

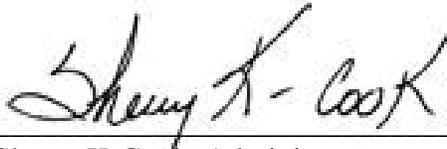


All motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

**THEREFORE, IT IS ORDERED** that the application of Hershner Enterprises, LLC d/b/a Marty's Hideaway for original Mixed Beverage and Mixed Beverage Late Hours Permits be **DENIED**.

This Order will become **final and enforceable** on the 4th day of July, 2013, **unless a Motion for Rehearing is filed by the 3rd day of July, 2013.**

**SIGNED** this the 10th day of June, 2013, at Austin, Texas.

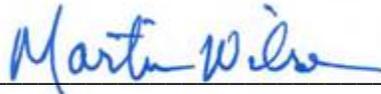


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Sherry K-Cook, Administrator  
Texas Alcoholic Beverage Commission

### **CERTIFICATE OF SERVICE**

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 10th day of June, 2013.



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Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Craig R. Bennett  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
300 W. 15<sup>th</sup> Street, Suite 502  
Austin, Texas 77018  
**VIA FACSIMILE: (512) 322-2061**

Hershner Enterprises, LLC  
d/b/a Marty's Hideaway  
**APPLICANT/RESPONDENT**  
5107 Bradford  
Dallas, Texas 75325  
***VIA FIRST CLASS MAIL, CERTIFICATION NO. 7012 0470 0001 3300 7623***

Timothy E. Griffith  
**ATTORNEY FOR RESPONDENT**  
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City Councilmember – District 14  
**PROTESTANT**  
Office of the City Council  
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***VIA FIRST CLASS MAIL, CERTIFICATION NO. 7012 0470 0001 3300 7609***

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Collen R. Meyer  
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Rick Schene  
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3332 Miro Place  
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Buena Vista Homeowners  
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Stillwater Capital Investments  
**PROTESTANT**  
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Dallas, Texas 75204  
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Lisa D. Crissman  
**ATTORNEY FOR JURISDICTIONAL PETITIONER**  
TABC Legal Division  
***VIA E-MAIL: [lisa.crissman@tabc.state.tx.us](mailto:lisa.crissman@tabc.state.tx.us)***

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

February 21, 2013

RECEIVED

FEB 25 2013

TABC HOUSTON  
LEGAL

Sherry Cook  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive  
Austin, Texas 78731

VIA INTERAGENCY MAIL

**RE: SOAH Docket No. 458-12-7102; TABC No. 611240; Texas Alcoholic Beverage Commission, Dallas City Councilmember District 14, Angela Hunt; Parkwood Townhomes Homeowners Association; Rick Shene; Shawna Wilson; Philip Merritt; and Other Concerned Citizens v. Hershner Enterprises, LLC d/b/a Marty's Hideaway**

Dear Ms. Cook:

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 § 155.507(c), a SOAH rule which may be found at [www.soah.state.tx.us](http://www.soah.state.tx.us).

Sincerely,

A handwritten signature in black ink, appearing to read "Craig R. Bennett".

Craig R. Bennett  
Administrative Law Judge

CRB/lc  
Enclosure

xc Lisa Crissman, Licensing Attorney, Texas Alcoholic Beverage Commission, 427 W. 20<sup>th</sup> Street, Suite 600, Houston, TX 77008 - VIA REGULAR MAIL  
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA INTERAGENCY MAIL  
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA INTERAGENCY MAIL (with Certified Evidentiary Record and 1 - Hearing CD)  
Timothy E. Griffith, Griffith & Rich, PLLC, 101 E. Park Blvd., Suite 600, Plano, TX 75074 - VIA REGULAR MAIL  
Angela Hunt, Councilmember, District 4, 1500 Marilla, Room 5-FN, Dallas, TX 75201 - VIA REGULAR MAIL  
Rick Schene, President, Parkwood Townhomes Homeowners Association, 3332 Miro Place, Dallas, TX 75204 - VIA REGULAR MAIL  
Van Shaw, Attorney at Law, 2723 Fairmount, Dallas, TX 75201 - VIA REGULAR MAIL  
Mark Giambrone, President, Buena Vista Homeowners, 4143 Buena Vista, Apt. A, Dallas, TX 75204 - VIA REGULAR MAIL  
Steven Yeager, President, Travis Street Homeowners, 4100 Travis Street, Apt. 7, Dallas, TX 75204 - VIA REGULAR MAIL  
Mick Rossley, Stillwater Capital Investments, 4145 Travis Street, Suite 202, Dallas, TX 75206 - VIA REGULAR MAIL



