

DOCKET NO. 608842

IN RE FIESTA PIZZA	§	BEFORE THE
D/B/A FIESTA PIZZA	§	
ORIGINAL APPLICATION NB, PE & FB	§	
	§	TEXAS ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-4430)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 2nd day of September, 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Brenda Coleman. The hearing convened on April 21, 2004 and adjourned on the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 21, 2004. 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.

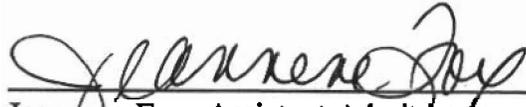
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the Original Application of Fiesta Pizza, for an NB, PE & FB, is hereby **GRANTED**.

This Order will become final and enforceable on September 22, 2004, 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.

SIGNED on this 2nd day of September, 2004.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Brenda Coleman
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (214) 956-8611

Fiesta Pizza
RESPONDENT
712 S. Walton Walker Blvd., No. E 3192
Dallas, Texas 75211
VIA CM/RRR#7000 1530 0003 1902 1491
Via Fax 1 214 352 9936 Attn: Mr. Chul Bak

PROTESTANT:

Mr. Frank Valtierra
Vista Real Subdivision
P.O. Box 210376
Dallas, Texas 75211

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Dallas District Office

SOAH DOCKET NO. 458-04-4430

TEXAS ALCOHOLIC BEVERAGE, COMMISSION, Petitioner VISTA REAL SUBDIVISION, Petitioner V.	§ § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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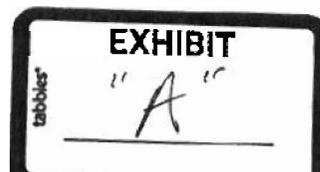
PROPOSAL FOR DECISION

Fiesta Pizza (Applicant), filed an original application with the Texas Alcoholic Beverage Commission (Commission) for a Private Club Beer and Wine Permit, a Beverage Cartage Permit, and a Food and Beverage Certificate for a premises known as Fiesta Pizza, located at 712 South Walton Walker Boulevard, No. E 3192, Dallas, Dallas County, Texas. The Property Owners Association of the Vista Real Subdivision (Protestant) protests the issuance of the permits based on general welfare, health, peace, moral, and safety concerns. The Commission's staff (Staff) did not take a position on the application. It found no basis existed for denial of the requested permits. This proposal for decision recommends the permits be issued.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

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

On December 1, 2003, Applicant filed an original application for a Private Club Beer and Wine Permit, a Beverage Cartage Permit, and a Food and Beverage Certificate. The premises where this application is sought is located at 712 South Walton Walker Boulevard, No. E 3192, Dallas, Dallas County, Texas. Protestant asserts that the application should be denied due Applicant's proximity to residential areas and schools, and because of issues related to loud noise, traffic conditions, damage to property, criminal activity, and other undesirable conditions.



On April 21, 2004, a hearing convened in Dallas, Texas, before Administrative Law Judge (ALJ) Brenda Coleman, State Office of Administrative Hearings (SOAH). The Applicant appeared and was represented by Dan Estrada, attorney. Staff was represented at the hearing by Tim Griffith, Staff Attorney. Protestant was represented by Frank A. Valtierra. After presentation of evidence and argument, the hearing concluded and the record closed on that date.

II. LEGAL STANDARDS AND APPLICABLE LAW

Protestant challenges the application on the basis of § 11.46(a)(8) of the Texas Alcoholic Beverage Code (Code). Section 11.46(a)(8) provides that a permit may be denied if the Commission 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, peace, morals, and safety of the people and on the public sense of decency.”

III. EVIDENCE

A. Background and physical location

The following is undisputed regarding the physical location of Applicant’s premises and its proximity to the Vista Real Subdivision (Vista Real) and surrounding area. Applicant’s premises is situated in the northwest corner of the building known as Fiesta Plaza, located at 712 South Walton Walker Boulevard, Dallas, Dallas County, Texas. A commission-licensed sports bar, Fiesta Billiards, is also situated inside the building, approximately 480 feet southeast of Applicant’s premises. The building is enclosed by a metal railing which only allows entrance and exit from specific points that are controlled by gates.

The nearest major cross street south of the building at Walton Walker Boulevard is Keeneland Parkway, which slopes upward. Vista Real is a residential area containing 198 homes situated behind and within a wooded area at the top of the slope. Vista Real is at the southeast corner of Walton Walker Boulevard and Keeneland Park. It is not visible from Applicant’s position. The closest housing to

Applicant's premises is a fourth of a mile away. The closest school is nine-tenths of a mile away.

B. Protestant's Evidence and Contentions

Frank Valtierra, Protestant's past president, testified on behalf of Protestant. Mr. Valtierra stated on several occasions that Protestant opposes issuance of a permit to sale alcoholic beverages to any establishment (including a restaurant) in a residential neighborhood. In support of its position, Protestant asserts that the sale of alcoholic beverages only serves to financially benefit the owner of the establishment; the availability of alcoholic beverages serves no benefit to the neighborhood and is only a detriment to the community. Protestant contends that once a permit is granted to one establishment, it becomes difficult to stop others from springing up throughout the area.

Protestant argues that since Applicant's premises is in the same building as a commission-licensed sports bar, Fiesta Billiards, any existing problems already believed to be attributable to alcohol consumption occurring within the residential neighborhood would be aggravated by issuing permits to Applicant. Specifically, Mr. Valtierra pointed out that when Vista Real first opened, Keeneland Parkway had very light traffic. Because of ongoing development in the area, the roadway now generates quite a bit of traffic. Speeding cars and gunshots are heard at night at least once a week. Trees are knocked down on the median. Mr. Valtierra stated that because the residential area includes two elementary schools and one high school, there is a safety concern for the many children who walk on the sidewalks near the building which houses the sports bar and Applicant's premises.

Mr. Valtierra acknowledged that there is more concern about a sports bar in the area because the general nature of this type of establishment represents a greater risk of intoxicated drivers generating problems for the community. He stated, however, that Protestant equates a pizza restaurant that sells alcoholic beverages to a sports bar, in that it too is capable of promoting anti-social behavior which negatively affects the community if alcohol consumption is not controlled.

Mr. Valtierra admitted that he has never been inside the sports bar or Applicant's premises. Nor does he have any personal knowledge of Applicant's hours of operation, the nature of Applicant's business or its owner.

Additionally, Protestant contends that a basis for the protest is that there is a residential area adjacent to the north property line of Applicant's premises in violation of the Commission's location restriction. Mr. Valtierra stated that a residential apartment complex is being constructed adjacent to the establishment.

C. Applicant's Evidence and Contentions

Applicant's owner, Chul Bak, testified that its premises is not a bar. Its primary business is a restaurant which serves pizza. Applicant's purpose in requesting the permits is to serve beer with pizza, however, Applicant anticipates that its primary revenue will come from the operation of the restaurant, not the sale of alcoholic beverages. Mr. Bak stated that Applicant's hours of operation are Sunday through Thursday from 10:00 a.m. to 8:00 p.m. According to Mr. Bak, Applicant intends to operate its premises within the State laws and regulations of the Commission and will serve its customers solely within these hours. Applicant has not requested a Late Hours Permit.

Mr. Bak stated that prior to opening the restaurant, he was employed at two commission-licensed premises for approximately seven years. During this time, he engaged in the handling and sales of beer, wine, and liquor. He testified that he has never had any commission related complaint filed against him, nor has he ever been cited for the sale of any alcoholic beverage.

Applicant stated in its application that its business is not located within 300 feet of any school, church, residential address or established neighborhood association.¹ Applicant argues that it has violated no section of the code or engaged in any conduct which would result in denial of the application. Applicant

¹ TABC (Staff) Exhibit Two, Certified Copy of Original Application.

contends that the basis of the protest is unfounded due to the fact that Protestant's general opposition to the sale of alcohol is oppressive and contrary to what state laws provide.

D. The Staff's Evidence

Staff took no position regarding issuance of the requested permits. Upon receiving Applicant's application, Staff conducted an investigation of its premises and surrounding area. It found no basis for denial of the permits.

Anthony Keel, an agent with the Commission, testified that he reviewed the report of the Commission's Compliance Division. The report contained no restrictions which would prevent Applicant from obtaining a permit to sale alcohol. He stated that he is familiar with the area and that he personally conducted an investigation of Applicant's premises in response to the protest. According to Agent Keel, the closest housing is a fourth of a mile away. The closest school is nine-tenths of a mile away.

III. DISCUSSION

The issue in this case is whether Protestant has proved that issuance of the requested permits would create a detrimental effect on the residential neighborhood and the general welfare, morals, and safety of the public. After considering the evidence, the ALJ concludes that Protestant has not met that burden.

Staff, after an investigation of this application, found no basis for denial of the requested permits. No Commission record of criminal or administrative history exists for this Applicant or its owner. Agent Keel's testimony at the hearing that the closest housing is a fourth of a mile away and the closest school is nine-tenths of a mile away corroborates Applicant's statement on the application that its premises is not located within 300 feet of any school, church, residential address, or established neighborhood association. While there is a sports bar located in the same building, there is insufficient evidence to support Protestant's argument that issuance of the requested permits to Applicant would aggravate traffic and other potential criminal activity often associated with the operation of bars or that said issuance would have a generally

detrimental effect on the neighborhood.

Applicant asserts that it intends to operate its restaurant within the State laws and regulations of the Commission, serving its customers between the reasonably established hours of 10:00 a.m. and 8:00 p.m. from Sunday through Thursday. Applicant's qualifications or character were not in issue.

Ultimately, Protestant simply has not presented any credible evidence why the establishment proposed by Applicant will present any harm or is somehow in compatible with the community's morals and general welfare. The ALJ cannot conclude that the evidence supports a finding that the place or manner in which Applicant may conduct business warrants the refusal of a permit. There is no legitimate basis for denying the permits. For this reason, the ALJ recommends that the requested permits be issued.

IV. PROPOSED FINDINGS OF FACT

1. On December 1, 2003, Fiesta Pizza (Applicant) filed an original application with the Texas Alcoholic Beverage Commission (Commission) for a Private Club Beer and Wine Permit, a Beverage Cartage Permit, and a Food and Beverage Certificate for a premises located at 712 South Walton Walker Boulevard, No. E 3192, Dallas, Dallas County, Texas.
2. Applicant's premises is a pizza restaurant.
3. Applicant's business is not located within 300 feet of any school, church, residential address or established neighborhood association.
4. Applicant has met all Commission requirements for holding the permits. The Commission found no basis for denying the permits.
5. Applicant intends to operate its premises within the State laws and regulation of the Commission during reasonably established hours of operation.
6. The Property Owners Association of the Vista Real Subdivision (Protestant) opposes the issuance of a permit for the sale alcoholic beverages to any establishment (including a restaurant) in a residential area.
7. On March 26, 2004, Commission Staff issued a notice of hearing notifying all parties that a hearing

would be held on the permit requests.

8. The notice of hearing included a statement regarding the time, place, and nature of the hearing; referenced the legal authority upon which the hearing would be held; cited the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.
9. The hearing was held on April 21, 2004, in Dallas, Dallas County, Texas, before Brenda Coleman, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings. The hearing concluded and the record closed that same day.
10. The place or manner in which Applicant intends to conduct business is not incompatible with the general welfare, peace, morals, safety of the people, and the public sense of decency.

V. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Chapters 1 and 5 and §§ 6.01 and 11.46 (the Code).
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting 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. §2003.
3. The parties received proper and timely notice of the proceedings and hearing, pursuant to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the foregoing findings, a preponderance of the evidence does not show that issuance of the requested permits will adversely affect the safety of the public, the general welfare, peace, or morals of the people, nor violate the public sense of decency, as prohibited by TEX. ALCO. BEV. CODE ANN. §11.46(a)(8).
5. The application of Fiesta Pizza for a Private Club Beer and Wine Permit, a Beverage Cartage Permit, and a Food and Beverage Certificate should be granted.

SIGNED June 21, 2004.



BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS