

**DOCKET NO. 565881**

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
ORIGINAL APPLICATION OF NEW YORK BAR INC. D.B/A NEW YORK BAR	§	ALCOHOLIC
	§	
BEXAR COUNTY, TEXAS (SOAH DOCKET NO. 458-07-3991)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this day, in 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 the 18th day of September 2007 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on the 14th day of November 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.

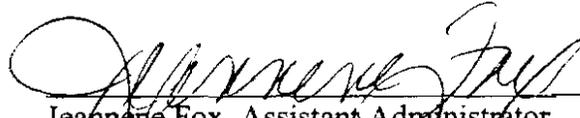
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that your Application for Mixed Beverage Permit and Mixed Beverage Late Hours Permit will be GRANTED.

This Order will become final and enforceable on November 20, 2008, 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 this December 11, 2007

On Behalf of the Administrator,

  
Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

CGG\bc

The Honorable George Lambright  
Administrative Law Judge  
State Office of Administrative Hearings  
VIA FAX (210) 308-6854

Robert J Birnbaum  
**ATTORNEY FOR RESPONDENT**  
7750 Broadway  
San Antonio, TX 78209  
VIA FAX (210) 822-0916

NEW YORK BAR INC.  
**RESPONDENT**  
d/b/a NEW YORK BAR  
PO BOX 681861  
SAN ANTONIO, TX 78268

**PROTESTANTS:**

Barbara & Stephen Kale  
3010 Sable Crossing  
San Antonio, TX 78232

Lance and Wendy Dolle  
3139 Sable Crossing  
San Antonio, TX 78232

Sheri L. Voss  
3138 Sable Crossing  
San Antonio, TX 78232

Pat McMullen  
2914 Sonora Creek  
San Antonio, TX 78232

Stewart Kline  
3123 Sable Crossing  
San Antonio, TX 78232

David & Jayne Smith  
17211 Sendero Falls  
San Antonio, TX 78232

John & Patricia Brown  
3018 Sable Crossing  
San Antonio, TX 78232

Ira L. Johnson  
3135 Sable Crossing  
San Antonio, TX 78232

PROTESTANTS:

Billy P. Perryman  
17314 Sable Landing  
San Antonio, TX 78232

Terry & Julia Tanner  
& Sawyer Miller  
3147 Sable Crossing  
San Antonio, TX 78232

Joseph & Naomi Bentley  
13851 Chisom Creek St.  
San Antonio, TX 78249

Donna M. Balderston  
17202 Sendero Falls  
San Antonio, TX 78232

Christopher G. Gee  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division

Enforcement District Office

# State Office of Administrative Hearings

Shelia Bailey Taylor  
Chief Administrative Law Judge

November 15, 2007

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

VIA REGULAR MAIL

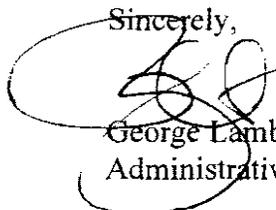
**RE: Docket No. 458-07-3991 - TABC vs New York Bar Inc, d/b/a New York Bar**

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](http://www.soah.state.tx.us).

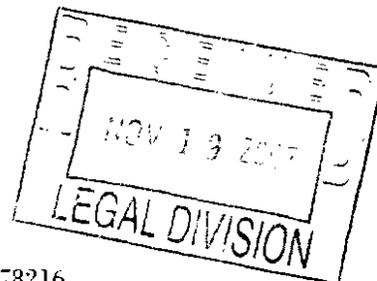
Sincerely,



George Lambright  
Administrative Law Judge

GL/ilap  
Enclosure

cc: Docket Clerk, State Office of Administrative Hearings- VIA REGULAR MAIL  
Chris 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  
Robert J Birnbaum, Attorney for Respondent, 7750 Broadway, San Antonio, Tx 78207 -VIA REGULAR MAIL





safety of the people, and the public sense of decency in violation of the Texas Beverage Code § 11.46(a)(8), to wit:

- a) Residents anticipate increased crime, noise and fights from the bar's patrons and a higher volume of vehicle traffic from its patrons' vehicles;
- b) The proposed bar backs up to family homes and is within 300 feet of some of the homes;
- c) There are many children in the area. Residents do not want them exposed to intoxicated patrons whose conduct would affect the sense of morals of children;
- d) Resident's property value will be jeopardized;
- e) Residents fear for their safety. The proposed bar would be located near the Redland Estates Subdivision which is a community of young families, many school age children, walkers, joggers and bikers, with two schools and churches located just down the road from Applicant's business.

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 September 18, 2007, a hearing 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, Staff Attorney. Protestants Julia Miller, Hannelore Hallinger, and Francis Furlong appeared *pro se*. Applicant appeared and was represented by Robert J. Birnbaum, Attorney at Law. 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.

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

### IV. EVIDENCE

#### A. Documentary Evidence

Petitioner offered and the Judge admitted into evidence the Notice of Hearing marked Exhibit #1, and Applicant's Application For Retailer's Permit or License marked Exhibit 2.

Protestants offered and the Judge admitted into evidence photographs marked as exhibits P#1, P#2, and P#3.

Applicant offered and the Judge admitted into evidence photographs marked A#1 through A#8; a letter of zoning verification from the City of San Antonio, Texas marked A#9; the retail lease for the location of New York Bar marked A#10; a description of the Sound-Deadening Fiberboard to be used in New York Bar marked A#11; and a Traffic Impact Analysis marked A#12.

**B. Witnesses****1. Julia Miller, Protestant**

Ms. Miller testified as follows. She is married to a colonel in the military and has two children, one child is twenty-four years of age, and the other is seventeen years of age. She stated her family is a military family and lives within fifty feet of a church. They picked the neighborhood where she lives because there are nine churches within a two-mile radius of her home.

She believes Applicant's business will bring intoxicated people into her neighborhood. She believes they will be on foot in her neighborhood and drive in her neighborhood. She plans to live in the neighborhood after retirement.

She is "anti-alcohol," and concerned for the safety of her children and her family, if Applicant is allowed to open for business. She also believes the sound generated by Applicant's business will be a nuisance. She thinks Applicant's business will cause a decline in property values of Redland Estates Subdivision. She believes a late night bar will bring corruption to her neighborhood.

She is only now aware that the area around her neighborhood has been zoned by the City of San Antonio, Texas as permissible for the sell of alcohol. On cross-examination she stated her neighborhood is a gated neighborhood with limited access.

**2. Hannelore Hallinger, Protestant**

Ms. Hallinger offered three photographs which were admitted into evidence as P#1, P#2, and P#3. P#1 through P#3 are photographs that show her backyard and the back of the strip center in which Applicant's bar will be located.

Ms. Hallinger is retired and in her 80s. She bought her house four years ago. Her real estate agent did not advise her regarding the zoning of the surrounding area. She is concerned that someone who is inebriated could literally jump into her backyard. She is also concerned about the noise that will be produced by the bar and the strip center. She reiterated the same concerns expressed by Ms. Miller.

### **3. Frances Furlong, Protestant**

Ms. Frulong is concerned that the people on the other side of Stable Crossing did not get notice from TABC regarding Applicant's application. She stated she did not get notice.

Due to the height of the paved area in back of the strip center, she is concerned that people will jump over the fence and gain access to the neighborhood.

The traffic on Redland Rd. between 5:00 p.m. and 6:00 p.m. is already bumper to bumper and will be heavier when the shopping center is opened.

### **4. Patrick Karam, Applicant**

Mr. Karam's business address is 7337 Carabu. He is the owner and applicant of New York Bar. Exhibit #2 is a true copy of his application, and everything in it is true and correct.

He is experienced in the management and operation businesses holding alcoholic beverage permits. He currently owns the Chicago Bar located at Stone Oak and Huebner. He previously owned the Broadway Bar and the Babcock Bar.

He identified A#1 as a photograph depicting the front of the strip center in which his bar will be located. A#2 is a photograph of the intersection at Redland and 1604. All four corners of the intersection of 1604 either are, or will be, developed commercially. A#3 is a photograph of a fence

that will be built bordering the area of the strip center and Protestant's neighborhood. A#4 is a photograph taken from the back door of the strip center depicting a 5'11" person standing where the 6' fence will be constructed. The fence will be continuous without gaps. A#5 is a photograph showing the length or depth of the fence to be built. A#6 is another photograph showing the depth of length of the future fence. A#7 depicts the shopping center from the intersection of Redland and 1604. A#8 is a photograph of the area across Redland from the strip center. A#9 is a certified copy of records from the City of San Antonio, Texas, describing the zoning of the area where the New York Bar will be located. The zoning for the area of the New York Bar is "C-3 ERZD," which permits, "alcoholic bar land use." A#10 is a copy of the lease applicant has with the owners of Redland Trail Retail Ltd., the owners of the strip center.

Materials used to construct the two side walls of the New York Bar will be 5/8 thick sound board and two layers of 5/8 inch thick sheet rock with six inches of insulation. The wall at the back of the business will be built the same way with the addition of a two-inch sound gap, a vinyl back standard wall insulation and the wall itself. These materials are being used to lessen sound traveling out of the business. Exhibit A#11 is the specification of the soundboard that will be used to reduce sound.

The New York Bar will be 2600 square feet in size, and the hours of operation will be 3:00 p.m. to 2:00 a.m. The New York Bar will cater to individuals between 25 and 40 years-of-age. There will be no live music, and no area provided for people to dance. No one under the age of 21 will be allowed to enter the bar. The back door will not be available to the public, and will be locked at all times. Parking will not be permitted behind the bar, in the area between the bar and the Redland Estates Subdivision. The front will have a main entrance and also an exit to the main parking lot area.

The New York Bar will require employees to be TABC certified to ensure intoxicated persons are not served or allowed to remain on the premises. If necessary, cabs will be called to take persons from the bar.

### 5. Brandt Klutts, Owner of Redland Trails Retail

Mr. Klutts is employed as one of the owners of the Redland Trails Retail, Ltd. He has leased part of Redland Trails Retail to Applicant. A#12 is a Traffic Impact Analysis regarding the impact the strip center will have on the surrounding area. The Traffic Impact Analysis concludes the shopping center is anticipated to generate modest vehicle volumes on the adjacent roadway system. The City of San Antonio accepted and approved A#12.

He states he will build a 6' privacy fence between his retail center and the Redland Estates Subdivision. The fence will be made from cedar and attached to steel rails.

## V. ANALYSIS

The evidence is undisputed that the New York Bar is a new establishment scheduled to open in the future. Protestants' concerns regard the possibility of future problems in the areas of traffic, noise, declining property values, and public safety.

The only evidence regarding the impact of Applicant's business is the Traffic Impact Analysis admitted in evidence as A#12. The analysis describes the impact of the shopping center, which Applicant will only comprise a portion of, as minimal. The analysis states:

"When completed and operating, the shopping center is anticipated to generate modest vehicle volumes on the adjacent roadway system. The immediate traffic volumes from the proposed shopping center should comprise only a portion of its ultimate capacity. There are no potential capacity issues apparent at this time. The overall traffic impact to this area will be minimal since the adjacent roadways were designed to anticipate commercial development."

The evidence reflects the materials used to construct the two side walls of the New York Bar will be composed of 1/2" thick sound board, two layers of 5/8" thick sheet rock, and six inches of

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insulation. The back wall of the New York Bar will be built the same way with the addition of a two-inch sound gap, vinyl back standard wall insulation, and an exterior wall. The sound board or "Sound Deadening Fiberboard" is not required by the City of San Antonio and is being used by Applicant in a voluntary attempt to insure little, if any, noise escapes the building. Further, Applicant stated no live music will be played.

No evidence was presented to support Protestants' claim that property values will decline in Redland Estates Subdivision if Applicant's application is approved.

No evidence was presented to support Protestants' claim that granting Applicants application will result in a crime problem for the Redland Estates Subdivision. Applicant testified he will require all his employees TABC certified. All foot traffic in and out of the business will be through the front two doors, not the rear door which will be kept locked. Nor will patrons be allowed to park at the rear of the business. Further, a six-foot privacy fence will be constructed at the rear of the shopping center separating the Redland Estates Subdivision and the Redlands Trail Retail Shopping Center. Additionally, the Redland Estates Subdivision is a gated subdivision with limited access.

## VI. PROPOSED FINDINGS OF FACT

1. Applicant, New York Bar, Inc. d/b/a New York Bar, Bexar County, Texas has filed an original application for a mixed beverage and mixed beverage late hours permit for the premises located at 2838 Loop 1604 North East, Suite 105, Bexar County, Texas.
2. The Texas Alcoholic Beverage Commission received protests by residents of the Redland Estates Subdivision against the issuance of the permits and determined that sufficient facts existed to warrant a protest hearing.
3. The Staff takes a neutral position regarding the protests.
4. Applicant received proper and timely notice of the hearing from the TABC in a notice of hearing dated August 24, 2007.
5. The hearing on the merits convened September 18, 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 Christopher G. Gee, Staff Attorney. Applicant appeared and was represented by Robert J. Birnbaum, Attorney at Law. The Protestants appeared *Pro Se*. The record closed on the same day.

6. There is no evidence to show there will be a decline in property values of the Redland Estates Subdivision, if Applicant's application is approved.
7. There is no evidence to show crime will increase in the Redland Estates Subdivision, if Applicant's application is approved.
8. There is no evidence to show Applicant's business will cause an increase in noise in the Redland Estates Subdivision, if Applicant's application is approved.
9. The total number of customers visiting the Redland Trails Retail Shopping Center, of which Applicant's customers will only be a fraction, will only have a minimal impact on the traffic of adjacent roadways.

#### **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. TEX. ALCO. BEV. CODE ANN. §11.46(a) (8).
5. Based on the foregoing, the Administrative Law Judge recommends Applicant's Application for a Mixed Beverage and Mixed Beverage Late Hours Permit should be granted.

Signed on this the 14<sup>th</sup> day of November 2007.



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George Lambright  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS