

DOCKET NO. 458-07-3210

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner**

**LINDA NOVOSAD, MARSHA
KERSHAW, CHARLOTTE GATLING
SANDRA ORTIZ, ET AL
Protestants**

V.

**518 SPORTS BAR, INC.
D/B/A 518 SPORTS BAR
PERMIT NOS. MB 572797, LB 572798
HARRIS COUNTY, TEXAS
TABC NO. 535980,
Respondent**

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The 518 Sports Bar, Inc., D/B/A 518 Sports Bar, (Respondent) filed a renewal application with the Texas Alcoholic Beverage Commission (Commission or TABC) for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for the premises located at 2750 W. Main, Suite C, League City, Galveston County, Texas. Linda Novosad, Marsha Kershaw, Charlotte Gatling, and approximately 19 other residents of Dem Shadows Subdivision filed a protest to the application asserting 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.¹ The Administrative Law Judge (ALJ) recommends that the Commission not grant Respondent the renewal.

¹

The TABC appeared only as a jurisdictional petitioner, had no independent evidence to protest the issuance of the permits, and is neutral on the issues. Additionally, the TABC asserted the Respondent is qualified to hold the permits at the location.

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 August 10, 2007, a public hearing was held before Stephen J. Burger, ALJ, in Houston, Harris County, Texas. Protestants were not represented by counsel, but allowed one of their residents, Herbert Medsger, to represent them. The TABC attorney was Ramona Perry. Chris Sellars, Respondent's owner, appeared for Respondent without counsel.

II. LEGAL STANDARDS AND APPLICABLE LAW

The Commission or Administrator may refuse to issue 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). Additionally, in order to deny a permit to a qualified applicant proposing to operate a lawful business in a wet area and in compliance with zoning laws, an unusual condition or situation must be shown. Kermit Concerned Citizens Committee v. Colonial Food Stores, Inc., 650 S.W.2d 208 (Tex. App. 8 Dist., 1983).

III. EVIDENCE AND PUBLIC COMMENT

A. Protestants' Evidence

1. Public Comments

Approximately 14 Protestants appeared at the hearing. Four gave public comments, and six testified.

Documentary evidence consisted of:

No. 1: Plat map of Dem Shadows Subdivision;

No. 2: Affidavits of Pamela Sybert, Ernest Lay, Marshaw Kershaw, Ben Novosad, and Cassie Galindo, all residents of the subdivision (residents complaining of loud motorcycles at 2:00 a.m.; loud music from live bands at night; entrance to bar posing traffic hazard, as it is the only street entry to the subdivision; bar patrons dumping trash at entrance to subdivision; bar patrons speeding down Amber Lane; vehicles running over a resident's front lawn; vehicles not belonging to residents parked in front of homes, as well as at the park at the end of the street);

No. 3: Police call reports concerning 518 Sports Bar from March 21, 2005, to July 27, 2007, (including in 2006 approximately 21 loud music complaints; two intoxicated drivers; four suspicious persons; two city ordinance violations; four disturbances; two criminal mischiefs);

No. 4: Amy Blankenship's report and pictures;

No. 5: Protestant's Opening Statement.

The TABC submitted one exhibit, the license record of Respondent.

All the Protestants live in the Dem Shadows Subdivision, whose main street is Amber Lane, which is approximately two blocks in length, and dead-ends at a small park. The subdivision has 35 lots. Respondent's bar is at the entrance to the subdivision, along with several other businesses. In summary, the Protestants oppose the renewal permits being granted based on the safety, health, peace, and general welfare concerns, which include but are not limited to the following:

Motorcyclists frequent the bar, and the sound of their bikes disturbs the peace and quiet of the neighborhood, especially on weekends and holidays. The motorcyclists occasionally travel into the subdivision, their engine noise disturbing the peace and quiet of the neighborhood. There have been reports of fights in the bar parking lot. On one occasion, two motorcyclists followed a teenage resident to his home, and threatened the teenager because he did not see their motorcycles.

Protestants point out that the bar is located at the only entrance to the subdivision, causing an increased traffic hazard involving drivers who have been drinking at the bar. There are no sidewalks on Amber Lane, the only through street in the subdivision, and many of the residents walk for exercise, which is a safety issue.

Protestants contend that music coming from the bar is loud, and prevents them from sleeping at night. Protestants also claim that some residents have considered moving because of the bar, and that property values have been affected.

2. Protestant's Witnesses

Lloyd Averill

Lloyd Averill has lived in the subdivision 35 years, and his home is 200 feet from the bar. He stated that the noise from the bar after 10:00 p.m. bothers him the most. He has called the police because of the loud music, but was told the decibel level is not excessive. The loud music (mainly the bass) has been disturbing him for two to three years.

He also complains of noise from the motorcycles. The noise is the worst on weekends and Wednesdays. Although he has heard loud arguments emanating from the bar location, he has never seen any fights. There had been strong odors coming from the bar location, due to "crawfish boils," but that was only during the first year of the bar's operation.

Mr. Averill also stated that in the last six months or so, the music noise from the bar has been somewhat reduced.

Linda Novosad

Linda Novosad has lived at 261 Amber Lane for 30 years. She complains mainly of an incident that occurred in 2005. Her teenage son was driving to a marching band event, and when he arrived at the intersection next to the bar, he remembered he had forgotten something at home, and turned around near the bar. Apparently, he came close to some motorcyclists that he did not notice. When he arrived at his home, two motorcyclists pulled behind him, accosted him verbally and nearly attacked him, ostensibly for the teenager nearly hitting them while near the bar. Linda Novosad heard the commotion, came outside her house, and was verbally abused and intimidated by the two motorcyclists. She claims the motorcyclists smelled of alcohol.

Linda Novosad also complained of broken bottles and trash from the bar, people drinking in cars, and noise which is worse on weekends and Wednesdays.

Mike Goodwin

Mike Goodwin has lived on lot 29 for about 29 years. He hears loud music coming from the bar two to three nights per week, mainly low-thumping bass. He also hears loud motorcycles going up and down Amber Lane. Additionally, there is a small park at the end of the subdivision, and at times bar patrons drive down to the park to drink. He also complained of the trash and broken glass on Amber Lane. According to Mr. Goodwin, the neighborhood has gone down since the bar opened.

Mr. Goodwin saw the confrontation described above between two motorcyclists and Linda Novosad and her son.

Christine Camarata

Christine Camarata lives on lot 26. She claims that there was a protest when the bar first opened three years ago. She complains of trash at the bar location.

Amy Blankenship

Amy Blankenship lives on lot 12. She originated Protestants' Exhibit 4, which includes photos. She is concerned about the drivers leaving the bar after drinking alcohol, as she has seen drivers swerving while they drive down Amber Lane. She has also seen people drinking alcohol in their cars while driving down Amber Lane to the aforementioned park. The sound of motorcycles wakes her up at night, and she has seen motorcyclists "popping wheelies."

Sid Novosad

Sid Novosad is the husband of Linda Novosad. He stated his son, involved with the aforementioned incident with the two motorcyclists, is still fearful of driving past the intersection next to the bar. He also mentioned the increased traffic problems at the intersection where the bar is located, that his vehicle on one occasion was nearly hit by patrons of the bar who were driving to the bar and were distracted by waving to other bar patrons.

B. Respondent's Evidence

Respondent presented the testimony of one witness, and Exhibit 1, a June 5, 2007, letter from the TABC.

Chris Sellars

Chris Sellars has been the owner of the 518 Sports Bar for the last two years. He stated that the bar was opened three years ago, and the first year he was the manager. The bar is open seven days a week, noon to 2:00 a.m. He has three employees.

Mr. Sellars states that he has tried to work with the residents adjacent to the bar. He believes he has remedied many of the complaints from the residents. He no longer has the "crawfish boils," tries to keep the area and lot clean, and has turned down the music. He now has live music only on Wednesday nights and Friday nights, and ends the music at midnight on Wednesday, and 1:30 a.m. on Fridays. He used to have live music four days per week.

Mr. Sellars states that he no longer caters to the "biker" crowd, but some bikers still patronize his sports bar.

Mr. Sellars states he does not own the building, and if he loses his permits, he would lose \$250,000 over the remaining years of the lease. This is his livelihood, although he does have another bar in Dickenson.

He admits that if the permits are renewed, he would still have motorcyclists as patrons, but their number he believes would be less. He states that he has no control over his patrons once they leave the premises, and also points out he is in compliance with the TABC.

IV. ANALYSIS

Protestants seek denial of Respondent's renewal license on the basis of the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. Protestants must prove their case by a preponderance of the evidence. Additionally, where a qualified applicant requests to operate in a wet area, some unusual condition or situation must be shown to exist. In re Simonton Gin., Inc., Tex. Civ. App. 616 SW2d 274 (1981).

Upon review of all the evidence, the ALJ finds that there are five main categories of complaints: 1. The loud music from the bar; 2. The trash from the bar; 3. The sound of the loud motorcycles at night; 4. The increased traffic from the bar due to it sharing the only entry

to the subdivision; and 5. The bar patrons that travel down Amber Lane, the only through street in the subdivision.

Before addressing these categories, the ALJ finds that Respondent's bar is the only bar located anywhere near this subdivision. Until the bar opened three years ago, there were apparently no problems with any of the businesses located at the entrance to this subdivision.

Regarding the loud music, although the owner has made attempts to alleviate the problem to adjacent residents, the testimony and public comments clearly show there is a loud music problem caused by the bar. It is affecting the peace and quiet of the residents at critical times, that is, at night from about 10:00 p.m. to closing at 2:00, when residents are attempting to sleep. Although the loud music is not played every night, the evidence shows that to be the case at least two nights per week now (and had been four nights per week). The police reports of complaints bear this out. The ALJ finds this to be an unusual condition, as this is the only bar in the area, the bar is next to a residential area, and not all bars necessarily have music that can be heard by adjacent residents late at night.

The Protestants have not shown sufficient evidence that the trash from the bar is a significant problem that affects their general welfare, health, and safety. The "crawfish boils" are no longer held, which had caused some problems in the past, and the Protestants' complaints of beer bottles strewn about the parking lot and street does not rise to the level to deny the permit renewal. Additionally, no food is sold at the bar, although free food is offered on weekends.

The motorcycle noise cited by Protestants is in the ALJ's opinion one of the most serious of the complaints. The evidence shows that this bar has become a gathering place for motorcycles of the Harley-Davidson type, which create very loud noise that is especially disturbing at night to residents trying to sleep. Most of the complaints of residents living nearby the bar, and along Amber Lane, deal with the motorcycle noise problem. The bar owner does

not dispute that these motorcyclists frequent his establishment, and admits that he has no control of them once they leave his bar, which is self-evident.

Not only do the motorcycles create excessive noise at night, there are many complaints by residents of motorcycles traveling down Amber Lane, which dead-ends to a park. This creates a noise problem not just to the residents immediately adjacent to the bar, but to residents all along Amber Lane. This is not a large subdivision, having only about 35 homes.

The presence of these motorcycles which frequent this bar presents an unusual condition. Not all bars develop such clientele. If this bar was located in another area, not near a residential subdivision, perhaps the noise would not present an unusual condition.

Regarding the increased traffic from the bar affecting residents, it is clear that during the bar's operation, there is increased traffic; patrons leaving the bar will have imbibed alcohol, and this poses a higher risk to residents living in the subdivision. At least two incidents of near-accidents have been described above. Additionally, Protestants Linda Novosad, Amy Blankenship, Sid Novosad, Sandra Ortiz, Paullette Kukuk, Pamela Sybert, Ernest Lay, Marsha Kershaw, Ben Novosad, and Cassie Galindo have all complained regarding the increased traffic resulting from this bar.

Additionally, there is evidence that occasionally bar patrons have driven down Amber Lane, creating noise complaints when the patrons are driving motorcycles, especially when this occurs late at night. If motorcycles were not involved, and if only increased traffic was the complaint, the Protestants' complaints may not have risen to a sufficient degree to warrant denial of a permit renewal. However, in the current situation, it is yet another factor that convinces the ALJ that the Protestants have met their burden.

The ALJ, after reviewing all the evidence, finds that the general welfare, peace, and safety of the surrounding residents warrants the refusal of the renewal permits, and further, that

granting the renewal would continue the unusual condition or situation relating to the general welfare, peace, and safety of the surrounding residents. There is insufficient evidence that the permits should be denied based on the health or morals of the people, or on the public sense of decency.

V. RECOMMENDATION

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

VI. FINDINGS OF FACT

1. 518 Sports Bar, Inc., D/B/A 518 Sports Bar (Respondent), filed a renewal application with the Texas Alcoholic Beverage Commission (Commission) for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit.
2. The Commission, as Petitioner, filed a Protest on behalf of Linda Novosad, Marsha Kershaw, Charlotte Gatling, Sandra Ortiz, et al, protesting the renewal application, asserting it 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 June 15, 2007, was issued by the Commission notifying the parties that a hearing would be held on the renewal application and informing the parties of the time, place, and nature of the hearing.
4. On August 10, 2007, a public hearing was held before Administrative Law Judge Stephen J. Burger in Houston, Texas. The Commission appeared at the hearing, and was represented by Ramona Perry, attorney. Protestants were not represented by attorney, but allowed a fellow Protestor, Herbert Medsger, to represent them at the hearing. Chris Sellars, Respondent's owner, appeared for Respondent without an attorney. Evidence was heard and received and the record closed on the same date.
5. Approximately 14 Protestants appeared at the hearing, of which four gave public comments, and six testified in opposition to the permit renewals.
6. Respondent has owned the 518 Sports Bar (Bar), located at 2750 W. Main, Suite C, League City, Galveston Co., Texas, for the last two years. The Bar was first opened three years ago.

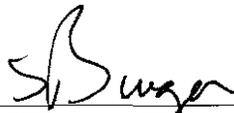
7. The Commission does not have independent evidence to protest the permit renewal, and states that the Respondent has met all Commission requirements to hold the permits at the permitted location.
8. Respondent's Bar is located next to Amber Lane. Amber Lane intersects with FM 518.
9. Amber Lane's main entry and exit is on FM 518.
10. Amber Lane is the only through street in the Dem Shadows Subdivision, League City, Galveston Co., Texas. Amber Lane dead-ends at a small private park. Amber Lane has no sidewalks.
11. The Dem Shadows Subdivision has 35 lots.
12. Lot 35 of the Dem Shadows Subdivision is immediately adjacent to Respondent's bar.
13. Respondent's Bar is the only bar at the corner of Amber Lane and FM 518.
14. Respondent's Bar is frequented by motorcyclists, some of which ride large motorcycles such as Harley-Davidsons.
15. Respondent's Bar is open seven days a week, noon until 2:00 a.m.
16. At this time, Respondent's Bar features live music Wednesdays until midnight, and Fridays until 1:30 a.m.
17. There have been at least 21 police reports of loud music complaints from residents adjacent to Respondent's Bar from February 6, 2006, to July 27, 2007. Police have responded to approximately 28 additional calls to Respondent's Bar from February 6, 2006, to July 27, 2007.
18. Approximately eight residents living on Amber Lane have complained of loud motorcycles coming and going from Respondent's Bar late at night and at the Bar's closing time.
19. Approximately five residents living on Amber Lane have complained of Respondent's Bar patrons driving down Amber Lane, speeding, and throwing bottles.

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. The place or manner in which the Respondent conducts its business warrants the denial of the renewal of its permits based on the general welfare, peace, and safety of the people. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).
5. The place or manner in which Respondent conducts its business presents an unusual condition or situation that warrants the denial of its permit renewals.
6. The Respondent's renewal application for a Mixed Beverage Permit MB 572797, and Mixed Beverage Late Hours Permit LB 572798, should be denied.

SIGNED October 10, 2007.



STEPHEN J. BURGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS