

DOCKET NO. 612494

IN RE ZIBA INCORPORATED	§	BEFORE THE
D/B/A CAFÉ SALTARI & ZIBA'S	§	
BAR AND GRILL, RESPONDENT	§	
ORIGINAL APPLICATION MB & FB	§	
	§	TEXAS ALCOHOLIC
	§	
DENTON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-05-2169)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 21st day of March, 2005, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Kyle Groves. The hearing convened on January 4, 2005, and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 3, 2005. This Proposal For Decision (**attached hereto as Exhibit "A"**), 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 MB & FB for Ziba Incorporated d/b/a Café Saltari & Ziba's Bar & Grill, is hereby **GRANTED**.

This Order will become final and enforceable on April 11, 2005, 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 21st day of March, 2005, at Austin, Texas.

On Behalf of the Administrator,


Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

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

Michelle Morgan
Shackelford, Melton & McKinley
ATTORNEY FOR RESPONDENT
VIA FAX (214) 696-0699

ZIBA INCORPORATED
D/B/A CAFÉ SALTARI & ZIBA'S BAR AND GRILL
RESPONDENT
2940 FM 407
HIGHLAND VILLAGE, TX 75077
CERTIFIED MAIL/RRR NO. 7000 1530 0003 1930 1548

PROTESTANTS:

Robert Sepanek, Sr.
101 Thistle Court
Highland Village, TX 75077 - Via Regular Mail

Kathleen Zeier
102 Thistle Court
Highland Village, TX 75077 - Via Regular Mail

Jo Le Hoover
104 Thistle Court
Highland Village, TX 75077 - Via Regular Mail

-
Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Dallas District Office

Docket No. 458-05-2169

Page 2

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 January 4, 2005, a hearing convened at the State Office of Administrative Hearings (SOAH) in Dallas, Texas, before ALJ Kyle J. Groves. The Applicant was represented by Attorney Michelle Morgan. Staff was represented by Timothy Griffith. Robert Sepanek and Jo Le Hoover appeared as Protestants. The record closed on January 4, 2005.

II. LEGAL STANDARDS AND APPLICABLE LAW

The Protestants challenge 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

Applicant seeks a permit and certificate from the Commission to sell alcohol at two new restaurants in Highland Village, Denton County, Texas. Applicant currently operates a restaurant, Ziba's Casual Grill, at the proposed location of the two new restaurants. Café Salfari would be a new restaurant and Ziba's Casual Grill would be renamed Ziba's Bar & Grill. The two restaurants would be adjacent to each other.

Docket No. 458-05-2169

Page 3

B. Protestant's Evidence and Contentions

Jo Le Hoover lives in the community where Respondent intends to open the two restaurants. She testified that there is traffic congestion on the street in front of the current restaurant. Ms. Hoover said that because of this congestion, many vehicles drive through the subdivision where many children play in their front yards and ride their bicycles on the street. She is concerned that an intoxicated patron of the proposed restaurants may drive through the subdivision and harm the children.

Ms. Hoover also testified that the proposed restaurants are very close to a daycare and a karate school that conducts classes in the evening. She voiced her concern with the lack of parking space near the restaurants and the possibility that the restaurants' patrons may park in the neighborhood.

Robert Sepanek testified that he also lives in the subdivision. He is concerned that the issuance of the permit and certificate would endanger children attending a nearby daycare facility and two schools located in the neighborhood. Mr. Sepanek also said the traffic congestion on FM 407 would cause patrons leaving the restaurants to drive through the subdivision, endangering children playing in their yards or riding their bicycles.

C. Applicant's Evidence and Contentions

Tony Farahani is the President of Ziba, Inc. He testified that he has been in the restaurant business for 25 years. He currently operates a restaurant, Ziba's Casual Grill, at the same location where Ziba's Bar & Grill would be located. Farahani intends to open a second restaurant, Café Salfari, next to Ziba's Bar & Grill. He stated that the sale of alcohol would be ten percent of the restaurants' business. The restaurants would close at 10:00 p.m. Farahani also said that there is a Chili's restaurant only one-fourth mile away on FM 407. He stated that, in his opinion, Chili's adds greatly to the traffic congestion and serves much more alcohol than his restaurants would.

Docket No. 458-05-2169

Page 4

III. DISCUSSION

TABC did not take a formal position in this hearing. The Protestants are very concerned that the issuance of the permit and certificate would be dangerous for children in the neighborhood. The Protestants presented evidence based on conjecture that the issuance of the permit and certificate would be a detriment to the area. There was no evidence presented that Ziba's Casual Grill has in any way been harmful to the community. In addition, there was no testimony that criticized Applicant or the manner in which he operates Ziba's Casual Grill.

According to the evidence presented by the Applicant, alcohol sales would only be ten percent of his total business. The Protestants and the Applicant both agreed that FM 407 is congested. But there was no correlation between increased congestion and the issuance of the permit and certificate. There was only speculation of what may happen.

The conclusion cannot be reached that granting the permit and certificate would create a business inconsistent with the existing area. Ultimately, the Protestants simply have not presented any evidence why the issuance of the permit and certificate would present any harm or is somehow incompatible with the community's morals, peace, safety 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 the permit or certificate. There is no legitimate basis for denying the permits or certificate. For this reason, the ALJ recommends that the requested permit and certificate be issued.

IV. PROPOSED FINDINGS OF FACT

1. On September 30, 2004, Ziba Incorporated d/b/a Café Salfari & Ziba's Bar & Grill (Applicant) filed an original application with the Texas Alcoholic Beverage Commission (Commission) for a mixed beverage permit and food and beverage certificate for premises known as Café Salfari and Ziba's Bar & Grill, located at 2940 FM 407, Suites 101 and 102, Highland Village, Denton County, Texas.

Docket No. 458-05-2169

Page 5

2. Commission Staff determined that Applicant met all of the technical requirements to obtain the permit and certificate.
3. Protestants contested the issuance of the permits on the basis that it would negatively impact the surrounding community because of the place and manner of the proposed businesses.
4. On November 23, 2004, Commission Staff issued a notice of hearing notifying all parties that a hearing would be held on the permit and certificate requests.
5. 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.
6. The hearing was held on January 4, 2005, in Dallas, Dallas County, Texas, before ALJ Kyle Groves, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings. The hearing concluded and the record closed that same day.
7. Applicant currently operates a restaurant, Ziba's Casual Grill.
8. Applicant intends to serve alcohol at Ziba's Casual Grill and rename the business Ziba's Bar & Grill.
9. Applicant intends to open a second restaurant adjacent to Ziba's Casual Grill, Café Salfari, and also serve alcohol at this location.
10. There was no evidence that the issuance of the permit or certificate would cause a danger to children in the neighborhood.
11. There was no evidence that the issuance of the permits would be detrimental to the general welfare, health, peace, morals, and safety of the people in the surrounding neighborhood.

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

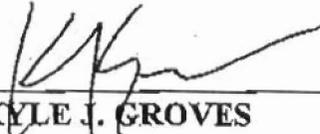
Docket No. 458-05-2169

Page 6

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, the evidence shows this application meets all requirement for issuance by the Commission. TEX. ALCO. BEV. CODE chs. 11, 28, 32 and 44.
5. Since Applicant met all the standards set forth by the Commission, the burden of proof is upon the Protestants to show the permits should not be issued. The Protestants failed to meet this standard of proof.
6. 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).
7. The application of Ziba Incorporated d/b/a Café Salfari and Ziba's Bar & Grill for a mixed beverage permit and food and beverage certificate should be granted.

ISSUED March 3rd, 2005



KYLE J. GROVES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS