

TABC DOCKET NO. 589746

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, Jurisdictional Petitioner	§	
	§	
XAVIER CANTU,	§	
Protestant	§	
VS.	§	ALCOHOLIC
	§	
BENITO GUERRA (ET AL)	§	
D/B/A OLD NO. 2 CAFE & GRILL,	§	
Respondent	§	
	§	
PERMIT/LICENSE NO(s).	§	
MB607374, LB & PE	§	
	§	
WEBB COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-10-2021)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 23rd day of September, 2010, the above-styled and numbered cause.

The hearing in the above matter was conducted by the State Office of Administrative Hearings, with Administrative Law Judge Donald B. Dailey presiding. The hearing convened on February 5, 2010, and the record was closed on February 9, 2010. The Administrative Law Judge made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on March 24, 2010.

On May 18, 2010 the Assistant Administrator of the Texas Alcoholic Beverage Commission issued an Order Adopting Proposal for Decision granting Respondent's renewal application for a Mixed Beverage Permit, Mixed Beverage Late Hours Permit and a Beverage Cartage Permit.

A Motion for Rehearing was filed by the Protestant, and the Assistant Administrator remanded the case back to the Administrative Law Judge to make additional findings of fact and conclusions of law.

The Administrative Law Judge made and filed Additional Finding of Facts and Conclusions of Law on August 3, 2010. No exceptions or replies were filed in response to the Additional Finding of Facts and Conclusions of Law.

The Administrator of the Texas Alcoholic Beverage Commission reviewed and considered the Proposal for Decision and the Additional Findings of Fact and Conclusions of Law. After such review, the Administrator adopts the Findings of Fact and Conclusions of Law made and entered into the Proposal for Decision by the Administrative Law Judge. The Administrator also adopts the Additional Findings of Fact and Conclusions of Law made and entered by the Administrative Law

Judge. The adopted Findings of Fact and Conclusions of Law and the adopted Additional Findings of Fact and Conclusions of Law are incorporated into this Order as if such were fully set out and separately stated herein.

IT IS THEREFORE ORDERED that Respondent's application for renewal of a Mixed Beverage Permit, Mixed Beverage Late Hours Permit and a Beverage Cartage Permit be **GRANTED**.

This Order will become final and enforceable on the 19th day of October, 2010, unless a Motion for Rehearing is filed **before** that date.

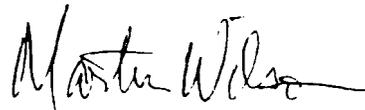
SIGNED this the 24th day of September 2010, at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that service shall be made upon all parties in the manner indicated below on this the 24th day of September, 2010.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

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Administrative Law Judge
State Office of Administrative Hearings
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Lisa D. Crissman
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission

Licensing Division

Agent Eddie Torres
Laredo Enforcement Office

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

August 3, 2010

Ms. Sherry K-Cook
Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

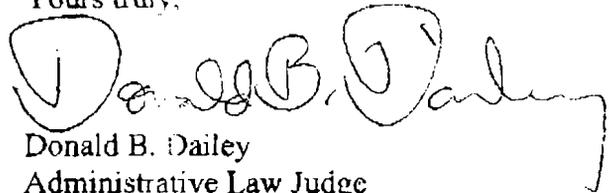
BY FIRST CLASS MAIL

RE: SOAH Docket No. 458-10-2021; TABC Docket No. 589746; Texas Alcoholic Beverage Commission v. Benito Guerra, et al., d/b/a Old No. 2 Café and Grill, Permit Nos. MB607374, LB & PE

Greetings Ms. Sherry K-Cook:

Enclosed are Additional Findings of Fact and Conclusions of Law in this case.

Yours truly,



Donald B. Dailey
Administrative Law Judge

DBD/dbd
Enclosure

xc: Ms. Lisa D. Crissman, Staff Attorney, Texas Alcoholic Beverage Commission, Suite 600, 427 West Twentieth Street, Houston, Texas 77008 - **BY FACSIMILE: 713-426-7965**

xc: Dr. Xavier Cantu, Suite 104, 313 West Village Boulevard, Laredo, Texas 78041 - **BY FIRST CLASS MAIL**

xc: Mr. Julio A. Garcia, Jr., The Garza Firm, 5829 Northgate Lane, Laredo, Texas 78041 - **BY FACSIMILE: 956-568-4370**

SOAH DOCKET NUMBER 458-10-2021

TEXAS ALCOHOLIC BEVERAGE	*	BEFORE THE STATE OFFICE
COMMISSION,	*	
Petitioner,	*	
	*	
AND	*	
	*	
XAVIER CANTU,	*	
Protestant	*	
	*	
V.	*	OF
	*	
BENITO GUERRA, ET AL., D/B/A OLD	*	
NO. 2 CAFÉ & GRILL, PERMIT	*	
NUMBERS MB607374, LB & PE,	*	
Respondent	*	
	*	
WEBB COUNTY, TEXAS		ADMINISTRATIVE HEARINGS
(TABC CASE NUMBER 589746)		

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to an order from the Texas Alcoholic Beverage Commission (Commission), the Administrative Law Judge (ALJ) makes the following additional findings of fact and conclusions of law. The Commission remanded this matter to the ALJ to address issues raised by Protestant Xavier Cantu (Protestant) regarding the request of the partnership of Benito Guerra and Maria J. Gonzalez (Applicant) to renew their permit to operate Old No. 2 Café and Grill (Old No. 2) at the commercial business center (the CMX Center) located at 313 West Village Boulevard, Laredo, Texas. The additional findings of fact and conclusions of law are preceded by "AFF" and "ACL," respectively, to distinguish them from the findings of fact and conclusions of law contained in the Proposal for Decision (PFD).

Protestant's first numbered basis for rehearing refers to "alcoholic beverages being served over a period of many months in an open parking lot." Also, Protestant's second, third, and seventh numbered bases for rehearing refer to the same issue. Protestant argues that such sales were in an area not zoned for bars, a public place, and a prohibited place. In addition, Protestant argues such sales enabled open container violations, sales to minors, public consumption of alcohol, and exposed

the public to debauchery. Further, Protestant argues that the situation was a free-for-all environment with no controls over admissions and no controls over the removal of alcoholic beverages. With regard to the serving of alcoholic beverages in the parking lot, the ALJ makes the following Additional Findings of Fact and Additional Conclusions of Law. For clarity, the language from page 10 of the PDF quoted by Protestant is a reference to the activities on the enclosed patio in back of Old No. 2, not the parking lot in front of Old No. 2.

- AFF1. In July 2009, with the permission of representatives of the Commission, Applicant used temporary fencing to set off a portion of the parking lot in front of Old No. 2 and furnished such area with tables and chairs.
- AFF2. In September 2009, after a complaint from Protestant and not after an unannounced raid by representatives of the Commission, Applicant ceased fencing off any portion of the parking lot in front of Old No. 2.
- AFF3. During the foregoing period, Applicant served alcoholic beverages to its patrons in the temporarily fenced area, and Applicant's patrons consumed alcoholic beverages in the temporarily fenced area.
- AFF4. During the foregoing period, with security guards and management personnel, Applicant controlled ingress and egress to the temporarily fenced area to prevent the entry of minors and prevent patrons from leaving the area with alcoholic beverages.
- ACL1. During the foregoing period, the sale and consumption of alcoholic beverages in the temporarily fenced area was not sale or consumption of alcoholic beverages in a prohibited place.
- ACL2. The place or manner in which Applicant conducted its business from July 2009 to September 2009 with regard to the temporarily fenced area in the parking lot in front of Old No. 2 does not warrant refusal of the requested renewal of Applicant's mixed beverage permit, late hours permit, or beverage cartage permit based on the general welfare, health, peace, morals, and safety of the people, or the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).

In Protestant's second and fourth numbered basis for rehearing, Protestant refers to littering by the patrons of Old No. 2 in the parking lot at the CMX Center and at the adjacent property of Mr. Kowalski. Also, Protestant refers to property damage to and blocked access to the adjacent property of Mr. Kowalski. With regard to those issues, the ALJ makes the following Additional Finding of Fact and Additional Conclusions of Law.

AFF5. The property of Mr. Kowalski adjacent to the CMX Center has experienced littering, such as broken beer bottles and empty beer cans, and property damage, such as broken curbs.

ACL3. Littering by the patrons of Old No. 2, which has not been shown to be abnormally high, does not warrant refusal of the requested renewal of Applicant's mixed beverage permit, late hours permit, or beverage cartage permit based on the general welfare, health, peace, morals, and safety of the people, or the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).

ACL4. Property damage that has occurred at the CMX Center and at the adjacent property of Mr. Kowalski, which has not been shown to be caused by the patrons of Old No. 2, does not warrant refusal of the requested renewal of Applicant's mixed beverage permit, late hours permit, or beverage cartage permit based on the general welfare, health, peace, morals, and safety of the people, or the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).

In Protestant's fifth numbered basis for rehearing, Protestant refers to the parking for Old No. 2 being inadequate and the patrons of Old No. 2 overwhelming the parking capacity of the CMX Center to the detriment of the other tenants of the CMX Center. With regard to those issues, the ALJ makes the following Additional Finding of Fact and Additional Conclusion of Law.

AFF6. The patrons of Old No. 2 have adequate parking available in the common parking area available to all tenants of the CMX Center.

ACL5. The use of the common parking area for the CMX Center by the patrons of Old No. 2, which has not been shown to conflict with the parking requirements of customers of other tenants of the CMX Center, does not warrant refusal of the requested renewal of Applicant's mixed beverage permit, late hours permit, or beverage cartage permit based on the general welfare, health, peace, morals, and safety of the people, or the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).

In Protestant's fifth numbered basis for rehearing, Protestant, also, asserts that the back patio of Old No. 2 is a fire trap and safety hazard. The ALJ refers the Commission to Finding of Fact 16 in the PDF and makes the following Additional Conclusion of Law.

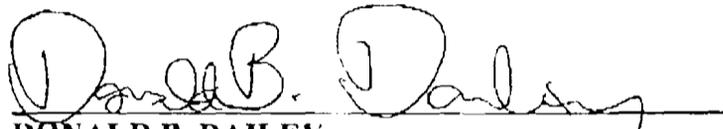
ACL6. The place or manner in which Applicant conducts its business with regard to the back patio does not warrant refusal of the requested renewal of Applicant's mixed beverage permit, late hours permit, or beverage cartage permit based on the general welfare, health, peace, morals, and safety of the people, or the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).

In Protestant's fifth numbered basis for rehearing, Protestant, in addition, asserts that the close proximity of Old No. 2 does not permit peace. The ALJ makes the following Additional Conclusion of Law.

ACL7. The proximity of Old No. 2 to the premises of Protestant, which has not been shown to inconvenience Protestant, his employees, or his patients, does not warrant refusal of the requested renewal of Applicant's mixed beverage permit, late hours permit, or beverage cartage permit based on the general welfare, health, peace, morals, and safety of the people, or the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).

With regard to Protestant's sixth and seventh numbered paragraphs in which Protestant complains of the scheduling of the protest hearing and the failure of the Commission and the ALJ to call certain witnesses, the ALJ makes no additional findings of fact or additional conclusions of law.

SIGNED August 3, 2010.


DONALD B. DAILEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARING

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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DATE: 08/03/2010
NUMBER OF PAGES INCLUDING THIS COVER SHEET: 6
REGARDING: ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW
DOCKET NUMBER: 458-10-2021

JUDGE DONALD DAILEY

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TABC DOCKET NO. 589746

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, Jurisdictional Petitioner	§	
	§	
XAVIER CANTU,	§	
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D/B/A OLD NO. 2 CAFE & GRILL,	§	
Respondent	§	
	§	
PERMIT/LICENSE NO(s).	§	
MB607374, LB & PE	§	
	§	
WEBB COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-10-2021)	§	BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION this 18th day of May, 2010, the above-styled and numbered cause.

The hearing in the above matter was conducted by the State Office of Administrative Hearings, Administrative Law Judge Donald B. Dailey, presiding. The hearing convened on February 5, 2010, and the record was closed on February 9, 2010. The Administrative Law Judge made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on March 24, 2010. The time for filing and ruling on any Exceptions and Replies to the PFD has passed.

The matter is before the Administrator, 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 further Ordered that the sanctions and penalties found to be warranted by the findings and conclusions of the Administrative Law Judge are adopted by the Administrator as the sanctions and penalties of the Texas Alcoholic Beverage Commission.

IT IS THEREFORE ORDERED that the renewal of Respondent's application for the issuance of a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit and a Beverage Cartage Permit be **GRANTED**.

This is a Final Order of the Commission. The terms of this Order will be enforced without further notice to the Respondent on June 11, 2010, unless a Motion for Rehearing is filed before that date.

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

SIGNED this the 18th day of May 2010,
at Austin, Texas.

On Behalf of the Administrator,



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

Administrative Law Judge
State Office of Administrative Hearings
Texas Department of Transportation
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DATE: 03/24/2010
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REGARDING: PROPOSAL FOR DECISION
DOCKET NUMBER: 458-10-2021

JUDGE DONALD DAILEY

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State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

March 24, 2009

Mr. Alan Steen
Administrator
Texas Alcoholic Beverage Commission
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Austin, Texas 78731

BY FIRST CLASS MAIL

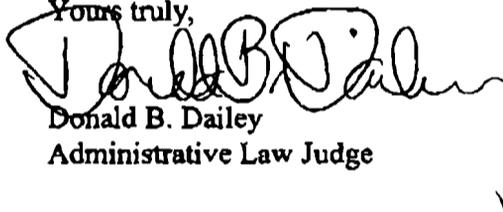
RE: SOAH Docket No. 458-10-2021; TABC Docket No. 589746; Texas Alcoholic Beverage Commission v. Benito Guerra, et al., d/b/a Old No. 2 Café and Grill, Permit Nos. MB607374, LB & PE

Greetings Mr. Steen:

Enclosed is 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 § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Yours truly,



Donald B. Dailey
Administrative Law Judge

DBD/dbd
Enclosure

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xc: Mr. Stephen Dittlinger, The Notzon Law Firm, Suite B, 415 Shiloh Drive, Laredo, Texas 78045 - **BY FACSIMILE: 956-717-2789**

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hearing concluded on February 5, 2010, and the record closed on February 9, 2010.

II. APPLICABLE LAW

The Commission may refuse to issue a renewal permit if it has reasonable grounds to believe and finds that the place or manner in which the applicant may conduct its business warrants the refusal of a permit based on the general welfare, health, peace, morals, and safety of the people and the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).

In one case, the refusal to renew a permit was sustained where the substantial evidence indicated that the premises had been the site of several drive-by shootings, including fatal shootings, late-night weekend gatherings involving hundreds of vehicles and gang members, drive-up sales of narcotics, repeated sales of alcohol to minors, sales of alcohol after legal hours, and consumption of alcohol at prohibited locations. *Four Stars Food Mart, Inc. v. Texas Alcoholic Beverage Com'n.*, 923 S.W.2d 266 (Tex. App. – Forth Worth 1996, no writ). The court noted that some of the foregoing activity was facilitated or at least condoned by the owners of the premises.

In another case, the refusal to renew a permit was sustained where the substantial evidence indicated that the premises had been the site of numerous arrests for assaults, public intoxication, disorderly conduct, minors in possession, curfew violations, sales to intoxicated persons, and miscellaneous other offenses. Also, the patrons of the premises had blocked driveways and alleys; nearby residents had complained of patrons of the premises urinating on their yards, committing vandalism, and using drugs; and the premises generated excessive noise, had inadequate parking, and had inadequate security for the premises and the parking lot. *Garza v. Texas Alcoholic Beverage Com'n.*, 138 S.W.3d 266 (Tex. App. – Houston (14th Dist.) 2004, no pet.).

III. POSITIONS OF THE PARTIES

A. Commission's Position

The Commission took a neutral position on the application and the protest. In the Amended

Notice of Hearing, the Commission's staff attorney pointed out that "[t]he Texas Alcoholic Beverage Commission has no independent evidence to protest the issuance of these permits," that "Applicant has met all Commission requirements to hold the permits at the location," that "Applicant has complied with all Texas Alcoholic Beverage Code requirements in effect at the time of the application," and that "no cases for violations of the Texas Alcoholic Beverage Code are pending against the Applicant."

B. Protestant's Position

Protestant argues that Old No. 2 has caused substantial problems for neighboring businesses such as public intoxication, vandalism, litter, parking conflicts, and property damage.

C. Applicant's Position

Applicant argues that the problems of which Protestant complains either do not exist or are caused by other businesses.

IV. THE SETTING

From the photographs, plats, and testimony offered by the parties and admitted into evidence, the setting for this contested case emerges as follows. Old No. 2 is one tenant in an "L"-shaped commercial business center (the CMX Center) that is located at the corner of West Village Boulevard and an access road for Interstate Highway 35, in Laredo, Texas. The CMX Center has 20 spaces of 1000 square feet each, one 876 square foot space, and one 6000 square foot space. In front of the CMX Center is about 50,000 square feet of parking area, designated as Lot 23. In back of the CMX Center is about 40,000 square feet of vacant land, designated as Lot 24. An accounting firm is located in a building about 75 yards down West Village from Old No. 2. Two motels are located nearby.

Old No. 2 is located in the space designated as Lot 8. Protestant's Del Mar Medical Center has two stories and is located in Lot 6. Although previously occupied, Lot 7 is now empty. Other

tenants in the building include an electronic gaming machine business in Lots 9 and 10; Linn's Buffet, a restaurant, in Lot 11; the Texas Commission for the Blind and the Texas Rehabilitation Commission in Lots 12 through 18; and a swimming pool business in Lot 1.

Old No. 2 has an outdoor patio in back of its premises on Lot 24. The patio has a wooden deck and is entirely enclosed by a wooden fence that is about six feet high. The patio is equipped with a tarpaulin that can be erected with ropes to provide some overhead cover. The patio is furnished with tables, chairs, a bar equipped with a cooler and a large ice chest, portable heaters, and trash cans.

V. SUMMARY OF THE TESTIMONY PRESENTED

A. Xavier Cantu

Dr. Cantu testified as follows. He is a physician. In 1995, he and three other persons formed a corporation and built the CMX Center. His medical clinic is open from about 8:45 a.m. to 9:00 p.m. He owns Lot 6 and Lot 7. The Texas Rehabilitation Commission office has employees present from about 8 a.m. to about 8 p.m.

Dr. Cantu said that Old No. 2 operates from about 7 p.m. to about 3 a.m. Old No. 2 produces loud music, tobacco smoke, and empty beer cans and bottles in the parking lot. The hundreds of patrons of Old No. 2 take over the parking at the CMX Center. They illegally park in handicapped parking spaces. The patrons of Old No. 2 leave the premises with alcoholic beverages in their hands, are rowdy, consume alcoholic beverages in the parking lot, and are intoxicated in public. On one occasion a tree was knocked down. Handicap parking signs have been stolen. The CMX Center has experienced graffiti. The number of complaints against Old No. 2 has increased in 2008 and 2009. Dr. Cantu is concerned that the continued operation of Old No. 2 will result in someone being injured as a result of an accident or assault. Also, Dr. Cantu is concerned that sanitation is poor at Old No. 2.

Dr. Cantu testified that one of his former tenants, a medical supply company, complained to

him about graffiti being painted on its delivery truck, and smoke, noise, and a sewage smell coming from Old No. 2. That tenant left the CMX Center due to the bad conditions there. Another tenant complained of beer bottles becoming wedged under the tires of vehicles in the parking lot.

According to Dr. Cantu, prior to July 2009, part of the parking area in front of Old No. 2 was fenced off and furnished with tables and chairs. After he complained to the Commission, the temporary area was removed. The outdoor patio was built behind Old No. 2 in September 2009. He believes that the tarpaulin is flammable. Access to the patio is from the rear door of Old No. 2. The patio is in use from about 5 p.m. to about 2:30 a.m. Sale of alcoholic beverages is not allowed on the patio, but he has seen patrons walking around drinking and being served. The City of Laredo issued a warning to the CMX Corporation that sale and consumption of liquor is not allowed on the patio, due to zoning restrictions.

Dr. Cantu conceded that he is not aware of Applicant being fined by the Commission or the City of Laredo on account of the operation of Old No. 2. He is not aware of any arrests at the premises of Old No. 2. He does not know who stole the handicap signs or painted graffiti at the CMX Center; he cannot say that patrons of Old No. 2 did so.

B. Samuel M. Kowalski

Mr. Kowalski testified as follows. He is a partner in a partnership that owns the building at 219 West Village. He has operated a certified public accounting firm at that location for the last 20 years. Since Old No. 2 became popular, he has noticed certain problems at his location such as empty beer cans, broken beer bottles, broken curbing, vehicles blocking access to his building (which he has had towed away), and broken car parts from vehicles jumping curbs. He did not notice such problems before Old No. 2 became popular. He conceded that the problems could be caused by customers of other businesses operating in the area, such as three nearby bingo parlors. With his own eyes, he has not seen patrons from Old No. 2 causing the problems. However, the problems occur overnight after Old No. 2 is open.

Mr. Kowalski said that, in 2009, Old No. 2 fenced off the parking area in front of its premises

and parked a flatbed there for a band. As a result, patrons from Old No. 2 parked in front of his business. He did not file a complaint, because he was leaving. He considers Old No. 2 to be a bad neighbor. Their patrons come on his property and do not respect his property rights.

C. Cesar Cantu

Mr. Cantu testified as follows: He is one of the owners of the corporation that built the CMX Center. He operates the swimming pool business there. He is not opposed to the renewal of Old No. 2's permits.

Mr. Cantu said that he has seen drivers jumping the curb at the CMX Center who were going elsewhere than Old No. 2. He stopped the problem by having the utility company put in poles to act as barriers. Parking at the CMX Center is a problem. He has seen customers from Linn's Buffet parking elsewhere than in front of the restaurant and persons going to one of the motels parking in the CMX Center's parking lot. He has not seen anyone consuming alcoholic beverages in the CMX Center's parking lot.

D. Marina Cantu Ramirez

Ms. Ramirez testified as follows. She is one of the owners of the corporation that built the CMX Center. The same four persons own Lot 24, as well. She has not operated a business at the CMX Center since 2006. She owns Lot 8 and has rented that space to Old No. 2. She sometimes goes to Old No. 2 in the evenings. She wants Old No. 2's permits to be renewed. Otherwise, she will lose a tenant.

Ms. Ramirez said that she was told by representatives of the Commission that the back patio was allowable as long as it was enclosed by a fence. The patio was built in October 2009. She pays the other owners of the corporation a certain amount, based on square footage, for Old No. 2's use of the ground on which the patio was built.

Ms. Ramirez testified that she did not know who was responsible for vandalism and graffiti at

the CMX Center.

