

DOCKET NO. 610527

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
&	§	
RIVERBEND HOMEOWNERS	§	
ASSOCIATION	§	
	§	
V.	§	ALCOHOLIC
	§	
LIBERTY HILL ENTERTAINMENT	§	
L.P. D/B/A HANDLEBARZ	§	
MB	§	
	§	
	§	
WILLIAMSON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-7098)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 5th day of November, 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 July 27, 2004 and the record was closed on July 27, 2004. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 8, 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. Protestant's Attorney, Kemp W. Gorthey, filed Exceptions to the Proposal for Decision on October 25, 2004 and a Motion To Reopen Evidence on October 25, 2004. Respondent's Attorney, Bill Aleshire, filed a Response to Protestant's Exceptions and Motion on October 27, 2004. All Exceptions and the Motion were denied by the Administrative Law Judge on October 29, 2004.

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.

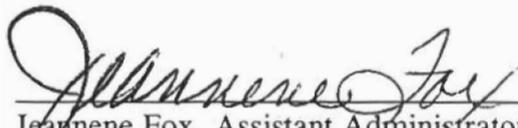
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the Original Application of Liberty Hill Entertainment L.P. d/b/a Handlebarz, for the issuance of a Mixed Beverage Permit be **GRANTED**.

This Order will become final and enforceable on NOVEMBER 26, 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 5th day of November, 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

Bill Aleshire
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TABC Legal Section

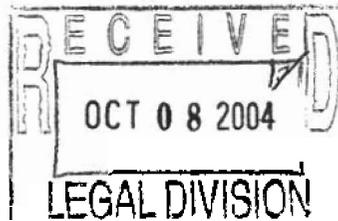
Licensing Division
Austin District Office

10-28

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



October 8, 2004

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

HAND DELIVERY

RE: Docket No. 458-04-7098; Texas Alcoholic Beverage Commission & Riverbend Homeowners Association v. Liberty Hill Entertainment, LP, d/b/a Handelbarz Williamson County, Texas TABC No. 610527

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**
Christopher Gee, Attorney, TABC, 5806 Mesa, Suite 160, Austin, Texas 78731- **VIA HAND DELIVERY**
Bill Aleshire, Attorney, 700 Lavaca, Ste 920, Austin, Texas 78701 -**VIA REGULAR MAIL**
Lisa Zintsmaster Bradford, P.L.L.C., Attorney, 4611 Bee Caves Road, Ste. 102, Austin, Texas 78746-**VIA REGULAR MAIL**

DOCKET NO. 458-04-7098

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
&	§	
RIVERBEND HOMEOWNERS	§	
ASSOCIATION,	§	
	§	OF
v.	§	
	§	
LIBERTY HILL ENTERTAINMENT,	§	
LP, D/B/A HANDELBARZ	§	
WILLIAMSON COUNTY, TEXAS	§	
TABC NO. 610527	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Liberty Hill Entertainment LP, D/B/A Handelbarz (Respondent) filed an application with the Texas Alcoholic Beverage Commission (Commission) for a Mixed Beverage Permit for the premises located at 15395 Highway 29 West in Liberty Hill, Williamson County, Texas, and Riverbend Homeowners Association (Protestant) protested the application and asserted that the permit should be denied based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. Specifically, Protestant alleges that there will be excessive noise and a traffic hazard if the permits are issued. The Commission's staff (Staff) took no position concerning the allegations. The Administrative Law Judge (ALJ) recommends that the Commission grant Respondent the requested permit.

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 July 27, 2004, a public hearing was held before John H. Beeler, ALJ, in Austin, Travis County, Texas. Staff was represented by Christopher Gee, attorney. Protestant was represented by attorney Lisa Zintmaster Bradford, and Respondent appeared through Applicant Dan Walters and was represented by attorney Bill Aleshire. Evidence was received and the record closed that same day.

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, Respondent properly posted or published all required notices, and Respondent complied with all applicable Texas Alcoholic Beverage Code requirements.

B. Protestant's Evidence and Contentions

Protestant¹ offered the statements of several individuals during the public comment portion of the hearing. All live in the general area of the premises and voiced concerns about noise and

¹ Protestant is a homeowners association of a neighborhood in the area of the proposed premises.

traffic that would occur if the permit is granted. Protestant also offered numerous documents and photographs, and the testimony of several witnesses. The testimony is summarized as follows:

1. Dan Walters

Protestant first called Applicant Dan Walters as an adverse witness. Mr. Walters identified numerous photographs for Protestant as depictions of the area of the premises and the surrounding areas. He testified that the location is safe for the operation of a bar and that noise would not be a problem. The name "Handlebarz" is not a reference to a proposed motorcycle bar, but is a tribute to his father's handlebar moustache. He said he intends to operate a safe and respectable business located quite a distance from any residence

2. Marcos Meyers

Mr. Meyers lives in Riverbend Subdivision and his property borders the licensed premises. He is concerned that loud music from the proposed licensed premises will interfere with his quiet enjoyment of his property. His daughter and her friends frequently ride horses, bicycles, and electric scooters in the area. Traffic is already a problem and the bar would add to the problem. Further, he believes property values would decrease if a bar was in the area.

3. Betty Bartage

Ms. Bartage lives in Riverbend Subdivision on six acres and is concerned with traffic in the area of her home. She knows of dangerous occurrences around the entrance to the subdivision which is close to the entrance of the proposed bar. Any consumption of alcohol by drivers would result in a dangerous situation.

4. Julia Beddington

Ms. Beddington lives in Riverbend Subdivision with her husband and children. She works at preschool operated by a church down the road from the premises, and fears noise and traffic problems if the bar is opened.

5. John Turman, Bill Turney, and Gary Langford

Mr. Turman, Mr. Turney, and Mr. Langford all live in Riverbend Subdivision with their families and are concerned about noise and traffic problems if the bar opens.

C. Respondent's Evidence and Contentions

Respondent offered the testimony of several witnesses. The testimony is summarized as follows:

1. Barry Haag

Mr. Haag is employed by the bank that is financing the premises. Prior to making the loan, the bank determined that the location was proper for a bar. Nothing about the area is unusual. He has received threatening phone calls regarding the bank financing the project but has determined that the concerns are unfounded.

2. Bill Davison

Mr. Davison is also employed by the bank that is financing the bar. He has made loans for similar businesses and there is nothing unusual about the location of Handlebarz. The roadway

where Handlebarz is located is appropriate. After receiving complaints concerning the project, he went to the location to investigate them. He found complaints to be unfounded.

3. Harry Akin

Mr. Akin is the attorney for the bank. After learning of complaints from residents of Riverbend Subdivision, he investigated the situation and determined that they were unfounded. He understands the protesters are sincere, but the bar is not a real threat to the neighborhood. The 3000 square foot building that will house the bar sits on over six acres and near the street and away from the residential area of Riverbend.

4. Steve Shaw

Mr. Shaw is the mayor of Liberty Hill and is also a realtor.² He sees no reason that Handlebarz should not be given a permit. He understands the concerns of the residents of Riverbend, but believes them unfounded.

D. Physical Evidence

Numerous photographs and diagrams were admitted and depict the area of the proposed premises. They are discussed below.

IV. ANALYSIS

A test for denying permits on the basis of the general welfare, health, peace, morals, and

²Mr. Shaw testified in his individual capacity, not in his capacity as mayor.

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. Mikulenska 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, Protestant failed to demonstrate that any unusual condition or situation exists that would warrant refusal of the permit. The premises are located on a major roadway in an area with other alcohol-related businesses nearby. Although several witnesses voiced concerns about potential noise, it is clear that the present noise from the roadway is not a concern and no convincing evidence was offered that the premises would significantly increase the noise level to the residences of Protestant's concern. Each home in the area is surrounded by several acres of land and is quite a distance from the premises.

Protestant's second concern, that of a traffic hazard, is also without merit. Other alcohol-related businesses are in the same area under similar traffic and roadway conditions without the problems Protestant asserts would occur. Protestant argues that the lack of the continuation of the turn lane is the unusual condition that should preclude the issuance of the permit. A review of the evidence, however, reveals that the turn into the neighborhood, near the proposed entrance to the premises, is no more dangerous than other intersections along the same roadway.

The photographs and diagrams admitted clearly show that the proposed premises are quite a distance from the home of Riverbend Subdivision. Each of the homes is on several acres of land as is the bar. The bar itself is located on Highway 29, a major commercial roadway with other alcohol related business located on it. From the photographs, it appears that the bar will have no impact on the subdivision.

Accordingly, based on the evidence in the record, the Protestant has 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 permit be granted.

VI. FINDINGS OF FACT

1. Liberty Hill Entertainment LP d/b/a Handlebarz (Respondent) filed an application with the Texas Alcoholic Beverage Commission (Commission) for a Mixed Beverage Permit for the premises located at 15395 Highway 29 West in Liberty Hill, Williamson County, Texas.
2. A protest to the application was filed by Riverbend Homeowners Association 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 July 13, 2004, was issued by Commission Staff notifying the 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 July 27, 2004, a public hearing was held before Administrative Law Judge John H. Beeler in Austin, Texas. Staff appeared at the hearing, took no position, and was represented by Christopher Gee, attorney. Protestant was represented by attorney Lisa Zintmaster Bradford, and Respondent was represented by attorney Bill Aleshire. Evidence was received and the record closed that same day.

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 permit.

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 permit 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 for the premises located at 15395 Highway 29 West in Liberty Hill, Williamson County, Texas, should be granted

SIGNED October 8, 2004.



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