## I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

On January 18, 2013, a public hearing was convened in this matter in Dallas, Texas, before ALJ Craig R. Bennett. Applicant was represented by attorney Timothy E. Griffith. Protestants were represented by attorneys Van Shaw and Collen Meyer. TABC was represented by Lisa Crissman, staff attorney. The hearing concluded that same day, but the record did not close until February 5, 2013, after written closing arguments were filed by the parties. Issues of notice and jurisdiction are set out in the proposed findings of fact and conclusions of law without further discussion here.

## II. DISCUSSION AND ANALYSIS

### A. Undisputed Background Facts

Certain facts are undisputed and provide a background context for this dispute. Applicant owns and operates several licensed bars in Dallas which cater to the gay community. Applicant seeks to open another bar—Marty's Hideaway—that would also cater to the gay community. Marty's Hideaway is located in a building that was originally built as a house, but rezoned commercial. For many years, the building was the location of a bar known as Bill's Hideaway. However, Bill's Hideaway closed in 2009. Since that time, the building has been empty and the area has continued to develop residentially.

Two of Applicant's other bars allow dancing; however, Marty's Hideaway would not. Rather, Applicant contends it will be operated as a piano bar. Applicant has had a relatively good—but not perfect—compliance history with TABC. Applicant has three other bars that are regulated by TABC. "Chesterfields" has been licensed since 2000 and has five prior warnings associated with it, but no violations. "The Drama Room" has been licensed since 2010 and has one prior warning and no violations. "The Tin Room" has been licensed since 1999 and has four prior warnings in that time, as well as one violation in 2010 related to prostitution occurring on the premises by male dancers that resulted in a civil penalty of \$2,100.

Applicant also has had financial difficulties in recent years. Currently, Applicant's principal owner owes the Comptroller for the State of Texas back taxes and penalties totaling nearly \$700,000 associated with the failure to pay mixed beverage gross receipts taxes for Applicant's bars. Applicant has reached a payment agreement with the Comptroller to resolve that outstanding debt.

Applicant submitted the application to TABC for Marty's Hideaway in March 2012. The proposed location consists of a main front building (which was originally built as, and resembles from the outside, a single residential structure), a back patio, and a back building that has a garage-type door that can be opened. The building and patio area are located approximately ten feet from an adjoining townhome complex (Parkwood Townhomes). Directly across the street is another residential complex. On the other side of the property are a parking lot and a small dentist's office. Marty's Hideaway faces onto Buena Vista Street, which is a relatively narrow side street off a larger road—Fitzhugh Avenue. There are two existing permitted bars on Fitzhugh Avenue very close to Buena Vista Street, but both of these are on Fitzhugh Avenue, which is a divided six-lane road.

## **B. Applicable Law**

In this case, TABC staff has remained neutral on the application. However, Protestants strongly oppose issuance of the permits. Protestants challenge the applications on the basis of Section 11.46(a)(8) of the Texas Alcoholic Beverage Code, which provides that the commission or administrator may refuse to issue an original or renewal permit with or without a hearing if it has reasonable grounds to believe and finds that:

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

In a protest hearing, the burden is on the protesting parties to show by a preponderance of the evidence that the permit(s) should not be issued.

## C. Arguments and Evidence

### 1. Protestants' Case

Protestants oppose issuance of the permits because they allege that allowing the proposed facility—a piano bar with an open air patio—would be contrary to the general welfare, health, peace, morals, and safety of the local area, which is predominantly residential. Protestants offered the testimony of numerous witnesses. Their testimony overlapped in many ways and indicated a number of concerns if the permits are granted. Those concerns are essentially the following:

- The manner in which Applicant operates its existing businesses is against the welfare of the local populace. Protestants expressed concerns about the manner in which Applicant operates its other bars. Protestants presented demonstrative video taken from those other bars, photographs of advertising,<sup>1</sup> and the testimony of witnesses who had involvement with those bars in one way or another. Protestants contend that those videos and pictures show lewd behavior and are indicative of how Marty's Hideaway will be operated. Witnesses also testified that the Tin Room has excessive noise problems that have not been resolved.
- Applicant's tax problems show an inability to properly operate the bar. Protestants cite to the tax debt of \$696,514.93 owed by Applicant's principal owner, Mary Paulette Hershner, for failure to pay mixed beverage receipts taxes in the past as evidence that Applicant will not be expected to operate the bar in a lawful manner.<sup>2</sup>
- The addition of a bar on Buena Vista Street will increase crime in the area. Protestants contend that crime will increase if Marty's Hideaway is permitted. Local residents, as well as TABC investigator Leo Sandoval, testified that crime, disturbances, and nuisance complaints were much higher when Bill's Hideaway existed, and diminished after it closed. Protestants contend that these problems will increase if Marty's Hideaway is permitted.

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<sup>1</sup> Protestants Ex. 15.

<sup>2</sup> See Protestants Ex. 60.

- Noise and traffic from the bar will be a nuisance to the local residents. Protestants noted the close location to existing residences and the narrowness of the street on which the bar would be located. The testimony of witnesses indicated that there are already parking and noise problems at night because of bars located on Fitzhugh, and these problems would be expected to increase significantly if Marty's Hideaway—which is much closer to the residences on a dark, narrow side street—is permitted.
- The proposed bar does not meet building codes. Protestants presented the testimony of Scott McCaslin, an architect who reviewed the existing building and plans to determine whether they complied with building codes, the Americans with Disabilities Act (ADA) requirements (or applicable Texas Accessibility Standards), and zoning requirements. He testified to numerous deficiencies, ranging from too few parking spaces to improper exit and entry locations, among other things.

Protestants point out that there is significant community opposition to the requested permits, including a Dallas City Councilmember and many local residents and other business owners. Finally, although TABC has remained neutral as a party to this case, its principal investigator charged with evaluating the applications (Leo Sandoval) testified that, in his opinion, the permits should not be granted because they would be against the general welfare, health, peace, morals, and safety of the community. For all of these reasons, Protestants urge the permits to be denied.

## **2. Applicant's Case**

Applicant argues that the location of the proposed establishment is entirely appropriate and will not negatively impact the community in the manner alleged by Protestants. Applicant notes that its other bars have a relatively good compliance history, with just a handful of warnings and only one violation. Moreover, Applicant argues that Marty's Hideaway cannot be compared to those other bars because it will not have dancing. Therefore, any issues associated with dancers at the other clubs would be inapplicable to the evaluation for Marty's Hideaway, which will be simply a piano bar.

Applicant also disputes that anything about the bar will have a negative effect on the area. Applicant notes that the location in issue had a bar, Bill's Hideaway, for many years until 2009. Applicant disagrees that the area has changed much since Bill's Hideaway closed in 2009. Further, the area already has two other permitted clubs close by—Pub Pegasus and Zippers. Applicant's evidence indicated that there would be off-duty police officers employed as security at the bar to ensure that crime and nuisance problems are avoided. Applicant would also employ parking attendants and has a lease option on additional parking spaces associated with nearby businesses. Therefore, Applicant argues that parking will not be a problem. Applicant also asserts that its employees will be responsible for cleaning up trash around the bar daily.

Applicant argues that noise also will not be a problem because Marty's Hideaway is going to be a piano bar, with no disc jockey or dancing. Accordingly, Applicant contends that noise from the bar will be minimal. Applicant points out that it is located in the commercial part of Buena Vista Street, in a location that has been commercial for many years, and is consistent with the other types of facilities around it.

Finally, Applicant asserts that there is no basis for Protestants' concerns regarding building codes or ADA compliance. Applicant notes that the governmental entities charged with enforcing various building and zoning requirements (such as the City of Dallas, the Texas Department of Licensing and Regulation, and the TABC) have not found any violations or non-compliance. Moreover, if they do, Applicant contends it will work with those entities to resolve any problems in a timely manner.

Given the long history of a bar in the location where Marty's Hideaway is sought to be permitted, the fact that Applicant's compliance history is relatively good, and the steps Applicant proposes to take to ensure that the bar will cause no nuisance or traffic problems, Applicant urges that the permits be approved because there is simply no basis for denying them.

**D. ALJ's Analysis**

After considering the evidence, the ALJ concludes that most of Protestants' concerns are without merit. Applicant's compliance history is relatively good, with only one noted violation among three bars and only a handful of warnings over the last decade.<sup>3</sup> Although Protestants may disagree with some of Applicant's advertising or the conduct that has occurred at Applicant's other bars, the advertising and conduct in issue were legal and expected of the type of bars in issue (namely, gay bars with male dancers). The exception is the incident of prostitution that led to the one violation found by TABC, and that appears to have been an isolated incident. Further, the building code issues are properly regulated by other entities and there has been no showing of non-compliance found by any regulating body over the current building proposed for Marty's Hideaway. While Applicant's tax debt is a concern, Applicant has an agreement in place with the Comptroller for paying that debt and that alone does not appear to be a justification for denying a permit to the proposed location. So, given the evidence in the record, the ALJ does not find that the manner in which Applicant has conducted its business is a valid basis for denying the permits in this case.

However, in evaluating the application, the ALJ does not focus solely on the manner in which Applicant may operate but also considers the "place" where the proposed facility will be located. Here, Protestants make a compelling case. Although a bar was previously operated in the same location as Marty's Hideaway, that bar closed in 2009. The evidence indicates that noise, crime, and nuisance problems have diminished since Bill's Hideaway closed. Further, Buena Vista Street is a relatively narrow side street that consists primarily of residential buildings.<sup>4</sup> Marty's Hideaway would be the closest commercial building to those residences, and the next commercial building adjacent to it contains a dentist office (that operates principally during normal daytime working hours). Marty's Hideaway is literally less than 10 feet from the nearest residential building—one of the townhome buildings of the Parkwood Townhomes.<sup>5</sup> Attachment 1 to this PFD visually shows this close proximity.

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<sup>3</sup> See Applicant Ex. 1.

<sup>4</sup> See TABC Ex. 1 at 27.

<sup>5</sup> See TABC Ex. 1 at 21 and 31.

A bar that is open until 2:00 a.m., with an open air patio and music, is not consistent with the general welfare and peace of the local community. Rather, such would be expected to be disruptive to local residents and be a nuisance to them. This is demonstrated not only by the evidence about the area but also by the significant opposition to the requested permits by local residents and business owners, some of whom testified at the hearing. Further, although TABC has remained neutral, its own investigator testified that in his opinion the permits should not be granted. Applicant argues that new residential development that occurs after a bar is in place should not be used as a justification for closing the bar. While this may be true, that is not the situation in this case. Applicant is proposing a new facility, and the prior bar closed more than three years ago. Applicant cannot rely on the prior bar's existence to bootstrap its application; rather, the area is evaluated as it is at the time relevant to the application.

In addition to the disruptive nature of the bar itself to the local residents, the ALJ also has significant concerns that the bar will negatively impact parking and traffic for the residents on Buena Vista Street. The street is a narrow residential side street that would appear to barely allow for two-way traffic if cars are parked on one side of the street (and would not allow for two-way traffic if cars are parked on both sides). The evidence indicates there are already parking problems along Buena Vista. If an additional bar is added directly on that street, the ALJ expects this will significantly add to parking and traffic problems and create additional nuisance factors that are against the general welfare and safety of the residents that live on the street.<sup>6</sup>

So, while the ALJ is not necessarily concerned with the manner in which Applicant would operate a bar, he does find that the proposed location—immediately next to and across the street from residential housing—is currently not suitable for a late-night bar with an open-air patio. Therefore, the ALJ finds that the place in which Applicant would conduct its business warrants the refusal of the permits based on the general welfare, peace, morals, and safety of the people, and he recommends that the permits be denied. In support of this recommendation, the ALJ makes the following findings of fact and conclusions of law.

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<sup>6</sup> Although Paulette Hershner testified to having lease options for additional nearby parking, there was no documented evidence of the leases or their terms, so the ALJ is unable to determine whether such options would alleviate parking concerns. Moreover, even if additional parking is available, traffic concerns still remain.

### III. FINDINGS OF FACT

1. Mary Paulette Hershner, on behalf of Hershner Enterprises, LLC d/b/a Marty's Hideaway (Applicant) has 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 known as Marty's Hideaway, located at 4144 Buena Vista Street in Dallas, Dallas County, Texas.
2. Protests to the application were filed by Dallas City Councilwoman Angela Hunt, numerous individual homeowners, and a local homeowners association (collectively, Protestants).
3. On July 9, 2012, the TABC referred the matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.
4. On July 11, 2012, TABC Staff issued a 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 a short, plain statement of the matters asserted. A Second Amended Notice of Hearing was sent out on January 7, 2013, containing the same information, as well as additional supplemental information regarding the detailed nature of the protests.
5. On January 18, 2013, a public hearing was convened in this matter in Dallas, Texas. Administrative Law Judge (ALJ) Craig R. Bennett presided. Applicant was represented by attorney Timothy E. Griffith. Protestants were represented by attorneys Van Shaw and Collen Meyer. TABC Staff was represented by Lisa Crissman, staff attorney. The hearing concluded that same day, but the record did not close until February 5, 2013, after written closing arguments were filed by the parties.
6. The requested permits are for Marty's Hideaway, a new establishment to be located in a building that was originally built as a house, but rezoned commercial.
7. Until 2009, a bar known as Bill's Hideaway was in the proposed location for Marty's Hideaway. Since 2009, the building has been empty and the area has continued to develop residentially.
8. Noise, crime, and nuisance problems have diminished in the area since Bill's Hideaway closed in 2009.
9. The proposed location for Marty's Hideaway consists of a main front building, a back patio, and then a back building that has a garage-type door that can be opened. The building and patio area are located approximately ten feet from an adjoining townhome complex (Parkwood Townhomes), and is directly across the street from another residential complex. On the other side of the proposed location for Marty's Hideaway are a parking lot and a small dentist's office.

10. The proposed location for Marty's Hideaway faces onto Buena Vista Street, which is a relatively narrow side street off a larger road—Fitzhugh Avenue. There are two existing permitted bars on Fitzhugh Avenue very close to Buena Vista Street, but both of these are on Fitzhugh Avenue, which is a divided six-lane road.
11. Marty's Hideaway would be the closest commercial building to the Parkwood Townhomes and most of the other residential properties on Buena Vista Street.
12. Residents currently experience parking problems on Buena Vista Street.
13. Many local residents and business owners oppose the permits.
14. A bar that is open until 2:00 a.m., with an open-air patio and music, is not consistent with the general welfare and peace of the local community. Rather, such would be expected to be disruptive to local residents and be a nuisance to them.

#### IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Texas Alcoholic Beverage Code Chapters 1 and 5 and Sections 6.01, 11.41, 11.46, and 32.01.
2. SOAH 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, pursuant to Texas Government Code Chapter 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, Texas Government Code Sections 2001.051 and 2001.052.
4. Based on the foregoing findings of fact, a preponderance of the evidence shows that the place in which Applicant proposes to conduct its business warrants the refusal of a permit based on the general welfare, peace, morals, and safety of the people and on the public sense of decency. Tex. Alco. Bev. Code §11.46(a)(8).
5. Based on the foregoing findings and conclusions, the original application for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for the premises known as Marty's Hideaway should be denied.

**Signed February 21, 2013.**



**CRAIG R. BENNETT**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**



tabbles® PFD Attachment  
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