E. Joe Gonzalez

Mr. Gonzalez testified as follows. He is the manager of Old No. 2. His spouse is one of the Applicants. He, his spouse, and Mr. Guerra are at Old No. 2 every day. He and the owners of Old No. 2 monitor the premises to prevent patrons from leaving with alcoholic beverages. Old No. 2 serves food at all times that it is open. However, alcohol sales make up more than half of Old No. 2's revenue. Old No. 2 is in compliance with all city and state regulations. Old No. 2 is frequently inspected and has always passed. Old No. 2 has not received any complaints from other tenants of the CMX Center.

Mr. Gonzalez said that the outdoor area in front and the patio in back were erected in response to the enactment of a smoking ordinance by the City of Laredo. He was told by a representative of the Commission that the outdoor area in front of Old No. 2 was allowable as long as none of the property owners complained. When Dr. Cantu complained, the front outdoor area was removed.

Mr. Gonzalez testified that he was told by a representative of the Commission that the patio in back of Old No. 2 was allowable as long as it was surrounded by a 6-foot high permanent wooden fence and as long as the only exit was an emergency exit. Patrons can eat, drink, and smoke on the back patio. Alcoholic beverages are not sold on the back patio, and patrons are not allowed to take alcoholic beverages onto the patio.

Mr. Gonzalez said that Dr. Cantu's allegations are untrue. Mr. Gonzalez has not seen Old No. 2 patrons vandalizing property or littering. Old No. 2 employs private security guards to make sure that minors do not enter and that patrons do not take any alcoholic beverages off the premises. Old No. 2 does not sell alcoholic beverages in cans. The parking lot in front of the CMX Center is a common parking area for all tenants.

Mr. Gonzalez testified that Old No. 2 obtained a special use permit and a cartage permit to

bring in the flatbed and put on a benefit for Laredo firefighters. Temporary fencing was provided by the firefighters so that no one could leave the fenced area with an alcoholic beverage.

VI. ANALYSIS

A. Noise and Smoke

Dr. Cantu complains about the noise and smoke generated by Old No. 2. Applicant did not dispute that Old No. 2 generates noise and smoke. However, Dr. Cantu pointed to no particular problem that the noise and smoke from Old No. 2 causes the public, visitors to the CMX Center in general, his patients and employees in particular, or himself. For example, Dr. Cantu presented no evidence that the noise and smoke had any impact on his treatment of his patients at his clinic. Dr. Cantu offered no evidence of any complaints by anyone to the police on account of loud noise from Old No. 2. Further, no evidence was presented that any residences are located near Old No. 2. No evidence was presented that any guests from the nearby motels have complained about the noise from Old No. 2. The preponderance of the evidence does not establish, with regard to noise and smoke, that the place or manner in which Applicant operates Old No. 2 warrants refusal of the requested renewal of Applicant's permits.

B. Litter

Dr. Cantu and Mr. Kowalski complain about litter such as empty beer cans and broken beer bottles generated by Old No. 2. The ALJ finds credible the testimony of Mr. Gonzales that he, the owners, and the security guards endeavor to prevent patrons from leaving Old No. 2 with alcoholic beverages, and that Old No. 2 does not sell alcoholic beverages in cans. No evidence was offered that the Commission has ever cited Old No. 2 for patrons leaving the premises with alcoholic beverages. A reasonable inference from such evidence is that very few beer bottles or cans are taken out of Old No. 2 and left in the CMX Center's parking lot.

Further, the parking area of the CMX Center and Mr. Kowalski's property is accessible from nearby public roads, including an interstate highway access road, every day and at all hours. Dr.

Cantu did mention security at the CMX Center; however, he did not provide any details about such security. While it may be that the Laredo police and the CMX Center's security guards patrol the parking lot to some extent, the evidence admitted is insufficient to exclude the possibility that uninvited members of the public walk or drive through Mr. Kowalski's property and the CMX Center or park on those properties and leave behind empty cans, bottles, and other litter. In addition, a number of businesses operate in and around Mr. Kowalski's property and the CMX Center. No doubt their customers sometimes leave behind empty cans, bottles, and other litter. No evidence was offered that the litter on Mr. Kowalski's property or in the CMX Center is any worse than at other similar business centers in Laredo.

Mr. Kowalski mentioned the litter problems have become worse since Old No. 2 became popular. His testimony is some circumstantial evidence that Old No. 2 might be responsible for some of the litter on his property and at the CMX Center. However, the increase in litter and the increase in Old No. 2's popularity may just as easily be a coincidence. The evidence is insufficient to establish that the litter on Mr. Kowalski's property and in the CMX Center is particularly due to the patrons of Old No. 2, as opposed to others. Further, the evidence is insufficient to establish that the litter at Mr. Kowalski's property and the CMX Center, whatever the source, is so extensive as to cause a significant problem for Mr. Kowalski's business or for any of the businesses operating in the CMX Center. The preponderance of the evidence does not establish, with regard to litter, that the place or manner in which Applicant operates Old No. 2 warrants refusal of the requested renewal of Applicant's permits.

C. Crime

Dr. Cantu complains of vandalism generated by Old No. 2. Again, since the parking area of the CMX Center is accessible from nearby public roads, the evidence admitted is insufficient to exclude the possibility of persons other than patrons of Old No. 2 walking or driving through the CMX Center or parking there and stealing signs or spraying graffiti. Further, no evidence was presented that the vandalism in the CMX Center is any worse than at other similar business centers in Laredo. The evidence is insufficient to establish that the vandalism in the CMX Center is particularly due to the patrons of Old No. 2 as opposed to persons coming to the center. The

preponderance of the evidence does not establish, with regard to vandalism, that the place or manner in which Applicant operates Old No. 2 warrants refusal of the requested renewal of Applicant's permits.

Dr. Cantu complains of patrons of Old No. 2 being served and walking around the patio with drinks. However, the evidence is insufficient to establish that such consumption is of alcohol as opposed to tea or soda. No evidence was presented that the City of Laredo has taken any further action after the original warning. The ALJ finds credible the testimony of Mr. Gonzales that he, the owners, and the security guards do not allow patrons of Old No. 2 to consume alcoholic beverages on the patio.

Dr. Cantu complains of rowdy and/or intoxicated patrons leaving Old No. 2 and patrons with alcoholic beverages leaving Old No. 2. Also, Dr. Cantu expressed a concern about such persons causing accidents or committing assaults. The entrance to Old No. 2 faces an open parking area of 50,000 square feet and a public road beyond the parking lot. Any patron leaving Old No. 2 with a alcoholic beverage, or in an intoxicated state, or with a rowdy disposition should be plainly visible for a significant distance to any persons at other businesses in the area, patrolling private security guards, passing law enforcement officers, or passing civilians with cellular telephones. Yet no evidence was presented of any calls to the police or arrests at the CMX Center for collisions, disturbing the peace, public intoxication, assault, or other criminal conduct at any time since Old No. 2 has held a permit. Further, Dr. Cantu offered no evidence that any patron leaving Old No. 2, whether or not rowdy, intoxicated, or in possession of an alcoholic beverage, has ever caused a problem for him, his patients, his employees, or other members of the public at the CMX Center. The evidence of rowdy patrons, intoxicated patrons, or patrons in possession of alcoholic beverages and the potential harm they might cause at the CMX Center is insufficient with regard to the place or manner in which Applicant operates Old No. 2 so as to warrant refusal of the requested renewal of Applicant's permits.

D. Parking

Mr. Kowalski complained of access to his building being blocked. However, he admitted

that customers from other businesses could be causing the problem and that he could not say that he had seen any patrons of Old No. 2 causing the problem. Also, Mr. Kowalski complained of the one occasion when the parking area in front of Old No. 2 was blocked off for a firefighters' event. However, Mr. Kowalski did not claim that that one special event actually caused any parking problem for his clients, his employees, or himself. Mr. Kowalski admitted that he made no contemporaneous complaint to anyone on the occasion of the firefighters' fundraiser.

The uncontroverted evidence from Mr. Gonzales indicates that all tenants of the CMX Center, including Dr. Cantu, share common parking. No spaces are particularly reserved for the use of Dr. Cantu, his employees or patients, or the customers of any other tenant at the CMX Center. Further, while some overlap exists as to hours of operation of Old No. 2 and the other businesses in the CMX Center, no evidence was presented that a significant number of customers of the other businesses at the center are present when Old No. 2 has a significant number of patrons present. Understandably, any tenant at the CMX Center would be aggravated by a customer of another business parking in front of their business; however, such conduct has not been prohibited by the owners of the CMX Center. Parking conflicts have not been of such magnitude as to result in the owners of the CMX Center designating certain spaces for the customers of certain businesses and posting signs that violators will be towed away. even though at least two of the owners operate businesses at the center. Dr. Cantu did not testify to even once calling the police to have a car towed from any handicapped parking space in front of his clinic or elsewhere at the CMX Center. Dr. Cantu did not give any specific examples of an occasion in which he, his employees, or his patients had suffered any significant inconvenience as a result of patrons of Old No. 2 parking in front of Dr. Cantu's clinic. The evidence of parking conflicts is insufficient with regard to the place or manner in which Applicant operates Old No. 2 so as to warrant refusal of the requested renewal of Applicant's permits.

E. Sanitation

Dr. Cantu mentioned sewage smells coming from Old No. 2. While evidence was presented that Old No. 2 is inspected, no evidence was presented that Old No. 2 has ever failed a single inspection, including food handling inspections. No doubt, bad smells sometimes emanate from Old

No. 2; however, the preponderance of the evidence does not establish, with regard to sanitation, that the place or manner in which Applicant operates Old No. 2 warrants refusal of the requested renewal of Applicant's permits.

F. ALJ's Recommendation

After considering the testimony presented by the witnesses and the other admitted evidence, the ALJ recommends that the renewal application be granted and that the requested permits be reissued.

VII. FINDINGS OF FACT

1. The partnership of Benito Guerra and Maria J. Gonzalez (Applicant) filed a renewal application with the Texas Alcoholic Beverage Commission (Commission) for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit for the premises known as Old No. 2 Café & Grill (Old No. 2).
2. A protest to the application was filed by Xavier Cantu, a medical doctor.
3. On January 15, 2010, the Commission issued an Amended Notice of Hearing informing the parties of the time, date, and location of the hearing on the application; the applicable rules and statutes involved; and the matters asserted.
4. On February 5, 2010, a public hearing was convened in Laredo, Texas, before Administrative Law Judge Donald B. Dailey. The Commission was represented by staff attorney Lisa D. Crissman. Dr. Cantu was represented by attorney Stephen Dittlinger. Applicant was represented by attorney Julio A. Garcia, Jr. The hearing concluded on February 5, 2010, and the record closed on February 9, 2010.
5. Old No. 2 is located at Suite 109, 313 West Village Boulevard, Laredo, Texas, and is a tenant in a commercial business center (the CMX Center).
6. The CMX Center has total of about 27,000 square feet of tenant space, about 50,000 square feet of off-street parking in front, and about 40,000 square feet of vacant land in back. The CMX Center is adjacent to an access road for Interstate Highway 35.
7. Other tenants in the CMX Center include Dr. Cantu's medical clinic, an "eight-liner" business, a restaurant, the Texas Commission for the Blind, the Texas Rehabilitation Commission, and a swimming pool business. A building containing an accounting firm is located about 75 yards from Old No. 2, at 219 West Village. Two motels are located near the CMX Center, but no residences are located nearby.

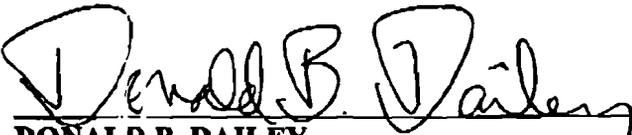
8. Old No. 2 occupies about 1000 square feet of building space with an outdoor fenced patio in the back. The patio was erected in response to a City of Laredo smoking ordinance.
9. Dr. Cantu's medical clinic is separated from Old No. 2 by one empty 1000-square-foot tenant space. The clinic is two stories high and occupies 6000 square feet of tenant space.
10. Old No. 2 is in operation from about 5 p.m. to about 3 a.m. Dr. Cantu's hours of operation are from about 8:45 a.m. to about 9 p.m. The Texas Rehabilitation Commission's office is in operation from about 8 a.m. to 8 p.m.
11. Old No. 2 employs security guards to prevent minors from entering the premises and patrons from leaving with alcoholic beverages.
12. Loud music, loud conversations, tobacco smoke, and a sewage smell sometimes emanate from the interior and patio of Old No. 2.
13. Persons who appear intoxicated and who are rowdy sometimes exit Old No. 2.
14. The CMX Center has experienced vandalism, such as graffiti and stolen handicap parking signs, littering such as broken beer bottles and empty beer cans, and property damage, such as a knocked down tree.
15. Other than handicapped parking, the CMX Center does not have reserved parking areas for customers of particular tenants. Persons visiting the CMX Center do not always park in front of the business they are visiting, including patrons of Old No. 2. Persons visiting one of the nearby motels sometimes park at the CMX Center.
16. Old No. 2 has not failed any inspections by City of Laredo fire, health, or other inspectors.
17. Applicant's administrative violations record with the Commission consists of only one warning for an empty spirits bottle with an unmutated stamp.
18. Applicant is fully qualified, operates a lawful business in a wet area, and is in compliance with all applicable requirements of the Commission.

VIII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter. TEX. ALCO. BEV. CODE ANN. chs. 1 and 5 and §§ 6.01, 11.41, 11.46, and 32.01.
2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law. TEX. GOV'T. CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was provided. TEX. GOV'T. CODE ANN. §§ 2001.051 and 2001.052.

4. The place or manner in which Applicant conducts its business does not warrant refusal of the requested renewal of Applicant's mixed beverage permit, late hours permit, or beverage cartage permit based on the general welfare, health, peace, morals, and safety of the people, or the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).
5. Based on the foregoing findings and conclusions, the application for renewal of Applicant's mixed beverage permit, late hours permit, and a beverage cartage permit should be granted.

SIGNED March 24, 2010.


DONALD B. DAILEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARING

