

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

October 30, 2014

RECEIVED
NOV 3 2014
TAGS HOUSTON
LEGAL

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

VIA REGULAR MAIL

RE: SOAH Docket No. 458-14-5030; Texas Alcoholic Beverage Commission vs. Joe Alberto Villarreal d/b/a Bayou City Ice House

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, appearing to be "CLM", written over a circular stamp or mark.

Carrie L. McLarty
Administrative Law Judge

CLM/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 W. Bursleson, Attorney for Respondent, 1533 W. Alabama, Suite 100, Houston, TX 77006 - VIA
REGULAR MAIL

2020 North Loop West, Suite 111, Houston, Texas 77018
713-957-0010 (Main) 713-812-1001 (Fax)
www.soah.state.tx.us

State Senator Sylvia R. Garcia, District 6, Protestant, 5425 Polk Street, Suite 125, Houston, TX 77023 – VIA REGULAR MAIL
Victor Villarreal, Greater Magnolia/Pineview Place Civic Club, Protestant, 1728 Esperanza Street, Houston, TX 77023 – VIA REGULAR MAIL
Oscar Ramirez, Protestant, 6503 Avenue N, Houston, TX 77011 – VIA REGULAR MAIL
Alicia Ramirez, Protestant, 6503 Avenue N, Houston, TX 77011 – VIA REGULAR MAIL
Rosa Yeveirino, Protestant, 6629 Avenue N, Houston, TX 77011 – VIA REGULAR MAIL
Rosalba Heredia, Protestant, 6602 Avenue N, Houston, TX 77011 – VIA REGULAR MAIL
Luis Heredia, Protestant, 6602 Avenue N, Houston, TX 77011 – VIA REGULAR MAIL
Luigi Ramirez, Protestant, 6503 Avenue N, Houston, TX 77011 – VIA REGULAR MAIL
Maria Jimenez, Protestant, 6605 Avenue N, Houston, TX 77011 – VIA REGULAR MAIL
Robert Jimenez, Protestant, 6605 Avenue N, Houston, TX 77011 – VIA REGULAR MAIL
Maria Zuniga, Protestant, 6623 Avenue S, Houston, TX 77011 – VIA REGULAR MAIL
Ramiro Gonzalez, Protestant, 6623 Avenue S, Houston, TX 77011 – VIA REGULAR MAIL
Jose Ramon Garcia, Protestant, 7734 Southern, Houston, TX 77087 – VIA REGULAR MAIL

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The hearing in this case was held on October 10, 2014, in Houston, Texas, before ALJ Carrie L. McLarty. Applicant appeared in person and was represented by Clyde W. Burlison. TABC's Staff (Staff) was represented by staff attorney Sandra K. Patton. Protestant Senator Sylvia Garcia appeared through her representative, Matala Idi. Protestant Greater Magnolia/Pineview Place Civic Club appeared through its president, Victor Villarreal. The following individual homeowner and citizen Protestants appeared at the hearing: Oscar A. Ramirez, Rosa Yevevino, Alicia Ramirez, Rosalba Heredia, Luigi A. Ramirez, Luis Heredia, Maria Jimenez, Robert Jimenez, Maria Zuniga, Ramiro Gonzalez, and Jose Ramon Garcia.

There are no disputed issues of notice or jurisdiction in this proceeding. Therefore, matters relating to notice and jurisdiction are set out in the proposed findings of fact and conclusions of law without further discussion here.

II. REASONS FOR DECISION

A. Applicable Law

Protestants have the burden of proof to establish, by a preponderance of the evidence, that the permits should not be issued. 1 Tex. Admin. Code § 155.427. Texas Alcoholic Beverage Code § 11.46(a)(8) provides that an original permit may be denied if “the place or manner in which the applicant may conduct his business warrants the refusal of a permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.”

B. Evidence

1. Staff

TABC staff did not take a position on the application and appeared solely as a jurisdictional petitioner. It produced its records relating to the application. Eric Fontenot, an enforcement agent

with TABC, conducted an initial inquiry into the protest of the applications. He determined the Protestants were primarily concerned with traffic, safety, and noise.

Bayou City Ice House is located on Navigation Boulevard. The east side of the building faces Terminal Street. This is a mixed-use area with residences along Terminal Street. Agent Fontenot interviewed Applicant and visited the premises of Bayou City Ice House. Agent Fontenot's report indicated there were several problems with the parking facilities. Not all of the parking places could be accessed from the existing driveway, including four spaces on the south side of the building that could only be accessed by driving over a curb. He also noted that, if all nine of the parking places on the north side of the building are occupied, there is no access, save driving over the curb, to the nine spaces on the east side of the building. Applicant advised Agent Fontenot that he had obtained permits from the City of Houston to cut additional driveways to provide access to the south and east parking areas, although Agent Fontenot determined no such permits were on file.

As to noise, Applicant advised Agent Fontenot that the building was insulated to control noise from the bar but also indicated that he intended to allow the garage-type overhead doors to the bar to remain open during business hours. Applicant said all music would come from a jukebox. He asserted he would not use speakers or allow sound to be amplified outside of the building.

2. Protestants

Protestants contend that, although Bayou City Ice House is not yet in business as a bar, Applicant has demonstrated how he intends to conduct business as evidenced by two fundraising benefits conducted at the premises. Both events produced loud noise levels from loud music and voices emanating from the bar.

Residents stated there was insufficient parking and that patrons parked on both sides of Terminal Street, a two-way road, thereby impeding traffic and visibility, creating hazardous conditions for all motorists. Patrons drove over curbs in order to park in designated parking spaces because there was only one driveway onto the property and the layout of the parking lot did not

provide access to all spaces. Protestants said the curbs around the bar have already sustained damage from persons, including Applicant, driving over them to get to otherwise inaccessible parking spaces. Protestants believe the traffic and parking issues will increase once the bar is fully operational.

3. Applicant

Applicant testified TABC approved his applications as did the City of Houston. He specifically pointed out that the City approved his parking arrangements. Petitioner claimed it was not necessary to drive over the curb to access all parking areas and that he would address any issues with customers driving over curbs as such occurred. He indicated he had additional space in which to provide parking should the need arise.

Applicant stated he had not received a noise citation in connection with the benefits and added that no one was arrested at either event. He said noise would not be an issue because he wants to bring in the “over-40” clientele from a previous business. Applicant said he does not intend to operate a “shot” bar for young people to drink, adding that he did not tolerate “power drinking.”

C. Analysis

Applicant argues that Bayou City Ice House will not negatively impact the community as to either excessive noise or parking congestion. The bar is newly-constructed and no bar previously existed at this location. Although the area in which the bar is located is mixed use, a bar that is open until 2:00 a.m., with doors open to the outside, is not consistent with the peace of the community’s residents. Music emanating from an open doorway, even if such is only from a jukebox, would reasonably be expected to be a nuisance to local residents, as would clients coming and going from the bar.

It is clear that Applicant’s parking arrangements are unworkable. There is only one driveway into the property. While there are three areas of paved, marked parking for use by patrons of Bayou City Ice House, located on three sides of the building, there is only one driveway servicing the

property. Not all of the parking places can be accessed from the existing driveway, and patrons will either have to destroy the curbs surrounding the bar or park on the streets. During the benefits, Protestants reported congested traffic on the two-lane street across from the bar, resulting in limited visibility and driving room for residents attempting to use the street. This insufficient, inadequate parking arrangement would reasonably be expected to impact the general welfare and safety of local residents.

Accordingly, the ALJ finds that the place and manner in which Applicant would conduct his business warrants the refusal of the permits based on the general welfare, peace, morals, and safety of the people, and recommends that the permits be denied.

III. PROPOSED FINDINGS OF FACT

1. Joe Alberto Villarreal d/b/a Bayou City Ice House (Applicant) has filed an original application with the Texas Alcoholic Beverage Commission (TABC) for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit for the premises known as Bayou City Ice House, located at 6555 Navigation Blvd. in Houston, Texas.
2. Protests to the application were filed by State Representative Ana Hernandez, Senator Sylvia Garcia, the Greater Magnolia/Pineview Place Civic Club, and numerous individual homeowners (collectively, Protestants).
3. On September 5, 2014, 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.
4. On October 10, 2014, a public hearing was convened in Houston, Texas. Administrative Law Judge (ALJ) Carrie L. McLarty presided. Applicant was represented by attorney Clyde W. Burleson. TABC's Staff was represented by staff attorney Sandra K. Patton. Protestant Senator Sylvia Garcia appeared through her representative, Matala Idi. Protestant Greater Magnolia/Pineview Place Civic Club appeared through its president, Victor Villarreal. The following individual homeowner and citizen Protestants appeared at the hearing: Oscar A. Ramirez, Rosa Yeverino, Alicia Ramirez, Rosalba Heredia, Luigi A. Ramirez, Luis Heredia, Maria Jimenez, Robert Jimenez, Maria Zuniga, Ramiro Gonzalez, and Jose Ramon Garcia.

5. Bayou City Ice House is located in a mixed-use area consisting of residences and businesses. The building has garage-type doors that can be opened and is directly across the street from a residence.
6. Applicant will be open until 2:00 a.m. and intends to play music from a jukebox, with the doors open, during business hours.
7. The parking lot on the premises has three areas of paved, marked parking for use by patrons of Bayou City Ice House, but only one driveway services the property. Not all of the parking places can be accessed from the driveway, including four spaces on the south side of the building that could only be accessed by driving over a curb. If all nine of the parking places on the north side of the building are occupied, there is no access, save driving over the curb, to the nine spaces on the east side of the building.
8. Patrons who are unable to park in the parking lot must park on the sides of the two-lane roadway on the side of Bayou City Ice House, impeding traffic and visibility in the area.
9. A bar that is open until 2:00 a.m., with open doors and music, is not consistent with the general welfare and peace of the local community and will be a nuisance to local residents.
10. A bar with insufficient parking and parking that is only accessible by driving over a curb will cause traffic congestion and impede sight lines on a street used by local residents, and is not consistent with the general welfare and safety of local residents.

IV. PROPOSED CONCLUSIONS OF LAW

1. Petitioner has jurisdiction over this case pursuant to Texas Alcoholic Beverage Code Chapters 1 and 5 and Sections 6.01, 11.41, 11.46, and 32.01.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the 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.-052.
4. Based on the proposed 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, Applicant's the original application for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit should be denied.

SIGNED October 20, 2014.



**CARRIE L. MCLARTY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

DOCKET NO. 627034

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
STATE REPRESENTATIVE ANA HERNANDEZ, SENATOR SYLVIA GARCIA, GREATER MAGNOLIA PINEVIEW PLACE CIVIC CLUB AND OTHER CONCERNED CITIZENS, Protestants	§	
	§	
	§	
VS.	§	ALCOHOLIC
	§	
JOE ALBERTO VILLARREAL D/B/A BAYOU CITY ICE HOUSE, Respondent/Applicant	§	
	§	
	§	
ORIGINAL APPLICATION FOR MB PERMIT, LB PERMIT & PE PERMIT	§	
	§	
	§	
HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-14-5030)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 15 day of April, 2015, 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 Carrie L. McLarty presiding. The hearing convened on October 10, 2014, and the SOAH record closed that same day. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on October 20, 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.

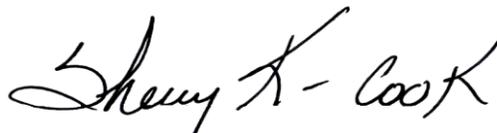
After review and due consideration of the Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set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

All motions, requests for entry of Proposed Findings of Facts 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 original application for a Mixed Beverage Permit, Mixed Beverage Late Hours Permit, and Beverage Cartage Permit be **DENIED**.

This Order will become final and enforceable on the 6 day of May, 2015, unless a Motion for Rehearing is filed by the 7 day of May, 2015.

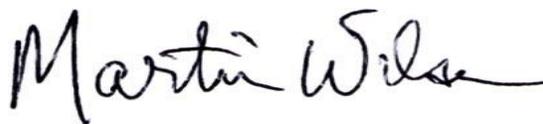
SIGNED this the 15 day of April, 2015, at Austin, Texas.



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 15 day of April, 2015.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

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

Clyde W. Burleson
ATTORNEY FOR RESPONDENT
1533 W. Alabama, Suite 100
Houston, TX 77006
VIA REGULAR MAIL, CMRRR# 7012 0470 0001 3301 2603

State Senator Sylvia R. Garcia
PROTESTANT
5425 Polk Street, Suite 125
Houston, TX 77023
VIA REGULAR MAIL, CMRRR# 7012 0470 0001 3301 2733

Victor Villarreal
Greater Magnolia/Pineview Place Civic Club
PROTESTANT
1728 Esperanza Street
Houston, TX 77023
VIA REGULAR MAIL, CMRRR# 7012 0470 0001 3301 2726

Oscar Ramirez
PROTESTANT
6503 Avenue N
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 7012 0470 0001 3301 2719

Alicia Ramirez
PROTESTANT
6503 Avenue N
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 7012 0470 0001 3301 2702

Rosa Yeverino
PROTESTANT
6629 Avenue N
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 7012 0470 0001 3301 2696

Rosalba Heredia
PROTESTANT
6602 Avenue N
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 7012 0470 0001 3301 2689

Luis Heredia
PROTESTANT
6602 Avenue N
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 7012 0470 0001 3301 2672

Luigi Ramirez
PROTESTANT
6503 Avenue N
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 7012 0470 0001 3301 2665

Maria Jimenez
PROTESTANT
6605 Avenue N
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 7012 0470 0001 3301 2658

Robert Jimenez
PROTESTANT
6605 Avenue N
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 7012 0470 0001 3301 2641

Maria Zuniga
PROTESTANT
6623 Avenue S
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 7012 0470 0001 3301 2634

Ramiro Gonzalez
PROTESTANT
6623 Avenue S
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 7012 0470 0001 3301 2627

Jose Ramon Garcia

PROTESTANT

7734 Southern

Houston, TX 77087

VIA REGULAR MAIL, CMRRR# 7012 0470 0001 3301 2610

Sandra 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

October 1, 2015

RECEIVED

OCT 06 2015

TABC HOUSTON
LEGAL DEPT.

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

VIA REGULAR MAIL

RE: SOAH Docket No. 458-14-5030; Texas Alcoholic Beverage Commission vs. Joe Alberto Villarreal d/b/a Bayou City Ice House

Dear Ms. Cook:

Please find enclosed a Proposal for Decision on Remand 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, appearing to be "CLM", written over a circular stamp or mark.

Carrie L. McLarty
Administrative Law Judge

CLM/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 W. Burlison, Attorney for Respondent, 1533 W. Alabama, Suite 100, Houston, TX 77006 - **VIA REGULAR MAIL**

State Senator Sylvia R. Garcia, District 6, Protestant, 5425 Polk Street, Suite 125, Houston, TX 77023 – VIA REGULAR MAIL

Victor Villarreal, Greater Magnolia/Pineview Place Civic Club, Protestant, 1728 Esperanza Street, Houston, TX 77023 – VIA REGULAR MAIL

Ana Hernandez, State Representative, District 143, 1233 Mercury Drive, Houston, TX 77029 – VIA REGULAR MAIL

Anita Suson, Attorney for Protestants, 700 Gemini, Suite 115, Houston, TX 77058 – VIA REGULAR MAIL

SOAH DOCKET NO. 458-14-5030
TABC NO. 627034

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Jurisdictional Petitioner	§	
	§	
STATE REPRESENTATIVE ANA	§	
HERNANDEZ, SENATOR SYLVIA	§	
GARCIA, GREATER MAGNOLIA	§	
PINEVIEW PLACE CIVIC CLUB,	§	
AND OTHER CONCERNED	§	OF
CITIZENS,	§	
Protestants	§	
v.	§	
	§	
ORIGINAL APPLICATION OF	§	
JOE ALBERTO VILLARREAL	§	
D/B/A BAYOU CITY ICE HOUSE,	§	
Applicant	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION ON REMAND

Joe Alberto Villarreal d/b/a Bayou City Ice House (Applicant) has applied to the Texas Alcoholic Beverage Commission (TABC) for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit for the premises known as Bayou City Ice House, located at 6555 Navigation Blvd. in Houston, Texas. State Representative Ana Hernandez, Senator Sylvia Garcia, the Greater Magnolia/Pineview Place Civic Club, and numerous individual homeowners (collectively, Protestants) oppose issuance of the permits. Protestants contend that the place and/or manner in which Applicant would operate the Bayou City Ice House would be against the general welfare, health, peace, morals, and safety of the community. On May 28, 2015, TABC remanded the case to the State Office of Administrative Hearings (SOAH) for the purpose of allowing additional evidence into the record. After considering the arguments and evidence presented by the parties, the Administrative Law Judge (ALJ) finds that the manner and place in which Applicant would operate Bayou City Ice House is contrary to the general welfare and peace of the community. Therefore, the ALJ recommends that the application be denied.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The remand hearing in this case was held on September 25, 2015, in Houston, Texas, before ALJ Carrie L. McLarty. Applicant appeared in person and was represented by Clyde W. Burleson. TABC's Staff (Staff) was represented by staff attorney Sandra K. Patton. Protestant Senator Sylvia Garcia appeared through her representative, Derek Darnell. Protestant Representative Ana Hernandez appeared through her representative Linda Jamail. Protestant Greater Magnolia/Pineview Place Civic Club appeared through its president, Victor Villarreal. The following individual homeowner and citizen Protestants appeared at the remand hearing: Oscar A. Ramirez, Alicia Ramirez, Maria Jimenez, Rosalba Heredia, and Jose Ramon Garcia. The individual Protestants were represented by attorney Anita Suson.¹

There are no disputed issues of notice or jurisdiction in this proceeding. Therefore, matters relating to notice and jurisdiction are set out in the proposed findings of fact and conclusions of law without further discussion here.

II. REASONS FOR DECISION

A. Remand Order

The original Proposal for Decision (PFD) in this case was issued on October 20, 2014. By Order dated May 28, 2015, Sherry K-Cook, Executive Director of TABC, remanded the case to SOAH and instructed the ALJ to reopen the record and allow the parties to present evidence of any additional unusual conditions justifying refusal of the permit, other than those previously cited in the original PFD; evidence regarding any other similarly situated permits to that of Petitioner's proposed operation; and evidence regarding any changed circumstances since the original hearing that would warrant changing the PFD.

¹ Protestants were not represented by Ms. Suson at the original hearing.

B. Applicable Law

Protestants have the burden of proof to establish, by a preponderance of the evidence, that the permits should not be issued. 1 Tex. Admin. Code § 155.427. Texas Alcoholic Beverage Code § 11.46(a)(8) provides that an original permit may be denied if “the place or manner in which the applicant may conduct his business warrants the refusal of a permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.”

C. Evidence**1. Additional Unusual Conditions**

Protestants relied primarily on their evidence from the original hearing, relating to their concerns that this bar, located in a primarily residential neighborhood, generated an excessive amount of noise. Applicant intends to open at least one bay door to the bar and play music from a jukebox until at least 2:00 a.m. The Protestants point out that, although the operation is not yet in business, Applicant continues to host private parties that disturb the peace of the neighborhood. Protestant Rosalba Heredia demonstrated this through a video recording of a private party that clearly revealed very loud music coming from Applicant’s building. She explained that law enforcement authorities were repeatedly called to the party relating to noise and that, in response, Applicant lowered the music levels. Ms. Heredia stated that the music resumed its loud levels after authorities left the scene.

2. Similarly Situated Permits

Applicant produced documentation, including TABC public inquiry reports, aerial views, and photographs for five permits that he asserts are similar to his proposed operation. All five of the permits are for establishments that are located in or near residential neighborhoods. Three of the operations have outdoor, patio-type seating. Applicant’s attorney, Mr. Burlison, represented that he had personal knowledge that music was played from two of the locations.

3. Changed Circumstances

Applicant testified accessible parking is no longer an issue because he now has two entrances to his parking lot. He said he added French doors to the side of the building facing the neighborhood street in lieu of a bay door. Applicant stated the French doors would remain closed, and the only open bay door would be facing away from the residences. He said he added additional insulation inside the building to reduce noise levels and eliminated one of the four speakers. Applicant testified he has never received a citation for violation of any noise ordinance.

D. Analysis

Applicant argues that Bayou City Ice House will not negatively impact the community as to either excessive noise or parking congestion. Protestants showed that, at a recent private party, loud music emanated from Applicant's building. When law enforcement authorities were summoned to the scene, Applicant lowered the volume of the music; however, once authorities left the scene, the volume was increased. Applicant's conduct during the private parties is indicative of how Applicant would conduct business if the permit is granted and demonstrates his unwillingness to address the concerns of his neighbors.

Applicant relies on *Texas Alcoholic Beverage Com'n. v. Mikulenska*, 510 S.W.2d 616 (Tex. App. – San Antonio 1974, no writ) in support of his position that his application should be granted because the Protestants have failed to show any unusual condition or situation exists to warrant denial of the application. The *Mikulenska* case is the controlling standard in this case. It holds that there must be a showing of some unusual condition or situation is required that would justify denying the application. The facts surrounding the application in the *Mikulenska* case are clearly distinguishable from those at issue in this case. In *Mikulenska*, the proposed bar was located in a small business center and was surrounded by commercial properties for a distance of one mile in either direction. Applicant's bar is across the street from residences. The bar in *Mikulenska* also proposed to conduct operations until 2:00 a.m. but, unlike Applicant's bar, all activities were to be conducted inside a closed building. Protestants have established that a situation in which a bar that plays loud music

through an open bay door until 2:00 a.m. in a residential neighborhood is a situation that warrants denial of this application.

Applicant produced evidence of permits issued to other bars and argued that his operation would be virtually identical to those establishments. While it is true that the other bars appear to be located in or near residential neighborhoods, there is little evidence to show that they are otherwise similar to the manner in which Applicant intends to operate his bar. Specifically, there is no evidence to establish whether the bars were opened prior to the existence of surrounding residential areas or, as in this case, they opened in pre-existing neighborhoods. There is also no showing that the other bars play loud music, through doors opening to the outside, until 2:00 a.m. Such activity is not consistent with the peace of the community's residents. Music emanating from an open doorway, even if such is only from a jukebox, would reasonably be expected to be a nuisance to local residents, as would clients coming and going from the bar. The recording made by Ms. Heredia demonstrates that Applicant is playing very loud music from his establishment and that the music is audible in the neighborhood. Although Applicant testified he will only open one bay door, facing away from the residences, the noise continues to disturb the peace of the neighborhood. His additional efforts to lower noise by adding insulation and eliminating a speaker are equally ineffective.

It is clear that, at the time of the original hearing, Applicant's parking arrangements were unworkable. Applicant added another entrance to the parking lot, creating more useable parking slots at his building. This change serves to mitigate the parking problem addressed by the original PFD.

Accordingly, the ALJ finds that the place and manner in which Applicant would conduct his business warrants the refusal of the permits based on the general welfare, peace, morals, and safety of the people, and recommends that the permits be denied.

III. PROPOSED FINDINGS OF FACT

1. Joe Alberto Villarreal d/b/a Bayou City Ice House (Applicant) has filed an original application with the Texas Alcoholic Beverage Commission (TABC) for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit for the premises known as Bayou City Ice House, located at 6555 Navigation Blvd. in Houston, Texas.
2. Protests to the application were filed by State Representative Ana Hernandez, Senator Sylvia Garcia, the Greater Magnolia/Pineview Place Civic Club, and numerous individual homeowners (collectively, Protestants).
3. October 20, 2014, Administrative Law Judge (ALJ) Carrie L. McLarty issued a Proposal for Decision (PFD) recommending denial of Applicant's application.
4. On May 28, 2015, Sherry K-Cook, Executive Director of TABC, remanded the case to SOAH and instructed the ALJ to reopen the record and allow the parties to present evidence regarding any additional unusual conditions justifying refusal of the permit, other than those previously cited in the original PFD; evidence regarding any other similarly situated permits to that of Petitioner's proposed operation; and evidence regarding any changed circumstances since the original hearing that would warrant changing the PFD.
5. By order dated September 10, 2015, the ALJ notified the parties of the date, time, and location of the remand hearing,
6. On September 25, 2015, a public hearing was convened in Houston, Texas. ALJ Carrie L. McLarty presided. Applicant appeared in person and was represented by Clyde W. Burlison. TABC's Staff (Staff) was represented by staff attorney Sandra K. Patton. Protestant Senator Sylvia Garcia appeared through her representative, Derek Darnell. Protestant Representative Ana Hernandez appeared through her representative Linda Jamail. Protestant Greater Magnolia/Pineview Place Civic Club appeared through its president, Victor Villarreal. The following individual homeowner and citizen Protestants appeared at the remand hearing: Oscar A. Ramirez, Alicia Ramirez, Maria Jimenez, Rosalba Heredia, and Jose Ramon Garcia. The individual Protestants were represented by attorney Anita Suson.
7. Bayou City Ice House is located in a mixed-use area consisting of residences and businesses. The building has garage-type doors that can be opened and is directly across the street from a residence.
8. Applicant will be open until 2:00 a.m. and intends to play music from a jukebox, with a set of bay doors open, during business hours.

9. A bar that is open until 2:00 a.m., with open doors and music, is not consistent with the general welfare and peace of the local community and will be a nuisance to local residents.

IV. PROPOSED CONCLUSIONS OF LAW

1. Petitioner has jurisdiction over this case pursuant to Texas Alcoholic Beverage Code Chapters 1 and 5 and Sections 6.01, 11.41, 11.46, and 32.01.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the 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.-052.
4. Based on the proposed 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, Applicant's the original application for a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit should be denied.

SIGNED October 1, 2015.



CARRIE L. MCLARTY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 627034

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, Petitioner	§	
	§	
STATE REPRESENTATIVE ANA	§	
HERNANDEZ, SENATOR SYLVIA	§	
GARCIA, GREATER MAGNOLIA	§	
PINEVIEW PLACE CIVIC CLUB AND	§	
OTHER CONCERNED CITIZENS,	§	
Protestants	§	ALCOHOLIC
	§	
VS.	§	
	§	
JOE ALBERTO VILLARREAL	§	
D/B/A BAYOU CITY ICE HOUSE,	§	
Respondent/Applicant	§	
	§	
ORIGINAL APPLICATION FOR	§	
MB PERMIT, LB PERMIT & PE PERMIT	§	
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-14-5030)	§	BEVERAGE COMMISSION

POST-REMAND ORDER

CAME ON FOR CONSIDERATION this 25th day of April, 2016, the above-styled and numbered cause.

On April 15, 2015, an Order was issued in this cause denying the application for original permits. The following day, an Order Nunc Pro Tunc Correcting Dates was issued. A timely Motion for Rehearing was filed and on May 28, 2015, an Order Granting Motion for Rehearing and Remanding to the State Office of Administrative Hearings was issued.

A remand hearing was held on September 25, 2015 by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Carrie L. McLarty presiding. The Administrative Law Judge made and filed a Proposal for Decision on Remand containing Findings of Fact and Conclusions of Law on October 1, 2015. The Proposal for Decision on Remand 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 on Remand, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in

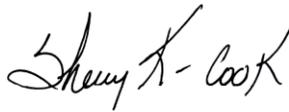
the Proposal for Decision on Remand, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein.

All motions, requests for entry of Proposed Findings of Facts 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 a Mixed Beverage Permit, Mixed Beverage Late Hours Permit, and Beverage Cartage Permit be **DENIED**.

This Order will become final and enforceable on the 19th day of May, 2016, unless a Motion for Rehearing is filed by the 18th day of May, 2016.

SIGNED this the 25th day of April, 2016, 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 25th day of April, 2016.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

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

Clyde W. Burleson
ATTORNEY FOR RESPONDENT
1533 W. Alabama, Suite 100
Houston, TX 77006
VIA REGULAR MAIL, CMRRR #9171082133393776142238

State Senator Sylvia R. Garcia
PROTESTANT
P.O. Box 12068
Austin, TX 78711-2068
VIA REGULAR MAIL, CMRRR# 9171082133393776142221

Victor Villarreal
Greater Magnolia/Pineview Place Civic Club
PROTESTANT
1728 Esperanza Street
Houston, TX 77023
VIA REGULAR MAIL, CMRRR #9171082133393776142214

State Representative Ana Hernandez
PROTESTANT
P.O. Box 2910
Austin, TX 78768-2910
VIA REGULAR MAIL, CMRRR #9171082133393776142207

Anita Suson
ATTORNEY FOR PROTESTANTS
700 Gemini, Suite 115
Houston, TX 77058
VIA REGULAR MAIL, CMRRR #9171082133393776142191

Oscar Ramirez
PROTESTANT
6503 Avenue N
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 9171082133393776142184

Alicia Ramirez
PROTESTANT
6503 Avenue N
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 9171082133393776142177

Rosa Yevevino
PROTESTANT
6629 Avenue N
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 9171082133393776142160

Rosalba Heredia
PROTESTANT
6602 Avenue N
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 9171082133393776142153

Luis Heredia
PROTESTANT
6602 Avenue N
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 9171082133393776142146

Luigi Ramirez
PROTESTANT
6503 Avenue N
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 9171082133393776142139

Maria Jimenez
PROTESTANT
6605 Avenue N
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 9171082133393776142122

Robert Jimenez
PROTESTANT
6605 Avenue N
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 9171082133393776142115

Maria Zuniga
PROTESTANT
6623 Avenue S
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 9171082133393776142108

Ramiro Gonzalez
PROTESTANT
6623 Avenue S
Houston, TX 77011
VIA REGULAR MAIL, CMRRR# 9171082133393776142092

Jose Ramon Garcia
PROTESTANT
7734 Southern
Houston, TX 77087
VIA REGULAR MAIL, CMRRR# 9171082133393776142085

Sandra Patton
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: sandra.patton@tabc.texas.gov