

SOAH DOCKET NO. 458-03-0015

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION**

VS.

**ORIGINAL APPLICATION OF
MARTIN VELASQUEZ VILLANUEVE
D/B/A WRESTLING BAR
HIDALGO COUNTY, TEXAS
(TABC CASE NO. 600800)**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Martin Velasquez Villanueve, d/b/a Wrestling Bar ("Applicant") has applied to the Texas Alcoholic Beverage Commission ("TABC") for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for a premises located on the east side of Cesar Chavez Road, 500 feet north of the intersection with Alberta Road, Hidalgo County, Texas ("Premises"). Gustavo Farias, Felix Garza and Paul Windbigler ("Protestants") filed a protest to the issuance of the permits based on safety, peace, and general public welfare concerns. The TABC's staff ("Staff") remained neutral on the application. This proposal for decision recommends issuance of the permits.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are addressed in the findings of fact and conclusions of law below, without further discussion here.

On September 17, 2002 a public hearing was convened in this matter in Edinburg, Texas before Administrative Law Judge Melissa M. Ricard. The TABC was represented by Dewey Brackin, and attorney for the Legal Division. The Applicants and the Protestants represented themselves. The record closed the same day.

II. LEGAL STANDARDS AND APPLICABLE LAW

The TABC may refuse issuance of a permit if 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 public.

Section 11.46 (a) (8)¹ of the Texas Alcohol Beverage Code ("Code") states:

General Grounds for Refusal

(a) The commission or administrator may refuse to issue an original or renewal permit with or without a hearing if it has reasonable grounds to believe and finds that any of the following circumstances exists:

....

(8) the place or manner in which the applicant may conduct his business warrants the refusal of a permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency;

....

Generally, to deny a permit to a qualified applicant to operate a lawful business in a wet area, some unusual condition or situation must be shown to justify a finding that the place or manner in which the business may be conducted warrants refusal or cancellation of a permit, or its renewal. *Simonton Gin, Inc.*, 616 S.W.2d 274 (Tex. Civ.App.-Houston 1981, no writ) (citing *Texas Alcoholic Beverage Com'n v. Mikulenska*, 510 S.W.2d 616, 619 (Tex.Civ.App.- San Antonio 1974); *Elliott v. Dawson*, 473 S.W.2d 668, 670 (Tex.Civ.App.--Houston [1 Dist.] 1971)).

The Code does not define how the place or manner in which a business might be operated would jeopardize the general welfare, health, peace, morals, or sense of decency of the people, giving the TABC discretion in making this decision. There is no "set formula."

The burden of proof is on the party contending the permit should be denied.

IV. EVIDENCE AND PARTIES CONTENTIONS

A. Documentary Evidence

On April 19, 2002, Applicant filed an application with the TABC for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for a premises located on the east side of Cesar Chavez Road, 500 feet north of the intersection with Alberta Road,

¹ The notice in this proceeding referenced Section 11.61 (b)(7) of the Code which contains analogous language to Section 11.46(a)(8). Section 11.61(b)(7) allows the TABC to suspend or cancel an original or renewal permit if "the place or manner in which the permittee conducts his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency." Whether proceeding under either section, the parties would have to prepare for the hearing similarly, as the issue is identical under either section.

Hidalgo County, Texas (TABC Ex.1). The application indicated that required notices were posted and sent to the residents within 300 feet of the Premises. Pictures showing the Premises, the parking lot, Cesar Chavez Road and the surrounding area were admitted into the record (TABC Ex. 2-16). Residents of Cesar Chavez Road, signed a protest petition objecting to the granting of a mixed beverage permit for the Premises citing that "[t]he increased traffic will exacerbate traffic safety concerns." The petition contains 238 signatures (TABC Ex. 17). Residents also filed a letter with the TABC alleging that Cesar Chavez road is narrow, the area is primarily residential, a school is nearby, lack of law enforcement presence, lack of lighting, lack of traffic signals, lack of posted speed limits and enforcement thereof, and traffic congestion (TABC Ex.18).

The TABC investigated the residents' complaints and completed its investigation on July 17, 2002. The investigator found that the school is more than a mile away from the Premises and that there had been only one accident reported at the intersection of Cesar Chavez Road and Alberta. The report verified that notice had been given appropriately to the adjacent landowners. The investigatory report concluded that no documentation had been submitted during the investigation which would justify the denial of a permit at the Premises (Villanueva Ex. 1). A map showing the Premises and the surrounding area was also admitted (Villanueva Ex. 2).

