

DOCKET NO. 609984

IN RE ORIGINAL APPLICATION OF	§	BEFORE THE TEXAS
OSVALDO ELIAS DELGADO	§	
D/B/A OR'S SPORTS BAR	§	
MB, LB & PE	§	ALCOHOLIC
	§	
	§	
VAL VERDE COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-5769)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 1st day of September, 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge John H. Beeler. The hearing convened on June 11, 2004 and the record was closed on June 18, 2004. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on August 17, 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 Osvaldo Elias Delgado d/b/a OR's Sports Bar, for the issuance of a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit and a Beverage Cartage Permit be **GRANTED**.

This Order will become final and enforceable on **SEPTEMBER 21, 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 the 1st day of September, 2004.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

/vr

Hon. John H. Beeler
Administrative Law Judge
State Office of Administrative Hearings
Austin, Texas
VIA FAX (512) 475-4994

Juan M. Gonzalez
ATTORNEY FOR RESPONDENT
115 E. Travis St.
Suite 640
San Antonio, Texas 78205
VIA FAX (210) 220-3701

Oswaldo Elias Delgado
d/b/a O.R.'s Sports Bar
RESPONDENT
302 Boulder Ridge
Del Rio, TX. 78840-3566
CERTIFIED MAIL NO. 7000 1530 0003 1902 6281

John R. & Sylvia Riggs
PROTESTANTS
200 Stricklen Ave.
Del Rio, Texas 78840
VIA REGULAR MAIL

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

August 17, 2004

FILED
AUG 18 2004
FBI

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

HAND DELIVERY

RE: Docket No. 458-04-5769; Texas Alcoholic Beverage commission & John R. Riggs and Sylvia Riggs, et al, v. Osvaldo Elias Delgado d/b/a O.R's Sports Bar, Val Verde County, Texas TABC No. 609984

Dear Ms. Fox:

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**
Gayle Gordon, Staff Attorney, TABC, 5806 Mesa, Suite 160, Austin, Texas 78731- **VIA HAND DELIVERY**
Juan M. Gonzalez, Attorney, 115 E. Travis Street, Ste. 640, San Antonio, Texas 78205- **VIA REGULAR MAIL**
John R. Riggs & Sylvia Riggs, 200 Stricklen Avenue, Del Rio, Texas 78840- **VIA REGULAR MAIL**
Clarence E. Eccleston, 121 Stricklen, Del Rio, Texas 78840- **VIA REGULAR MAIL**

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 June 11, 2004, a public hearing was held before John H. Beeler, ALJ, in Del Rio, Val Verde, County, Texas. Staff was represented by Gayle Gordon, attorney. Protestants appeared *pro se* through designated spokesperson Clarence E. Eccleston. Respondent was represented by attorney Juan M. Gonzalez. The record was closed on June 18, 2004, after the filing of written closing arguments.

II. LEGAL STANDARDS AND APPLICABLE LAW

The Commission or Administrator may refuse to issue an original permit if it has reasonable grounds to believe that the place or manner in which the applicant may conduct his business warrants the refusal based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).

III. EVIDENCE

A. Staff's Evidence and Contentions

Staff presented no evidence to protest the issuance of the permits and took no position on this matter. Staff contended in its Notice of Hearing that Respondent met all Commission requirements for holding the permits at the premises, that Respondent properly posted or published all required notices, and that Respondent complied with all applicable Texas Alcoholic Beverage Code requirements.

B. Protestant's Evidence and Contentions

Protestants offered the statements of several individuals during the public comment portion of the hearing. Each lives or owns property in the neighborhood located behind the premises and voiced concerns about noise, traffic, and crime that would occur if the permits were granted.

Protestants called no witnesses during the evidentiary portion of the hearing, but offered documents showing the proximity of the premises to the neighborhood.

C. Respondent's Evidence and Contentions**1. Evame Garza**

Ms. Garza testified that she is the office manager for Respondent. On the morning of the day of the hearing she was involved in the making of a videotape of the premises. (The video was admitted into evidence and is discussed below.) She is familiar with the premises and has attempted to meet with Protestants to address their concerns. She does not believe that noise will be a problem because the sound system was designed to provide music only inside the bar and to assure that no music could be heard outside. She also believes the neighborhood will not be adversely effected by added traffic because there would be no reason for patrons of the bar to drive into the neighborhood. There is only one exit from the parking area, a boulevard that forces the cars to proceed away from the entrance to the neighborhood.

2. Osvaldo Elias Delgado

Mr. Delgado testified that he is the owner of the premises. He hired a professional to install the sound system to assure that no noise could be heard outside the building. He will employ

adequate security and install security cameras outside the bar to assure crime will not be a problem. He doubts that any traffic leaving the bar will enter the neighborhood because the boulevard forces traffic away from the entrance to the neighborhood.

D. Physical Evidence

The video and diagrams presented show the location and layout of the premises. The premises are located on a commercial major street. Behind the premises is a fence, a grassy area, and an alley type street. Beyond the alley is the neighborhood where Protestants reside.

The parties also requested that the ALJ view the area at the close of the hearing. This was done and revealed that the area is commercial and has several licensed premises. The exit from the bar forces traffic to drive away from the neighborhood.

IV. ANALYSIS

A test for denying permits on the basis of the general welfare, health, peace, morals, and safety of the area is that some unusual condition or situation must be shown to justify a finding that the place or manner in which the applicant may conduct his business warrants a refusal of the permit. Texas Alcoholic Beverage Commission v. Jack E. Mikulenka d/b/a Frigate Club, 510 S.W.2d 616, 619 (Tex.App.-- San Antonio 1974).

Such unusual conditions include, for example, a "sexually-themed" business located in a primarily residential neighborhood, Texas Alcoholic Beverage Commission v. Twenty Wings, LTD and TWI XXV, Inc., Judy Hall, Director, as Partners d/b/a Hooters, 112 S.W.3d 647 (Tex.App.--Ft. Worth, 2003); a history of an unacceptable and pervasive amount of criminal activity in the location for which the permit had been requested, Texas Alcoholic Beverage Commission v. Carlos Sanchez, d/b/a Tierra Caliente Bar and Grill, 96 S.W.3d 489 (Tex.App.--Austin, 2002); or a location where

the only exit from the premises was onto a frontage road at the "gore area," the triangular section between a freeway exit ramp and the service road striped with white paint and designed to keep cars from moving off the exit ramp too soon or from moving from the service road into the exit lane too quickly, Bavarian Properties, Inc. v. Texas Alcoholic Beverage Commission, 870 S.W.2d 686 (Tex.App.-- Fort Worth, 1994);

In the instant case, Protestants presented no evidence of any unusual condition or situation that would warrant refusal of the permits. The premises are located in a commercial area with other alcohol related businesses nearby. Although it is not uncommon for residents of a neighborhood to be concerned when a bar is being opened anywhere near the neighborhood, the concerns in this case appear to be without merit.

Accordingly, based on the evidence in the record, the Protestants have failed to show, by a preponderance of the evidence, that Respondent's application should be denied based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

V. RECOMMENDATION

The ALJ recommends that Respondent's application for the permits be granted.

VI. FINDINGS OF FACT

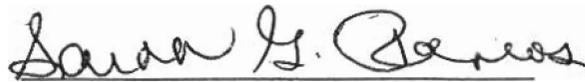
1. Osvaldo Elias Delgado d/b/a O. R.'s Sports Bar (Respondent) filed an application with the Texas Alcoholic Beverage Commission (Commission) for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit for the premises located at 2528 Veterans Boulevard in Del Rio, Val Verde County, Texas.
2. Protests to the application were filed by residents of a nearby neighborhood asserting that the application should be denied based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency.

3. A Notice of Hearing dated May 5, 2004, was issued by Commission 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.
4. On June 11, 2004, a public hearing was held before Administrative Law Judge John H. Beeler in Del Rio, Texas. Staff appeared at the hearing, took no position, and was represented by Gayle Gordon, attorney. Protestants appeared *pro se* though their spokesperson, Clarence E. Eccleston. Respondent was represented attorney Juan M. Gonzalez. The record was closed on June 18, 2004, after the filing of written closing arguments.
5. Respondent has met all Commission requirements for holding the permits and certificate at the premises location.
6. No unusual conditions or situations exist that would warrant refusal of the permits.

VII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, §§ 6.01 and 11.46(a)(8).
2. The State Office of Administrative Hearings has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was effected on all parties pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE § 155.55.
4. Issuance of the requested permits and certificate will not adversely affect the safety of the public, nor will it adversely affect the general welfare, peace, or morals of the people or violate the public sense of decency. TEX. ALCO. BEV. CODE ANN. §11.46(a)(8).
5. Respondent's application for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit for the premises located at 2528 Veterans Boulevard in Del Rio, Val Verde County, Texas should be granted.

SIGNED August 17, 2004.

A handwritten signature in cursive script, appearing to read "John H. Beeler", is written over a horizontal line.

JOHN H. BEELER

ADMINISTRATIVE LAW JUDGE

STATE OFFICE OF ADMINISTRATIVE HEARINGS