

DOCKET NO. 586316

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
MICHAEL C. FULTZ, GINA BIONDO, PATRICIA ANDERSON, GREG WINTER, CAROL MILLER, Protestants	§	
	§	
	§	
VS.	§	ALCOHOLIC
	§	
ORIGINAL APPLICATION OF BLUE BOOK LLC D/B/A BLUE BOOK, Respondent PERMIT/LICENSE NO (s) (MB & LB).	§	
	§	
	§	
HARRIS COUNTY, TEXAS <i>(SOAH DOCKET NO. 458-09-5962)</i>	§	BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION this 18th day of December 2009, the above-styled and numbered cause.

The hearing in the above matter was conducted by the State Office of Administrative Hearings, Administrative Law Judge Stephen J. Burger, presiding. The hearing convened on October 2, 2009 and the record was closed on the same date. The Administrative Law Judge made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on December 1, 2009. The time for filing and ruling on any Exceptions and Replies to the PFD has passed.

The matter is before the Administrator of the Texas Alcoholic Beverage Commission for review, consideration and entry of the final agency decision.

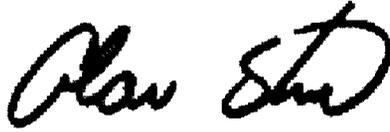
It is Ordered that the Findings of Fact and Conclusions of Law made and entered into the Proposal for Decision by the Administrative Law Judge are adopted by the Administrator as the Findings of Fact and Conclusions of Law of the Texas Alcoholic Beverage Commission.

IT IS THEREFORE ORDERED that the Original Application of Blue Book LLC d/b/a Blue Book for the issuance of a Mixed Beverage Permit and Mixed Beverage Late Hours Permit be **GRANTED**.

This Order is final and enforceable on the date it is signed.

By copy of this Order, service shall be made upon all parties in the manner indicated below.

SIGNED this the 18th day of December 2009 at
Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

HON. STEPHEN J. BURGER
ADMINISTRATIVE LAW JUDGE
State Office Of Administrative Hearings
2020 N. Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: (713) 812-1001

Jim L. DeFoyd
ATTORNEY FOR RESPONDENT
103 Eastway
Galena Park, Texas 77547
VIA FACSIMILE: (713) 672-7420

Clyde Burleson
ATTORNEY FOR RESPONDENT
1533 W. Alabama, Suite 100
Houston, Texas 77006
VIA FACSIMILE: (713) 521-7365

Blue Book LLC
RESPONDENT
d/b/a Blue Book
10998 Wilcrest '212'
Houston, Texas 77099
VIA U.S. REGULAR MAIL

Michael C. Fultz
PROTESTANT
5224 Lillian Street
Houston, Texas 77007
VIA U.S. REGULAR MAIL

Tina Biondo
PROTESTANT
5123 Lillian Street
Houston, Texas 7007
VIA U.S. REGULAR MAIL

Patricia Anderson
PROTESTANT
5016 Lillian Street
Houston, Texas 77007
VIA U.S. REGULAR MAIL

Greg Winter
PROTESTANT
916 Lester Street
Houston, Texas 77007
VIA U.S. REGULAR MAIL

Carol Miller
PROTESTANT
5105 Lillian Street
Houston, Texas 77007
VIA U.S. REGULAR MAIL

Nelson Trimble
PROTESTANT
922 Lester Street
Houston, Texas 77007
VIA U.S. REGULAR MAIL

Ramona M. Perry
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Houston District Office

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

December 1, 2009

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

VIA REGULAR MAIL

RE: Docket No. 458-09-5962; Texas Alcoholic Beverage Commission vs. Blue Book LLC d/b/a Blue Book

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 "S Burger".

Stephen J. Burger
Administrative Law Judge

SJB:mr
Enclosure

cc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Ramona Perry, Staff 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**
Clyde Burleson, Attorney at Law, 1533 W. Alabama, Suite 100, Houston, Texas 77006 -**VIA REGULAR MAIL**
Nelson Trimble, Protestant, 922 Lester Street, Houston, Texas 77007 - **VIA REGULAR MAIL**

On October 2, 2009, a public hearing was held before Stephen J. Burger, ALJ, in Houston, Harris County, Texas. Protestant was represented by Nelson Trimble, a non-attorney. The TABC was represented by attorney Ramona Perry. Respondent was represented by attorneys Clyde Burlison, Michael Craig and Sam Dean.

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, case law states that 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. – El Paso [8 Dist.] 1983).

III. EVIDENCE

A. Protestants' Witnesses

1. Testimony of Jina Biondo

Jina Bionda has lived in a townhouse at 5123 Lillian, about a half block from Respondent's location since 2001. Although there is not presently an operating bar at Respondent's proposed location, she had problems with the former bar located there, which was named Viviana's. The problems she cited were noise from patrons and the loud music, especially the bass. She is also concerned about traffic at the location and intoxicated patrons. There are about 18 townhouses in the area.

2. Testimony of Michael C. Fultz

Michael C. Fultz lives about 100 feet from Respondent's location and has lived there five years. He is the president of his development's architectural control unit. He states that three bars in the area have recently opened, which has increased traffic, especially on Wednesday, Thursday, Friday, and Saturday. He admits there are no noise problems presently, but he is afraid the noise problems and other problems will increase if Respondent's application is granted. His main concern is about loud music from the bar, especially the bass. He is aware that Respondent proposes to install sound insulation in the bar but does not think it will be adequate.

3. Testimony of Nelson Trimble

Nelson Trimble lives at 922 Lester Street, one of the closest residences to Respondent's building. He purchased his home in 2005. He is the president of the Lillian Townhome Association and its 10 members have asked him to represent them. He and other residents moved there for the quality of life it presented. He stated that the previous bar, Viviana's, presented problems, especially between 2-4:00 a.m. He noted that three other bars have recently opened in the area and that they are causing increased noise, parking and traffic problems, and loud music problems. They also encourage rowdy patrons. There are no buffer zones between nearby residents and the Respondent's location.

B. Respondent's Witnesses

1. Phillip Neisel

Phillip Neisel is the president of the Old 6th Ward Neighborhood Association and has gotten to know Saleem Fernandez, Respondent's manager. Mr. Neisel is happy with how Respondent is conducting the opening and remodeling of Respondent's bar. He believes the Respondent has done its best to alleviate any problems associated with opening the bar and

points to the sound insulation wall and increased security that Respondent is providing.

2. Michael Ferguson

Michael Ferguson is a sergeant with the Houston Police Department. He works as a private security officer at the nearby bar called Pandora's, 1815 Washington Street, and will be employed at Respondent's bar when it opens. He stated that crime in this area has been reduced and property values have risen due to the increased police presence. He also stated that the Respondent is the most responsible owner he has worked for.

3. Kelly Gipson

Kelly Gipson lives at 5214 Lillian Street, a townhouse that is the closest to Applicant's bar. He has lived there two-and-a-half years, is married, but has no children. He has no objections to the bar, and notes it is not the only bar on that street. He believes Respondent's bar may be good for the neighborhood and he has no problem with the two or three newly opened bars.

4. Saleem Fernandez

Mr. Fernandez is one of the owner's of Respondent. He has been in this type of business for nine years and is also an owner of Pandora's, a nearby bar about one mile away. Pandora's has a younger clientele while Blue Book will have an older clientele, catering to the 25 year-and-up professional, with drinks in the \$8-9 range and a dress code. He intends on keeping out the younger clientele.

Mr. Fernandez has tried to work with the neighbors, has attended Old 6th Ward Civic Association meetings and is aware of their concerns regarding loud music, soliciting and traffic. He has acted on those concerns and notes that the Rice Military Civic Association is not protesting his application.

Mr. Fernandez is designing Respondent's bar to minimize music noise by installing an insulated, 20-foot-tall wall on the side closest to residences in the neighborhood. He will not be installing sub-woofers and has hired sound engineers to reduce music noise to the outside of the building. The music will cater to an older crowd, will focus on jazz and disco and will be recorded, not live. All music will be inside the bar, and there will be no dance floor.

There will be three times more parking spaces than the minimum required. Houston Police Department officers will be hired as security at the front door. The bar will be open until 2 a.m. Thursday through Saturday and to 12 a.m. weekdays.

Mr. Fernandez picked this location because it had previously been a bar, so he did not expect any protests. He has spent about \$600,000 so far on remodeling and expects to spend about \$50,000 more. He is losing about \$30,000 per month when the bar is not open, and if no license is granted he may lose his home.

IV. ANALYSIS AND RECOMMENDATION

Protestants seek denial of Respondent's permit 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., 616 SW2d 274 (Tex. App. – Houston [1st Dist] 1981, no writ).

Protestants cite concerns of increased traffic, noise both from within and without the bar, noisy patrons, possibly intoxicated patrons, parking issues, littering, and loitering that may increase with the opening of Respondent's bar. However, there are other residents, including the Rice Military Civic Club, who specifically do not object to the opening of the bar. There are three bars presently open nearby, and Respondent's location had been the site of a bar that has been closed for one or two years.

The Respondent has shown that he is well aware of the concerns of the neighbors and has incorporated sound barriers into the remodeling plans. The ALJ is particularly impressed with the Respondent's extensive sound barrier plans. Also, Respondent has shown that the bar will cater to an older, wealthier clientele. There will be no live music, no sub-woofer bass and no dance floor. Parking will be more than adequate, and Houston Police Department officers will be hired for security.

While not necessarily a determinative factor, the TABC has no objection to the opening of the bar or the granting of a TABC license. Additionally, there is insufficient evidence that the opening of this bar will constitute an unusual condition or situation.

After reviewing all the evidence, the ALJ finds insufficient evidence that the general welfare, peace, and safety of the surrounding residents warrants the refusal of the permit, and further, that no unusual condition or situation prohibits the permit's issuance. There is also insufficient evidence that the permit should be denied based on the health or morals of the people or on the public sense of decency.

V. FINDINGS OF FACT

1. Blue Book LLC, d/b/a Blue Book, (Respondent) filed an original application with the Texas Alcoholic Beverage Commission (TABC) for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for the premises to be located at 5219 Washington, Houston, Harris County, Texas.
2. The TABC as Petitioner filed a Protest on behalf of Michael C. Fultz and other nearby residents (Protestants), 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.
3. A Notice of Hearing dated August 17, 2009, was issued by the TABC 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 October 2, 2009, a public hearing was held before Administrative Law Judge (ALJ) Stephen J. Burger in Houston, Texas. The TABC appeared at the hearing, and was represented by Ramona Perry, attorney. Protestants were represented by Nelson Trimble. Respondent was represented by Clyde Burleson, Sam Dean and Michael Craig, attorneys. Evidence was received and the record closed on the same date.
5. Respondent intends to open a bar called Blue Book at the proposed premises.
6. The site of the proposed bar had formerly been a bar known as Viviana's, which has been vacant for about two years.
7. Respondent has met all TABC requirements to hold the permit at the proposed location, and there are no zoning laws or deed restrictions prohibiting the opening of the proposed bar known as Blue Book.
8. Respondent's bar will be approximately 4,000 square feet, with approximately 120 parking spaces in total.
9. Respondent intends on catering to an over-25, professional clientele, with mixed drinks in the \$8 to \$9 range. It will have no dance floor, and will have recorded, not live, jazz and disco music.
10. Respondent has installed sound barriers and baffles inside the proposed location.
11. Respondent will have security provided by off-duty Houston Police Department officers.

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 provided to all parties pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE § 155.501.
4. The place or manner in which the Respondent plan to conduct its business does not warrant the refusal of the 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 intends to conduct its business does not

present an unusual condition or situation that warrants the refusal of the permits.

6. Respondent's original application for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for the premises to be located at 5219 Washington, Houston, Harris County, Texas, should be granted.

SIGNED December 1, 2009.



STEPHEN J. BURGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE