DOCKET NO. 372522

IN RE THE RENEWAL APPLICATION	§	**BEFORE THE TEXAS ALCOHOLIC**
FREDERICKSBURG ROAD	§	
ENTERTAINMENT COMPLEX LLC	§	
D/B/A GRAHAM CENTRAL STATION/	§	
SOUTH BEACH/BELL BOTTOMS/	§	
ALLEY CATS/DENIM AND	§	**BEVERAGE COMMISSION**
DIAMONDS/T2002/VERTIGO	§	
	§	
	§	
Permit/License Nos. MB511542, LB511543	§	
BEXAR COUNTY, TEXAS	§	
SOAH No. 458-06-2130	§	

ORDER

CAME ON FOR CONSIDERATION this 26 day of February, 2007, the above-styled and numbered cause.

In this proceeding, Staff of the Texas Alcoholic Beverage Commission ("TABC"); the San Antonio Police Department ("SAPD"); the Oak Hills Citizens Association ("Oak Hills"); and numerous concerned citizens protested the renewal of the mixed beverage permit and mixed beverage late hours permit held by Fredericksburg Road Entertainment Complex, L.L.C., d/b/a Graham Central Station/South Beach/Bell Bottoms/Alley Cats/Denim and Diamonds/ T2002/Vertigo ("Applicant") for use at 4902 Fredericksburg Road, San Antonio, Bexar County, Texas.

This proceeding was transferred to the State Office of Administrative Hearings ("SOAH"). On August 25, 2006, the parties attended a mediated settlement conference, presided over by two mediators assigned by SOAH. As a result of the settlement conference, Applicant, TABC Staff, SAPD, and Oak Hills reached the agreement attached to this Order as Exhibit 1 and incorporated herein by reference. The terms of such agreement are incorporated into this Order, and its terms are made a part hereof as though fully set forth herein.

Because some citizen protestants were not parties to the settlement agreement, a hearing convened on October 2, 2006 before Administrative Law Judge ("ALJ") Sharon Cloninger. The hearing was continued until October 6, at which time the ALJ reconvened the hearing by telephone to take the testimony of witnesses who were unavailable on October 2. On December 5, 2006, the ALJ made and filed a Proposal for Decision ("PFD") containing Findings of Fact and Conclusions of Law, which PFD is attached hereto as Exhibit 2 and incorporated herein by reference. The PFD was properly served on all parties, who were given an opportunity to file Exceptions and Replies. As of this date, no party has filed Exceptions.

After review and due consideration of the PFD, transcripts, and exhibits, the TABC Assistant Administrator hereby ADOPTS the findings of fact and conclusions of law of the ALJ, which are

contained in the PFD, and hereby INCORPORATES those findings of fact and conclusions of law into this Order as though each was fully set forth herein. All proposed findings of fact and conclusions of law submitted by any party which are not specifically adopted herein are hereby DENIED.

IT IS THEREFORE ORDERED by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 Tex. Admin. Code 31.1 of the TABC Rules, that Applicant's renewal application shall be **APPROVED** and **GRANTED**, and that Applicant's permits shall be **RENEWED**.

This Order will become final and enforceable on March 8, 2007, unless a motion for rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties as indicated below.

SIGNED on this 12th day of February, 2007.

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

The Honorable Sharon Cloninger
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (512) 475-4994

Don E. Walden
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Attorney for TABC Staff
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HAND DELIVERY

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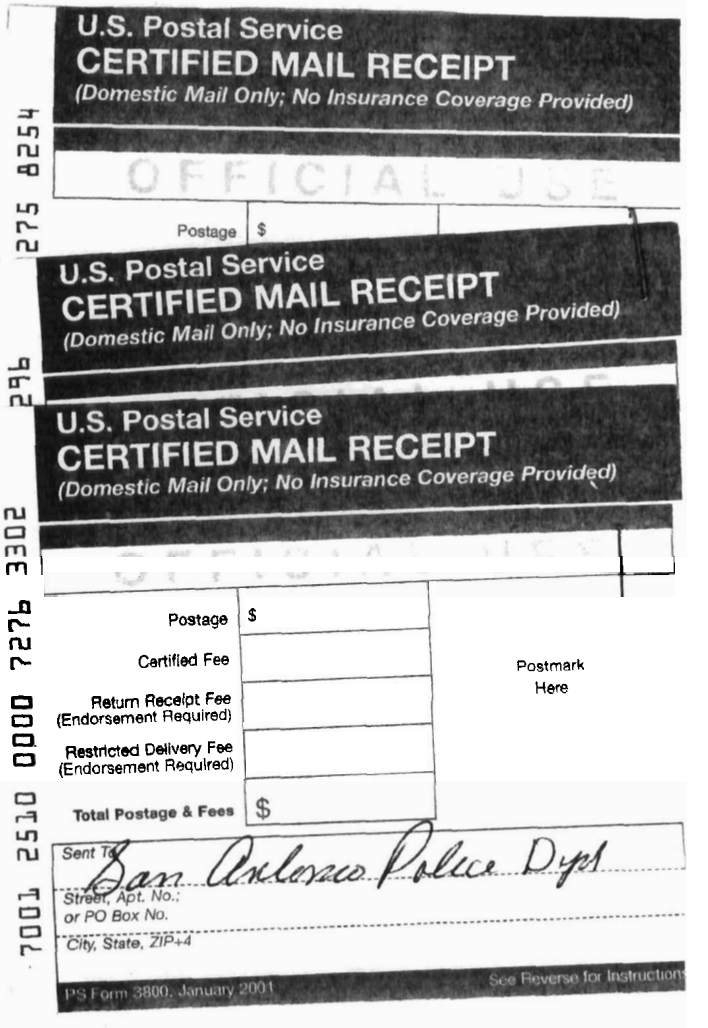

Lt. Michael Gorham
San Antonio Police Department
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CERTIFIED MAIL NO. 7001 2510 0000 7276 3302

Marco Gamboa
Oak Hills Citizens Association
314 Lakeridge
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Licensing Division
San Antonio District Office

State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge

December 5, 2006

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

HAND DELIVERY

RE: Docket No. 458-06-2130; Texas Alcoholic Beverage Commission vs. Fredericksburg Road Entertainment Complex, L.L.C. d/b/a Graham Central Station/South Beach/Bell Bottoms/Alley Cats/Denim and Diamonds/T2002/Vertigo

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Sharon Cloninger

Sharon Cloninger
Administrative Law Judge

RECEIVED
DEC 6 2006
LEGAL DIVISION

SC/pp
Enclosure
xc: Docket Clerk, State Office of Administrative Hearings- **VIA HAND DELIVERY**
Judith Kennison, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA HAND DELIVERY**
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA HAND DELIVERY**
Don E. Walden, Attorney at Law, 7200 North Mopac, Suite 300, Austin, TX 78731 -**VIA REGULAR MAIL**
Narciso Mendoza, 3130 Cato Boulevard, San Antonio, TX 78223 - **VIA REGULAR MAIL**

DOCKET NO. 458-06-2130

IN RE RENEWAL APPLICATION OF FREDERICKSBURG ROAD COMPLEX, L.L.C., d/b/a GRAHAM CENTRAL STATION/ SOUTH BEACH/BELL BOTTOMS/ ALLEY CATS/DENIM AND DIAMONDS/T2002/VERTIGO PERMIT/LICENSE NOS. MB-511542 AND LB-511543 BEXAR COUNTY, TEXAS (TABC CASE NO. 372552)	§	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

Fredericksburg Road Entertainment Complex, L.L.C. d/b/a Graham Central Station/South Beach/Bell Bottoms/Alley Cats/Denim and Diamonds/T2002/Vertigo (Applicant) filed a renewal application with the Texas Alcoholic Beverage Commission (Commission or TABC) for Mixed Beverage Permit No. MB-511542 and Mixed Beverage Late Hours Permit LB-511543 for the premises located at 4902 Fredericksburg Road, San Antonio, Bexar County, Texas. Applicant's mailing address is 6999 Hwy. 80 E., Odessa, Texas 79762.

TABC, the San Antonio Police Department (SAPD), Marco Gamboa on behalf of the Oak Hills Citizens Association (Oak Hills), and Reinette Alecozay on behalf of other concerned citizens (Protestants), protested the renewal, asserting that the place or manner in which Applicant may conduct his business warrants the refusal of the permits based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

On August 25, 2006, prior to the hearing on the merits, Applicant, TABC, SAPD, Oak Hills, and Protestants participated in a mediated settlement conference. As a result of an agreement reached through mediation, TABC, SAPD, and Oak Hills withdrew their protests of the renewal. However, Protestants did not reach an agreement with Applicant and did not withdraw their protest.[1]

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[1] Ms. Alecozay did not attend the mediated settlement conference. Instead, Narciso Mendoza, Charles Rodriguez, and Edmundo Vargas attended on behalf of Protestants.

The Administrative Law Judge (ALJ) finds Protestants did not present sufficient evidence at the hearing on the merits to prove the allegations set out in the Notice of Hearing, and recommends that the Commission renew Applicant's permits.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No contested issues of notice, jurisdiction, or venue were raised in this proceeding. Therefore, these matters are set out in the findings of fact and conclusions of law without further discussion here.

The hearing on the merits convened on October 2, 2006, before ALJ Sharon Cloninger at the State Office of Administrative Hearings (SOAH), 10300 Heritage Blvd., Suite 250, San Antonio, Bexar County, Texas. Protestants appeared *pro se*, through their spokesperson Mr. Mendoza. Applicant was represented by Don E. Walden, attorney. TABC appeared through Judith L. Kennison, Staff Attorney, and did not protest the renewal, but Ms. Kennison offered exhibits to establish notice, jurisdiction, and to show what information was presented to the Commission related to the protest. Allen and Joan Ellebracht were admitted as protesting parties, although they had not previously participated in this matter; they represented themselves. After the presentation of evidence, the hearing recessed that same day.

The hearing reconvened October 6, 2006, via telephone conference call, for Protestants to present the testimony of two witnesses who were unavailable at the October 2, 2006 proceeding. The record closed October 6, 2006, following the presentation of evidence.

II. LEGAL STANDARDS AND APPLICABLE LAW

Under TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8), the Commission is authorized to refuse to issue a renewal permit with or without a hearing if it has reasonable grounds to believe and finds that the following circumstance exists:

> the place or manner in which the applicant may conduct his business warrants the refusal of a permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

Protestants allege the renewals should be denied pursuant to TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8) for the following reasons, as set out in the Second Amended Notice of Hearing:[2]

> ...from January 1, 2004, to May 31, 2005, there were numerous calls for service in which SAPD responded to Applicant's location. These calls included charges of murder, assaults, driving while intoxicated, public intoxication, minors possessing/consuming alcohol, thefts, and accidents. These incidents endangered the health, safety, and general welfare of the public.[3] Further, Applicant knew or should have known such offenses were occurring and failed to take reasonable steps to prevent them.

III. EVIDENCE

TABC Staff offered the Second Amended Notice of Hearing,[4] which was admitted to establish notice and jurisdiction; Applicant's renewal application,[5] which was admitted; and the protest materials received by TABC,[6] which were admitted for the limited purpose of showing what had been submitted to the Commission for its consideration. Protestants called six witnesses, and

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[2] TABC Exh. 1.

[3] The Second Amended Notice of Hearing does not specify that the calls for service to SAPD endangered peace, morals, or the public sense of decency, although TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8) includes those items. Instead, the allegation is that the charges incidental to the calls endangered the health, safety, and general welfare of the public. Therefore, this Proposal for Decision will not address whether the manner in which Applicant may operate his business could endanger peace, morals, or the public sense of decency. *See* TABC Exh. 1.

[4] TABC Exh. 1.

[5] TABC Exh. 2. Applicant's permits were first issued by TABC on April 5, 2002, and have been continuously renewed, most recently on April 5, 2004, with an expiration date of April 5, 2005. The renewal application that is the subject of this proceeding was received by TABC on April 4, 2005.

[6] Although TABC Agent Dina Ahrens – who prepared the very thorough investigation report admitted as part of TABC Exh. 3 – was called as a witness by Protestants, the report was not offered for all purposes, and Agent Ahrens was questioned about very little of the information contained in the report. Therefore, the ALJ will only give weight to information from the report that was testified to by Agent Ahrens.

offered no documentary evidence. Applicant called two witnesses, and offered no documentary evidence.

A. Protestants' Evidence

1. Roger Gearhart[7]

Roger Gearhart is a member of a group based in Odessa, Texas, that owns Applicant's premises under Fredericksburg Road Entertainment Complex, L.L.C.,[8] as well as about 14 other clubs in Texas and about six clubs in other states. He testified he did not know about the combined investigation of the club by TABC and SAPD until it was reported in the media around April 2006. He said once he learned about the investigation, he met with Lt. Christina Guerra of the TABC because he felt he had a duty to address problems pointed out by Lt. Guerra, even though the club was managed in accordance with TABC rules, and Applicant had broken no laws. After meeting with Lt. Guerra, Mr. Gearhart implemented a temporary change in management of the club beginning in April 2006, with a permanent change in June 2006. Subsequently, there was a reduction in the number of calls to SAPD related to the club, he said.[9]

Mr. Gearhart testified he did not know how many times the police were called to the location during the past year. He said the club might generate more calls than normal, because managers are instructed to call police when there is a problem.[10] He admitted he did not know what constitutes a "normal" amount of calls for a club.[11] In response to questioning, he said that even assuming there

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[7] Mr. Gearhart was also called as a witness by Applicant. *See* Applicant's Evidence, below.

[8] *See* TABC Exh. 2.

[9] Mr. Gearhart testified that the reduction in calls is not due to incidents being reported differently under the new manager.

[10] The ALJ believes Mr. Gearhart may have been referring to the policy under prior management. Applicant now employs more Texas peace officers to provide security. Mr. Gearhart explained that if the off-duty police officers who work as club security feel a situation is under control, they do not call SAPD. If they feel an arrest needs to be made, they decide with management whether to call SAPD.

[11] No evidence was presented regarding the number of patrons who are at the club on any given night, or how many calls for service are made to SAPD by other clubs of a similar size in Bexar County.

were more than 400 service calls to SAPD related to the club, and even assuming a patron left the club and killed someone, he would still live in Oak Hills.[12]

Mr. Gearhart said that club security staff includes between four and six off-duty law enforcement officers outside the club, and two off-duty police officers inside the club. He said security staff is stationed at the front door to ascertain if a patron is too intoxicated to drive away from the premises, but agreed that an intoxicated patron can sometimes get past security.

Mr. Gearhart testified there is no "last call" at closing time. He said the club's approximately 65 employees all go to the door at closing time to watch patrons leave and identify anyone who appears to be drunk.

Mr. Gearhart testified that under state law, Applicant must notify TABC of violent incidents that occur on the club premises, and typically does so by leaving a recorded message at a TABC telephone number. He said Applicant is not required to report violent incidents to SAPD. However, he said that following the mediated settlement conference in August 2006, Applicant has been sending Lt. Michael Gorham at SAPD information regarding "incidents of consequence"[13] via electronic mail.

2. Lt. Michael Gorham

Lt. Michael Gorham , SAPD Vice Unit Commander, testified that he oversees the vice unit that has received complaints regarding Applicant's premises for the past three years. He said SAPD initiated the protest of Applicant's renewal application based on the number of calls for service received as of the time the protest was filed.[14] He said the complaints received by SAPD from

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[12] Presumably the club is located in Oak Hills.

[13] Mr. Gearhart was not asked to elaborate about this arrangement, or to explain what constitutes "incidents of consequence."

[14] According to TABC Exh. 3, the SAPD protest was filed March 24, 2005.

January 1, 2004, through January 1, 2006, [15] are listed the way they are called in, and explained that upon investigation, it might be determined that the called in description of an incident needs to be changed.

Lt. Gorham agreed that the number of calls from the club to SAPD is substantially lower – maybe 40 to 50 fewer – for the period of January through August 2006 as compared to the total number for 2005.

Lt. Gorham said SAPD has not been pressured to withdraw its protest of the renewal application. He said the concerns of law enforcement were addressed in the mediated settlement, with express consequences for Applicant if the concerns are not met.

3. Dina Ahrens

Dina Ahrens is the TABC agent who conducted the investigation in this case,[16] beginning in the summer of 2004, and working in conjunction with the SAPD vice squad after SAPD's protest letter was received by TABC in March 2005. She said she cannot agree or disagree with the renewal of Applicant's permits at this time, because although Applicant has taken steps to alleviate problems, she needs to see "how the changes play out" before she makes up her mind.

Agent Ahrens was asked about the 439 disturbances listed in her investigation report.[17] She said the list is what "brought us to the protest today."[18] She said there were a large number of SAPD

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[15] *See* TABC Exh. 3, the last 12 pages of the exhibit, excluding the twelfth page. (The exhibit pages are not numbered).

[16] See TABC Exh. 3, which is Agent Ahrens' investigative report. However, the report was offered and admitted for the limited purpose of showing what the Commission received regarding this case, and not for the truth of its contents. Therefore, the ALJ gives the contents of the report no weight, unless there was testimony regarding specific parts of the report.

[17] *See* TABC Exh. 3, p. 2.

[18] Agent Ahrens explained that Applicant is required to report every breach of the peace to TABC, and is only required to call SAPD in certain instances, such as if there is an act of violence with a charge to be filed. She added that this past May, June, and July, Applicant has been good about reporting breaches of the peace.

calls for Applicant's premises, and a dramatic increase in police activity in the area after the club opened in April 2002. She said that even though she brought the problems to the previous management's attention on approximately five different occasions, the problems continued. She said following her investigation,[19] she concluded there was sufficient grounds to protest Applicant's renewal application.[20]

On cross examination, Agent Ahrens clarified that the figures in her report[21] reflect calls made to SAPD, with case titles determined by SAPD, based on actual police reports for charges to be filed.

4. Lt. Christina Guerra

Lt. Christina Guerra, who is Agent Ahrens supervisor at TABC, testified that beginning in January 2006, she had many meetings with Applicant's prior manager and staff, meetings that became more regular after April 2006, when Mr. Gearhart became aware there were problems at the club. She said she found Mr. Gearhart to be extremely concerned, and had no difficulty communicating with him.

Lt. Guerra explained that calls for service to a police department are not an adequate gage alone of whether there is an ongoing problem at a club. She said the reports must be studied to determine if there is a problem. She did not know if calls for service are still being made regarding

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[19] Agent Ahrens said she completed the investigation report around July 2005, adding a few incidents in August 2005. She said anything dated later was added by Lt. Guerra. The ALJ notes the last entry to have been made on October 4, 2005. *See* TABC Exh. 3, p. 9.

[20] Agent Ahrens referred to her conclusion, set out at TABC Exh. 3, pp. 9-10. The report states she found sufficient grounds to protest the renewal mixed beverage permit based on evidence she gathered, including SAPD case reports and Applicant's own records for fights resulting in assaults and aggravated assaults between intoxicated patrons; minors consuming alcoholic beverages and some found to be intoxicated; known gang members being allowed to frequent the club which resulted in a gang-related murder on the premises; DWIs coming out of the location; sexual assaults alleged to have been committed by third party employees of Applicant; and concerns of citizens and business owners in the area. The report states that Agent Ahrens had brought these public safety concerns to the attention of Applicant's management, but numerous incidents of a criminal nature continued to occur on Applicant's premises.

[21] TABC Exh. 3, p. 2.

Applicant's club, because once the case report was finished, Agent Ahrens' job was done, and no other TABC agent has been assigned to the case.

5. Sgt. Roland Ortiz

Roland Ortiz is a sergeant with SAPD's vice squad. He testified that his ordinary work hours are noon to 8 p.m., and that he has observed no problems on Applicant's premises during that time.

6. Edmundo Vargas

Edmundo Vargas, one of the Protestants, said he lives about a mile from Applicant's premises. He said it is his opinion – as a former high school teacher and as someone who has worked in juvenile probation – that places that tempt youngsters, such as Applicant's club, are detrimental to the area.

On cross examination, Mr. Vargas said he has never been to Applicant's club, that he goes to a different bar to drink beer. He also said there are other bars within the one-mile vicinity of his home, and that he does not see problems in the other bars. He said his protest of Applicant's renewal is based on what other people have told him. He also said he received telephone calls from people asking him to participate in the protest.

B. Applicant's Evidence

1. Zachary Kepple

Zachary Kepple has been Applicant's general manager since June 2006. He has worked as a manager for Applicant at various clubs across the state for seven of the past 10 years. He started out employment with Applicant as a floorwalker and on the security staff at a club in Temple, Texas. He was an assistant manager at Applicant's club in Waco for a year, then became general manager of Applicant's club in Fort Worth for a year. He most recently was an area manager for Applicant's clubs in Laredo, Corpus Christi, and McAllen for a year-and-a-half. When asked, he replied that

every move within Applicant's organization was a promotion for him. He said he was transferred to San Antonio because Applicant's club needed a stable management team. He said he reports directly to Mr. Gearhart.

Mr. Zepple testified that the concerns related to endangerment of the public were conveyed to him upon his becoming general manager of Applicant's club. He said he has developed a more in-depth security plan, involving licensed Texas peace officers. He said he has also communicated regularly with TABC and SAPD regarding security at the club, with no dissatisfaction from either of them. He said TABC agents stop by the club regularly and SAPD officers routinely drive through the parking lot.

Mr. Zepple explained that for security, the club hires off-duty police officers through a licensed peace officer who is an employee of the club and is in charge of them. He said each off-duty police officer works for the club on a subcontract basis. Mr. Zepple said security is needed outside because the parking lot is large, and there is back parking. He said the club has a security vehicle that patrols the parking lot and adjacent streets, to check for people consuming alcoholic beverages in their cars, and to ascertain if minors are consuming alcoholic beverages. He said he constantly rotates the 18 employees who provide door security, to prevent minors from having a door person "friend" who will let them in. He said employees must undergo between two and three weeks of training before being assigned to door security. Mr. Kepple said he believes the club has a good security system now.

Mr. Zepple testified that all club employees – including everyone from managers to disc jockeys – must undergo four-hours of TABC training on matters such as Texas alcoholic beverage laws and identifying minors.

On cross examination by TABC Staff, Mr. Kepple testified that the club has an "18 and up" night on Wednesdays. He said the issue of consumption of alcoholic beverages by minors is addressed in part by having additional security on duty on Wednesday nights. He said the club has one security guard per bartender, and the security guard watches to see if a patron takes a drink to

another person. In addition, a big black "X" is marked on each palm of minors. He said if a bartender has any doubt about a patron's age, he is to have a security guard ask the patron for identification, or ask the patron himself. Bartenders are taught to greet the customer as he comes up to the bar, and identify if the person is a minor, or if he is possibly intoxicated. He said that if a minor attempts to purchase an alcoholic beverage, he will be escorted to the front door and a safe ride home will be found for him. He said if a minor is ejected from the club, he will not be allowed back on the premises until he is at least 21 years old.

Mr. Zepple said if a minor attempts to get into the club unlawfully, a manager will get involved to determine if the person's identification is false or not. If the identification is false, the manager will confiscate it, and arrange a safe ride home for the minor to remove him from the premises. Mr. Zepple testified the police are not called if a minor has false identification.

Mr. Zepple said if a patron is identified as intoxicated, club employees will find out if the patron has a friend with him who can take him home, if he can call a friend, or if he can afford a taxi. If he can do none of these things, the club will pay for a taxi to take him home.

Mr. Zepple said club sales are down from last year, which could be related to higher gasoline prices, or the safety issues raised in the media.

2. Roger Gearhart

Mr. Gearhart testified that he brought Mr. Zepple in to manage Applicant's premises because Mr. Zepple is one of his group's top employees. He said Mr. Zepple was doing an excellent job as an area manager for the Corpus Christi, Laredo, and McAllen clubs, and he knew Mr. Zepple would get security under control and develop good rapport with TABC and SAPD as general manager of Applicant's premises.

Mr. Gearhart said he tried to communicate with Ms. Alecozay, who was the spokesperson for Protestants at the time, leaving about 20 telephone messages for her over a week-and-a-half, with

none of his calls returned. He said he told Lt. Guerra what had happened, and she told him he had done all he could to reach Ms. Alecozay. He said he has given his home telephone number to Protestants, because he wants to address their concerns.

When asked on cross examination why he had not addressed problems at the club before now, Mr. Gearhart explained he was not aware of the problems until April 2006, when Lt. Guerra made them public. He said the club's previous manager did not let him know there were problems that needed to be solved. Mr. Gearhart said the prior manager was fired in April 2006, at which time the area manager stepped in temporarily, until Mr. Zepple could be moved into the general manager position. He said the San Antonio area manager has been re-assigned, and now San Antonio is a district all by itself.

Mr. Gearhart said his meeting with Lt. Guerra led him to believe the club needed a larger security staff outside, although the inside staffing was ample. As a result, the club has developed a security plan that is more than what SAPD and TABC requested, with plans for the security plan to be in place for 10 years. He said Lt. Guerra was concerned about minors consuming alcoholic beverages on Wednesday nights at the club, so the club no longer offers liquor by the shot on minor nights. He said she was concerned about the price and duration of the drink special, so he voluntarily raised the drink special price and reduced the duration of the drink special time.[22]

Mr. Gearhart said it costs about $5,000 per week to implement the measures requested by TABC and SAPD.[23] For instance, each bulb in the parking lot is being raised from 100 candlepower to 1,000 candlepower, and light fixtures are being added so there are no more dark spots in the parking lot.

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[22] It is not clear if some of these changes occurred prior to the mediated settlement conference, or as a result of the mediated settlement conference. Because of the confidential nature of mediated settlement conferences, the ALJ asked not to be provided with terms of the settlement agreement.

[23] Presumably these are the measures agreed to during the mediated settlement conference.

IV. ANALYSIS

Protestants proved some, but not all, of the allegations necessary to show that Applicant's permits should not be renewed:

- Protestants proved that from January 1, 2004, to May 31, 2005, there were numerous calls for service in which SAPD responded to Applicant's location. However, they offered no evidence that the number of police calls to Applicant's premises was higher than for other licensed premises of a similar size in Bexar County.

- Protestants proved the calls for service to SAPD included charges of murder, assaults, driving while intoxicated, public intoxication, minors possessing/consuming alcohol, thefts, and accidents, based on the testimony provided by Lt. Gorham and by Agent Ahrens.

- However, Protestants did not prove the incidents underlying the calls for service endangered the health, safety, and general welfare of the public, because they offered no evidence to show the calls were based on actual incidents that led to arrests and/or prosecution.

- Protestants also proved Applicant should have known such offenses were occurring. Lt. Guerra testified that she had numerous meetings with Applicant's prior general manager, who should have conveyed the information to his area manager, who should have then conveyed the information to Mr. Gearhart and other members of the company that owns the club.

- However, Protestants did not prove Applicant failed to take reasonable steps to prevent the incidents from occurring. Instead, evidence and testimony establish that as soon as Applicant's owners became aware of the ongoing problems, immediate steps were taken to straighten out the situation: the general manager was replaced with Mr. Zepple, who has been with the company for 10 years and has a proven track record of effectively managing Applicant's clubs in other Texas cities; they re-assigned the area manager and made San Antonio its own district, with Mr. Zepple reporting directly to Mr. Gearhart; they raised the price of the drink special and reduced the amount of time drinks were on special, per Lt. Guerra's suggestion; they stopped serving liquor by the shot on minor nights; they cooperated with SAPD and TABC to strengthen security; they participated in a mediated settlement conference to address the concerns of SAPD, TABC, and protesting citizens; they agreed to make changes that satisfied SAPD, TABC, and the Oak Hills Citizens Association to the extent that they all withdrew their protest of the renewal application.

Protestants did not prove that Applicant *may* operate his business in a way that endangers public health, safety, or general welfare. The word "may" implies the future; Protestants did not

demonstrate an ongoing problem with the way Applicant's premises are currently operated. Instead, the evidence shows a steady improvement in the operation of Applicant's premises since April 2006, when Mr. Gearhart became involved. Because the current general manager, Mr. Zepple, reports directly to Mr. Gearhart, the ALJ believes Mr. Gearhart will continue to be involved in the operation of Applicant's premises. In addition, Lt. Gorham testified that should Applicant fail to meet the terms of the settlement agreement, which he characterized as meeting all the concerns of SAPD, there will be consequences. The ALJ finds Applicant to have every motivation to operate the premises in a responsible way that does not endanger health, safety, or general welfare of the public.

Based on the above, the ALJ concludes that the allegations, as set out in the Second Amended Notice of Hearing, were not proven.

V. RECOMMENDATION

The ALJ recommends that Applicant's application for renewal of the permits be granted.

VI. FINDINGS OF FACT

1. Fredericksburg Road Entertainment Complex, L.L.C. d/b/a Graham Central Station/South Beach/Bell Bottoms/Alley Cats/Denim and Diamonds/T2002/Vertigo (Applicant) filed a renewal application with the Texas Alcoholic Beverage Commission (Commission) for Mixed Beverage Permit MB-511542 and Mixed Beverage Permit Late Hours permit LB-522543 for the premises located at 4902 Fredericksburg Road in San Antonio, Bexar County, Texas. Applicant's mailing address is 6999 Highway 80 E., Odessa, Texas 79762.

2. The Texas Alcoholic Beverage Commission (TABC or the Commission), joined by the San Antonio Police Department (SAPD) and some residents of the area (Protestants), protested the application, asserting that the application should be denied because of the place or manner in which Applicant may conduct its business, based on the general welfare, health, and safety of the public: specifically that from January 1, 2004, through May 31, 2005, there were numerous calls in which SAPD responded to Applicant's location. These calls included charges of murder, assaults, driving while intoxicated, public intoxication, minors possessing/consuming alcohol, thefts, and accidents. Further, Applicant knew or should have known such offenses were occurring and failed to take reasonable steps to prevent them.

3. A Second Amended Notice of Hearing, dated August 29, 2006, was issued by Commission Staff notifying the parties that a hearing would be held on the application and informing the

parties of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

4. On August 25, 2006, Applicant, TABC, SAPD, Marco Gamboa on behalf of Oak Hills Citizens Association (Oak Hills), and Narciso Mendoza, Charles Rodriguez, and Edmundo Vargas on behalf of other concerned citizens (Protestants), participated in a mediated settlement conference.

   a. Applicant reached an agreement with TABC, SAPD, and Oak Hills.

   b. TABC, SAPD, and Oak Hills withdrew their protests of renewal of Applicant's permits.

   c. Protestants did not reach an agreement with Applicant, and did not withdraw their protest.

5. On October 2, 2006, a public hearing convened before Administrative Law Judge Sharon Cloninger in San Antonio, Texas. Protestants appeared *pro se*. Applicant appeared through Don E. Walden, attorney. TABC was represented by Judith L. Kennison, Staff Attorney, who did not protest the renewal but appeared to introduce evidence related to notice and jurisdiction and other matters. Allen and Joan Ellebracht were admitted as parties, and represented themselves. The hearing recessed that same day, and reconvened October 6, 2006, via telephone conference call. All parties participated in the telephone conference call. The hearing concluded and the record closed October 6, 2006.

6. Between January 1, 2004, and May 31, 2005, there were 439 calls for service in which SAPD responded to Applicant's location.

   a. No evidence was presented to show that Applicant's club was subject to a greater number of calls for service than other licensed premises of a similar size in Bexar County.

   b. The calls for service included charges of murder, assaults, driving while intoxicated, public intoxication, minors possessing/consuming alcohol, thefts, and accidents.

   c. No evidence was presented to show the calls were based on actual incidents that led to arrests and/or prosecution.

   d. The number of calls for service is substantially lower – maybe 40 or 50 fewer – for the period of January through August 2006 as compared to the total for 2005.

7. In April 2006, when Roger Gearhart, who is a member of an Odessa-based group that owns the club, found out about the calls for service through media reports, he began making changes to address the concerns of TABC, SAPD, and local residents.

   a. Mr. Gearhart met with Lt. Christina Guerra of TABC to learn about TABC's concerns.

   b. After meeting with Lt. Guerra, Mr. Gearhart replaced the club's general manager with Zachary Kepple, who has worked as a general manager for Applicant's company for seven years, and has a proven record of effective management.

   c. The area manager for San Antonio was re-assigned, and San Antonio became its own district, with Mr. Kepple reporting directly to Mr. Gearhart.

   d. Club security staff was strengthened by hiring off-duty Texas peace officers to monitor the premises, with two off-duty police officers inside and between four and six off-duty police officers outside, more than meeting the level of security requested by SAPD and TABC.

   e. A security vehicle patrols the parking lot and adjacent streets for security staff to ascertain if people are consuming alcoholic beverages in their cars, or if minors are consuming alcoholic beverages.

   f. The club's 18 door security personnel are constantly rotated, to prevent minors from having a door person "friend" who will let them inside unlawfully.

   g. There is no "last call" at closing time.

   h. The club's approximately 65 employees all go to the door at closing time to watch patrons leave and identify anyone who appears to be intoxicated.

   i. Although Applicant is required to report violent incidents to TABC only, unless there is an arrest, Mr. Gearhart notifies Lt. Michael Gorham – commander of the SAPD vice unit that has heard complaints related to Applicant's club for the past three years – via electronic mail of "incidents of consequence."

   j. All club personnel must attend a four-hour TABC training course to learn about things such as Texas alcoholic beverage laws and how to identify minors.

   k. The club has an "18 and up" night on Wednesdays.

      1. A big black "X" is marked on each palm of minors.
      2. Liquor by the shot is not served on minor nights.

3. If a minor attempts to purchase an alcoholic beverage, he is escorted to the front door, and a safe ride home is found for him.
4. Any minor who is ejected from the club is not permitted back on the premises until he is at least 21 years old.

l. The price of the drink special was raised, and the duration of the drink special was shortened.

m. Applicant is spending about $5,000 per week to implement the measures requested by SAPD and TABC.

8. Due to changes made to the way Applicant's business is conducted beginning in April 2006, and changes made pursuant to the agreement made with TABC, SAPD, and Oak Hills that addresses their concerns, the way Applicant may conduct its business currently and in the future does not endanger the safety, health, or general welfare of the public.

VII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, §§ 6.01 and 11.46(a)(8).

2. The State Office of Administrative Hearings has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.

3. Proper and timely notice of the hearing was effected on all parties pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE § 155.5.

4. Issuance of the renewal permits will not endanger the health, safety, or general welfare of the public. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).

5. The renewal application for a Mixed Beverage Permit and Mixed Beverage Late Hours Permit for the premises located at 4902 Fredericksburg Road, San Antonio, Bexar County, Texas, should be granted.

SIGNED December 5, 2006.

SHARON CLONINGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS