DOCKET NO. 537297

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE
COMMISSION, Petitioner	§	
and	§	
CITY OF AUSTIN, CHIEF OF POLICE,	§	
AUSTIN POLICE DEPARTMENT,	§	
Protestants,	§	
Vs.	§	TEXAS ALCOHOLIC
ORIGINAL APPLICATION OF AUSTIN LA	§	
BARE L.L.P. D/B/A LA BARE, MB, LB,	§	
Respondent	§	
	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-3283)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this day, in the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge John Beeler. The hearing convened on September 18, 2006 and adjourned the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 1, 2006. The Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. Exceptions and replies were filed. The Administrative Law Judge overruled the exceptions.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein.

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 TAC §31.1, of the Commission Rules, that your application for a permit or license is hereby **DENIED.**

This Order will become final and enforceable on March 26, 2007, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this February 27, 2007

On Behalf of the Administrator,

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

WMC\bc

Administrative Law Judge
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AUSTIN LA BARE L.L.P.
RESPONDENT
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PROTESTANT:
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Hon. Samuel T. Biscoe
County Judge
Travis County Administration Building
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VIA REGULAR MAIL

W. Michael Cady
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Enforcement Division

State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge

December 1, 2006

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

HAND DELIVERY

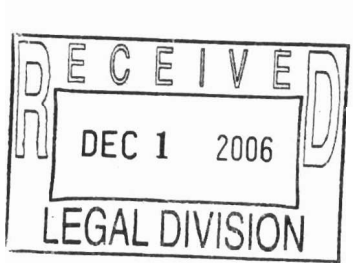
RE: Docket No. 458-06-3283; Texas Alcoholic Beverage Commission, Petitioner, City of Austin, Chief of Police, Austin Police Department, Protestants v. Austin La Bare, L.L.P. d/b/a La Bare, Applicant, Travis County, Texas (TABC Case No. 537297)

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,



John H. Beeler
Administrative Law Judge

JHB/sb
Enclosure
xc: Docket Clerk, State Office of Administrative Hearings- **VIA HAND DELIVERY**
W. Michael Cady, 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**
Fred Hawkins, City Attorney, City of Austin, P.O. Box 1546, Austin, Texas 78767-1546 - **VIA REGULAR MAIL**
Jeffrey S. Kelly, Attorney, Hajjar Sutherland & Kelly, L.L.P., 504 Congress Avenue, Austin, TX 78701 - **VIA REGULAR MAIL**

SOAH DOCKET NO. 458-06-3283

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
CITY OF AUSTIN, CHIEF OF POLICE AUSTIN POLICE DEPARTMENT, Protestants	§	
V.	§	OF
AUSTIN LA BARE, L.L.P. D/B/A LA BARE, Applicant TRAVIS COUNTY, TEXAS (TABC CASE NO. 537297)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Austin La Bare, L.L.P. d/b/a La Bare (Applicant) filed an original application with the Texas Alcoholic Beverage Commission (Commission) for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for the premises known as La Bare, located at 110 E. Riverside, Austin, Travis County, Texas. Protests were filed by the City of Austin and the City of Austin Police Department Chief of Police (Protestants) asserting that the Applicant is operating a sexually oriented business[1] on the premisses and is within 1000 feet of a public school, in violation of Austin City Code § 25-2-801 and of TEX. GOV'T CODE ANN. § 243.001 *et seq.* Protestants also alleged that the marketing of the business and actual practices at the premises violate the same sections. The Commission staff (Staff) took the position that, if Protestant's allegations are true, the issuance of the permits would be in conflict with the provisions of TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8). The Administrative Law Judge (ALJ) recommends that the Commission deny Applicant the requested permits.

[1] The City of Austin Code uses the term "adult-oriented business" instead of "sexually-oriented business," and the two terms were used interchangeably in the hearing.

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.

On September 18, 2006, a public hearing was held before John H. Beeler, ALJ, at the offices of the State Office of Administrative Hearings, Austin, Travis County, Texas. Staff was represented by W. Michael Cady, attorney. Protestants were represented by Fred Hawkins, attorney. Applicant was represented by Jeffrey S. Kelly, attorney. Evidence was received and the record was left open through October 2, 2006, for the filing of written closing arguments.

II. ISSUE

The parties agree that the premises in question are located within 1000 feet of the Texas School for the Deaf, and that, if it is a sexually oriented business, it cannot operate in that location. The only issue in contention is whether the premises are being operated as a sexually oriented business, or as Protestants contend, an "adult-oriented business," as defined by City of Austin Code §25-2-801. Applicant contends that it is a sexually suggestive business, not a sexually oriented business.

IV. EVIDENCE

A. Protestants' Evidence

Testimony of Tamara Joseph

Ms. Joseph testified that she is employed as a City of Austin police detective and, as part of her employment, entered La Bare in an undercover capacity on January 27, 2006. While there, she

observed the activities of the male dancers and recorded their actions on video, using a hidden camera. Her ID was checked at the door, but no alcohol was being sold. IDs were checked to make sure only adults were allowed in. The dancers started out fully clothed and did strip tease acts, she testified. The acts were of a sexual nature and simulated the sex act. She, as did other patrons, placed dollar bills in the dancers' briefs. Ms. Joseph also testified that she observed other women patrons touch dancers' buttocks in a sexual nature, and some dancers exposed their buttocks. The briefs were worn low and patrons could see the pubic area when placing dollar bills in the shorts. The officer saw one dancer in a turgid state.

Some dancers moved their hands up and down the groin area while moving their hips back and forth. Other dancers got down on the floor and imitated the sex act. Ms. Joseph purchased a lap dance and the dancer exposed his buttocks, placed his hands on each side of her, and moved his pelvis back and forth in front of her pelvis, mimicking sexual intercourse. She observed this same activity with other patrons.

Testimony of Kelly Davenport

Ms. Davenport testified that she is employed as a City of Austin police detective and, as part of her employment, entered La Bare in an undercover capacity on January 27, 2006. Her ID was checked even though no alcohol was being sold. She had no doubt that La Bare was operated as an adult-orientated establishment. She observed dancers expose their buttocks and mimic sexual intercourse. She also observed dancers in what looked to be a turgid state.

Testimony of Tonya Enlow

Ms. Enlow testified that she is employed as a City of Austin police officer and, as part of her employment, entered La Bare in an undercover capacity on April 15, 2006. Her ID was checked

even though no alcohol was being sold. While there, she observed live entertainment that emphasized sexual activities.

Ms. Enlow approached a dancer on the main stage, and the dancer placed dollar bills in the front of her shirt and in the front of her pants. He then used his mouth to take the money from the bra area of her shirt. He also touched her buttocks. He then had her put the bills down the front of his speedos and allowed her to touch his penis. The dancer then got on the floor and simulated sexual intercourse. She observed similar acts done for other patrons.

Testimony of Gerald Rustoven

Mr. Rustoven testified that he is employed by the City of Austin as a manager of the Neighborhood Planning Zoning Department. He is familiar with Austin's adult-oriented business code, and heard the testimony of the Austin police officers and viewed the videos taken in La Bare. (The videos were played during officer Enlow's testimony) Mr. Rustoven said he has no doubt that La Bare is operating as an adult cabaret and would be an adult lounge if the alcohol license was issued. La Bare could legally operate in Austin, but not in its current location, he added.

Testimony of Ronald Russell

Mr. Russell testified that he is employed by the City of Austin as a police detective in the organized crime unit on the Alcohol Control Team. He has reviewed La Bare's application and noticed that Mr. Cox indicated on the application that La Bare is not a sexually orientated business and is not located within 1000 feet of any public school. He also did a criminal record check on Mr. Cox and determined that he left off some information on the application. Instead of filing charges because of the omission, he allowed Mr. Cox to add the information. He has met with representatives of La Bare concerning the issues of it being a sexually-orientated business.

Videos and Documents

Protestants offered several videos taken inside La Bare and several documents.

B. Applicant's Evidence

Testimony of Kevin Cox

Mr. Cox testified that he is an owner of La Bare and has many years experience in the male review dance business in several Texas cities. In his opinion, La Bare is not a sexually-oriented business, but only a sexually-suggestive business. The dancers' genitals and buttocks are always full covered and no dancer is in a turgid state. The dancers do not simulate sex. Specifically, the dancer seen in one video down on the floor of the stage is just doing pushups, not simulating sex, as suggested. Women will pay a 20-dollar cover to see men do pushups, he stated. There is nothing different between his business and other business in the area, such as Hooters.

Videos and Documents

Applicant offered numerous videos of the activities of the club and documents concerning other businesses sexual nature. The ALJ attempted to view the videos by several means, but was only able to view a small portion of the footage, which appeared to be taken from the security video cameras on the premises. Dancers could be seen, but the distance they were from the camera made it impossible to determine if violations were occurring.

V. ANALYSIS AND RECOMMENDATION

A review of the testimony and videos of the activities in La Bare clearly shows that La Bare is a sexually-oriented business. Section A (3) of the City of Austin Code §25-2-801 (Austin Code) sets out the types of business considered as adult oriented, including "adult cabaret." It defines "adult cabaret" as, "a business that primarily offers live entertainment that emphasizes specified sexual activities or specified anatomical areas." Section A (9) of the Austin Code defines "specified sexual activities" as:

(a) human genitals in a state of sexual stimulation or arousal;

(b) acts of human masturbation, sexual intercourse, or sodomy; or

(c) erotic touching of human genitals, the pubic region, the buttock, or the female breast.

Section A (10) of the Austin Code defines "specified anatomical areas" as:

(a) less than completely and opaquely covered:

(I) human genitals or pubic region;

(ii) buttock; or

(iii) female breast below a point immediately above the top of the areola; or

(b) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

The credible evidence admitted at the hearing demonstratsd that La Bare is an adult-oriented business as that term is defined in the Austin Code. The testimony and video evidence establishes that buttocks are exposed, erotic touching of human genitals and buttocks occurs, acts of human masturbation and sexual intercourse are simulated, and males are, at times, in a discernibly turgid state.

Mr. Cox testified that the above acts do not occur on the premises, but the video evidence makes it clear that they do. For example, Mr. Cox stated that the dancers, when on the floor, were not simulating sexual intercourse, but were simply doing pushups. The video that was shown in the

hearing prior to his testimony depicted a dancer with his elbows and knees supporting him on the floor and his pelvis moving up and down. He clearly was not doing pushups, and Mr. Cox's testimony is not credible.

Section E (2) of the Austin Code makes it illegal for an adult-oriented business to operate within 1000 feet of a public school, and the parties agree that La Bare is within 1000 feet of the Texas School for the Deaf. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8) provides that: "the commission or administrator may refuse to issue an original or renewal permit with or without a hearing if it has reasonable grounds to believe and finds that any of the following circumstances exists:

. . .

> (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;

16 TEX ADMIN. CODE § 35.31 (c)(16) construes offences against the general welfare to include operation of premises in violation of municipal ordinances that are designed to protect the general welfare of the community. Certainly, the 1000 foot regulation falls within this general welfare protection.

The application should, therefore, be denied.

VI. FINDINGS OF FACT

1. Austin La Bare L.L.P. d/b/a La Bare (Applicant) filed an original application with the Texas Alcoholic Beverage Commission (Commission) for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit, and for the premises known as La Bare, located at 110 E. Riverside, Austin, Travis County, Texas.

2. Protests were filed by the City of Austin and the City of Austin Police Department Chief of Police (Protestants) asserting that the Applicant is operating a sexually oriented business on

the premisses and is within 1000 feet of a public school in violation of Austin City Code § 25-2-801 and of TEX. GOV'T CODE ANN. § 243.001 *et seq.*

3. A Notice of Protest Hearing dated September 6, 2006, was issued by Staff 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; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

2. On September 18, 2006, a public hearing was held before John H. Beeler, ALJ, at the offices of the State Office of Administrative Hearings, Austin, Travis County, Texas. Staff was represented by W. Michael Cady, attorney. Protestants were represented by Fred Hawkins, attorney. Applicant was represented by Jeffrey S. Kelly, attorney. Evidence was received and the record was left open through October 2, 2006, for the filing of written closing arguments.

3. Activities of the dancers at La Bare include exposing buttocks, erotic touching of human genitals and buttocks, acts and simulation of human masturbation, simulated sexual intercourse, and males in a discernibly turgid state.

4. The Premises of La Bare are within 1000 feet of the Texas School for the Deaf, a public school.

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, and §§ 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. The place or manner in which Applicant conducts its business constitutes an adult-oriented business pursuant to Austin City Code § 25-2-801.

5. La Bare is operating in violation of Austin City Code § 25-2-801 (E) (2).

6. La Bare's application for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit should be denied based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency pursuant to TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8) and 16 TEX ADMIN. CODE 35.31 (c)(16).

SIGNED December 1, 2006.

JOHN H. BEELER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS