at the brewery. Mr. Herring stated high proof, flavored alcohol, marketed in 3-oz shooter style vessels, sold in off-premise businesses frequented by underage individuals is a public safety concern. Mr. Herring added the Commission has been uniform in rejection of the shooter type containers. Mr. Herring recommended the Commission uphold the decision of the staff to disapprove the sale of Stout 21, 3-oz shooter products, in North Carolina.

Commissioner Green asked whether the Stout product could be sold in ABC stores rather than convenience stores. Mr. Herring stated currently there is nothing similar to these products sold in ABC stores. Mr. Herring stated the Stout 21 products could not be sold in the ABC stores unless the product was reformulated.

Mr. Adams asked the ABC Commission to reverse the staff's recommendation and approve the Stout 21 products.

Chairman Gardner stated this was a tough decision for the ABC Commission and that he understands the community's concerns. Chairman Gardner stated underage drinking is of the highest concern to the Commission.

Commissioner Keith stated that Mr. Adams and the others made a compelling argument, but underage drinking is a major concern in this state. Commissioner Keith stated he felt this product would be more appealing to the underage consumers and this vial is less than half the size of any products previously approved.

Commissioner Keith made a motion to adopt the staff's recommendation and disapprove the Stout products. Commissioner Green seconded the motion. Motion passed.

## **II. HEARING CASES – 108**

Assistant Counsel LoRita Pinnix asked that hearing cases #5, 50 and 61 be continued to the April 10, 2013 NC ABC Commission Meeting.

Commissioner Green made a motion to continue the cases. Commissioner Keith seconded the motion. Motion passed.

Ms. Pinnix stated Doug Besser, the Director of Operations and Chris Beagley, the general manager of hearing case #75, Carolina Ale House, were present to speak on behalf of the business. Mr. Beagley

stated the business had been operating for one and one-half years and this was the first violation. He stated a negligent employee served an underage person. The underage individual then approached the bar; the bartender asked for identification and did not serve to that person. The employee was immediately terminated. Mr. Beagley stated the company conducts its own training and the entire staff has also taken an extensive class with the Pitt County ABC Law Enforcement. Ms. Pinnix stated there was room for flexibility on the penalty.

Commissioner Green made a motion to reduce the penalty by 50%. Commissioner Keith seconded the motion. Motion passed.

Ms. Pinnix stated Phil Evans and Mike Parent, the owners of hearing case #14, Rudy's Pub and Grill, were present to speak on behalf of the business. Mr. Parent stated that he had been in business for nine years when the violation occurred. The bartender had asked the underage buyer for identification, but misread the Florida license. The employee was sent to take more training. The owners of the business utilized underage buyers to self-test their employees. When the same employee failed their self-test, that employee was terminated.

Commissioner Green made a motion to reduce the penalty by 50%. Chairman Gardner seconded the motion. Motion passed.

Ms. Pinnix stated Brian Ealy, the manager of hearing case #97, Big Shots Entertainment Sports Bar and Grill, was present to speak on behalf of the business. Mr. Ealy stated he was unaware the business received the violations until he received the notification from the ABC Commission. Assistant Counsel Tim Morse stated there is no statement in the violation report saying that a manager was informed, but there were employees present and it is implied that they are notified. Mr. Morse added, five spirituous liquor bottles were found that were not permanently defaced and the Fire Marshall was called to the premises regarding occupancy issues. ALE agents came in afterwards.

After conferring with the others, Commissioner Green made a motion to leave the penalty as stated in the Offer in Compromise. Commissioner Keith seconded the motion. Motion passed.

Ms. Pinnix stated Gurmukh Multani, the owner of hearing case #64, Mike's Convenience Store, was present to speak on behalf of the business. Mr. Multani stated the employee sold the underage person the alcohol at a time when he was not at the store. The employee was busy and made a mistake. Mr. Multani stated that he now tries to be present at the store during the busier hours.

After conferring with the others, Commissioner Keith made a motion to leave the penalty as stated in the Offer in Compromise. Commissioner Green seconded the motion. Motion passed.

### **III. OTHER BUSINESS – ABC STORE RELOCATION – DARE COUNTY ABC BOARD**

Mr. Herring stated on January 14, 2013, the ABC Commission received a letter from Ted Toler, the General Manager for the Dare County ABC Board requesting approval to relocate their ABC store in Duck, North Carolina.

On January 21, 2013, ALE Special Agent in Charge Pat Forbis began an investigation and found the Dare County ABC Board wished to relocate from 1216 Duck Road to 1215-A Duck Road. The new location would provide more visibility and a larger, modernized retail space; as well as a more customer-friendly location.

The proposed location is owned by Wee Winks, LLC. All Dare County ABC Board Members have submitted financial disclosure forms indicating no financial interest in the property owned by Wee Winks, LLC. This location would be rented by the Dare County ABC Board and the cost would be \$5,000.00 per month.

The building will be 2160 square feet, with 1818 feet of retail floor space and 342 square feet of storage space.

The nearest church is located 150 yards southwest of the proposed site. The pastor stated he had not received objections from anyone in the church. The nearest school is located 6.3 miles from the proposed location. Notice of intent to open an ABC store at the site was properly posted on January 10, 2013.

Sales from the current location for 2012 were \$773,000.00. Sales at this new location are projected to increase 5%, with anticipated annual sales of \$811,650.00.

The closest ABC store is the Dare County ABC Board's Kitty Hawk store, approximately 5.8 miles away. The Commission did receive three letters in objection to this site. The concern was that one side of the road was commercial and the proposed site was on the primarily residential side. However, it was confirmed the proposed site is in a commercially zoned area with other businesses. Mr. Herring recommended approval of the relocation.

Commissioner Green made a motion to approve the location. Commissioner Keith seconded the motion. Motion Passed.

Ms. Pinnix asked the Commission to ratify the Offers in Compromise. Commissioner Green made a motion to approve the offers in compromise from which Commissioner Keith recused himself. Chairman Gardner seconded the motion. Motion Passed. Commissioner Keith made a motion to approve the remaining offers in compromise, with the exception of the previously ratified cases. Commissioner Green seconded the motion. Motion Passed.

#### **IV. OTHER BUSINESS – CONSIDERATION OF ADOPTION OF RULE PUBLISHED IN VOLUME 27, ISSUE 11 OF THE NC REGISTER (04 NCAC 02S .0228)**

Mr. Hamilton asked that the Commission enter the proposed rule change and the impact statement into the record and waive the reading of the rule. Mr. Hamilton asked the Commission to adopt 04 NCAC 02S .0228 Dispensing Alcoholic Beverages: Product Identification and its impact analysis and to give Mr. Hamilton the authority to make technical changes required by the Rules Review Commission.

Commissioner Keith made a motion to approve staff's recommendation. Commissioner Green seconded the motion. Motion Passed.

#### **V. OTHER BUSINESS – EXEMPTION REQUEST – DAVID MEEKER**

Mr. Morse stated David Meeker, the owner of Busy Bee Café and Restaurant, was present to ask the NC ABC Commission for an exemption. Mr. Meeker asked for an exemption so that he may become a partial owner of Trophy Brewing, a microbrewery. Mr. Morse stated the retail business would not sell products produced by Trophy Brewing.

Commissioner Green made a motion to grant the exemption. Commissioner Keith seconded the motion. Motion Passed.

**VI. OTHER BUSINESS – APPROVAL OF FUTURE COMMISSION MEETING DATES**

Mr. Herring recommended the Commission approve Wednesday, May 8, 2013, as the date of the May 2013 NC ABC Commission Meeting and Wednesday, June 12, 2013, as the date of the June 2013 NC ABC Commission Meeting. Commissioner Keith made a motion to approve these dates as future NC ABC Commission meeting dates. Commissioner Green seconded the motion. Motion passed.

With no further business, the meeting adjourned.

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James C. Gardner, Chairman  
N.C. Alcoholic Beverage Control Commission

Respectfully submitted by,

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Caroline Y. Washburn for the Legal Division