JK - protest

SOAH DOCKET NO. 458-06-0121

IN RE THE ORIGINAL APPLICATION	§	BEFORE THE STATE OFFICE
OF NERO'S COCKTAIL LOUNGE	§	
INC.	§	
MB & LB	§	
	§	OF
	§	
	§	
EL PASO COUNTY, TEXAS	§	
(TABC CASE NO. 611120)	§	ADMINISTRATIVE HEARINGS

ORDER

CAME ON FOR CONSIDERATION this 15th day of March, 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Veronica S. Najera. The hearing convened on November 21, 2005, and the record was closed on December 19, 2006. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on February 17, 2006. This 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, Transcripts, 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 the Original Application of Nero's Cocktail Lounge Inc., for the issuance of a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit be **GRANTED**.

This Order will become final and enforceable on April 5, 2006, unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

SIGNED on this the 15th day of March, 2005.

On Behalf of the Administrator,

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

/vr

Hon. Veronica S. Najera
Administrative Law Judge
State Office of Administrative Hearings
El Paso, Texas
VIA FAX (915) 834-5657

David J. Ellis
ATTORNEY FOR RESPONDENT
VIA FAX (915) 566-0111

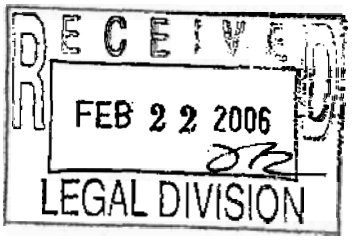
Nero's Cocktail Lounge Inc.
RESPONDENT
2415 Montana
El Paso, Texas 79903
CERTIFIED MAIL NO. 7005 0390 0005 7550 1494
RETURN RECEIPT REQUESTED

Judith L. Kennison
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
El Paso District Office

State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge



February 17, 2006

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

VIA FACSIMILE NO. 512-206-3350
AND REGULAR MAIL

RE: Docket No. 458-06-0121
Texas Alcoholic Beverage Commission v. Nero's Cocktail Lounge, Inc.

Dear Ms. Fox:

Please find enclosed the Proposal for Decision on the above referenced case.

Sincerely,

Veronica S. Najera
Administrative Law Judge
State Office of Administrative Hearings
El Paso Regional Office

VSN/cr
Enclosure
xc: Docket Clerk, State Office of Administrative Hearings- **VIA Docket Change Form**

Ms. Judith L. Kennison, Attorney, TABC Legal Division, 5806 Mesa, Suite 160, Austin, Texas - 79912-**VIA FACSIMILE NO. 512-206-3498**

Mr. David J. Ellis, Attorney at Law, 4115 Trowbridge, El Paso, Texas 79903-**VIA FACSIMILE NO. 915- 566-0111**

SOAH DOCKET NO. 458-06-0121

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
V.	§	OF
NERO'S COCKTAIL LOUNGE, INC. Respondent	§	
EL PASO COUNTY, TEXAS (TABC CASE NO. 611120)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Nero's Cocktail Lounge, Inc. ("Respondent"), a sexually-oriented business, has filed an original application with the staff of the Texas Alcoholic Beverage Commission ("Petitioner") for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit. The Petitioner opposes the issuance of these permits based on the general welfare, health, peace morals and safety of the people.[1] Denial of these permits would prevent the club from selling alcoholic beverages.

After a contested case hearing and review of the applicable law hereto, this proposal for decision recommends issuance of these permits.

I. NOTICE AND JURISDICTION

A notice of hearing was issued on September 19, 2005, by the Texas Alcoholic Beverage Commission apprising all parties of Petitioner's allegations and of the hearing date. Notice and jurisdiction were not contested issues and are further addressed in the findings of fact and conclusions of law without further discussion here.

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1 TEX.ALCO.BEV.CODE ANN. § 11.46(a)(8).

II. PROCEDURAL HISTORY

On November 21, 2005, a contested case hearing was convened in this matter in El Paso, Texas, before the State Office of Administrative Hearings. Petitioner was represented by Ms. Judith L. Kennison, staff attorney. The Applicant was represented by Mr. David J. Ellis, attorney at law. Administrative Law Judge (ALJ), Veronica S. Najera presided. The record closed on December 19, 2005, to allow parties to file post hearing briefs on the issue of general welfare.

III. DISCUSSION

A. Background

Respondent operates a BYOB, all nude club within the City and County of El Paso, Texas, at which patrons bring their own alcohol beverages, and exotic dance performances are presented as entertainment. The club has been operating in this capacity since 1997 when it chose not to renew its licence.[2] The club is owned by Dr. Manuel Hernandez, a licensed physician. Nero's Cocktail Lounge, Inc., has been a Texas corporation since 2002.[3]

On April 12, 2004, Respondent filed an original application with the TABC for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for Nero's Cocktail Lounge, Inc., located at 10662 Vista del Sol, El Paso, El Paso County, Texas 79903.[4] The application indicated that

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2 Facts derived from the testimony of Dr. Manuel Hernandez, owner of the club.

3 Petitioner's Exhibit No. 2, Office of the Secretary of State, Certificate of Incorporation No. 800141089. The registered agent and sole director is Dr. Hernandez.

4 *See* Petitioner's Exhibit No. 2.

required notices were posted and sent to the residents within 300 feet of the premises.[5] The permits were not protested by any neighbors of the establishment or by any El Paso citizens.

B. Evidence

Petitioner proffered four exhibits: the notice of hearing (Exhibit No.1); Respondent's application (Exhibit No. 2); a protest letter from TABC (Exhibit No. 3) and a compilation of police reports (Exhibit No. 4)]. All were admitted into evidence. TABC enforcement agent Wesley Rappe and detective Sergio Lopez Jr. testified for Petitioner. Dr. Manuel Hernandez and Mr. Miguel Free, the club's general manager, testified for the Respondent.

IV. EVIDENCE AND ARGUMENT

A. Petitioner's case

The Petitioner is contesting these permits on the ground that serving alcohol at the location would threaten the general welfare, peace, morals, and safety of the citizens of El Paso. To support its claim, the Petitioner relies on police reports and testimony of two TABC agents.

First, agent Rappe testified, in general terms, that if Respondent were to sell alcohol, the criminal activities on the premises would increase. Second, 46 police reports were relied upon to support the argument that citizens would be adversely affected by the issuance of these licenses. Agent Rappe stated that these reports show a pattern of criminal activity in the area. An area, which he testified, has a high crime rate already.

For the year 2005, eight incident reports were admitted into evidence. Four reports involved

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5 Petitioner's Exhibit No. 2. includes a notice advising of the protest procedures. Also included is a sheet identifying 16 neighbors, all businesses. The protest notice was not an issue at the hearing, and the ALJ assumes that the adjacent addresses were neighbors who received the notice.

possession of marijuana,[6] two reports involved outstanding warrants,[7] one report involved alcohol possession,[8] and one report alleges stolen property found in vehicle/theft.[9] All eight reports were based on situations discovered in the parking lot of the establishment after welfare or suspicious subject checks by the police.

For the year 2004, six incident reports are in evidence, of which only three are relevant. They involved an assault,[10] one possession of marijuana,[11] and criminal mischief where a patron was removed for breaking a windshield.[12] Two reports have no bearing on this PFD since they are only information reports with no arrests.[13] Another involved a bar check which resulted in the discovery that a patron was a fugitive.[14]

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6 Petitioner's Exhibit No. 4, police reports dated 05-20-05, 03-03-05, 02-13-05 and 01-31-05.

7 Petitioner's Exhibit No. 4, police reports dated 04-27-05 and 02-24-05.

8 Petitioner's Exhibit No. 4, police report dated 02-11-05.

9 Petitioner's Exhibit No. 4, police report dated 02-02-05.

10 Petitioner's Exhibit No. 4, police report dated 07-29-04.

11 Petitioner's Exhibit No. 4, police report dated 05-09-04. Officers made contact while on proactive patrol, and the "officers learned that the listed offense had occurred." No other information given.

12 Petitioner's Exhibit No. 4, police report dated 01-24-04.

13 Petitioner's Exhibit No. 4, police reports dated 02-01-04, which states "Met with the RP/RE-02's mother. The RP states that she recently learned from the RE-02 that the RE-01/RP's ex-boyfriend, had taken him to the listed address of occurrence, without her consent. The RP advised that she was unsure about when the RE-02 was taken to the club but advised that he was underage. The RP was given an incident information card and advised." *See* also police report dated 10-04-04, which states "Officers working as unit were dispatched to the address of occurrence in reference to an assault. Upon arrival he officers met with CO-01 who advised SU-01 assaulted hi. CO-01 was issued an incident information card and advised."

14 Petitioner's Exhibit No. 4, police report dated 09-19-04, which states: " . . . reference a bar check officers obtained ID from the arrestee and a routine warrant check he was found to have the listed warrant outstanding . . .".

The year 2003 has the most incident reports, a total of 25. One report dated 12-31-03 provides no information and, thus, will not be considered.[15] The nature of the incidents are possessions, assaults and the like,[16] all with the same pattern as in the years 2004-2005.

The most serious of the incidents involved a sexual performance by a minor.[17] The report states that the police received information that an underage dancer was working at another establishment. Detective Sergio Lopez's testimony expanded on the facts. He testified that he received information via an anonymous call that a juvenile was dancing at another bar. He said that he followed the juvenile to Nero's Cocktail Lounge and observed her perform. Thereafter, he obtained verbal consent from the club's management to review the employment records. On the same night, another dancer was booked for having a traffic warrant, and it was subsequently discovered that she had provided fake identification and was underage.

Another serious incident involved a fight which resulted in a stabbing in the parking lot.[18] Another incident involved the performance of a lewd act in a public place by making sexual contact in the presence of the officer.[19]

There are seven reports for the year 2002. Two resulted from undercover investigations

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15 Petitioner's Exhibit No. 4, police report dated 12-31-03 states, "Officer Sanchez while working with the vice-detail advised by the listed witness that the listed offense had occurred. Officer obtained the information on the listed suspect to be listed in the supplement." It appears some kind of license violation. No further information given.

16 *See* Petitioner's Exhibit No. 4.

17 Petitioner's Exhibit No. 4, police report dated 05-21-03.

18 Petitioner's Exhibit No. 4, police report dated 01-25-03.

19 Petitioner's Exhibit No. 4, police report dated 05-21-03.

which entailed the sale and delivery of a-user-amount of cocaine.[20] This is the only year that involved undercover investigations inside the club. The other incidents for the year involved a public intoxication charge,[21] two assault charges,[22] one drug possession,[23] and one outstanding warrant.[24] Four incidents took place in the parking lot.

B. Respondent's case

Dr. Hernandez testified that the club has interior and exterior security cameras and policies and procedures, but not a handbook. His testimony, and that of Miguel Free's testimony, for the most part, did not touch upon any relevant element of the case. Their testimony was mainly background information.

V. LEGAL STANDARD

The Texas Alcoholic Beverage Commission may refuse to issue an original or renewal permit if it has reasonable grounds to believe that the place and 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.[25] This is the statutory provision

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20 Petitioner's Exhibit No. 4, police reports dated 10-02-02 and09-18-02.

21 Petitioner's Exhibit No. 4, police report dated 07-16-02.

22 Petitioner's Exhibit No. 4, police report dated 05-23-02 and 02-16-02.

23 Petitioner's Exhibit No. 4, police report dated 04-26-02.

24 Petitioner's Exhibit No. 4, police report dated 03-17-02.

25 TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8). Specifically, the statutes states: (a) The commission or administrator may refuse to issue an original or renewal permit with or without a hearing if it has reasonable grounds to believe and finds that any of the following circumstances exists: (8) 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.

used by Petitioner to protest the issuance of the licenses at issue.

This is an original application case. In contrast to a renewal application case, in which evidence of the manner in which the applicant has conducted his business is required before a renewal is denied, in an original application, such as this one, there is no such history.

Furthermore, precedent has established that to deny a permit to a qualified applicant to operate a lawful business, some unusual condition or situation must be shown to justify a finding that the place or manner in which the business may be conducted warrants refusal or cancellation of a permit or its renewal.[26]

The Code does not define how the place or manner in which a business might be operated would jeopardize the general welfare, health, peace, morals, or sense of decency of the people. There is no set formula, but it is reasonable to assume or infer that the general welfare means the common well-being.

VI. ANALYSIS

As stated above, the Petitioner contested these permits on the ground that serving alcohol at that particular location would threaten the general welfare, peace, morals, and safety of the citizens of El Paso.

First, in general, the argument that criminal activities may increase if the permits were issued is reasonable because of the nature of alcohol to alter judgment especially when it is combined with sexually-related entertainment.[27] So, there is no disagreement with the conclusion that the

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26 *Simonton Gin, Inc.*, 616 S.W.2d 274 (Tex. Civ.App.-Houston 1981, no writ) (citing *Texas Alcoholic Beverage Com'n v. Mikulenka*, 510 S.W.2d 616, 619 (Tex.Civ.App.- San Antonio 1974); *Elliott v. Dawson*, 473 S.W.2d 668, 670 (Tex.Civ.App.--Houston [1 Dist.] 1971)).

27 *California v. LaRue*, 409 U.S. 109 (1972). The Supreme Court held that a state's determination that "certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. *Id.* at 118.

combination of liquor and sex has a tendency to foster undesirable and possibly criminal, behavior. This would be a valid and convincing point if the club was not there already because the introduction of alcohol into the situation would be a new. But, the facts of this case are that the club is there; has been there for many years, operates as a sexually-oriented business and alcohol is already on the premises. So, the only factor that would change if these permits were to be granted is the source of the alcohol on the premises. There is no evidence before the ALJ which proves or indicates how the change of the source of the alcohol will affect the general welfare.

Besides the officer's general statements, there is no evidence before the ALJ to substantiate the officer's testimony that the granting of these licenses will contribute to increased crime rates in the club's premises, or vicinity. There is no evidentiary basis to support a correlation between crime and a sexually-oriented business with a license, versus one without license. There is no law enforcement evidence to support the allegation that this is a high crime area, much less any to support the secondary effects on crime were the permits to be issued.

Secondly, at first glance, the list of the 46 offenses[28] encompassing a three- year time period[29] appears to support Petitioner's position. But a review of each alleged offense, reveals that on or about 25[30] occurred in the parking lot of the premises and a number of them are not relevant to the case. Also, the number alone certainly does not show a pervasive amount of criminal activity, although, there is no evidence before the ALJ to indicate what is to be considered a pervasive amount of criminal activity in these type of cases. Certainly, the reports do not show how the granting of these licenses would contribute to the criminal activity in the area.

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28 *See* Petitioner's Exhibit No. 4.

29 TABC's review of application is from February 2002 through May 2005. Thus, the evidentiary review is limited to this time period. No other evidence, prior or subsequent to, this time period was proffered.

30 The ALJ has done her best to ascertain the details of the offenses. This was difficult because the reports were incomplete, conclusory and no first hand testimony on them was provided. So the number 25 may be off slightly.

As stated above, Petitioner relied almost exclusively on these police reports to justify the denial of these licenses. But the reports merely make clear that the police responded to calls or investigated alleged criminal activity. The reports include only one paragraph of general information. From what can be derived from the scarce information provided in each police report, the officers approached vehicles on the premises that were deemed suspicious and subsequently arrested persons. No further testimony was offered from the authors of the reports, nor were the complete reports introduced. Agent Rappe did not have first hand knowledge of the incidents and, thus, was not in a position to testify about them.

Finally, in contrast to other cases in which these license have been denied, there are no citizen protests.

C. Recommendation

For the reasons stated in the preceding section, the ALJ recommends that a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit be issued to the Respondent.

VII. FINDINGS OF FACT

1. On April 12, 2004, Nero's Cocktail Lounge, Inc. filed an original application with the TABC for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for Nero's Cocktail Lounge, Inc., located at 10662 Vista del Sol, El Paso, El Paso County, Texas 79903.

2. The staff of the Texas Alcoholic Beverage Commission opposes the issuance of these permits based on the general welfare, health, peace morals and safety of the people.

3. The permits were not protested by any neighbors of the establishment or El Paso citizens.

4. Proper and timely notice of the hearing was sent on September 19, 2005, by the Texas Alcoholic Beverage Commission apprising all parties of Petitioner's allegations and of the hearing date.

5. On November 21, 2005, a contested case hearing was convened in this matter in El Paso, Texas, before the State Office of Administrative Hearings.

6. The record closed on December 19, 2005 .

7. At the location for which the permits are requested, Respondent operates a BYOB, all nude club within the City and County of El Paso, Texas, at which patrons bring their own alcohol beverages and exotic dance performances are presented as entertainment.

8. Nero's Cocktail Lounge, Inc. has been operating without an alcoholic beverage permit since 1997.

9. Nero's Cocktail Lounge, Inc. is owned by Dr. Manuel Hernandez, a licensed physician.

10. Nero's Cocktail Lounge, Inc., has been a Texas corporation since 2002.

11. For the year 2005, there are eight police incident reports related to the location.

12. For the year 2004, there are six police incident reports related to the location.

13. For the year 2003, there are 25 police incident reports related to the location.

14. For the year 2002, there are seven police incident reports related to the location.

15. The time period of review for the application encompasses three years, from 2002 through 2005.

16. There is no unusual condition to justify a finding that the place in which the business may be conducted warrants refusal of the permits.

17. Besides one agent's testimony, there is no evidence to substantiate the officer's testimony that the granting of these licenses will contribute to increased crime rates in the club's premises or vicinity.

18. There is no evidentiary basis to support a correlation between a sexually-oriented business with a license, versus one without license, and crime rates at the location.

19. The police incident reports contain only one paragraph giving general, conclusory information.

20. No testimony was offered from the authors of the police reports nor were the complete reports introduced.

21. The testifying agent did not have first hand knowledge of the police incidents which make part of the police reports, and thus, was not in a position to testify about them.

22. The only factor that would change if these permits were to be granted is the source of the

alcohol on the premises.

23. There is no evidence which proves or indicates how the change of the source of the alcohol will affect the general welfare based on place or manner in which the applicant may conduct his business.

VIII. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE §§ 6.01 and 61.13.

2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative 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.

3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T. CODE §§ 2001.051 and 2001.052.

4. There is insufficient evidence to deny the application based on the general welfare, health, peace morals and safety of the people.

5. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent should be issued a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit.

SIGNED 17th day of February, 2006.

Veronica S. Najera
Administrative Law Judge
State Office of Administrative Hearings
El Paso Regional Office