

bike trail that close to a bar would pose a danger for neighborhood residents; and (3) the delivery area in back of the proposed premises backs up to residents' backyards. The Administrative Law Judge (ALJ) recommends that the Commission refuse Applicant's application because operation of a bar at the proposed premises would be illegal under the City of San Antonio's zoning ordinance.

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 convened April 24, 2007, before ALJ Sharon Cloninger at the State Office of Administrative Hearings (SOAH), 10300 Heritage, Suite 250, San Antonio, Texas, and adjourned that same day. Applicant was represented by Robert J. Birnbaum, attorney. TABC staff (Staff) was represented by Christopher G. Gee, attorney. Churchill Estates was represented by Keith Miller, attorney. NEISD was represented by Brian Gottardy, Ed. D., Associate Superintendent, Operations. Also in attendance was Alison Greer, a member of District 9 City Councilman Kevin Wolff's staff, who represented that Mr. Wolff opposes approval of Miami Bar's application.¹

II. BACKGROUND

It is undisputed that Miami Bar's proposed premises are located in a commercial center whose structure falls within an area zoned C-2 by the City of San Antonio (the City). Taverns, bars and lounges are not allowed within C-2 zones without a special use permit or a variance.² Applicant plans to seek a variance or special use permit with the City, but had not done so as of the hearing

¹ The proposed premises are located in Councilman Wolff's district.

² At least part of the parking lot of the commercial center, but none of the structure, is zoned C-3; taverns, lounges and bars are allowed in C-3 zones.

date. TABC staff stated that under TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8) and (a)(10),³ the Commission may not approve permits that fail to comply with any law, including city ordinances. Churchill Estates and NEISD allege that even if Miami Bar obtains a special use permit or variance from the City, TABC should deny the application because of the noise and danger that would be created by the proposed premises' close proximity to an elementary school, a hike and bike trail, and residents' homes.

III. EVIDENCE

Applicant offered the testimony of Patrick M. Karam, and no exhibits. TABC staff offered six exhibits, which were admitted, and called Alex Garcia, a Development Services Manager with the City of San Antonio, and Louis DeWitt, TABC agent, as witnesses. Churchill Estates offered three exhibits, which were admitted, and called Lora Reynolds as a witness. Dr. Gottardy testified on the behalf of NEISD.

A. Applicant's Evidence

Patrick M. Karam, the owner of Miami Bar, currently owns Babcock Bar, Chicago Bar, and Dixie's Country Bar in San Antonio. He said Miami Bar would be open from 3 p.m. to 2 a.m. seven days a week, and would serve only beverages, not food. He described the proposed location to be in a commercial center, but was not sure who other tenants of the center will be. He has measured the distance between the proposed premises and Huebner Oaks Elementary School to be more than 300 feet. He agreed on cross-examination that individuals will come out of Miami Bar at 2 a.m.,

³ **General Grounds for Refusal.** (a) The commission or administrator may refuse to issue an original . . . permit . . . if it has reasonable grounds to believe and finds that any of the following circumstances exist: . . . (8) 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; . . . (10) the applicant will sell liquor unlawfully...in a manner contrary to law TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8) and (a)(10).

after they have been drinking, and it is possible they would be noisy, disturbing residents within “a stone’s throw” of the bar. But he added that noise would not necessarily be a problem.

B. Staff’s Evidence

1. Testimony of Alex Garcia

Alex Garcia, a Development Services Manager for the City, said Miami Bar’s proposed premises are within a C-2 zone. He said taverns, bars, and lounges are not allowed in C-2 zones, although a restaurant that serves alcoholic beverages is allowed. Mr. Garcia explained that Applicant would have to obtain a special use permit for a bar or have the City re-zone the proposed premises’ location to C-3 in order to legally operate a bar under City code.

Mr. Garcia said if Applicant requested a zoning change, owners of property within 200 feet of the proposed location would be notified of public hearings to be held before the Zoning Commission and the City Council. The City Council would make the final decision, regardless of the Zoning Commission’s recommendation. He said typically the City Councilman for the district in which the zoning change is requested – in this instance, Councilman Wolff – makes a motion regarding approval of the request; if no motion is made, the zoning change request dies for lack of a motion.

Mr. Garcia said Applicant must obtain a City building permit before finishing out the Miami Bar premises, and issuance of a building permit is currently on hold because bars are not allowed in a C-2 zone. In addition, Miami Bar may not occupy a building or space without a Certificate of Occupancy from the City, certifying the space is safe. Applicant cannot receive a Certificate of Occupancy unless in compliance with zoning requirements.

Mr. Garcia said even if TABC approves Applicant's application and issues the requested permits, a zoning change would be necessary for Miami Bar to open. He said the zoning change procedure is a separate process unrelated to issuance of permits by TABC.

2. Testimony of Louis DeWitt

Staff called Louis DeWitt, a TABC licensing standards investigator who reviews applications to determine if they conform with TABC requirements for issuance. Agent DeWitt said that Applicant states in Question 2b on page 1 of its application that it will operate a bar. He said operating a bar at the proposed location would violate the law if the business opens under current City zoning, referencing the "place and manner of operation" language found at TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8). He said such a violation is grounds for TABC to refuse to grant Applicant's application. He recommended refusal of the application because issuing the permits for Miami Bar to operate at the proposed location would be in violation of a city ordinance. He said if the proposed location were re-zoned C-3, TABC would not oppose issuance of the permit, because all legal standards would be met.

C. Churchill Estates Evidence

Churchill Estates called Lora Reynolds, administrator for the Churchill Estates homeowners association, as a witness. She estimated the distance between the back of the commercial center and the back fences of homes in the subdivision to be 17 or 18 yards; the homes themselves are located less than 100 feet from the back of the commercial center.

Based on a poll of Churchill Estates' residents, Ms. Reynolds said they are concerned about late-night noise from patrons in the Miami Bar parking lot, noise from delivery trucks using the driveway between the commercial center and peoples' homes, and possibly inebriated drivers using the entrance to the commercial center that crosses a hike and bike trail. She agreed with Applicant's

counsel on cross-examination that even if Miami Bar's application is refused, trucks making deliveries to other business in the commercial center will be noisy, and other businesses in the center could generate traffic. She also agreed that patrons typically leave a bar through its front door, and that the building could serve as a buffer against parking lot noise. But Ms. Reynolds opined that parking lot noise could carry over the building and reach people's homes.

D. NEISD's Evidence

Dr. Gottardy testified that Huebner Oaks Elementary School, located diagonally across the street from the proposed premises, has about 830 students. He said when school lets out at 2:45 p.m., hundreds of students are picked up in cars and loaded onto buses, while others walk and ride bikes away from the school to areas adjacent to the commercial center. He said there are dozens of evening extracurricular activities at the school throughout the year, some lasting as late as 9 p.m., that involve students, staff, and parents traveling to and from the school. He said NEISD is strongly opposed to the granting of Applicant's application.

E. Statement by Ms. Greer

Ms. Greer spoke on behalf of Councilman Wolff, and said he opposes issuance of the permits, as set out in a letter to the State Office of Administrative Hearings, and will oppose any request from Miami Bar for a zoning change should such a request come before him.

IV. ARGUMENT

A. Applicant's Argument

Applicant argued that all state requirements for approval of its application have been met, and the application should not be refused based on additional requirements imposed by the City.

Applicant pointed out that TABC does not oppose approval of its application based on the way Applicant operates his other three bars in San Antonio because he operates those bars in a way that is consistent with the law. Applicant stated that if TABC issues the permits, they cannot be used until a variance or special use permit is obtained from the City. Applicant also said that despite Councilman Wolff's opposition to a zoning change, Miami Bar will pursue a variance or special use permit; if the City Council denies Miami Bar's application for a zoning change, Applicant will go to the Board of Adjustment.

B. Argument of TABC Staff

Mr. Gee argued that even if TABC issues permits to Miami Bar, the business cannot operate legally at its proposed location due to the City zoning requirements. He recommended refusal of the application but said if Miami Bar obtains a variance or special use permit, it could file an application at that time.

C. Churchill Estates' Argument

Counsel for Churchill Estates argued that due to the proximity of the proposed premises to their homes, residents adamantly oppose approval of the application. He said Miami Bar would be serving nothing but alcoholic beverages for 11 hours a day, ending at 2 a.m., which places children at risk and is not in keeping with the quiet neighborhood the residents want.

D. NEISD's Argument

Dr. Gottardy urged refusal of the application based on the safety and welfare of students, parents, and the community.

V. ANALYSIS AND RECOMMENDATION

The evidence established that Miami Bar's proposed premises are located within an area zoned C-2, where bars are not allowed by City ordinance except by variance or special use permit. The evidence also established that Miami Bar does not have a variance or special use permit, so cannot legally operate a bar at its proposed location. TABC may refuse to approve an application that would result in an applicant selling liquor in a manner contrary to law, pursuant to TEX. ALCO. BEV. CODE ANN. § 11.46(a)(10). Therefore, the ALJ finds there is no reason to address the elements of TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8) related to general welfare, health, peace, morals and safety of the people and on the public sense of decency, and recommends that Applicant's application be refused.

VI. FINDINGS OF FACT

1. On September 29, 2006, Miami Bar Incorporated d/b/a Miami Bar (Applicant) filed an original application with the Texas Alcoholic Beverage Commission (TABC or the Commission) for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for the premises located at 15614 Huebner Road, Suite 106, San Antonio, Bexar County, Texas.
2. Protests were filed by the Churchill Estates Homes Association (Churchill Estates) and the North East Independent School District (NEISD) asserting that the proposed place of business is near a public school and would present a danger for school children and parents going to and from school; there is a biking and walking trail used by local residents that passes directly by the proposed premises, and the premises would pose a danger to residents who use the trail; and the delivery area in back of the proposed location will be backing up to residents' backyards located directly behind the location.
3. TABC staff proposes denial of the application because it is not in compliance with City of San Antonio zoning requirements for a bar to be located at the proposed premises.
4. On March 7, 2007, Commission staff (Staff) issued a Notice of Protest to Applicant indicating the application would not be granted because the place or manner in which Applicant may conduct its business warrants refusal based on the general welfare, health, peace, morals and safety of the people and the public sense of decency. The Notice also informed Applicant of the opportunity to show compliance with all requirements of law for the approval of the application and/or to resolve the matter informally.

5. On March 27, 2007, Staff sent a Notice of Hearing to Applicant, Churchill Estates and NEISD, informing the parties of the time, place, and nature of the hearing; referring to the particular sections of the statutes and rules involved; and making a short, plain statement of the matters asserted.
6. On April 18, 2007, Staff issued an Amended Notice of Hearing, notifying all parties that a hearing would be held on the application and informing the parties of the time, place, and nature of the hearing; referring to the particular sections of the statutes and rules involved; and making a short, plain statement of the matters asserted.
7. On April 24, 2007, a public hearing was held before ALJ Sharon Cloninger at the State Office of Administrative Hearings, 10300 Heritage, Suite 250, San Antonio, Bexar County, Texas. Applicant was represented by Robert J. Birnbaum, attorney. Churchill Estates was represented by Keith Miller, attorney. NEISD was represented by Brian Gottardy, Ed.D., Associate Superintendent, Operations. Staff was represented by Christopher G. Gee, attorney. Alison Greer, a member of City of San Antonio Councilman Kevin Wolff's staff, appeared to represent his position regarding the application. Evidence was received and the record closed that same day.
8. Miami Bar's proposed premises are within an area zoned C-2 by the City of San Antonio (City).
9. Taverns, bars, and lounges are not allowed to be located within a C-2 zone without a variance or special use permit.
10. Miami Bar has not obtained a variance or special use permit for its proposed premises in the C-2 zone.

VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code, and TEX. ALCO. BEV. CODE ANN. §§ 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 § 155.55.

4. Miami Bar's proposed location would not be in compliance with the City's C-2 zoning, which prohibits taverns, lounges and bars.
5. Miami Bar's application for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit should be refused because if the bar is operated at its proposed location Applicant will sell liquor in a manner contrary to law. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(10).

SIGNED June 15, 2007.



SHARON CLONINGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS