

**DOCKET NO. 587607**

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION, PETITIONER,	§	
AND	§	
J. B. DAVIS, III, DONALD W. SCOTT,	§	
& T. G. SIMPSON, PROTESTANTS	§	
	§	
VS.	§	
	§	OF
MARIA ASUNCION MORENO	§	
D/B/A THE LOUNGE	§	
MB & LB	§	
TARRANT COUNTY, TEXAS	§	
(SOAH Docket No. 458-00-0809)	§	ADMINISTRATIVE HEARINGS

**ORDER**

**CAME ON FOR CONSIDERATION** this 31st day of August, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Robert F. Jones, Jr. The hearing convened on June 8, 2000, and adjourned June 16, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on August 4, 2000. This 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. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, 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. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

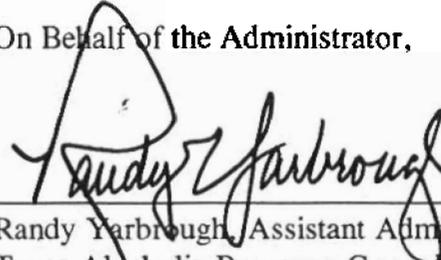
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the applications for a Mixed Beverage Permit and Mixed Beverage Late Hours Permit are **granted**.

**This Order will become final and enforceable on September 21, 2000, unless a Motion for Rehearing is filed before that date.**

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

**WITNESS MY HAND AND SEAL OF OFFICE on this the 31st day of August, 2000.**

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Robert F. Jones, Jr.  
Administrative Law Judge  
State Office of Administrative Hearings  
Fort Worth, Texas  
**VIA FACSIMILE (817) 626-7448**

Holly Wise, Docket Clerk  
State Office of Administrative Hearings  
300 West 15th Street, Suite 504  
Austin, Texas 78701  
**VIA FACSIMILE (512) 475-4994**

Steven Swander  
**ATTORNEY FOR/ RESPONDENT**  
505 Main Street, suite 250  
Fort Worth, Texas 76102  
**CERTIFIED MAIL NO. Z 473 042 534**

Dewey A. Brackin  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
Fort Worth District Office



# TEXAS ALCOHOLIC BEVERAGE COMMISSION

Post Office Box 13127, Austin, Texas 78711-3127 (512) 206-3333  
<http://www.tabc.state.tx.us> Fax: (512) 206-3498

Doyne Bailey, Administrator

August 29, 2000

Mr. Randy Yarbrough  
Assistant Administrator  
Texas Alcoholic Beverage Commission  
P. O. Box 13127  
Austin, Texas 78711-3127

Re: Docket No. 587607  
TABC v. Maria Asuncion Moreno,  
d/b/a The Lounge

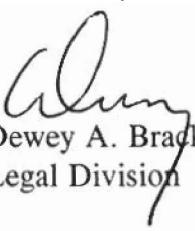
Dear Mr. Yarbrough:

Please find enclosed a Proposal for Decision and exhibits in the above-referenced cause. No exceptions to the Proposal have been filed.

After your review, please inform this office of your decision. We will then draft an Order conforming with your judgment.

Thank you for your attention to this matter.

Yours truly,

  
Dewey A. Bradkin  
Legal Division

DAB/yt

*Adopt PFD  
Randy Yarbrough  
8/29/2000*

# State Office of Administrative Hearings



AUG - 8 2000

Shelia Bailey Taylor  
Chief Administrative Law Judge

August 4, 2000

Doyne Bailey  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive, Suite 160  
Austin, Texas 78731

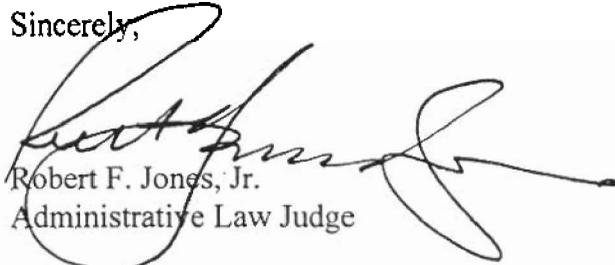
**RE: Docket No. 458-00-0809; Texas Alcoholic Beverage Commission vs. Maria Asuncion Moreno  
d/b/a The Lounge; (TABC Case No. 587607)**

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Dewey Brackin attorney for Texas Alcoholic Beverage Commission, and to Steven Swander, Attorney for the Respondent. For reasons discussed in the proposal, I recommend that Respondent's permits be issued.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

  
Robert F. Jones, Jr.  
Administrative Law Judge

RJ:ds  
Enclosure

xc: Holly Wise, State Office of Administrative Hearings, Austin, Texas - Regular Mail; Dewey Brackin, Staff Attorney, Texas Alcoholic Beverage Commission - Regular Mail; Steven Swander, Attorney for Respondent, 505 Main Street, Suite 250, Fort Worth, Texas 76102 - Regular Mail; J. B. Davis, III, Protestant, J.B. Davis, Inc. 1412 W. Magnolia Avenue, Fort Worth, Texas 76104 - Regular Mail; Donald W. Scott, Protestant, 1606 Mistletoe Boulevard, Fort Worth, Texas 76104 - Regular Mail; T. G. Simpson, Protestant, Fort Worth Police Department, 350 Belknap, Fort Worth, Texas 76102-2004.

IN THE MATTER OF THE APPLICATION OF § BEFORE THE STATE OFFICE  
MARIA ASUNCION MORENO §  
D/B/A THE LOUNGE FOR A §  
MIXED BEVERAGE PERMIT & A § OF  
MIXED BEVERAGE LATE HOURS PERMIT §  
TARRANT COUNTY, TEXAS §  
(TABC CASE NO. 587607) § ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic Beverage Commission (Staff) brought this action to determine protests made to issuing a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit to Maria Asuncion Moreno d/b/a the Lounge (Respondent). The Protestants are J. D. Davies, III, Donald W. Scott, and Officer T.G. Simpson (on behalf of the Fort Worth Police Department). Protestants made a "place or manner" complaint against issuing the permits. This proposal finds that there are not reasonable grounds to believe the place or manner in which Respondent may conduct her business warrants refusal of the permits. The Administrative Law Judge (ALJ) recommends the permits be issued.

**I. PROCEDURAL HISTORY**

On December 15, 1999, Respondent filed an application for Mixed Beverage Permit and a Mixed Beverage Late Hours Permit with the Texas Alcoholic Beverage Commission (TABC). On January 21, 2000, the Staff informed Respondent that TABC had received a protest against issuing the permits. The matter was referred to the State Office of Administrative Hearings on April 6, 2000. On June 8, 2000, a public hearing was convened before ALJ Robert F. Jones Jr., at The Vinnedge Building, 2100 North Main Street, Fort Worth, Tarrant County, Texas. Staff was represented by Dewey Brackin, an attorney with the Commission's Legal Division. Respondent appeared personally and with her counsel, Steve Swander. Protestants J. D. Davies, III, Donald W. Scott, and Officer T.G. Simpson appeared. Patsy Powell, J. D. Davies, III, Judy Phillipson, Dr. James Watts, T.G. Simpson, Jeff McKenney, Shirley Smith, Celeste Cisneros, and Respondent were sworn and testified. Beatrice Moreno was sworn as an interpreter for Respondent. Fifteen exhibits were admitted into evidence. The record was closed on June 16, 2000.

Staff, in its Notice of Hearing and Prehearing Statement, supported neither issuing the permits nor the protest. Staff averred that (1) Respondent was legally qualified to be permitted, and that the proposed location was within an area of Fort Worth, Texas, and Tarrant County where alcohol sales are legal, (2) the Protestants had stated sufficient factual and legal grounds to warrant a legal protest of the application, and (3) Applicant had no administrative history with the TABC. The sole issue to be decided is whether Protestants established grounds to refuse the application.

## II. JURISDICTION

The Commission has jurisdiction and authority over this matter pursuant to Chapter 5 and §§ 6.01, 11.61, and 32.01 of the Texas Alcoholic Beverage Code (the Code). TEX. ALCO. BEV. CODE ANN. § 1.01 *et seq.* (Vernon 2000). The State Office of Administrative Hearings has authority to conduct a hearing in this matter and make recommendations to the Commission, including the issuance of a proposal for decision containing findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2000) and TEX. ALCO. BEV. CODE ANN. §5.43 (Vernon 2000).

## III. DISCUSSION

### A. Applicable Law

Under TEX. ALCO. BEV. CODE ANN. §11.46(a)(8) (Vernon 2000)(the Code), the TABC may refuse to issue an original permit if it has “reasonable grounds to believe” and finds that “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.” Generally, to deny a permit to qualified applicant to operate a lawful business in a wet area, some “unusual condition or situation must be shown so as to justify a finding that the place or manner in which the applicant may conduct his business warrants a refusal of a permit.” *Texas Alcoholic Beverage Com'n v. Mikulenska*, 510 S.W.2d 616, 619(Tex.Civ.App.-San Antonio 1974); *Elliott v. Dawson*, 473 S.W.2d 668, 670(Tex.Civ.App.-Hous (1 Dist.) 1971). The Code does not define how the place or manner in which a business might be operated would jeopardize the general welfare, health, peace, morals, or sense of decency of the people, giving the ALJ has discretion in making this decision. There is no “set formula.” For example, the location and surroundings of a proposed business can be proper grounds for refusal of a license based on the general welfare. *Brantley v. Texas Alcoholic Beverage Com'n*, 1 S.W.3d 343, 347(Tex.App.-Texarkana 1999); *see e.g. Helms v. Texas Alcoholic Beverage Com'n*, 700 S.W.2d 607, 611 (Tex.App.-Corpus Christi 1985); *Ex parte Velasco*, 225 S.W.2d 921,923(Tex.Civ.App.-Eastland 1949) (location and surroundings of proposed premises and number of such licensed establishments in community are proper considerations and may be basis for refusal of license); *but see Carson v. State*, 216 S.W.2d 836, 836-37(Tex.Civ.App.-Fort Worth 1949). Traffic conditions around the proposed premises can constitute an “unusual condition or situation.” *Bavarian Properties, Inc. v. Texas Alcoholic Beverage Com'n*, 870 S.W.2d 686, 688-90 (Tex.App.-Fort Worth 1994); *Dienst v. Texas Alcoholic Beverage Com'n*, 536 S.W.2d 667, 670-71(Tex.Civ.App.-Corpus Christi 1976); *but see Kermit Concerned Citizens Committee v. Colonial Food Stores, Inc.*, 650 S.W.2d 208, 210(Tex.App.-El Paso 1983). On the other hand, noise may not be an unusual condition or situation. *In re Simonton Gin, Inc.*, 616 S.W.2d 274, 276(Tex.Civ.App.-Hous [1st Dist.] 1981). In any case the evidence concerning the unusual condition or situation must be more than mere conclusions. *Id.* at 276.

### B. Public Comment

Patsy Powell, J. D. Davies, III, Judy Phillipson, Dr. James Watts, T.G. Simpson, Jeff McKenney, Shirley Smith, Celeste Cisneros, and Respondent were sworn and testified. Aside from

Protestant, Mr. McKenney, Ms. Smith, and Ms. Cisneros, the witnesses did not express support for the application, citing safety and aesthetic opposition to the application.

## C. Evidence

### 1. The Proposed Location

The documents and testimony established that The Lounge is to be located at 1408 West Magnolia Avenue, Fort Worth, Tarrant County, Texas (the premises). It consists of a single story building, of approximately 2500 square feet, located on a plot of ground 5000 square feet in area. The building is located on the south half of the plot, and off street parking for six or seven vehicles is located on the north half of the plot. The building is on the north side of Magnolia, facing south, with the front door of the club opening onto the north sidewalk of Magnolia Street. A sketch of the club, Exhibit 15, indicates the premises has a twenty foot bar, four pool tables, and table seating. The club has a jukebox, cigarette vending machine, and a 140 square foot dance floor. Applicant's Certificate of Occupancy, Exhibit 14, allows a maximum occupant load of 81.

The block on which the club is located is bounded on the south by West Magnolia, on the east by Sixth Avenue, and on the west by Fairmount Avenue. A twelve foot alley bisects the block, north to south, and is on the eastern boundary of the club's plot. J. B. Davies, Inc. (Davies Inc.), leases the property on the block surrounding the premises. The Davies Inc. parking lot is across the alley from the club's off street parking and has been accessible to the club's patrons.

West Magnolia Avenue is the northern boundary of the Fairmount Historical District, and is a commercial and office street abutted on the north and south by residential areas. Other bars or restaurants serving alcoholic beverages are located within a mile radius of the proposed location. The location is within what is known in Fort Worth as the "hospital district." The general area is also called "Fort Worth South," and is the particular interest of the Fort Worth Southside Development District, Inc. (FWSDD), a private, not-for-profit development company, involved in redevelopment and revitalization of the near southside of Fort Worth. FWSDD has, in cooperation with the City of Fort Worth, instituted a redevelopment plan for The Lounge's general area. West Magnolia Avenue is considered a "primary street" in FWSDD's redevelopment plan.

### 2. The Protestants

The Protestants consisted of a business neighbor of the proposed location, residents from the surrounding neighborhoods, the chairman of FWSDD, and a representative of the Fort Worth Police Department. No moral opposition was expressed to the consumption of alcohol. Instead, complaints were made of past experiences with prior establishments who had occupied the space that Applicant now seeks to rent. Specifically, Protestants pointed to noise, parking problems leading to trespass, acts of public drunkenness, and police complaints as reasons why Applicant should be denied a license. Second, Protestants pointed out that the past two applicants for a wine and beer license to be located at the premises had been denied on a "place and manner" basis by County Judge Tom Vandergriff. Third, Protestants argued that the operation of a bar was inconsistent with the neighborhood, and the plans for its development.

### a. Witness Testimony

Protestants presented five witnesses. Mrs. Patsy Powell identified herself as a resident of the Fairmount Historical District since 1978. Mrs. Powell lived at 1312 5th Avenue from 1978 to 1998, currently resides at 2105 6th Avenue, and is a member of the Fairmount Neighborhood Association. The 5th Avenue address was about two blocks from the premises. In Mrs. Powell's experience, the prior establishments at the premises featured loud music, yelling, tires screeching, street parties, and public drinking. Mrs. Powell made numerous police complaints concerning two bars which had occupied the premises. In her opinion bars on Magnolia Avenue are always problems, and bars do not enhance the quality of life in the neighborhood. Mrs. Powell has joined in a number of liquor application protests, including protests of others seeking a license for these premises.

J. D. Davies, III is the owner of Davies Inc. which is located at 1412 West Magnolia, and which is the next door neighbor of the premises. Davies Inc. is a family business that has been at its current location since 1956, and Mr. Davies has personally conducted business on Magnolia Avenue since 1968. Mr. Davies recalled the premises to be the scene of assaults, murders, public defecation, and a source of litter and noise. Patrons of the former proprietors have trespassed onto Davies Inc. to park their cars, and pursue illegal activities, taking up his parking, and blocking access to his garage. Mr. Davies is considering putting up a fence to exclude trespassers, as signs he has put up in the past were ignored or destroyed. Mr. Davies acknowledged his understanding that the premises in question does not violate city ordinances on parking. He has joined in at least one protest of others seeking a license for these premises.

Judy Phillipson has lived at 1401 5th Avenue, near the premises, for seven years and works in the neighborhood. She recalled an evening when she was walking with a young boy on Magnolia and two men and a woman exiting the front door of the premises onto the sidewalk. The three were drunk and arguing and shouting. Ms. Phillipson and her companion were scared, and took pains to avoid the three. She went by the premises a short while later and saw the woman passed out on the sidewalk, and informed the police. Neighborhood children pass by the premises on their way to and from the local recreation center; but she could not recall any instance in the last year in which a child had been harmed. Ms. Phillipson has been a member of the volunteer citizen's patrol for her neighborhood, and participated in either calling the police to the premises, or working traffic control for the police around the premises during police operations at the premises. As with Ms. Powell, this Protestant believes that bars on Magnolia Avenue are bad for the community, and has joined in other protests against licenses and permits. She acknowledged that other businesses within a few blocks of the premises stay open late and serve alcohol; however, these businesses (Benito's and Palermo's) are restaurants that sell alcohol.

Dr. James Watts is the chairman and a founder of FWSDD. As described above, FWSDD is a private, not-for-profit development company, involved in redevelopment and revitalization of the near southside of Fort Worth, with 172 current members. FWSDD envisions the locale as a new urban center. According to FWSDD 1998 statistics, there are about 8700 residents and 3400 dwellings in the 1400 acres that comprise Fort Worth South, with approximately 30,000 people working in the hospitals in the area. Dr. Watts asserted that there are seventeen bars in Fort Worth South, as opposed to two bars in downtown Fort Worth. FWSDD has worked to reduce crime in Fort

Worth South, and Dr. Watts provided statistics showing that crimes such as murder, rape, robbery, aggravated assault, and burglary have gone down significantly since 1993. FWSDD was instrumental in the opening of a store front police station just a few blocks east on Magnolia from the premises. FWSDD in its March 2000 "Report to Members & Stakeholders," admitted as Exhibit 12, stated:

In support of the effort to create an environment that encourages new commercial, retail, and residential development, we are formally opposing the re-permitting of troublesome bars in the District.

Fort Worth South will support applications for permits when the establishment generates more than 50% of their revenues from food sales. Palermos Italian Cafe . . . will be applying for a beer and wine license. This permit will require a variance with wide support. because its located within 500 feet of the Accelerated High School.

Dr. Watts acknowledged that it was FWSDD's policy to protest all bars in the district.

Officer T.G. Simpson of the Fort Worth Police Department testified as to her experience with the premises. She has been a nuisance abatement officer and liquor permit investigator since 1992. and prior to that, was in vice enforcement. She identified the premises as "trouble," known for violence and liquor violations. The premises has always had a wine and beer permit, which according to Officer Smith's experience, invites a clientele that causes trouble. This was why the premises was a problem location. Further, the landlord never in the past had a responsible operator.

#### b. Prior Protests

Protestants offered two decisions of the Honorable Tom Vandergriff, County Judge, concerning prior licensing protests of the premises. Judge Vandergriff issued the decisions acting under § 61.31 of the Code. Both decisions represented applications for wine and beer retailer's permits and associated retail dealers late hours licenses. In the earlier decision, *In the Matter of El Barrilito*, No. 182 Index 91 [admitted as Exhibit 5], Judge Vandergriff found that within six months of the filing of the application eleven police offense reports for aggravated assault, minor in possession of alcoholic beverages, criminal mischief, disorderly conduct, and weapons violations were taken at the premises. Judge Vandergriff denied the application on the bases of § 11.46(a)(3) & (8). Subsection (a)(3) allows a refusal where "within the six-month period immediately preceding his application the applicant violated or caused to be violated a provision of this code or a rule or regulation of the commission which involves moral turpitude, as distinguished from a technical violation of this code or of the rule." Subsection (a)(8) is the "place or manner ground" at issue in this hearing.

*In the Matter of La Tropicana*, No. 297 Index 91 [admitted as Exhibit 6], concerned an application by a person who had worked as a bar manager at another licensed premises. The evidence before Judge Vandergriff indicated the bar applicant managed had 862 police calls in a two year period, and the applicant had a general complaint for narcotics paraphernalia on the managed

premises. Judge Vandergriff denied the application on the basis of § 11.46(a)(3).

### c. Documentary Evidence

Protestants offered Exhibit 7, a letter from State Representative Lon Burnham, Exhibit 8, a letter from Fort Worth Mayor Kenneth Barr, and Exhibit 9, a letter from Sergeant K. S. Foster of the Fort Worth Police Department. The Exhibits were admitted under § 11.41 of the Code. Each official opposed the application. Representative Burnham opined “this bar was a public nuisance and source of public safety concerns,” and would be a “deterrent to the momentum of rebuilding the Magnolia corridor and adjacent residential neighborhoods.” Mayor Barr cited “the close proximity of a residential area and past incidences or problems associated with these types of facilities” as the basis for his view that “the above establishment would not be complementary to this neighborhood” and the “safe and profitable environment” the community has worked to restore to Fort Worth South. Sergeant Foster established himself as knowledgeable concerning this premises, and noted that three different establishments had located at this premises. The first business was a gay bar, where there were instances of nude dancing and sexually oriented business violations, public intoxication arrests, and disorderly conduct and exposure. The second tenant was a rock and roll bar with arrests made for public intoxication, narcotics, and disorderly conduct and fights. The third business was El Barrilitos, where there were fights (inside and outside the premises) nightly, weapons violations, and public intoxication. The Sergeant concluded:

When this establishment is open, it is the scene of frequent, repeated calls for police service. It is my opinion, this bar, when open, constitutes a public nuisance and a safety hazard for persons living in the area.

## 3. The Texas Alcoholic Beverage Commission

### a. The Commissions Position

As noted above, Mr. Brackin, on behalf of the Commission, stated that Respondent was legally qualified to be permitted, and that the proposed location was within an area of Tarrant County and Fort Worth where alcohol sales are legal, and Applicant had no administrative history with the TABC.

### b. Documentary Evidence

The Commission offered Exhibit 1, consisting of a certified copy of the Application, a sworn document, and Applicant’s Conduct Surety Bond. Applicant is not a U. S. Citizen, and has no criminal history. She worked for 20 years at Justin Boot Company in Fort Worth, Texas, as a machinist, and has invested \$5,500.00 of her savings in this venture. Neither Applicant nor her spouse have been convicted of a felony, a vice crime, bootlegging, vagrancy, controlled substance offenses, an offense aggravated by the use of a firearm or deadly weapon, any violation of the Code involving a minor, or a violation of the Code resulting in a cancellation or a fine of more than \$500.00. City Vending Co., 510 West Magnolia, Fort Worth, Texas, is the owner of the premises,

and the owners or officers of City Vending reside in Tarrant or Dallas Counties. Applicant is leasing the premises from City Vending for \$250.00 per week, with the lease running week to week. The premises are not located within 300 feet of a church or hospital, or 1000 feet of a school.

The Application contains a certificate from the Fort Worth City Secretary that the premises is located in an area of Fort Worth, Texas, where sales of mixed beverage are legal, and that such sales are not prohibited. A separate certificate from the Fort Worth City Secretary indicates that Fort Worth's ordinances authorize the sale of mixed beverages in the premise's area between midnight and 2:00 a.m. The Application also contains a certificate from the County Clerk of Tarrant County that the premises is located in an area of Tarrant County, Texas, where sales of mixed beverage are legal, and that such sales are not prohibited. A separate certificate from the County Clerk of Tarrant County indicates that the Commissioner's Court of Tarrant County by order has authorized the sale of mixed beverages in the premise's area between midnight and 2:00 a.m.

Applicant's Conduct Surety Bond is in the amount of \$5,000.00. Applicant is the principal on the bond, and First Indemnity of America Insurance Company, with an office in Dallas, Texas, is the Surety. The bond is payable to the State of Texas, and conditioned that the Applicant shall faithfully conform with the Code and the Rules of the Commission.

#### 4. The Applicant

##### a. Witness Testimony

Jeff McKenney testified on behalf of the Applicant. Mr. McKenney is vice president and general manager of City Vending Co. City Vending is the owner of the premises, and owns the locations for four or five bars in the Fort Worth South area. City Vending has begun a program of management under Mr. McKenney which monitors the manner of business of its tenants. Mr. McKenney requires written reports from tenants, such as Applicant, of incidents involving drugs, prostitution or violence. He also knows the police officers patrolling the area, and has contact with the sergeants overseeing the area. City Vending has shut down two bars in the last year for law violations. Mr. McKenney related that FWSDD has successfully protested beer and wine permits at locations owned by City Vending at the County Judge venue. As a result City Vending has recommended to Applicant she seek a mixed beverage permit, as Mr. McKenney believes the permitting process would be easier, as it would avoid a hearing before the County Judge.

Shirley Smith is another applicant for a permit in the FWSDD. The proposed location at 150 West Rosedale is identified in FWSDD's literature as The Imperial. Ms. Smith offered no evidence relevant to Applicant, aside from the fact she is being protested by the same parties as Applicant.

Celeste Cisneros testified that she has known Applicant for twenty years, and that Applicant is an honest, law-abiding person.

Applicant testified, through her daughter Beatrice Moreno acting as an interpreter. Applicant has lived in Fort Worth for 21 years. Applicant is not a United States citizen, yet, but is a permanent resident. Prior to moving to the United States, Applicant worked as a waitress in a bar for two years,

and owned a bar in Monterey, Mexico, for one year. Applicant has begun class to learn the TABC rules.

Applicant proposed that herself, her husband Edmundo, and her daughter Beatrice, will work at the bar. The bar will be open 1:00 p.m. to 2:00 a.m., and will close on Tuesdays. Applicant will be at the bar six or seven hours a day, sharing the time with her husband. Applicant does not drink, and does not own a firearm. Applicant will rely on a jukebox for music, and will not have live bands (The Application also stated to the TABC, under oath, that live music will not be featured two or more times a week.). No food service is contemplated; Applicant will possibly serve snacks, such as chips and salsa. Mrs. Moreno anticipates about ten to twenty customers as an average night, with possibly fifty to sixty on weekends. Although she is requesting a mixed beverage permit, Applicant believes most of her customers will drink beer. Minors will not be allowed on the premises. If necessary, security in the form of a doorman will be employed. In response to the concerns raised by the Protestants, applicant could only offer her assurance that she would do her best to minimize or avoid altogether the problems earlier establishments have caused. Applicant requested she not be held accountable for the problems of past establishments, and be granted a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit.

#### D. Analysis, Conclusion, and Recommendation

The ALJ finds that Respondent is legally qualified to be granted a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit, and that the premises are within an area of Fort Worth, Texas, and Tarrant County where alcohol sales are legal, and in compliance with the zoning ordinances of the city and orders of the Commissioner's Court of the county. Applicant had no criminal history and no administrative history with the TABC. Further, Applicant has filed a conduct surety bond. To deny a permit to Applicant some unusual condition or situation must be shown so as to justify a finding that the place or manner in which the applicant may conduct his business warrants a refusal of a permit. The refusal must also be based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

The Protestants typified the premises as a "problem bar," in that the location itself, without regard to the management of the location, was a magnet for trouble and source of complaint. In support of that position, Staff offered four cases for the proposition that "numerous violations and/or complaints *at a specific location* may be grounds to deny an application under the 'place or manner' provisions of the Code." Petitioner's Brief, at 2 (emphasis supplied). However, in *Carson v. State*, 216 S.W.2d 836, 836-37(Tex.Civ.App.-Fort Worth 1949) the only evidence concerning location was that of a general nature. The protestants in *Carson* argued that the permit should not be granted because the applicant's premises was 1.6 miles outside the city limits, that the bar would become a public nuisance, and that concerned officials contested all permits outside of the city limits. The County Sheriff testified that he did not have sufficient force to patrol places where beer was sold outside the city limits. A "general discrimination" against the a rural location was held to be insufficient to deny a permit. However, evidence pertaining to the applicant personally and the way and manner he ran the premises as its manager was sufficient to support refusal of permit. The applicant in *Carson* had an extensive history of personal law violations, and complaints lodged against the location *while he was managing it*. These were sufficient to deny the permit he sought

as its new owner. *Carson* at 837. In *State v. Farris*, 239 S.W.2d 419(Tex.Civ.App.--Waco, no writ), the law in effect stated "there shall be sufficient legal reason to deny a license if it is found that the place, building, or premises for which the license is sought has theretofore been used for selling alcoholic beverages in violation of law at any time during the six (6) months immediately preceding the date of application, or has during that time been a place operated, used, or frequented in any manner or for any purpose contrary to the provisions of this Act, or, so operated, used or frequented for any purpose or in any manner that is lewd, immoral or offensive to public decency." *Id.* at 420-21. The county judge in that case found such a violation of laws at the location within the requisite time period. *Id.* at 421. In *Texas Liquor Control Bd. v. Stevens*, 310 S.W.2d 688(Tex.Civ.App.-Dallas 1958), the applicant had an extensive history of personal law violations, and complaints lodged against the location *while he was running it as an owner*. *Four Stars Food Mart, Inc. v. Texas Alcoholic Beverage Com'n*, 923 S.W.2d 266(Tex.App.-Fort Worth 1996) also involved a renewal application, and a store location with extensive law violations. The cases cited do not support the proposition that the location alone is sufficient to deny an application. In *Carson*, *Stevens*, and *Four Star*, the applicant "earned" his bad reputation and history and denial of a permit. In *Farris* a "location specific" statute similar to § 11.46(3) or (15) was in force and required the application to be denied. None of these considerations apply to this Applicant.

The Protestants have failed to demonstrate the issuance of the requested permits would be inconsistent with the public's safety or contrary to the public's general welfare, peace, morals, and public sense of decency. The ALJ recognizes there have been problems, complaints and violations of the law at the premises. Nevertheless, the ALJ is not persuaded by the evidence presented that the problems, complaints and violations of the past will lead to the same or similar problems in the future. Those problems were associated with a type of bar business different from the one contemplated by Applicant. The prior applicants refused by Judge Vandergriff has extensive personal law enforcement histories, and were denied beer and wine permits on "moral turpitude" grounds that do not exist in this case.

Protestants noted that children in the area walk past the premises on their way to and from neighborhood play. Protestants also noted that the premises has been a bar location for over thirty years. Protestants did not further demonstrate specifics concerning dangers actually posed to children, and how those dangers would be associated with Applicant's permit. It is undisputed that the premises are not located within 300 feet of a church or hospital, or 1000 feet of a school.

Protestants also urged that bars on West Magnolia are contrary to the style and quality of life sought by the supporters of FWSDD. Certainly, the witnesses brought forward by Protestants, and the comments of the State Representative and the Mayor, demonstrate the depth of commitment of FWSDD and the good work the organization has performed. However, FWSDD targets only bars in the Fort Worth south area, but not establishments that generate more than 50% of their revenues from food sales. FWSDD's redevelopment plans to the contrary, the premises are in an area where it is legal to sell alcohol. "The fact that a large number of the residents of the area protest the issuance of the permits is not of itself sufficient reason to deny the application of an otherwise qualified applicant. The question of whether the sale and purchase of alcohol should be permitted is a political one to be determined by the voters." *Texas Alcoholic Beverage Com'n v. Mikulenska*, 510 S.W.2d 616, 619(Tex.Civ.App.-San Antonio 1974).

Issuance of the permits would not be inconsistent with either the public's safety or any of the other considerations set forth in §11.46(a)(8) of the Code. Accordingly, the application should be granted in its entirety.

#### IV. FINDINGS OF FACT

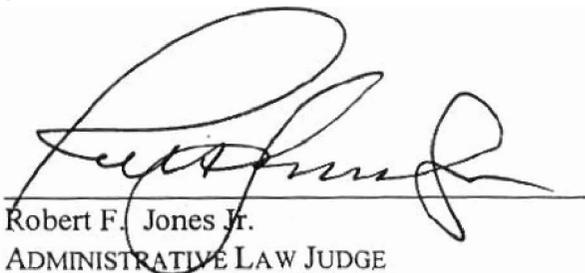
1. On December 15, 1999, Maria Asuncion Moreno d/b/a the Lounge (Respondent) filed an application for Mixed Beverage Permit and a Mixed Beverage Late Hours Permit with the Texas Alcoholic Beverage Commission(TABC) for a premises located at 1408 West Magnolia Avenue, Fort Worth, Tarrant County, Texas (the premises).
2. Protests to the application were filed by J. D. Davies, III, Donald W. Scott, and Fort Worth Police Officer T.G. Simpson alleging the place or manner in which the Applicant may conduct her 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.”
3. On April 11, 2000, Staff issued a 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.
4. The hearing was held on June 8, 2000, in Fort Worth, Tarrant County, Texas, before Robert F. Jones Jr., an administrative law judge with the State Office of Administrative Hearings ("SOAH"). Staff was represented by Dewey Brackin, an attorney with the Commission's Legal Division. Respondent appeared personally and with her counsel, Steve Swander. Protestants J. D. Davies, III, Donald W. Scott, and Officer T.G. Simpson appeared. The record was closed on June 16, 2000.
5. Applicant's premises are located in within an area of Fort Worth, Texas, and Tarrant County where sales of mixed beverages are legal and that such sales are not prohibited by city ordinance or Commissioner's Court Order . Fort Worth's ordinances or Commissioner's Court Order authorize the sale of mixed beverages between midnight and 2:00 a.m. at the premises.
6. Applicant is legally qualified to receive a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit.
7. In the event the application is granted, Applicant plans to establish procedures for operating the premises including, but not limited to, establishing hours of operation and serving alcoholic beverages to minors and non-members, which are consistent with statutory provisions or Commission's rules for operation of the business, as a bar.
8. The area in the immediate vicinity of the premises is comprised of both businesses and residences.

9. The premises are not located within 300 feet of a church or hospital, or 1000 feet of a school.

#### V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code), TEX. ALCO. BEV. CODE ANN. §1.01 et seq. (Vernon 2000).
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2000).
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 2000).
4. Based on the foregoing findings, the preponderance of the evidence did not show that issuance of the requested permits will adversely affect the safety of the public, pursuant to §11.46(a)(8) of the Code.
5. Based on the foregoing findings, the preponderance of the evidence did not show that issuance of the requested permits will adversely affect the general welfare, peace, or morals of the people or violate the public sense of decency, pursuant to §11.46(a)(8) of the Code.
6. Based on the foregoing findings and conclusions, the application of Maria Asuncion Moreno d/b/a the Lounge for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit should be granted.

SIGNED this 4<sup>th</sup> day of August, 2000.



Robert F. Jones Jr.  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS