

DOCKET NO. 624310

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
KENNETH WILLIAMS, VICTORINO A. ZELAYA, KEITH WALTISPERGER, VICTORINO FUENTES, RAMIRA FUENTES, AND CHARLES AND CAREN MCCALLISTER, Protestants	§	
	§	
	§	
	§	
VS.	§	
	§	
HEIGHTS BIER GARDEN LLC, D/B/A HEIGHTS BIER GARDEN, Applicant	§	ALCOHOLIC
	§	
	§	
ORIGINAL APPLICATION For MB, LB, AND PE PERMITS	§	
	§	
	§	
	§	
MONTGOMERY COUNTY, TEXAS (SOAH DOCKET NO. 458-14-3067)	§	
	§	
	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 12th day of September, 2014, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Stephen J. Burger presiding. The hearing convened on May 2, 2014 and the SOAH record closed on that same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on June 12, 2014. The Proposal for Decision was properly served on all parties, who were given an opportunity to file exceptions and replies as part of the record herein. No exceptions were filed.

After review and due consideration of the Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order as if such were fully set out and separately stated herein.

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

IT IS THEREFORE ORDERED that Respondent's application for the above permits and certificate be **GRANTED**.

This Order will become **final and enforceable** on the 7th day of October, 2014, **unless a Motion for Rehearing is filed by the 6th day of October, 2014.**

SIGNED this the 12th day of September, 2014, at Austin, Texas.



Sherry K-Cook, Executive Director
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 12th day of September, 2014.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Stephen Burger
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, TX 77018
VIA FACSIMILE: (512) 322-2061

Heights Bier Garden LLC
d/b/a Heights Bier Garden
RESPONDENT/APPLICANT
12302 Westmere Dr.
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Charles and Caren McCallister
PROTESTANTS
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Houston, TX 77008
VIA FIRST CLASS MAIL, CMRRR # 70120470000133008453

Kenneth Williams
PROTESTANT
2330 Tannehill Dr.
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VIA FIRST CLASS MAIL, CMRRR # 70120470000133008460

Victorino Zelaya
PROTESTANT
1511 N. Shepherd Dr.
Houston, TX 77008
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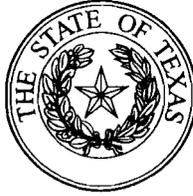
Keith Waltisperger
PROTESTANT
1431 N. Shepherd Dr.
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PROTESTANT
1511 Nashua
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Sandra K. Patton
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: Sandra.patton@tabc.texas.gov

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

June 12, 2014

RECEIVED

JUN 13 2014

12:00 PM '14

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

VIA REGULAR MAIL

RE: SOAH Docket No. 458-14-3067; Texas Alcoholic Beverage Commission vs. Heights Bier Garden LLC d/b/a Heights Bier Garden

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.

Sincerely,

A handwritten signature in black ink that reads "S. Burger".

Stephen Burger
Administrative Law Judge

SJB/mr
Enclosure

xc Sandra Patton Texas Alcoholic Beverage Commission, 427 W. 20th Street, Suite 600, Houston, TX 77008 - VIA REGULAR MAIL
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA REGULAR MAIL
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA REGULAR MAIL
Clyde Burleson and Michael Craig, Attorneys at Law, 1533 W. Alabama, Suite 100, Houston, TX 77006 - VIA REGULAR MAIL
Charles and Caren McCallister, Protestants, 1420 W. 15th Street, Houston, TX 77008 - VIA REGULAR MAIL

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Dr. Kenneth H. Williams, Protestant, 2330 Tannehill Drive, Houston, TX 77008 – VIA REGULAR MAIL
Victorino A. Zelaya, Protestant, 1511 N. Shepherd Drive, Houston, TX 77008 – VIA REGULAR MAIL
Keith Waltisperger, Protestant, 1431 N. Shepherd Drive, Houston, TX 77008 – VIA REGULAR MAIL
Victorino Fuentes, Protestant, 1501 W. 15th Street, Houston, TX 77008 – VIA REGULAR MAIL
Ramira Fuentes, Protestant, 1511 Nashua, Houston, TX 77008 – VIA REGULAR MAIL

another veterinarian. He has owned this property for about 35 years. His number one concern with the new proposed establishment is security. There are controlled drugs located at his location, and he is concerned that there will be break-ins should Applicant be granted its permits. Mr. Williams is also concerned about the increased traffic and the additional noise that will be created if the bar is opened. He notes the location is bounded by N. Shepherd Drive and N. Durham Drive, which are one-way, four-lane roads that are very busy.

He stated that the animals at the clinic, many of which are in recovery, may be subjected to increased stress from the bar noise. He admitted he does not know what kind of bar is proposed.

2. Testimony of Daniel Hendrix

Daniel Hendrix is an employee of the animal clinic formerly owned by Mr. Williams. He echoed Mr. Williams' concerns.

3. Testimony of Caren McCallister

Since 1991, Caren McCallister and her husband Charles have lived at 12 W. 15th Street, about one block from the proposed bar. Ms. McCallister testified that there have been many motor vehicle accidents on W. 15th and N. Durham Drive, some of which have damaged their property. She believes there will be more accidents due to increased traffic if the bar is opened. Ms. McCallister also believes traffic noise will increase and that property values will decrease if the bar is opened. She also testified that she did not know that Applicant had torn down a "crack house" to make room for a parking lot at the new bar.

4. Testimony of Charles McCallister

Charles McCallister echoed the testimony of his wife.

5. Documentary Evidence

Ms. McCallister submitted photos of damage to her property resulting from motor vehicle accidents over the past years.

B. Applicant's Case

1. Testimony of Lieutenant Ronald Burza

Lieutenant Ronald Burza is the officer in charge of the area where the prospective bar will be located. He stated that the general area is mostly residential, but more businesses have moved in recently. He believes the area has improved. The two main roads, N. Shepherd Drive and N. Durham Drive, are very busy streets and there have been about 80 motor vehicle accidents in the area over the past 2 years. Criminal activity has decreased recently.

Lt. Burza does not believe the bar will be a detriment to the community, and he would have no problem with the bar if he resided in the area. Off-duty officers will be working at the bar. There have been no problems with the other bars Applicant operates in the city, and Applicant has acted very professionally in the past. The loudspeakers Applicant intends to use will be pointed towards N. Shepherd Drive.

2. Testimony of Andy Aweida

Andy Aweida is the applicant. He has owned nine alcohol-related businesses over the past several years, and has had no TABC violations in the past 9 years. His proposed business will be a "beer garden" that will be family friendly, providing food and drinks and will also have an outdoor area with greenery and trees. Music will be mainly Top 40 and easy-listening. The building will be about 3,000 square feet on the inside, and 2,000 square feet on the outside entertaining area. Two new parking lots will be built. Hours of operation will be from 11:00 a.m. to 2:00 a.m., seven days per week.

The bar's entrance will face N. Shepherd Drive, which Mr. Aweida states is mostly commercial. The loudspeakers for music will face N. Shepherd Drive, and will not be aimed towards residential neighbors. A fence will be built around the parking lot on the south side. All servers will be TABC trained, and police officers will be hired when the bar is busiest.

3. Testimony of Jeff Barati

Jeff Barati is a partner of Mr. Aweida. He testified that one of the owners will be at the bar periodically. He also added that if the Mr. Williams wants a fence built between the veterinary clinic and the bar, the bar owners would build it.

4. Documentary Evidence

A review of the Applicant's documents generally comports with the testimony, except the ALJ notices that there were four written warnings from the TABC given to Applicant in 2007, 2008, 2009, and 2013, relating to different establishments apparently owned by Applicant. Additionally, in 2008 and 2013, "Place or Manner, Misc." violations were dismissed without prejudice relating to establishments owned by Applicant. In 2007, a "Place/Manner of Operation-Citizen Protest" violation was disposed of by the application being granted.

A map presented by Applicant shows that a tortilla factory, car dealership, and a multi-level storage business (under construction) are nearby or adjacent to the proposed bar, in addition to the veterinary clinic and the parking lots of the proposed bar.

A handwritten letter from Carlos and Abeline Flores was submitted stating that they have lived at 1410 W. 15th for over 40 years, detailing the various businesses that have preceded Applicant's proposed bar, the last two businesses being car lots. The Flores add that Applicant has cleaned up the property since it purchased it, and they contend they have no objections to the proposed bar, understand Applicant has a good business reputation, and believe the bar will attract younger professionals to the area.

C. TABC Evidence

The TABC file includes photos of the abandoned car lot building (covered with graffiti), that had been located at the location where Applicant's bar is proposed to be situated.

D. Analysis

To prevent the issuance of permits for Applicant's proposed bar, Protestants must prove their case by a preponderance of the evidence. After a review of all the relevant evidence, the ALJ finds that Protestants have not shown sufficient evidence to deny the issuance of Applicant's permits on the basis of the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. Nor have Protestants shown that some unusual condition or situation may exist to prevent Applicant, a qualified applicant requesting to operate in a wet area, from receiving alcoholic permits for the proposed premises.

In a case such as this, where there is no operating bar, the ALJ, after considering all the relevant existing facts, must make reasonable inferences and attempt to foresee how the future bar will affect the general welfare, health, peace, morals, and safety of the people and their sense of decency. Additionally, the ALJ must determine whether an unusual condition or situation will be presented by Applicant's bar.

The ALJ notes that neither the TABC nor any other government entity is contesting the issuance of the requested permits for Applicant. The proposed bar will be located between two very busy four-lane roads on which mainly commercial businesses are located, along with scattered private homes. Adjacent to or nearby the proposed bar is a tortilla factory, a car dealership, a veterinary clinic, and a multi-level storage business (under construction). The owner of the veterinary clinic property is protesting the new bar, claiming he is concerned about the clinic's security given that controlled substances are kept there. While there may be a possibility that the additional people working and patronizing the bar could present a theft or other problem to the clinic, at this time that possibility is unreasonably speculative. Additionally, Applicant has offered to erect a fence between the clinic and the bar property.

While the bar will increase the traffic on the adjacent streets, that does not create a condition warranting the refusal of the permit based on the general welfare of the public, or the public sense of decency. As to the noise from the bar that Mr. Williams is concerned with, Applicant testified the loudspeakers will be facing N. Shepherd Drive, which is not towards the clinic. Any excessive noise or traffic problems at this time would be speculative.

The McCallisters, who live about one block from the future bar, cite past instances of motor vehicles crashing onto their property from the adjacent streets, and they are concerned that these incidents will increase once the bar is open. While there is no doubt there will be additional traffic from the bar, and that some drivers will have consumed alcohol, that fact alone is too speculative and does not at this time show that it will create a condition warranting the refusal of the permit based on the general welfare of the public, or the public sense of decency.

Applicant has a good record according to TABC records regarding its ownership of numerous bars. Additionally, Applicant's owners' testimony that they intend on creating a "family friendly" beer garden-type bar is credible. The ALJ is cognizant of Protestants' perceptions that Applicant's bar may present future problems. At this time however, Protestants have not shown they have reasonable grounds to believe that the place or manner in which Applicant intends to conduct its business warrants the refusal of the permits based on the general welfare, health, morals, and safety of the people and on the public sense of decency.

IV. RECOMMENDATION

The ALJ recommends that Applicant's permits be granted.

V. FINDINGS OF FACT

1. Heights Bier Garden LLC d/b/a Heights Bier Garden (Applicant) filed an application for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit and a Beverage Cartage Permit for the premises located at 1433 N. Shepherd Drive, Houston, Harris County, Texas 77077.

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.

A public hearing was held and the record closed on May 2, 2014, before Stephen J. Burger, ALJ, in Houston, Harris County, Texas. Protestants appeared and represented themselves. The TABC Staff Attorney was Sandra Patton. Applicant was represented by Clyde Burleson and Michael Craig, attorneys.

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 (Code) § 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. Civ. App. 8th Dist., 1983); In re Simonton Gin, Inc., 616 S.W.2d 274 (Tex. Civ. App. 1st Dist., 1981).

III. DISCUSSION OF EVIDENCE AND ANALYSIS

A. Protestants' Case

1. Testimony of Kenneth Williams

Kenneth Williams testified that he is a veterinarian formerly practicing at the clinic which is located next to the proposed Bier Garden. He now only owns the property and he leases it to

2. Kenneth Williams, Victorino A. Zelaya, Keith Waltisperger, Victorino Fuentes, Ramira Fuentes, and Charles and Caren McAllister (Protestants) filed a protest against the original application of Applicant 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 April 9, 2014, was issued by the Texas Alcoholic Beverage Commission (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 May 2, 2014, 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 Sandra Patton, Staff Attorney. Protestants represented themselves. Applicant was represented by attorneys Clyde Burlison and Michael Craig. Evidence was received and the record closed on the same date.
5. Applicant has met all TABC requirements to hold the permits for its location, and the TABC has no independent evidence to protest the issuance of the permits.
6. The intended location of Applicant's bar is surrounded by a tortilla factory, used car dealer, storage facility, vacant lots, and veterinary clinic.
7. Applicant's prospective bar will be a "beer garden" with approximately 3,000 square feet indoors and 2,000 square feet outdoors. Two parking lots will be built. Loudspeakers will be aimed towards N. Shepherd Drive. The bar will be open seven days a week, from 11:00 a.m. to 2:00 a.m.
8. Applicant will hire police officers for security when the bar is busiest.
9. N. Shepherd Drive and N. Durham Drive are four-lane roads.
10. Protestant Kenneth Williams owns the property next door to Applicant's proposed bar, on which is a veterinary clinic storing controlled drugs. Mr. Williams believes Applicant's bar will pose a security risk for the controlled drugs kept at the clinic, and the increased traffic and noise from the bar will create problems for animals at the clinic.
11. Protestants Mr. and Mrs. McCallister live at 1420 W. 15th Street, about one block from Applicant's proposed bar.
12. Mr. and Mrs. McCallister have had incidents in the past of motor vehicles colliding with and damaging their property. The McCallisters believe Applicant's bar will expose their home to more traffic noise and more motor vehicle accidents.
13. In 2008 and 2013, "Place or Manner, Misc." TABC alleged violations against Applicant's other establishments were dismissed without prejudice.

14. No unusual condition or situation exists that would warrant the refusal of Applicant's permits.

VI. CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this matter. Tex. Alco. Bev. Code (Code) ch. 5 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 ch. 2003 and Code § 5.43.
3. The parties received proper and timely notice of the hearing pursuant to the Tex. Gov't Code §§ 2001.051 and 2001.052.
4. The place or manner in which Applicant intends to conduct its business does not warrant a refusal to issue the requested permits, and the issuance of the requested permits will not adversely affect the general welfare, health, peace, morals, and safety of the people or violate the public sense of decency. Code § 11.46(a)(8).
5. The place or manner in which Applicant intends to conduct its business does not present an unusual condition or situation warranting the denial of the Applicant's permits.
6. Applicant's permits should be granted.

SIGNED June 12, 2014.


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