

DOCKET NO. 533667

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
MARIANA LEMESOFF D/B/A MAUSOLEUM PERMIT/LICENSE NO(s). MB474749 LB474750	§	ALCOHOLIC
	§	
	§	
HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-07-0694)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 2nd day of April 2007, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Rex A. Shaver. The hearing convened on January 12, 2007 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 9, 2007. 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, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge that 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.

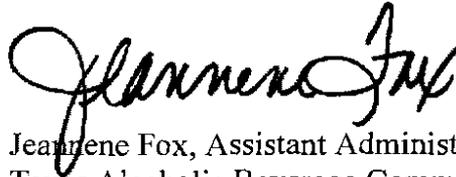
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that the renewal application of Mariana Lemesoff d/b/a Mausoleum for the issuance of a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit be **GRANTED**.

This Order will become final and enforceable on April 27, 2007 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 2nd day of April 2007.

On Behalf of the Administrator,



Jeanne Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

SKP/aa

Hon. Rex A Shaver
Administrative Law Judge
State Office of Administrative Hearings
Houston, Texas
VIA FACSIMILE: (713) 812-1001

Mariana Lemesoff
d/b/a Mausoleum
RESPONDENT
1603 Northwood
Houston, Texas 77009
VIA U.S. FIRST-CLASS MAIL

Rob Todd
ATTORNEY FOR PROTESTANT
4265 San Felipe, Suite 605
Houston, Texas 77227
VIA FACSIMILE: 713-629-1553

Stephen Barth
PROTESTANT
P. O. Box 22888
Houston, Texas 77227
VIA U.S. FIRST-CLASS MAIL

Sandra K. Patton
ATTORNEY FOR THE COMMISSION
Legal Services Division

Licensing Division

SOAH DOCKET NO. 458-07-0694

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
 	§	
and	§	
STEPHEN BARTH,	§	
Protestant	§	
 	§	
V.	§	OF
 	§	
MARIANA LEMESOFF	§	
D/B/A MAUSOLEUM,	§	
Renewal Applicant MB-474749,	§	
LB-474750	§	
HARRIS COUNTY, TEXAS	§	
(TABC CASE NO. 533667)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Mariana Lemesoff d/b/a Mausoleum (Applicant) filed a renewal application for a Mixed Beverage Permit and a Mixed Beverage Late Hours permit for the premises known as Mausoleum, located at 411 Westheimer, Houston, Harris County, Texas, 77006. The requested permits would be issued by the Texas Alcoholic Beverage Commission (Commission). Stephen Barth (Protestant) filed a protest asserting that the way the Applicant may conduct her business warrants the refusal of the renewal application based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency in violation of Section 11.46 (a) (8) of the Texas Alcoholic Beverage Code (Code). It was the position of the Commission staff that the Commission had no independent evidence to protest the issuance of these permits and that Applicant had met all Commission requirements to hold the permits at the premises, and has properly posted and/or published notice and complied with all Texas Alcoholic Beverage Code requirements in effect at the time of the application. The Administrative Law Judge (ALJ) recommends that the Commission grant the Applicant the requested permits.

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 January 12, 2007, a public hearing was held before Rex A. Shaver, ALJ, at the field office of the State Office of Administrative Hearings, Houston, Harris County, Texas. Staff was represented by Sandra Patton, attorney. Protestants were represented by Diana J. Singson, attorney. The applicant was represented by Robb Todd, attorney. Evidence was received and the record closed the same day.

II. ISSUE

The issue in contention is whether the place or manner in which the Applicant may conduct her business warrants the refusal of permits based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency, in violation of Section 11:46 (a) (8) of the Code.

III. EVIDENCE

A. Protestants' Evidence

Testimony of Stephen Barth

Stephen Barth testified that he has resided at 3300 Taft, Unit F, Houston, Texas, since April 15, 2004. The townhouse abuts the rear of Applicant's establishment, located at 411 Westheimer, with an alley way between the two buildings. He alleges that a "base resonance"

from inside the Applicant's premises and from its outdoor stage violates Harris County noise ordinance as well as Texas Alcoholic Beverage Commission requirements and the base resonance can be felt inside of his townhouse. He further alleged that customers of the Applicant's establishment park illegally, and leave behind broken bottles, cans, condoms, and syringes. Protestant claims that this manner of conducting business constitutes a negative impact on the general welfare, health, peace, morals, and safety of the general public and in particularly himself and the neighborhood.

Mr. Barth stated that the premises known as "Mausoleum," including an outside performance stage, was at its current location when he moved into his residence. Prior to moving into his residence he did not inspect the neighborhood during evening hours. He has seen people leaving the premises with beer but not with liquor containers. He did not know of any adverse effect on anyone's health or morality caused by the operation of the business. Mr. Barth further testified that since 2004 he had made 20 complaints to the Houston Police Department concerning noise from the premises, but was not aware that any citations were issued for noise violations at the premises in question. It was Mr. Barth's testimony that his residence was more than 50 feet from the premises.

Mr. Barth stated that he is a member of the townhome association consisting of 14 residences located near the licensed premises. He presented no resolution designating him as a representative of the association for purposes of this protest hearing. In response to questions from the Applicant the witness stated that he is an attorney with experience in the hospitality business but that he has no current clients in the Montrose neighborhood where the Applicant is located. He stated that the Applicant's business is located in a mixed use neighborhood. Other licensed premises, some of which have music as entertainment, are in close proximity to the Applicant's business. The street in that area is four lanes wide with cars and city buses traveling both directions. Mr. Barth alleged that on some occasions he had seen patrons of the Mausoleum cause litter with beer cans but did not see them leaving liquor bottles, condoms or syringes as alleged in his affidavit.

Testimony of Mariana Lemesoff

Mariana Lemesoff (Applicant) testified that she has conducted business as Mausoleum, at 411 Westheimer since 1994. An arts organization known as Helios books performers to appear at the Mausoleum. She was not aware of any citations being issued by the City of Houston to her employees. A citation was issued directly to her in February or March of 2006 and that matter is pending.

Applicant related the steps she has taken to moderate noise from her premises. She has installed 3 layers of insulation and has hung curtains at the windows. A wooden backdrop some 10 to 12 feet tall was built behind the outside stage.

B. Applicant's Evidence*Testimony of Sehba Sarwar*

Sehba Sarwar testified that she is an arts coordinator for an organization that promotes arts and educational programs. She sits on the board of the National Association of Arts Organizations. She is familiar with the organization, Helios, that provides many of the acts and artists who appear at the Mausoleum. Her offices are located within a few blocks of the licensed premises. There are more than five bars or night clubs in close proximity to the Mausoleum. She has never seen anyone on the premises who was intoxicated or using intravenous drugs. She has not seen patrons throwing trash, bottles or condoms onto the ground outside of the premises.

Testimony of Richard Eharlich

Richard Eharlich testified that he is a real estate developer with experience with the neighborhood surrounding the Mausoleum which is known as the Montrose area. He described the

area as a mix of licensed clubs, bars, tattoo parlors and residences. The people who purchase residences in the Montrose neighborhood tend to be single, retired or couples without children. The bohemian nature of the neighborhood is what attracts them to the area. He has not seen anyone from the Mausoleum throwing trash on the ground. He stated that there are numerous businesses from which trash might have originated. It is his opinion that the Applicant has a good reputation in the community.

Testimony of Debra McNulty

Debra McNulty testified that she is the executive director of a nonprofit organization which promotes the visual arts in Houston. She is familiar with the Applicant and the Mausoleum. It is her opinion that the Applicant's reputation in the surrounding community and in the art community is excellent. She believes that the Applicant makes a positive contribution to the arts community by providing a necessary "small space" for the arts in Houston.

IV. ANALYSIS AND RECOMMENDATION

The Protestant alleged that the Applicant was in violation of the City of Houston noise regulations. 16 TEX. ADMIN. CODE § 35.31 (c)(16) construes offences against the general welfare to include operation of premises in violation of municipal ordinances that are designed to protect the general welfare of the community. The Protestant alleged in his testimony that he has made 20 complaints to the Houston Police Department concerning noise from the premises; however, no citation has ever been issued to the Applicant as a result of those noise complaints. It was established that the Protestant's residence is in close proximity to a number of other clubs in which amplified music is a part of the entertainment. There was no showing that the "base resonance" complained of by the Protestant originated solely from the Mausoleum or was any greater than when Protestant moved to the location.

The evidence shows that the Mausoleum is a night club situated in what may be termed an entertainment district. There are many businesses, automobiles and pedestrians from which the detritus complained of by Protestant could originate. No witness gave testimony that the manner in which the applicant conducts her business constitutes a threat to the peace, health, morals, and safety of the people and on the public sense of decency. The evidence shows that the Applicant, who has held a Mixed Beverage Permit since June 29, 2000, has no violation history with the TABC and has a good reputation in the community.

Having found insufficient evidence to show the place or manner in which Applicant may conduct its business warrants denial of the renewal application based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency, the ALJ recommends renewal of Respondent's permits.

V. FINDINGS OF FACT

1. Mariana Lemesoff d/b/a Mausoleum filed a renewal application with the Texas Alcoholic Beverage Commission (Commission) for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit, and for the premises known as Mausoleum located at 411 Westheimer, Houston, Harris County, Texas.
2. A protest was filed by Stephen Barth (Protestant) asserting that renewal 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 Protest Hearing dated November 27, 2006, was issued by Staff notifying all parties that a hearing would be held on the renewal application and informing the parties of the time, place, and nature of the hearing; the notice included a reference to the particular sections of the statutes and rules involved, and a short, plain statement of the matters asserted.
4. On January 12, 2007, a public hearing was held before Rex A. Shaver, ALJ, at the field office of the State Office of Administrative Hearings, Houston, Harris County, Texas. Staff

was represented by Sandra Patton, attorney. Protestant Barth was represented by Diana J. Singson, attorney. Applicant was represented by Robb Todd, attorney. Evidence was received and the record closed the same day.

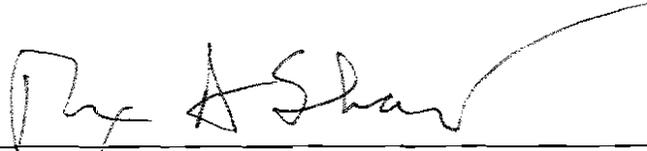
5. The Staff held the position that the Commission had no independent evidence to protest the issuance of these permits and that Applicant had met all Commission requirements to hold the permits at the premise location, and has properly posted and/or published notice and complied with all Texas Alcoholic Beverage Code requirements in effect at the time of the application.
6. The Applicant has held a Mixed Beverage Permit and Mixed Beverage Late Hours Permit since the 29th of June 2000 has no violation history.
7. Protestant could on occasion feel, while in his residence, the base resonance from amplified music; however, the Applicant does not conduct business in such a manner as to adversely effect the health, peace, morals and safety of any person.

VI. 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 §§ 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 made to all parties pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE § 155.55.
4. The place or manner in which the Applicant may conduct her business does not warrant the denial of the renewal application based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency pursuant to Section 11:46 (a) (8) of the Code.

5. Mariana Lemesoff d/b/a Mausoleum's renewal application for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit should be granted.

SIGNED March 9, 2007.

A handwritten signature in black ink, appearing to read "Rex A. Shaver", written over a horizontal line.

**REX A. SHAVER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

March 9, 2007

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

RE: Docket No. 458-07-0694 Texas Alcoholic Beverage Commission and Stephen Barth v. Mariana Lemesoff D/B/A Mausoleum

Dear Mr. Steen:

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,

A handwritten signature in black ink that reads "Rex A. Shaver".

Rex A. Shaver
Administrative Law Judge

RAS/jh
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- VIA REGULAR MAIL
Sandra K. Patton, Attorney, Texas Alcoholic Beverage Commission, 427 W. 20th Street, Suite 600, Houston, TX 77008
VIA REGULAR MAIL
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731
VIA REGULAR MAIL
Rob Todd, Attorney at Law, 4265 San Felipe, Suite 605, Houston, Texas 77027 -VIA REGULAR MAIL