B. Summary of Testimony

Mr. Gustavo Farias testified that his property is adjacent to the Premises. He owns ten acres. The Premises is located on approximately a five acre tract. Cesar Chavez Road is only 20 feet wide and there are no street lights. The area is residential. He is 65 and his wife is 72 and in ill health. His wife has trouble sleeping and he believes that if the Premises is allowed to open a bar the late hours and noise will not only disturb his household, but that it will also be detrimental to his wife's health. There have been a four accidents at the intersection of Cesar Chavez Road and Trenton Road, which is the next cross street north of the Premises. The increased traffic resulting from the operation of the Premises as a bar would increase the number of accidents and be unsafe for the residents of Cesar Chavez road, especially for the children living in the neighborhood.

Mr. Felix Garza testified that to him, the late hours permit was a problem. Mr. Garza lives approximately 1/4 mile south of the Premises. He has children ages 15, 16 and college age as well. He believes that the late hours will generate too much traffic and noise and interfere with the children's ability to perform at school. He also believes that there have been a few accidents on the corner of Alberta Road and Cesar Chavez.

Mr. Paul Windbigler lives 1/4 mile north of the Premises on Trenton Road. He stated that he believed adjoining property owners were not notified that the owner of the Premises intended to sell alcohol at the proper time. There is a church approximately 300 feet from the Premises. Cesar Chavez Road is a narrow, two lane road with no passing lanes, no lighting and a dirt shoulder. There are no large traffic generators in the area.

There have been at least four accidents in the area this year and at least eight fatal accidents during the time he has lived in the area. Mr. Windbigler circled the area which would include the residents who signed the petition (TABC Ex. 17) on the map (Villanueva Ex. 2) showing an area of approximately 3 ½ miles in length down Cesar Chavez road. The operation of a bar on the Premises will increase traffic and accidents in the area. On further examination, Mr. Windbigler acknowledged that location indicated was a church is in the process of being built and clarified that it is across the street from the Premises, approximately 500-400 feet.

Mr. Villanueva testified that the Premises, which he owns, is approximately five acres. There are only three residences on the east side of Cesar Chavez Road between Alberta and Trenton. He posted the notices as required by the TABC, and sent Mr. John Washington, the only resident within 300 feet of the proposed business, a notice. He intends to live on the Premises. The facility is 5,000 square feet and the parking lot is 30,000 square feet. The front door is more than 300 feet from Cesar Chavez Road. The facility is metal and block cement and is insulated. He will employ six employees. He intends to hire a professional security service. He intends to have wrestling matches during the day on weekends, and has already held that type of any event. The capacity is 140 persons. He intends to put lighting in the parking lot and could build a fence to reduce noise.

V. ANALYSIS

It is clear from the record that the Protestants and the surrounding residents do not want the applicant to obtain a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for the Premises. Nonetheless, the law requires some unusual condition or situation and more than a desire to deny the application for such permits. Here the Protestants believe if the permit is granted, the resulting traffic will be dangerous and the establishment would be noisy and keep the nearby residents from sleeping.

The testimony of the witnesses regarding possible traffic hazards amounted only to conclusions. The TABC investigatory report did not substantiate the witnesses estimates of the number of accidents in the area, reporting only one for the year of 1999, while the witnesses stated that there had been up to four already this year. Any increase in traffic could potentially increase accidents in the area, regardless of the type of business. The Protestants did not establish that the proposed business and increased traffic would be an unusual condition or situation.

The only possible ground for denying the application would be that the proposed business would be noisy and keep the nearby residents from sleeping. The locale is not intensely populated. The Premises is located on five acres and Mr. Farrias, the adjacent property owner, lives on a ten acre lot. It is common knowledge that establishments of this type can be loud and offensive to those nearby, but it is not necessary that they be such. The applicant testified that he had taken precautions to prevent this. The

Protestants did not establish that the noise from the proposed business would be an unusual condition or situation.

However, if the applicant does operate a noisy or disorderly establishment then Section 11.61 of the Code provides that the TABC may suspend or cancel the permit.

VI. RECOMMENDATION

The ALJ recommends that Applicant's application for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for the premises located at on the east side of Cesar Chavez Road, 500 feet north of the intersection with Alberta Road, Hidalgo County, Texas be granted.

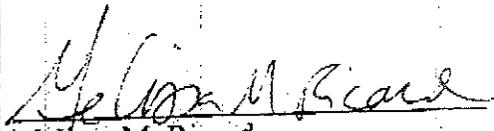
VII. PROPOSED FINDINGS OF FACT

1. Applicant, Martin Velasquez Villanueva d/b/a Wrestling Bar, filed an application with the TABC for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for a premises located on the east side of Cesar Chavez Road, 500 feet north of the intersection with Alberta Road, Hidalgo County, Texas.
2. Gustavo Farias, Felix Garza and Paul Windbigler filed a protest to the issuance of the permits based on safety, peace, and general public welfare concerns, specifically citing concerns over increased traffic and noise.
3. Other residents of Cesar Chavez Road signed a protest petition objecting to the granting of a mixed beverage permit for the Premises citing that "[t]he increased traffic will exacerbate traffic safety concerns."
4. Applicant has taken, or will take measures to prevent detrimental effects of operation of its business on the community, insulating the walls for noise reduction, providing for adequate security and parking.
5. The Protestant's allegations were unsubstantiated.
6. On September 5, 2002, the TABC issued its notice of hearing, directed to Applicant at 4108 N/ 21st Street, Mc Allen, Texas 78504-4114.
7. On September 17, 2002, a hearing convened before SOAH ALJ Melissa M. Ricard at the Hidalgo County Courthouse, County Judge's Office, 2nd Floor Conference Room, 100 E. Cano, Edinburg, Texas 78539. The TABC was represented by Dewey Brackin, and attorney for the Legal Division. The Applicants and the Protestants represented themselves. The record closed the same day.

VII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. chs. 5 and 11.
2. The State Office of Administrative Hearings has jurisdiction over 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, Chapter 2003.
3. Proper and timely notice was effected on the Applicant as required by TEX. GOV'T CODE § 2001.
4. Based upon the Proposed Findings of Fact and TEX. ALCO. BEV. CODE ANN., ch. 11, Applicant's application for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for the premises located at on the east side of Cesar Chavez Road, 500 feet north of the intersection with Alberta Road, Hidalgo County, Texas should be granted.

Signed this 10th day of October, 2002.



Melissa M. Ricard

ADMINISTRATIVE LAW JUDGE

STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 600800

IN RE MARTIN VELASQUEZ VILLANUEVE	§	BEFORE THE
D/B/A WRESTLING BAR	§	
ORIGINAL APPLICATION: MB	§	
	§	TEXAS ALCOHOLIC
	§	
HIDALGO COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-0015)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 2nd day of December, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Melissa M. Ricard. The hearing convened on September 17, 2002, 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 October 10, 2002. 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. On November 1, 2002, exceptions to the Proposal were filed by the Protestant..

The Acting 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.

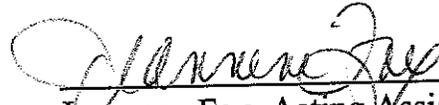
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the Original Application of Martin Velasquez Villanueve, d/b/a /Wrestling Bar, for a Mixed Beverage Permit be **GRANTED**.

This Order will become final and enforceable on December 23, 2002, 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.

WITNESS MY HAND AND SEAL OF OFFICE on this the 2nd day of December,
2002.

On Behalf of the Administrator,



Jeannene Fox, Acting Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

Martin Velasquez Villanueva
d/b/a Wrestling Bar

APPLICANT

4108 N. 21st Street

McAllen, Texas 78504-4114

CERTIFIED MAIL NO. 7001 2510 0003 8686 7369

RETURN RECEIPT REQUESTED

Mr. and Mrs. Gustave ~~Tomas~~ Farias

PROTESTANT

Route 11, Box 273

Edinburg, Texas 78539

CERTIFIED MAIL NO. 7001 2510 0003 8686 7352

RETURN RECEIPT REQUESTED

Frank Garcia

PROTESTANT

VIA FACSIMILE: (956) 787-8900

State Office of Administrative Hearings

Corpus Christi, Texas

VIA FACSIMILE: (361) 884-5427

Dewey A. Brackin

ATTORNEY FOR PETITIONER

TABC, Legal Division

McAllen District Office

Licensing Division