

DOCKET NO. 557931

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
ORIGINAL APPLICATION OF CROSSAN & EVERETT INVESTMENTS LLC D/B/A BUFFALO NICKEL BAR & GRILL MB & LB GILLESPIE COUNTY, TEXAS (SOAH DOCKET NO. 458-07-3312)	§	ALCOHOLIC
	§	
	§	
	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this day, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge George Lambright. The hearing convened on July 10, 2007 and adjourned July 10, 2007. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on August 28, 2007. 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. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

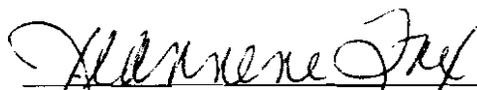
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's original application is hereby **GRANTED**.

This Order will become final and enforceable on October 24, 2007, unless a Motion for Rehearing is filed **before** that date.

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

SIGNED on Sept 27, 2007, at Austin, Texas.

On Behalf of the Administrator,


 Jeannene Fox, Assistant Administrator
 Texas Alcoholic Beverage Commission

CGG/vr

Crossan & Everett Investments LLC
RESPONDENT
d/b/a Buffalo Nickel Bar & Grill
105 S Llano St
Fredericksburg, TX 78624
VIA REGULAR MAIL

Melissa Riddle
ATTORNEY FOR PROTESTANTS
Jonathan and Sharla Godfrey
VIA FAX (636) 532-1082

Jonathan F. Godfrey
Sharla Godfrey
PROTESTANTS
P. O. Box 1532
Fredericksburg, Texas 78624
VIA REGULAR MAIL

Hon. George Lambright
Administrative Law Judge
State Office of Administrative Hearings
San Antonio, Texas
VIA FAX (210) 308-6854

Christopher G. Gee
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Austin District Office

SOAH DOCKET NO. 458-07-3312

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
	§	
HOLY GHOST LUTHERAN CHURCH	§	
AND JONATHAN & SHARLA	§	
GODFREY	§	
Protestants	§	
V.	§	OF
	§	
ORIGINAL APPLICATION OF	§	
CROSSAN & EVERETT INVESTMENTS	§	
LLC, D/B/A BUFFALO NICKEL BAR &	§	
GRILL, MB & LB	§	
Applicant	§	
	§	
GILLESPIECOUNTY, TEXAS	§	
(TABC CASE NO. 557931)	§	ADMINISTRATIVE HEARINGS
Respondent		

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission, Petitioner brought this protest action against the original application of Crossan & Everett Investments LLC D/B/A Buffalo Nickel Bar & Grill, Applicant, alleging that applicant has engaged in conduct that is prohibited and/or in violation of §11.46 (a)(8) and (12) of the Texas Alcoholic Beverage Code as follows: (a) There are inadequate restroom facilities at the establishment; (b) The location needs extensive repairs/remodeling to comply with the Texas Alcoholic Beverage Code; (c) There is no insulation to prevent live or amplified music from causing intrusive noise pollution on nearby residences and businesses.

Further, Christopher G. Nevins, on behalf of Holy Ghost Lutheran Church, and Jonathan F. Godfrey and Sharla Godfrey have filed protests to the issuance of the above permits. They argued the place of manner in which 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 in violation of the Texas Beverage Code § 11.46(a)(8), to wit:

- a) The proximity of the business to residences will be detrimental to the safety of the neighborhood and disruptive to the neighbors, particularly with the late hours permit;
- b) The building is small and in close proximity to residences;
- c) The building is not suited for this type of business; the building is historic and not built for noise protection, and therefore, noise from the building would cause intrusive noise pollution on nearby residences and businesses;
- d) There is no on-site parking;
- e) The establishment will disrupt evening functions held by the Holy Ghost Lutheran Church; and,
- f) Drunk drivers, property vandals, highly aggressive and/or loud individuals would put the members, pastor and guests of Holy Ghost Lutheran Church at risk of their safety, general welfare and peace.

Based on the evidence, the Administrative Law Judge (Judge) finds the Protestants did not prove the allegations by a preponderance of the evidence and recommends that Applicant's original application be granted.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

The Commission and the State Office of Administrative Hearings have jurisdiction over this matter as reflected in the conclusions of law. The notice of intention to institute a protest action and of the hearing met the notice requirements imposed by statute and by rule as set forth in the findings of fact and conclusions of law.

II. HEARING AND EVIDENCE

On July 10, 2007, a hearing was convened before Judge George Lambright, at the State Office of Administrative Hearings, 10300 Heritage Blvd., Suite 250, San Antonio, Texas 78216. Petitioner was represented by Christopher G. Gee, attorney. Protestants Jonathan and Sharla Godfrey appeared and were represented by Melissa Riddle, attorney. Applicant appeared and was represented pro se by Mark Everett, Owner. The record closed the same day.

III. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to the Code § 11.46(a)(8), the Commission may refuse to issue an original application for a permit or license if it finds that the place or manner in which the applicant may conduct his business warrants the refusal of a permit or license based on the general welfare, health, peace, morals, and the safety of the people and on the public sense of decency. Pursuant to the Code § 11.46 (a)(12), the Commission may refuse to issue the original application for a permit or license if it finds that the applicant does not provide an adequate building available at the address for which the permit is sought before conduction any activity authorized by the permit.

TABC and Protestants have the burden to prove any allegation by preponderance of the evidence.

IV. EVIDENCE

A. Documentary Evidence

Petitioner offered and the Court admitted into evidence exhibits, including the Notice of Hearing issued in the case, the Applicant's Application For Retailer's Permits and the Texas Alcoholic Beverage Commission's file regarding the Original Application Protest and Full and Final Settlement and Mutual Release Agreement. Protestants offered and the Court admitted into

evidence exhibits P#1 through P #7 in support of their request to have Applicant's permits denied. Applicant offered and the court admitted exhibit A#1 into evidence in support of the original application and Applicant's fitness to hold the proposed permit.

B. Witnesses

1. Christopher G. Gee, Attorney for TABC

During his presentation, Mr. Gee offered into evidence the Full and Final Settlement and Mutual Release Agreement between Holy Ghost Lutheran Church and Buffalo Nickel. He informed the Judge that the Holy Ghost Lutheran Church has withdrawn its protest and objections to the issuance of the permit and license as evidenced by the Full and Final Settlement and Mutual Release Agreement, marked and admitted as exhibit No. 3. He further informed the Judge that the Texas Alcoholic Beverage Commission has withdrawn its objections and protest to the issuance of the permits which were stated in the Notice of Hearing.

The only remaining parties to the protest are Jonathan Godfrey and Sharla Godfrey.

2. Jonathan Godfrey, Protestant

Mr. Godfrey testified to the following. He lives at 205 East Main St., Fredericksburg Texas. He has lived there for eleven years. Nothing in the area of his residence stays open past 10:00 p.m. or 11:00 p.m. His residence is located on the second floor of his building. The building is composed of his residences, two businesses downstairs and a Bed and Breakfast located upstairs next to his residence. Mr. Godfrey owns the entire building. He leases the bottom floor to other businesses and rents the Bed and Breakfast on the second floor to individuals.

There are three cafes on his block. On the opposing block there are another three cafes. The six cafes have liquor licenses, most of which are for beer and wine. Four of the six applied for and

obtained their licenses since Mr. Godfrey moved into his residence. Mr. Godfrey did not protest any of the four.

The Buffalo Nickel is on the north side of his driveway, approximately sixty-nine feet from the bedroom of his residence. He is protesting the application primarily due to his safety, the safety of his guests and his access to and from his driveway. He is also concerned about noise. The Buffalo Nickel is basically a tin building with no insulation.

From time to time vehicles and construction have blocked his driveway. There is undisposed garbage and junk in the alley of the Buffalo Nickel. At this time the Buffalo Nickel is not open for business. The obstruction was caused as a result of construction at the Buffalo Nickel.

Mr. Godfrey testified that, when he refused to withdraw his protest, he was threatened by the Mrs. Everett, wife of Mark Everett. He was told that if he did not withdraw his protest he would be ruined. The Applicant told Mr. Godfrey that whether or not Applicant gets a license, the Buffalo Nickel will still have loud music.

3. Sharla Godfrey, Protestant

Sharla Godfrey is the wife of Jonathan Godfrey. She lives with her husband at 205 East Main St., Fredericksburg Texas. She testified as follows. Her residence and the surrounding area is very quiet. Their Bed and Breakfast is an active ongoing business that depends on a quiet tranquil environment. Her concern is that if drinks are being served that close to her residence and the Bed and Breakfast there will be no peace. She is also concerned about safety. She is worried that people who are inebriated at 2:00 a.m. will wander down her driveway and cause a concern for her guests and herself. She has a grandchild who will not be able to play in the area of the carport if there is a Bar and Grill located next door. She said she stood in her residence and watched downstairs and saw Mrs. Everett laugh as her construction workers constructed a fence in their driveway at 205 East Main St., Fredericksburg, Texas.

4. Mark Anthony Everett, Applicant

Mr Everett testified as follows. The Buffalo Nickel is located in the central business district of Fredericksburg, Texas. It is also a Historical District. Mr. Everett estimates that 75% of the business will be from the restaurant portion of the Buffalo Nickel and the remaining 25% will be from the sale of liquor. The hours of dining operation will be 11:00 a.m. to 10:00 p.m. The bar will be open until 11:00 p.m. on the weekdays, 12:00 a.m. on Friday, and 1:00 a.m. on Saturday. The late hours permit is wanted only for special occasions such as New Year's Eve, etc. Parking is on the curb on the different streets. Patrons and staff will not be allowed to park on the Protestant's premises or the premises of the Buffalo Nickel. Applicant respects the environment and wants to run a respectable restaurant in Fredericksburg.

Renovations at the Buffalo Nickel have been extensive. There are new restrooms, roof materials, an air conditioner and cedar partitions throughout the restaurant. There are four to six inch walls that will act as insulation. Insulation has added throughout the restaurant, including the ceiling. Stainless steel materials that will also act as insulation will be added to the three sides of the kitchen which is the area of the restaurant closest to the Protestants. There will also be fiberglass walls in the kitchen that will create a noise barrier. A new acoustical ceiling is being added that will act as additional insulation. A vaulted area has been added that will cause the sound to go up and out in a direction other than Protestant's.

The Protestant shares a wall with Bejas Bar and Cantina which has extensive outdoor seating. In Mr. Everett's opinion, the noise coming from Bejas will exceed any noise that would come from the Buffalo Nickel. There is another Bar across the way called Buck O'Brien's. It is not his intention that the Buffalo Nickel become another Buck O'Brien's. The Buffalo Nickel will not be marketed to the younger crowd. The first headliner will be a native American minister named Bob Villa. Across the street and down one block is an establishment named Silver Creek. They have a liquor license and are opened late. In Mr. Everett's opinion, The Silver Creek will create more noise than the Buffalo Nickel.

Mr. Everett said any concerns of the Protestants will also be addressed in a satisfactory manner. He intends to have proper security. The area will be policed each and every day. The music will be played in such a manner that it will not be loud and offensive. All Texas Alcoholic Beverage Commission rules and regulations will be followed and all the employees of the Buffalo Nickel dealing with alcohol will be Texas Alcoholic Beverage Commission-certified.

Applicant owns an existing tavern in San Antonio, Texas, named the Texas Ice Service which has a beer and wine license with TABC. Applicant has owned Texas Ice Service for about four years. It is in the middle of a residential area. The Texas Ice Service has live bands, parties and barbeques. To the best of Applicant's knowledge, there have been no complaints from anyone regarding the operation of the Texas Ice Service. The Texas Ice Service is in compliance with all laws and ordinances and has never been fined or cited by the Texas Alcoholic Beverage Commission for any type of violation.

Mr. Everett believes the Protestant's real concern is access to a triangular concrete paved area that is depicted in the bottom left portion of Exhibit P-6. That property belongs to Applicant. Applicant will continue to allow the Protestant to use the area. Applicant will not build a fence in the area as it will not serve the interests of either the Applicant or Protestant.

The Buffalo Nickel is under construction and the area adjacent to the Protestant's property is the only area to work on large projects. He has tried to sweep up and maintain the area in good condition.

There will be no live music or active business conducted in the unpaved alley way that adjoins Protestants' driveway.

V. Sandy Everett, Applicant's Wife

Mrs. Everett testified to the following. She went to see Mr. Godfrey to resolve the issue of the protest and to show him the agreement Applicant had with the church. She said she never threatened Mr. Godfrey. She told Mr. Godfrey that they had spent thousands of dollars and were going to have a restaurant and live music regardless. She also told him they should get along and try to be neighbors. She said the conversation did not go well. She took him dessert, but he would not allow her to come in out of the heat and made her put the desserts and papers on the hood of the car. She testified he was very rude and she got angry, but she never threatened him.

Mr. Everett's great-great grandfather settled in Fredericksburg. His grandparents were from Fredericksburg. His father was born and raised in Fredericksburg and graduated from Fredericksburg High School. She said they still have eighty-five family members that live in Fredericksburg. Mr. Everett played in Fredericksburg as a boy. She and Mr. Everett live in Harper, about twenty miles west of Fredericksburg.

The construction workers for the Buffalo Nickel are the father and cousin of Sandy Everett.

6. Shane Presley Spruiell, Construction Worker for Buffalo Nickel

Mr. Spruiell said the reason Mr. Godfrey did not withdraw his protest is because they have not paved the driveway and trimmed the trees. Mr. Godfrey has asked Mr. Spruiell to move his truck twice. He said the object that was built on Protestant's driveway was not a fence, but a wall that was going to be moved inside the Buffalo Nickel. Mr. Godfrey also described improvements to minimize noise, namely, the 3/8s plywood and different wood used to make a sound barrier and the sheets of fiberglass board used to cut down on the sound.

Mr. Spruiell has been in Fredericksburg since 1993. The Silver Creek has live music out front and a B&B next door. Silver Creek also has a full liquor license with a 2:00 a.m. permit. Primeaux's also has a 2:00 a.m. license and a Bed and Breakfast next door. Hondo's is across the way from Premeaux's and they generally close around midnight or 1:00 a.m. Hondo's has live

music outside and is in a residential area three doors from a church. Main Street Wine Bar is located on San Antonio Street. They have a beer and wine license.

V. ANALYSIS

The evidence is undisputed that the Buffalo Nickel is a new establishment. Many of the problems experienced by Protestants relate to the inconvenience of construction and remodeling. Concerns relating to the building having adequate restrooms, being in need of repair, remodeling, having adequate insulation to prevent live or amplified music from escaping the location causing intrusive noise pollution on nearby residences and businesses have been sufficiently addressed to the extent that Staff of the Texas Alcoholic Beverage Commission and the Church have withdrawn their protest to the permits.

The Protestants' concern regarding noise relates to the possibility of future noise. The record is replete with evidence of other licensed businesses that have alcohol beverage permits in the same area that peacefully exist with neighboring residences and churches. Further, the evidence shows Applicant has a similar business, Texas Ice Service, in San Antonio, Texas, which he has operated for approximately four years without complaint. This business is also located in a residential neighborhood.

VI. PROPOSED FINDINGS OF FACT

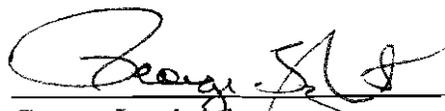
1. Applicant, Crossan and Everett Investments LLC, dba Buffalo Nickel Bar and Grill, Gillespie County, Texas, filed an original application for a mixed beverage and mixed beverage late hours permit for the premises 105 S. Llano Street, Fredericksburg, Gillespie County, Texas.
2. The Texas Alcoholic Beverage Commission received protests by Holy Ghost Lutheran Church, Jonathan Godfrey and Sharla Godfrey against the issuance of the permits and determined that sufficient facts existed to warrant a protest hearing.

3. The Commission's Staff initially alleged Applicant did not provide an adequate building available at the address for which the permit is sought before conducting any activity authorized by the permit.
4. Applicant received proper and timely notice of the hearing from the TABC in a notice of hearing dated June 25, 2007.
5. The hearing on the merits convened July 10, 2007, at the State Office of Administrative Hearings, 10300 Heritage Blvd., Suite 250, San Antonio, Texas 78216, Bexar County, Texas. The TABC was represented by attorney Barbara Moore. The Respondent appeared and was represented by Dewey Brackin, attorney. The record closed on the same day.
6. As a result of an agreement reached between the Holy Ghost Lutheran Church and Applicant, the protest of the Holy Ghost Lutheran Church was withdrawn.
7. As a result of construction and remodeling already performed and to be performed, the allegation by Staff of Applicant having an inadequate building has been withdrawn.
8. The Staff takes a neutral stance regarding the remaining protest by Jonathan Godfrey and his wife Sharla Godfrey.
9. There are a number of similar businesses which already operate in the same area as Protestants' residence.
 - a. The Silver Creek has live music out front and a Bed & Breakfast next door. Silver Creek also has a full liquor license with a 2:00 a.m. permit.
 - b. Primeaux's is in the area. It has a 2:00 a.m. license and a Bed and Breakfast next door.
 - c. Hondo's is across the way from Primeaux's and they generally close around midnight or 1:00 a.m. Hondo's has live music outside and is in a residential area, three doors from a church.
 - d. On San Antonio Street there is a wine bar named Main St. Wine Market which has a beer and wine license.
 - e. The Bejas Grill and Cantina is located next door to the Protestant's residence. The Bejas Grill and Cantina has outdoor seating and serves mixed drinks. They operate in such a manner as not to disturb Protestant.

VII. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 61.71, and 61.73.
2. SOAH has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Notice of the hearing was provided as required by the TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. There is no evidence in the record to support a finding that the place or manner in which Applicant may conduct business warrants the refusal of the permits based on the general welfare, health, peace, morals and safety of the people and the public sense of decency. See Texas Alcoholic Beverage Code §11.46(a) (8).
5. Based on the foregoing, the Administrative Law Judge recommends that Applicant's Application for a Mixed Beverage and Mixed Beverage Late Hours Permit be granted.

Signed on this the 28th day of August 2007.



George Lambright
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

August 28, 2007

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

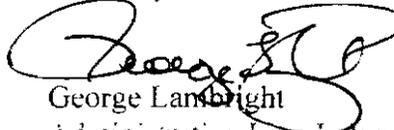
RE: Docket No. 458-07-3312, TABC vs Crossan & Everett Investments LLC, d/b/a Buffalo Nickle Bar & Grill, MB & LB

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,



George Lambright
Administrative Law Judge

Gl. ilap
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- VIA REGULAR MAIL
Christopher G. Gee, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA REGULAR MAIL
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA REGULAR MAIL
Mark Everett d.b.a Buffalo Nickel Bar & Grill, 105 S Llano Street, Fredericksburg, TX 78624 - VIA REGULAR MAIL

