SOAH DOCKET NO. 458-06-2695

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
	§	
V.	§	OF
	§	
JOSE J. HERNANDEZ D/B/A PLAZA DE TOROS EL R-3	§	
	§	
	§	
PERMIT/LICENSE NOS. BG533034 and BL533035	§	
	§	
TRAVIS COUNTY, TEXAS	§	ADMINISTRATIVE HEARINGS
(TABC CASE NO. 519764)	§	

PROPOSAL FOR DECISION

Jose J. Hernandez d/b/a Plaza De Toros El R-3 (Respondent) filed renewal applications with the Texas Alcoholic Beverage Commission (Commission or TABC) for a Wine & Beer Retailer's Permit and Retail Dealer's on Premise Late Hours License. The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) received a complaint from protesters regarding the renewal applications that alleged Respondent had engaged in conduct that is prohibited and in violation of the Texas Alcoholic Beverage Code (the Code). The Protestants allege the premises may contribute to unreasonable noise, sales to intoxicated persons, and traffic hazards. Petitioner took no formal position in this matter. For reasons discussed in this proposal, the Administrative Law Judge (ALJ) recommends renewal of Respondent's permits.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and § 11.43. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN ch. 2003.

On August 10, 2006, Petitioner issued its notice of hearing, directed to both Respondent and Protestant, Eloida Murrilo. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted, as required by TEX. GOV'T CODE ANN. § 2001.052.

On September 12, 2006, a hearing convened before SOAH ALJ Steven M. Rivas at the SOAH, 300 West 15th Street, William P. Clements Building, Fourth Floor, Austin, Texas 78701. Petitioner was represented at the hearing by Michael Cady, TABC Staff Attorney. Protestant appeared *pro se*. Respondent appeared and was represented by his attorney, Thomas Fagerberg. Following presentation of evidence, the hearing was adjourned and the record closed.

II. LEGAL STANDARDS AND APPLICABLE LAW

The Commission or Administrator may refuse to renew a 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. DISCUSSION

A. Background Facts

Respondent holds a Wine & Beer Retailer's Permit, BG533034, and a Retail Dealer's on Premise Late Hours License, BL533035, issued by TABC, for the premises located at 7704 FM 973, Austin, Travis County, Texas (the premises). These permits were originally issued on May 9, 2003, and they have been continuously renewed. Respondent has filed a renewal application regarding its permits.

B. Protestants

Protestants offered public comment and the testimony of several witnesses. All issues of concern discussed in the public comment portion of the hearing were repeated in the evidentiary portion. The testimony from the evidentiary portion of the hearing is summarized as follows:

Eloida "Louise" Murillo

Ms. Murillo lives about four hundred feet from the premises and has lived in the neighborhood for over forty years. Noise from live music is disruptive in the evening and during the hours she tries to sleep. The noise from the premises seems to decrease after complaints are made, but usually, the noise returns after a while. Vehicles used to use her driveway to turn around, but have since stopped because Respondent built a parking lot for additional parking. She wants Respondent to have respect for the neighbors and decrease the level of noise. She would be open to the possibility of Respondent building a wall between her residence and the premises in order to reduce the amount of noise.

Richard Murillo

Richard is Eloida's son and said he is does not visit anymore because the noise is unbearable on the weekends. The family cannot sit outside because the noise from the premises is too loud. Additionally, the noise starts in the afternoon and continues into the late hours on the weekends.

C. Applicant's Evidence and Contentions

Applicant offered the testimony of several witnesses. The testimony generally expressed that the premises was an asset to the community and did not cause any significant problems. The testimony of witnesses is summarized as follows.

Agent Sheila Doyle

Agent Doyle is with the TABC and was assigned to the complaints associated with Respondent and the premises. She has interviewed officers and other involved in the complaints, which have been primarily concerning the noise from the premises. She is familiar with one occasion where other TABC agents investigated a noise complaint but found the noise was not excessive. Additionally, it is her understanding that any traffic issues have been resolved at this point.

Ann Beran

Ms. Beran is a friend of Ms. Murillo and used to work as a Travis County volunteer fire fighter. Ms. Beran responded to the Murillo's residence on one occasion regarding an illegal controlled fire. Mr. Murillo met Ms. Beran and threatened her with a rake. Ms. Beran believes Mr. Murillo's reputation in the community is that he does not get along well with the neighbors. Additionally, Ms. Beran believes Richard Murillo is temperamental and is behind the complaints regarding the premises.

Lt. Greg Martinez

Lt. Martinez has worked with the Travis County Sheriff's Office for over 25 years. Lt. Martinez also works as a security guard coordinator at the premises. He is not a friend with Respondent, but knows him professionally. The events held at the premises are wedding receptions, baptism parties, and rodeos. The events are family oriented and many are held for charity or fund raising purposes. The security officers on duty patrol the premises to keep the peace and prevent sales to intoxicated persons. On rare occasions, fights have broken out, but peace was quickly restored and all participants were taken to jail. Lt. Martinez has issued only one warning for a noise complaint. The Murillo's make several calls to the sheriff's department whenever a rodeo is taking place the premises. Lt. Martinez does not believe the complaints are reasonable. While there are

other houses near the premises, the Murillo's are the only family that make complaints. He believes Respondent has spent a lot of money to appease the neighbors and reduce the amount of noise.

IV. ANALYSIS

Protestants seek denial of Applicant's renewal permits on the basis of the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. Specifically, the Notice of Hearing in this matter alleges that the premises may contribute to increased noise, sales to intoxicated persons, and traffic hazards.

According to the testimony, the traffic problems are no longer an issue due to a newly constructed parking lot near the premises. In addition, the noise complaints do not appear to be severe enough to warrant a denial of Respondent's license because they seem to originate from only one out of several neighboring residents. Respondent has pledged to construct a wall between the premises and the Murillo's residence, which Ms. Murillo approves and believes will reduce the amount of noise. There was no testimony from the Protestants regarding sales to intoxicated persons.

Based on the above, the ALJ concludes that the allegations, as set out in the Notice of Hearing, were not proven.

V. RECOMMENDATION

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

VI. FINDINGS OF FACT

1. Jose J. Hernandez D/B/A Plaza De Toros El R-3 (Respondent) filed a renewal application with the Texas Alcoholic Beverage Commission (Commission or Staff) for its Wine & Beer Retailer's Permit (BG533034) and Retail Dealer's on Premise Late Hours License

(BL533035) for the premises located at 7704 FM 973, Austin, Travis County, Texas (the premises).

2. Some residents of the area, protested the application 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: specifically that the premises contributed to unreasonable noise, sales to intoxicated persons, and traffic hazards. The Commission did not join the protesters.

3. A Notice of Hearing dated August 10, 2006, 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 September 12, 2006, a public hearing was held before Administrative Law Judge Steven M. Rivas in Austin, Texas. Staff appeared at the hearing, and was represented by Michael Cady, attorney. Respondent was represented by Thomas Fagerberg, attorney. Evidence was received and the record close the same day.

5. The premises is located near a neighborhood and hosts wedding receptions, baptism parties, and rodeos on the weekend.

6. There was evidence that any noise problems were being worked out, which included the construction of a wall between the premises and the Murillo residence.

7. There was no evidence that sales to intoxicated persons occurred or adversely affected the Murillo residence.

8. There was no evidence that any traffic hazards have been remedied with the construction a parking lot adjacent to the premises.

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, 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. Granting of the renewal application would not contribute to increased noise, sales to intoxicated persons, or traffic hazards.

5. Issuance of the renewal permits will not 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).

6. The renewal applications for a Wine & Beer Retailer's Permit and a Retail Dealer's on Premise Late Hours License for the premises located at 7704 FM 973, Austin, Travis County, Texas, should be granted.

SIGNED October 31, 2006.

STEVEN M. RIVAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS