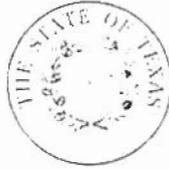


State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

September 13, 1999

Mr. Doyne Bailey, Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78711

HAND DELIVERY

RE: Docket No. 458-98-2317; Earnest Jerome Taylor; TABC No. 580894

Dear Mr. Bailey:

Please find enclosed a Proposal for Decision that has been prepared for your consideration in the above referenced case. Copies of the Proposal for Decision are being sent to Gayle Gordon, counsel representing the Texas Alcoholic Beverage Commission, and to Charles A. Herbert, attorney for Respondent. For reasons discussed in the Proposal for Decision, I have recommended Respondent's permit application be denied.

Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon Supp. 1996), each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed according to the time limits specified in TABC rules. A copy of any exceptions, briefs on exceptions, or reply must also be filed with the State Office of Administrative Hearings and served on the other party in this case.

Sincerely,

Ruth Casarez
Ruth Casarez
Administrative Law Judge
JUL 14 1999
RECEIVED
LEGAL DIVISION

RC/es

Enclosures

cc: Gayle Gordon, TABC, 5806 Mesa, Suite 160, Austin, Texas - **VIA HAND DELIVERY**
Charles A. Herbert, Attorney, 1001 Texas Avenue, Suite 1020, Houston, TX 77002 - **VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED NO. Z 332 923 701**
Maria A. F. Beck, City Attorney, City of La Grange, 155 E. Colorado, La Grange, Texas 78945 - **VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED NO. Z 332 923 702**
Jackie Shelton, Chief of Police, 155 E. Colorado, La Grange, Texas 78945 - **VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED NO. Z 332 923 703**
Shanee Woodbridge, Docketing, State Office of Administrative Hearings

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(512) 475-4993

Docket (512) 475-3445

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DOCKET NO. 458-98-2317

TEXAS ALCOHOLIC	§	BEFORE THE STATE OFFICE
BEVERAGE COMMISSION AND	§	
CITY OF LA GRANGE POLICE	§	
DEPARTMENT, CHIEF JACKIE	§	
SKELTON ET. AL, PROTESTANTS	§	
V.	§	OF
	§	
EARNEST JEROME TAYLOR, D/B/A	§	
SILVER STAR, RESPONDENT	§	
ORIGINAL APPLICATION - M/B	§	
FAYETTE COUNTY, TEXAS	§	
(TABC CASE NO. 580894)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff), the City of La Grange (City), Chief Jackie Skelton, Judge Ed Janecka, (collectively called Protestants), and a number of citizens from the residential area protested the original Mixed Beverage (MB) application of Earnest Jerome Taylor DBA Silver Star (Applicant or Taylor) to obtain a permit to sell and serve alcohol at 969 E. Guadalupe, La Grange, Fayette County, Texas.

Staff and Protestants claim, among other things, that reopening the bar is detrimental to the community's health, welfare, and safety because of problems with noise, trash, and crime involving club patrons in and around the bar that were experienced when it last operated with a liquor license in the early nineties.

This proposal for decision recommends the M/B permit application be denied because the proposed business known as Silver Star at 969 E. Guadalupe, La Grange, Texas, would adversely affect the residential community's health, safety, and welfare and because the City's zoning ordinance prohibits the Silver Star's operation as a legal non-conforming use at this time.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There was no challenge to notice and, except for the arguments made by Staff and Protestant City that granting of the application is barred by administrative *res judicata*, jurisdiction was not challenged. The City also argued that Applicant is estopped from obtaining a license because he has failed to comply with sales tax laws over a number of years and that failure to comply with legal obligations bars granting a license to sell alcohol. With the noted exceptions, which will be addressed below, jurisdiction and notice

will be discussed only in the Findings of Fact and Conclusions of Law.

The hearing in this case began and concluded on March 26, 1999, at the Fayette County Courthouse in La Grange, Texas, with Administrative Law Judge (ALJ) Joe Gilbreath of the State Office of Administrative Hearings (SOAH), presiding. General Counsel, Gayle Gordon, represented the Commission. City Attorney Angela F. Beck appeared for the City of La Grange and for Fayette County. A number of interested citizens appeared and testified in their own and in the public's behalf. Attorney Charles Anthony Herbert appeared for Earnest Jerome Taylor. The hearing on the merits concluded on the same date, but the record was left open for submission of written briefs. Judge Gilbreath resigned prior to the submission of briefs by the parties, and the case was assigned to Judge Ruth Casarez, who closed the record of the hearing after receipt of briefs on July 14, 1999. Judge Casarez reviewed the entire record of the hearing and prepared this proposal for decision.

A. Staff's Pleadings

Staff's pleadings for the Commission and Protestants allege that: (1) Applicant has filed previous applications for permits to sell beer at the Silver Star in 1992 and in 1993; that protests to the applications were lodged; that a fully protected evidentiary hearing was conducted by the County Judge after prior notice to Applicant and that the Judge sustained the State's protest and denied the Applicant's request for a beer permit; (2) Applicant's current application for a Mixed Beverage permit presents no showing of material change in circumstances since the prior applications were denied; (3) The principle of administrative *res judicata* requires that in the absence of changed circumstances, the application should be denied in accordance with the previous decisions of the County Court; (4) In the alternative, the place and manner in which Applicant may conduct his business warrants the refusal of the permit based on the general health, welfare, peace, morals and safety of the people and on the public sense of decency pursuant to Sec. 11.46(a)(8) of the Tex. Alco. Bev. Code Ann., (Code).

B. Public Comment

Pursuant to § 5.435 of the Code, the hearing began with a public comment session. Several citizens who live in the neighborhood near the establishment made comments on behalf of themselves and the public. They stated their opposition to the Silver Star's reopening as a club selling alcoholic beverages because their neighborhood is primarily residential and their property values will decline; they believe its influence will be detrimental to the environment in which to raise small children and believe patrons of the club will cause problems with noise, trash and criminal activities, all of which will jeopardize the health, safety, and welfare of their residential area. They also stated that as long as the Silver Star has remained closed, which it has been for many years, there have been no problems in their neighborhood and they want to keep it that way.

However, a number of citizens spoke in favor of licensing the Silver Star to sell alcohol at its current location. The gist of their comments was that there is a need for a nice place in La Grange where black people can get together and enjoy themselves, listening to music, dancing, etc., and the Silver Star is that place. Some indicated they were not aware that serious problems had occurred at the bar, but several stated they knew of some criminal complaints that had been filed in the late '80s or early '90s. Irrespective of those incidents, the six citizens, (only two live near the Silver Star), who appeared in support of the Applicant indicated the bar should be allowed to operate and sell alcoholic beverages.

The following witnesses testified in opposition to granting the permit:

Thomas Meuendorff: his home is about 50-60 feet away from the Silver Star; he believes reopening the club would decrease the value of his home; he also has children aged 2 to 6 years and does not believe having that type of establishment so near his home would be conducive to their proper upbringing.

Miguel Deleon: he lives about three houses from the Silver Star and is concerned about the club's effect on the peace and tranquility of the neighborhood; he believes if the club reopens, it will result in noise and loud music that will disturb him; he is also concerned about having that type of place in the neighborhood where small children live.

Michelle Urban: she lives in a house that is only separated by two duplexes which she also owns and which are right next to the Silver Star; she is concerned that reopening the club will jeopardize her family's safety, as well as, the neighborhood's. She has experienced loud music and noise on occasions when parties have been held at the bar, plus she had beer cans in her yard after the parties; parking had been a problem too.

John Urban: he has lived in La Grange all his life and when the Silver Star was opened, it gave the street a bad reputation; he and his friends avoided that part of town at night. Since it has been closed, the neighborhood has become quiet and nicer. He believes if the club reopens, the neighborhood will deteriorate again and he would not feel comfortable living there with his wife and son.

The following witnesses testified in favor of granting the permit:

Charles Williams: he has lived in La Grange 47 years; for the past nine months, he has lived next door to the Silver Star and sees no problem with allowing it to reopen; he believes the club is a nice place for black people to go and believes applicant should be given the liquor license.

Joel McDaniel: he thinks it would be good to let the Silver Star open again; he stated that neighbors often had parties, drank and littered around their yards anyway, so he sees no reason why the club, which Applicant keeps clean, should not be allowed to reopen.

Mary Jo Logan: she knows about Ms. Urban's opposition to reopening the Silver Star and has talked with her about it. She (Logan) has been to parties there with no problems

and sees no reason why applicant should not be given a license, so he may reopen the club. She lives about eight blocks away and wants the club to open because there are no other places in town for blacks. In October, 1991, while working at the Silver Star she called police and reported someone pulled a weapon on her, but that was the only time that happened and she would agree to work for Mr. Taylor again if he asked her, and would not fear for her safety.

Julius Shelton: he lives in an apartment at 819 Guadalupe; he is 71 years old and enjoys going to the club for occasional parties to listen to music; he's never seen trouble there, except when it was run by someone other than Applicant. He thinks it is a nice place, especially since it is in town.

Johnny Anderson, Jr.: he lives at 919 East Pearl and he has attended get-togethers, such as birthday parties at the Silver Star for six years--anytime Mr. Taylor comes into town on weekends and opens up the place. He has never seen any trouble there during that time, and he believes it would be good to let Mr. Taylor get the liquor license so black people would have a nice place to go and enjoy themselves.

Willie Lou Green: she is 88 years old and lives at 847 North Jackson; she has known the Silver Star ever since it was a café when she worked there. She says it is a nice place and Mr. Taylor should get a liquor license. She enjoys going there to listen to music when it is open on some weekends.

B. Evidence Presented

A summary of evidence, testimonial and documentary, is attached hereto as Appendix A.

II. LEGAL ANALYSIS

A. Res Judicata

The Staff and Protestant City argue that administrative res judicata and the ruling in Lindsay v. Cavazos, 650 SW2d 528, (Tex.App.14th Dist. 1983) require the application for Mixed Beverage (MB) Permit be summarily denied because Applicant has previously applied for permits to sell alcoholic beverages at the Silver Star and those applications have been denied by the Fayette County Judge. They urge that since Applicant has shown no material change in conditions or circumstances in his current application, it must be denied in the interest of consistency and judicial economy. Applicant counters that the subject of this hearing is an original application for a Mixed Beverage Permit; that a hearing on this application has never been held before and that even if the application is similar to his prior applications, he has shown changed circumstances that justify a hearing and issuance of the MB permit. It is important to put Applicant's current application in perspective; to that end, Appendix B chronicles Applicant's efforts to obtain a beer license for the Silver Star during the past six years.

The Staff and Protestant City contend that in the absence of changed conditions, the County Court's denial of Applicant's wine and beer permit application in October, 1992, works as a bar to the issuance of any subsequent license or permit for the sale of alcohol that Applicant might seek for the Silver Star. In fact, that has been the position consistently espoused since that first denial.¹ Generally speaking, a final order of a Court or administrative agency acting within its jurisdiction in an adjudicatory capacity is entitled to preclusive effect, *i.e.*, bars relitigation of the same issues or claims. Railroad Commission v. Phillips 364 SW2d 408, 411 (Tex.Civ.App.-Austin 1963, no writ).

In the instant case, it appears the numerous applications filed between 1992 and 1998 request the exact same thing – a permit to sell alcoholic beverages at the Silver Star located at 969 E. Guadalupe in La Grange, Texas. It also appears the Staff and Protestant City have consistently opposed the numerous applications for the same reasons. However, the record is not entirely clear that this is, in fact, true. The application chronology indicates there has been but one hearing on Applicant's many attempts to obtain a beer permit.² The rehearing held on October 2, 1992 resulted in the County Judge's denial of the March, 1992 application. The Staff and Protestant City argue that on that date, Applicant had prior notice of the hearing and protest, was provided with a "full evidentiary" hearing, and was represented by counsel. They urge the issues were decided against him and that decision should control, (see Commission's Notice of Hearing dated December 16, 1998, State Ex. #2). Unfortunately, there is no record of the hearing conducted on October 2, 1992, and it is impossible to determine the issues the Court considered in denying the application. Similarly, as no copy of the Court's order denying the permit was introduced into evidence, there is no way to examine the findings of fact that supported the Court's denial.

Res Judicata, also referred to as collateral estoppel, applies to court or agency orders or decisions issued by a tribunal acting in a judicial capacity that resolved disputed issues of fact that were properly before it and that the parties had adequate opportunity to litigate. Hill v. Heritage Resources, Inc. 964 SW2d 89, (Tex.App.-El Paso 1997, rehrg overruled, review denied, and rehearing of pet. for review overruled). The doctrine also means that a final order bars subsequent adjudication of the same subject matter sought by the same party. Champion Exploration, Inc. v. Railroad Commission, 627 SW2d 250 (Tex.App.1982, writ ref'd n.r.e.), unless allowed by statute, Sexton v. Mount Olivet Cemetery Association, 720 SW2d 129, (Tex.App.-Austin, 1986) or perhaps unless circumstances have changed. [citations omitted].

¹A cursory review of the Motions to Deny Permit filed by the County Attorney beginning on August 28, 1992 and continuing through December, 1997 reflects a text that is identical in each subsequent motion, with the only difference being the reference to the specific application, *i.e.*, third, fourth, fifth, that was being protested in the particular motion.

²The hearing on October 2, 1992 was granted because Applicant filed a Motion for Rehearing (MFR) challenging the Court's denial of the application on September 1, 1992. The challenge was sparked because the Court had held a public hearing on the application on August 27, 1992, at which apparently no one protested, (See Applicant's MFR of 9/15/92), but the Court did not issue an order on that date. On August 28, 1992, however, the County Attorney filed a Notice of Protest together with a Motion to Deny Permit; the County Judge then denied the application on September 1, 1992. Applicant filed a MFR on September 15, 1992. The County Judge granted the motion.

In this case, Applicant heretofore filed applications seeking a Wine and Beer Retailer's Permit under Chapter 25 of the Code. Under that chapter, the County Judge was and is to conduct any hearing required on an application. Code Section 25.06 sets out the specific grounds for denial of an application, and Section 25.01 sets out the authorized activities, *i.e.*, the types of alcohol that a wine and beer permit holder may sell. Those activities are much more restrictive³ than those of a Mixed Beverage permit holder, under chapter 28 of the Code.⁴

Thus, although Applicant's general purpose in seeking the MB permit is essentially the same as it was in prior years, the fact remains that he filed a new, original application for a MB permit which would give him different privileges than those previously sought. Consideration of this application is not the same subject matter as was considered by the County Judge in prior years. Furthermore, the Code allows eligible persons to apply for and obtain a MB permit. Section 28.16 of the Code sets out criteria that make an applicant ineligible for a MB permit. There was no evidence presented to show Applicant in this case is precluded from obtaining a MB permit. Thus, because the subject matter of this application is different from that of prior applications and because the Code permits one to apply for a wine and beer permit and/or a MB permit, this action is not precluded by *res judicata* and summary disposition of the application is not warranted.

B. Estoppel

Protestant City argues that Applicant is estopped from securing a license to sell alcoholic beverages from the TABC because his failure to comply with Texas Tax Code (Tax Code) provisions, (requiring collection, reporting and payment of sales taxes on taxable sales that he made between 1991 and 1997), bars him from claiming he operated a *de facto* business at 969 E. Guadalupe during that period. If he did not operate a business at that location for one year or more, he has lost the legal non-conforming use conferred on the premises in 1971 when the zoning code was adopted. The City's argument has merit.

No one contested the fact that the Silver Star has not operated as a bar where alcoholic beverages are sold since December, 1991. One question that was in dispute

³ In 1992, § 25.01 of the Code provided: "The holder of Wine and Beer retailer's permit may sell for consumption on or off premises where sold, but not for resale, wine, beer and malt liquors containing alcohol in excess of one-half of one percent by volume and not more than 14 percent by volume."

⁴ In 1998, § 28.01 of the Code provided:

(a) The holder of a mixed beverage permit may sell, offer for sale, and possess mixed beverages, including distilled spirits, for consumption on the licensed premises: (1) from sealed containers containing not less than one fluid ounce nor more than two fluid ounces or of any legal size; and (2) from unsealed containers.

(b) The holder of a mixed beverage permit for an establishment in a hotel may deliver mixed beverages, including wine and beer, to individual rooms.

(c) The holder of a mixed beverage permit may also: (1) purchase wine, beer, ale, and malt liquor containing alcohol of not more than 21 percent by volume in containers of any legal size from any permittee or licensee authorized to sell those beverages for resale; and (2) sell the wine, beer, ale, and malt liquor for consumption on the licensed premises.

was whether Applicant has continued to operate a business at the location known as the Silver Star. The evidence presented on this issue is ambiguous at best. The witnesses who appeared, both to oppose and to favor granting the permit, indicated the Silver Star has been closed since 1992. They testified that occasionally Applicant came into town and opened the bar allowing people to congregate there for what appeared to be private gatherings or parties. Applicant testified that he sponsored such activities for the benefit of the community and as a way "to keep the establishment active and going," and that he considers the Silver Star "a business," (Tr. Vol. II, p. 124 and 132, respectively); While there is little doubt that Applicant intended to maintain a business or carry out business activity at 969 E. Guadalupe, La Grange, Texas during the time that it took him to acquire a beer permit, his subjective intent is not dispositive of the issue. The Tax Code defines 'business' as an "activity of or caused by a person for the purpose of a direct or indirect gain, benefit or advantage." The evidence presented by the Applicant established that the type of activity in which he engaged was not for the purpose of making economic gain or profit. In fact, he testified he made no money on the bar since 1992, but rather that it cost him between \$1200 to \$1500 per year to maintain, (Tr. Vol. II, p. 130). When he held functions at the bar, he made no profit because he gave away or sold at cost the food and soft drinks that he provided. Evidence introduced by Staff indicated he reported zero sales in the returns that he filed with the Comptroller's Office for the years 1992 through 1996, even though he testified that he sold taxable items, (prepared foods and soft drinks are taxable under §151.010) during that time. He indicated he did not charge or collect sales taxes, as is required under Tax Code §§ 151.051 and 151.052, because he made no profit on the sales, (see Tr. Vol. II, pp. 123, 137). Thus, despite Applicant's intent, the evidence clearly establishes there was no true business activity conducted at the Silver Star in the past six years.

Applicant seeks to have it both ways: on the one hand, he represents that he operated a business at the Silver Star from 1992 through the present, but on the other hand, he argues he had no obligations that resulted from the operation of such business.

The Fifth Circuit Court of Appeals considered a situation in which a lessor sought to hold a prior lessee liable for damages caused to lessor's property a number of years after the lease had terminated and after lessor had assumed control of buildings the lessee had abandoned on the property. The Court refused to allow the lessor to benefit from this type of inconsistent posturing, and found that "Under Texas law, 'the principle of quasi-estoppel' precludes a party from asserting, to another's disadvantage, a right inconsistent with a position he has previously taken. (citation omitted)" Missouri Pacific R. Co. v. Harbison-Fischer Mfg., 26 F.3d 531,537 (5th Cir. 1994)

The same principle applies to Applicant in this case. The contention that he conducted business at the Silver Star in the past six years, by sporadically opening the place and selling certain foods and soft drinks, but which sales he unilaterally determined were non-taxable, cannot be accepted. He cannot be allowed to benefit from reporting no taxable sales and paying no sales taxes and yet benefit from the claim that he conducted a business during that period.

C. Place and Manner of business detrimental to public health, welfare and safety

Staff and Protestants maintain that even if the legal arguments presented above do not preclude granting the Mixed Beverage permit, there are grounds to believe the place and manner in which the Applicant may conduct his business warrant the refusal of the permit pursuant to §11.46 (a)(8) of the Code because it would be contrary to the public's general welfare, health, peace and morals and safety. They presented evidence to support this position.

1. Nature and History of the Place

The evidence was uncontroverted that the Silver Star is located in a residential area. When the zoning plan was adopted in 1971, there were a few non-residential structures, the Circle T and the Silver Star, two bars, that were in close proximity to one another; both were allowed to continue as legal non-conforming uses through grandfather provisions.⁵ Over the years, the Circle T closed down and was replaced by a funeral parlor. The remainder of the neighborhood continues to be a residential area and, in fact, has seen an increase in construction of new housing units and renovation of existing homes. Several witnesses indicated the area is undergoing a gentrification process which is improving real estate values; they also testified that since the Silver Star has been closed, the neighborhood has become a peaceful, quiet, family oriented neighborhood. Protestant's witnesses indicated the area is zoned "residential," and has very few structures that do not conform to that classification. (See testimony of Chief of Police, Captain of Fayette County Sheriff's Office and of the City Manager, Tr. Vol. II, pp.51-53; 84-85;92-94). City Manager Raborn explained that according to the zoning plan, if a non-conforming use is discontinued for a year or more, *i.e.*, business ceases to be conducted at the location that was grandfathered, use of the location reverts to the regular zoning classification of the area.

As is discussed above, the evidence established that the Silver Star has not been operated as a business for a prolonged period, and it is very likely, the property has lost the legal non-conforming use it enjoyed through the end of 1991. If the non-conforming use has been lost, Applicant cannot reopen the Silver Star. Case law recognizes a person's right to maintain a legal non-conforming use that rightfully accrues to a person's property, but there are restrictions that attach to such right. As the court stated in City of Carthage v. Allums, 398 SW2d 799,801 (Tex.Civ.App.-Tyler 1966):

If, when a zoning ordinance was adopted, the premises were used for a non-conforming use, one is within his rights in continuing that use. A zoning ordinance cannot deprive the owner of the use to which the property was put

⁵ Section 14 of the zoning code adopted by the City of La Grange in 1971 specified that "the lawful use of land existing upon the effective date of this Ordinance, although such use does not conform to the provisions hereof, may be continued, subject to the provisions hereof.

..... In the event a non-conforming use of any building or premises is discontinued for a period of one (1) year, the use of the same shall thereafter conform to the provisions of the district in which it is located...." The City's current zoning code continues the same provisions. See City's Exhibit #5 and #2.

before the enactment of the ordinance.... a non-conforming use will not be recognized in the absence of sufficient evidence to prove it was in existence at the time the ordinance was enacted and that it has continued in existence. (emphasis added.)

In this case, the overwhelming evidence proves the location of the proposed bar is almost exclusively residential. The area is zoned as such and the passage of time has reduced the number of structures within it that do not conform to residential uses. The evidence is also very strong that Applicant (through his failure to use the Silver Star for some business activity or purpose)⁶ has lost the legal non-conforming use that attached to his property when he acquired it. It is doubtful he could now resurrect that use and reopen the Silver Star as a tavern or bar at which alcoholic beverages could be sold. Indeed, it is very probable that Applicant would not be able to comply with §11.37(b) of the Code, which requires the secretary or clerk of the city in which an application for a permit is made to certify whether the location of address given in the application is in a wet area and whether the sale of alcoholic beverages for which the permit is sought is prohibited by charter or ordinance.⁷

Prior cases in which the refusal of permits to sell alcohol has been examined provide guidance on what factors may be considered. The Court in Helms v. Texas Alcoholic Beverage Com'n, 700 SW2d 607,611 (Tex. App.—Corpus Christi 1985) stated that "the location and surroundings of a proposed retail beer and wine establishment and the number of such licensed establishments in the community are proper considerations and could be the basis for the refusal of a licence.(citations omitted). In this case, it is clear that the introduction of a bar which would be allowed to sell mixed beverages into a neighborhood that has no such other establishments and that is, for all intents and purposes, strictly residential in nature would be detrimental to that neighborhood and its residents. This is not a case as was discussed in Texas Alcoholic Beverage Comm. v. Mikulenska, 510 SW 2d 616, 619 (Tex.Civ.App.—San Antonio 1974, no writ), where the Court indicated there had to be more to base a refusal or denial of the permit than simply the protests of a large number of area's residents. Indeed, when the Helms Court considered and followed the Mikulenska decision, it restated what is required to deny an application from a qualified person as follows: "For a fully qualified applicant who is proposing to operate a lawful business in a wet area and in compliance with the zoning ordinances of the city to be denied a permit, some conditions or situations must be shown so as to justify the denial under [the Code]." Helms at 611.

The evidence presented by Staff and Protestants not only proves there are conditions in this case that militate against granting the Mixed Beverage permit, but also that Applicant may not be in compliance with the City's zoning code which is a prerequisite

⁶It should be noted that even if Applicant could not sell alcohol at the location, he could have operated a café and sold food and non-alcoholic drinks. Additionally, he could have leased the property to a person who could have obtained a permit to sell alcohol, as he did in 1991 when he leased the club to Mr. Scott.

⁷Mr. Raborn, La Grange City Manager, testified it would be illegal for the Silver Star to start up bar operation now, as it would be in violation of the zoning code, see Tr. Vol. II, p. 99 and Appendix D.

for obtaining such permit. For those reasons, the Mixed Beverage permit application should be denied.

2. Manner of Operation

Staff and Protestants argue that Applicant's manner of operating the Silver Star in the past provides sufficient basis for denying the MB permit that he seeks now. There is very little evidence in the record about how Applicant managed the Silver Star after he purchased the business in 1984. Although he states in his application that he has been the bar's manager from 1984 through the present, see application in Staff's Exh. # 1, it is unclear if he, in fact, managed the day-to-day operations of the business during that time. Applicant testified he leased the tavern to Mr. Scott in 1991 because he (Taylor) got tired of going back and forth between Houston and La Grange; he had and continues to have a full time job in Houston. Applicant also testified that when he leased the bar to Mr. Scott, he put his license "in suspense"⁸ as two persons are not allowed to have a beer license for the same location at the same time.

Although the evidence is sparse on this issue, it appears Mr. Taylor did not personally manage the Silver Star on a full-time basis during the period of 1984-1991 when he claims he managed the bar. Testimony given by Mr. Taylor and some of his supporters leads to the inference that he employed persons who lived in La Grange to manage the bar on a day-to-day basis, and that he "managed" on weekends. (See Tr. Vol. II p. 133). How active his role in managing the bar was is unclear. But there is evidence that in 1991 there were problems at the bar when he was not there. For example, in the latter part of 1991, when Ms. Logan worked at the Silver Star, she was tending the bar alone when someone pulled a weapon on her and she had to call the police. (See Tr. Vol 1, p. 72) Other supporting witnesses testified there were problems, related to drug activity, when the Silver Star was leased to Mr. Scott, (See Tr. Vol 1, p. 59-60). Mr. Taylor himself acknowledged he did not closely monitor how the bar was operated while it was leased, but, at some point, he became aware of certain activities that made him decide to cancel Mr. Scott's lease. (See Tr. Vol II p. 125).

In addition to Applicant's management of the bar which appeared to be haphazard, Staff and Protestant City also presented evidence of numerous complaints of disturbances or criminal activity at the Silver Star that were recorded by the surrounding law enforcement agencies. Appendix C lists the various complaints that were recorded from the late '80s through the early '90s; several officers testified there were other complaints received, but not all were recorded and retained in the official file. Applicant argues that circumstances have changed due to his and his customers' maturation and that no complaints have been lodged during the past six years, (see Taylor affidavit of November 25, 1997 in Staff's Exh. #4). This argument ignores a conspicuously important fact: there have been no sales of alcoholic beverages at the Silver Star during that period. It would be naive to agree with Applicant that because he and his customers have matured,

⁸According to Commission records, it appears Mr. Scott received a permit authorizing him to sell beer or wine at the Silver Star in May, 1991, which permit was suspended in March, 1992. Mr. Taylor's permit was valid until October, 1991, when it expired. See Tr. Vol. II, p. 146.

permitting the sale of alcohol on the premises would result in no complaints or incidents similar to those that occurred in the early '90s. The obvious operative factor in this scenario is the sale and consumption of alcohol and not the age of those who sell or consume the alcohol. When people congregate (there was testimony that on weekends the Silver Star could serve as many 50 patrons, Tr. Vol. I p.46) and consume alcohol, some will consume more than is advisable and will become intoxicated. Once intoxicated, those customers will act in ways that offend others, whether it be others in the bar or residents of the neighborhood. Examples of offending conduct are insults, fights, assaults, loud music and noise, littering, parking in driveways, public intoxication, etc. When the Silver Star last operated as a bar, complaints of that type were regularly lodged. Since it has been closed, few if any, complaints have been made. The reason behind the lack of complaints is obvious.

The Staff and Protestants have proved by a preponderance of the evidence that the manner in which Applicant is likely to conduct his business will be detrimental to the health, welfare and safety of the residential area; consequently, the permit should be denied.

III. PROPOSED FINDINGS OF FACT

1. In 1984, Earnest J. Taylor purchased an existing bar known as the Silver Star which is located at 969 E. Guadalupe in La Grange, Lafayette County, Texas; the bar premises had been allowed to continue operating in the residential-zoned area as a legal non-conforming use pursuant to grandfather provisions in the zoning code that was enacted in 1971.
2. Earnest J. Taylor operated the bar from 1984 until 1991; his permit to sell wine and beer expired in October, 1991.
3. In mid-1991, Taylor leased the premises to Andre Scott, who operated the Silver Star for most of that year; the Silver Star was closed in December, 1991.
4. In March, 1992, Taylor applied for a wine and beer permit in order to reopen the Silver Star.
5. Fayette County Judge held a hearing on the application on October 2, 1992 and thereafter denied the application; no record of that hearing was made available for review, nor was the Judge's order denying the application.
6. In February, 1993, Taylor filed a second application for a wine and beer permit to reopen the Silver Star; the second application was denied by the County Judge without a hearing.
7. In April, 1994, Taylor filed a third application for a wine and beer permit to reopen the Silver Star; the third application was denied by the County Judge on May 3, 1994, without a hearing.

8. In October, 1994, Taylor filed a fourth application for a wine and beer permit to reopen the Silver Star; the fourth application was denied by the County Judge
9. In October, 1995, Taylor filed a fifth application for a wine and beer permit to reopen the Silver Star; the fifth application was denied by the County Judge on December 4, 1995, without a hearing.
10. In May, 1997, Taylor filed a sixth application for a wine and beer permit to reopen the Silver Star; the sixth application was denied by the County Judge on June 30, 1997, without a hearing.
11. In August, 1997, Taylor filed a seventh application for a wine and beer permit to reopen the Silver Star; the seventh application was denied by the County Judge on October 14, 1997, without a hearing.
12. In October, 1997, Taylor filed a Motion for Rehearing with the County Judge seeking a rehearing on the denial of the seventh application; the Judge denied the motion on October 28, 1997.
13. In November, 1997, Taylor filed an eighth application for a wine and beer permit to reopen the Silver Star; the eighth application was denied by the County Judge on December 8, 1997, without a hearing.
14. In December, 1997, Taylor filed a Motion for Rehearing with the County Judge seeking a rehearing on the denial of the eighth application; the County Judge summarily denied the motion on December 29, 1997.
15. In June, 1998, Taylor filed an application for a Mixed Beverage Permit with the TABC.
16. The basis for denial of the prior applications for beer and wine permits filed by Taylor are not in the record and therefore cannot preclude consideration of Taylor's current application for a mixed beverage permit which the Code permits.
17. The County Judge and the Chief of Police for La Grange sent letters opposing the issuance of the mixed beverage permit to Taylor on September 23, 1998.
18. TABC Staff, the City of LaGrange, the Lafayette County Judge and a number of citizens who reside in close proximity to the bar (Protestants) protested issuance of the mixed beverage permit, (SOAH Docket No. 458-98-2317).
19. On December 16, 1998, Commission's Staff sent proper notice of the hearing to Applicant, advising him of the protests to the mixed beverage

permit application that had been filed by Commission and Protestants.

20. The hearing on this docket was held March 26, 1999 at the Lafayette County Courthouse in La Grange, Texas. All parties appeared in person or through counsel. The hearing concluded, except for submission of briefs, on March 26, 1999. The record of the hearing was closed on July 14, 1999, after receipt of written briefs.
21. The Silver Star, located at 969 E. Guadalupe, La Grange, Texas is the only bar or tavern within an area that has been zoned residential since 1971.
22. Applicant has not operated the Silver Star as a bar or as any other type of business for profit since 1991.
23. In the past six years, the residential area surrounding the Silver Star has experienced construction of new housing units and remodeling of existing homes; property values in the area have increased.
24. Residents of the area surrounding the Silver Star are primarily family units, and several of those families have small children who live and play on the block where the Silver Star is located.
25. From 1988-1990 when the Silver Star operated as a bar, there were numerous complaints of persons intoxicated in public, which persons were bar patrons.
26. From 1988-1990 when the Silver Star operated as a bar, there were reports of disorderly conduct reported, i.e., fighting, loud noise, etc., at the bar, which disturbed the peace and safety of the neighborhood.
27. From 1989-1991 when the Silver Star operated as a bar, there were reports of criminal activity, involving burglaries, possession of drugs, aggravated assault, etc., in and around the bar, which endangered the health and welfare of the neighborhood.
28. Applicant, who lives and works full time in Houston, demonstrated a lack of vigilance in managing the Silver Star in the late eighties and in monitoring the activities of his lessee in 1991; Applicant presented no evidence to indicate he would manage the bar differently at the present time.
29. From December, 1991 to the present, the Silver Star has been closed and there have been no reports of disorderly conduct, public intoxication or other criminal activity in the surrounding neighborhood.
30. Applicant has conducted no business whatsoever at the Silver Star since December, 1991, and is estopped from claiming he operated a *de factor* business there since then.

31. Operation of the Silver Star as a bar in the 900 block of E. Guadalupe, La Grange, Texas is inconsistent with the current nature of the neighborhood and is incompatible with the city's zoning code.

IV. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Sections 6.01 and 11.46 of the Texas Alcoholic Beverage Code (Code), TEX. ALCO. BEV. CODE ANN. §1.01 et seq.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with 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 Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. The doctrine of *res judicata* does not bar subsequent adjudication of a new application when it has not be shown that the application is the same subject matter as was previously considered; that the prior decision resolved the same disputed issues, and that the statute does not allow the subsequent application.
5. The 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 based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency, TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).
6. Some unusual condition or situation must be shown to justify finding that the place or manner in which an applicant may conduct business warrants refusal of a permit; additionally, the location and surroundings of a proposed bar and the number of such licensed establishments in the community are proper considerations in assessing whether to grant or deny a license. Helms v. Texas Alcoholic Beverage Com'n., 700 S.W.2d 607, 611 (Tex. App.-Corpus Christi 1985).
7. Operation of the bar located at 969 E. Guadalupe, La Grange, Texas will have an adverse effect on the neighborhood because in the past, it contributed to disturbances and criminal activity in the neighborhood; no significant changes have occurred to suggest operation of the bar would be different in the future.
8. Based on Findings of Fact Nos. 24, 25, 26, 27, and Conclusion of Law Nos.5, 6 and 7, the operation of the bar endangers the safety of the residents of the neighborhood.

9. Based on Conclusions of Law Nos. 5, 6 and 7, Applicant has operated the bar in the past in a manner that endangers the safety and general welfare of the neighborhood residents.
10. Based on Findings of Fact No. 25, 26, 27, 28 and Conclusions of Law Nos. 5, 6 and 7, Applicant is likely to operate the bar in a manner that endangers the safety and general welfare of the neighborhood residents.
11. Based on Conclusions of Law Nos. 5 through 10, the Commission should deny the original application for a mixed beverage permit for the establishment at 969 E. Guadalupe, La Grange, Texas.

SIGNED this 15th day of September, 1999.



RUTH CASAREZ
Administrative Law Judge
State Office of Administrative Hearings

APPENDIX A

Staff presented the testimony of one witness and the following documentary evidence:

Ron Clinton—TABC Investigator

Taylor's MB permit application dated 6/18/98 (Exh. 1);
Notice of Hearing sent by Commission, dated 12/16/98 (Exh. 2);
Certified Records of Limited Sales, Excise and Use Tax data for
Earnest J. Taylor covering 1990-1998 from the Texas Comptroller
of Public Accounts (Exh. 3);
Copy of Fayette County Court's file on Earnest J. Taylor's beer and
wine applications covering 1992-1998 (Exh.4)¹

The City of La Grange presented the testimony of the following witnesses:

1. Jackie Skelton—La Grange Chief of Police
2. Kenneth Smith—Chief Deputy of the Fayette County Sheriff's Office
3. Tommy Michalka—Captain, Fayette County Sheriff's Department
4. Shaun Raborn—La Grange City Manager

and introduced the following documentary evidence:

Letter from Chairman of Zoning Commission, dated 11/29/71 (City's #1);
Appendix A (copy of current zoning ordinances), (City's #2);
City ordinance related to Alcoholic Beverages, (City's #3);
City ordinance related to Taxation, (City's #4);
Publisher's Affidavit accompanied by copy of zoning plan of 1971, plus
21 pages of documents related to Silver Star contained in La Grange
correspondence, tax and Police Department files, (City's #5)

The Applicant, Earnest J. Taylor, testified on his own behalf and presented no
documentary evidence.

¹ It should be noted that Commission Atty Gordon asked Judge Gilbreath to take judicial notice of the City Court's file at the conclusion of the public hearing section of the hearing; there was no objection and Judge Gilbreath agreed. Tr. Vol 1, p. 75 & 79. After the March 26th hearing on the merits, Ms. Beck sent the County Court's file to Judge Gilbreath on April 5, 1999, indicating that copies were also sent to Mr. Charles A. Herbert, Ms. Gayle Gordon, Mr. John W. Wied and to SOAH's Docket Clerk. The court reporter's transcription did not include this exhibit, however, as for some unknown reason, it was not forwarded to the reporter for inclusion.

APPENDIX B

Taylor Application Chronology

<u>Date</u>	<u>Action/Event</u>	<u>Party</u>	<u>Resulting Decision</u>	<u>Date of Decision</u>
1984	Taylor buys tavern	Taylor operates tavern until 1991		
05/91	Silver Star leased to A.Scott by	Earnest Taylor		
10/91	Taylor's beer permit expires			10/24/91
12/91	Silver Star closes	A. Scott license canceled for cause	TABC cancels Scott's permit	03/92
03/92	B & W application filed by	Ernest Taylor		
06/16/92	Hrg to be held on application	Scheduled by County Judge	Hrg postponed	on 6/16/92
08/14/92	Hrg reset	County Judge	Rescheduled hrg	for 8/27/92 at 2 pm
08/27/92	Public Hrg held on permit application	Taylor attends; no opposition	County Judge makes no decision	
08/28/92	Notice of Protest & Mtn to Deny filed	by County Atty w/ copy to Applicant	County Judge denies application	09/01/92
09/15/92	Mtn for Rehrgr filed by	Taylor		
09/22/92	Order granting Mtn for Rehrgr by	County Judge	Rehearing set for	10/02/92
10/02/92	Hrg conducted on 3/92 application by	County Judge	Permit denied	10/02/92*
02/25/93	2d app. for W&B permit filed by	Taylor		
04/19/93	Mtn to deny permit filed by, citing <u>Lindsay</u>	County Atty		
04/16/93	Hrg set on 2d app by	County Judge	County Judge denies permit app. w/o hrg	Hrg set - 04/22/93 @ 2 pm
04/13 /94	3d app. for W&B permit filed by	Taylor		

05/03/94	Mtn to deny permit citing Lindsay filed by	County Atty	County Judge denies permit app. w/o hrg	05/04/94
10/13/94	4 th app. for W&B permit filed by	Taylor		
10/20/95	5 th app. for W&B permit filed by	Taylor		
12/04/95	Mtn to deny permit filed by	County Atty	County Judge summarily denies application	12/04/95
05/09/97	6 th app. for W&B permit filed by	Taylor		
06/24/97	Letter opposing permit filed by	La Grange Police Chief		
06/30/97	Mtn to deny permit filed by	County Atty	County Judge summarily denies application	06/30/97
07/29/97	Notice of Appeal filed by	Taylor		
08/27/97	7 th app. for W&B permit filed by	Taylor		
10/14/97	Inquiry re status of app. sent by	Taylor		
10/14/97	Mtn to deny permit filed by	County Atty	County Judge summarily denies application	10/14/97
10/24/97	Mtn for Rehrq filed by	Taylor	County Judge summarily denies Mtn for Rehrq	10/28/97
11/26/97	8 th app. for W&B permit w/ affidavit filed by	Taylor	County Judge forwards app. to TABC	11/26/97
12/03/97	8 th app. for W&B permit refiled w/ addendum by	Taylor		
12/03/97	Mtn to deny permit filed by	County Atty	County Judge summarily denies application	12/08/97
12/18/97	Mtn for Rehrq filed w/ County Judge by	Taylor		

12/18/97	Mtn for Rehrq filed w/ County Judge by	Taylor		
12/97	Mtn to deny permit filed by	County Atty	County Judge summarily denies application	12/29/97
06/18/98	App f. Mixed Bev. Permit filed by	Taylor	with TABC, which sent ntc/hrq for	02/10/99
12/98	Ntc of Hrg sent by TABC setting hrg	before SOAH		Hrg. set for 02/10/99**
09/23/98	Letter opposing MB permit sent to TABC by	County Judge		

* The hearing on October 2, 1992 was granted because Applicant filed a Motion for Rehearing (MFR) after the Court had held a public hearing on the application on August 27, 1992, at which apparently no one protested, (See Applicant's MFR of 9/15/92), However, the following day, August 28th, the County Attorney filed a Notice of Protest together with a Motion to Deny Permit; the County Judge denied the application on September 1, 1992 and notified Applicant, who then filed a MFR on September 15, 1992. The County Judge granted the motion and set the rehearing for October 2, 1992.

** Hearing before SOAH set for 2/10/99 was continued and was ultimately held on March 26, 1999.

APPENDIX C

1997

CALLS TO SILVER STAR 969 E GUADALUPE ST

1981				
1982				
1983				
1984	#644	12-21-84	12:32 AM	DISCHARGING FIREARMS CITY
1985	NONE			
1986				
1987	#1088	1-22-87	4:35 AM	ARSON
1988	NONE			
1989	#1708	9-9-89	9:30AM	BURGLARY OF BUILDING
1990	#1868	3-23-90	11:15 PM	DISORDERLY CONDUCT
	#1887	4-16-90	8:15 PM	BURGLARY OF VEHICLE
1991	91-67	4-13-91	9:02 PM	AGG. ASSAULT
	91-272	10-13-91	2:45 AM	UNLAWFULLY CARRYING WEAPON
1992	NONE			
1993	NONE			
1994				
1995	NONE			
1996				
1997				

SILVER STAR

DISORDERLY CONDUCT:

33072	41718	10-11-88	10:15 P.M.	SHELLIE HATCH	900 Dix E. Guard (LANGUAGE) ?
33095	42640	3-10-89	12:05 A.M.	SHELLIE HATCH	(FIGHTING)
33096	42641	3-10-89	12:05 A.M.	CLAUD RIVERS	(FIGHTING)
33110	43539	8-7-89		EARNEST TAYLOR	(NOISE)
35009	44161	1-6-90	3:50 P.M.	SAMUEL BRITTON	(FIGHTING)
35012	44545	3-23-90		EARNEST TAYLOR	(NOISE)

PUBLIC INTOXICATION

33033	40134	1-23-88	10:35 P.M.	WILBERT PHEARSE	✓
33041	41786	10-27-88	5:20 P.M.	ALFREDO BOSQUE	✓
33035	42639	3-10-89	12:05 P.M.	SHELLIE HATCH	
35007	44160	3-23-90	3:50 P.M.	SAMUEL BRITTON	



La
Grange

APPENDIX D

City of La Grange

155 E. Colorado • La Grange, Texas 78945

December 7, 1998

Lt. David Ferrero
Texas Alcoholic Beverage Commission

Re: Silver Star
969 E. Guadalupe St.
La Grange, Texas 78945

Dear Lt. Ferrero:

It has come to my attention that Mr. Earnest Taylor has petitioned to open the Silver Star which is located at 969 E. Guadalupe Street. This property is in a residential zoned area and has been out of business for a number of years. According to City Code in the event a nonconforming use of any building or premises is discontinued for a period of one year, the use of the same shall thereafter conform to the provisions of the district in which it is located. Also, the majority of the residents in the area are not in favor of the re-opening of this establishment and I feel that it would not be in the best interest of the neighborhood to allow it to open. The City of La Grange is asking that the TABC take this into consideration and not allow the opening of the Silver Star.

Sincerely,

Shawn Raborn
City Manager

AFFIDAVIT OF EARNEST TAYLOR

STATE OF TEXAS §
COUNTY OF HARRIS §

On this day, **EARNEST TAYLOR** appeared before me, the undersigned notary public, and after I administered an oath to him, upon his oath, he said:

"My name is Earnest Taylor. I am more than 21 years of age and capable of making the affidavit.

"I am the owner of Silver Star café and bar located at 969 Guadalupe, La Grange, Texas. I have applied for a permit to sell beer at Silver Star on eight different occasions. My first application was filed sometime in August of 1992. A hearing was held on this application. On September 1, 1992, this application was denied by County Judge Edward F. Janecka, purportedly, because he did not feel that the awarding of a beer retailer's permit to Silver Star would be in the best interests of the community.

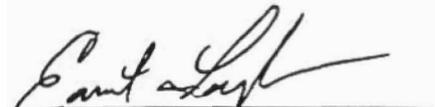
"Since that first application, I have been summarily denied a license on each successive application without a hearing.

"It has now been over six years since a hearing on whether to deny me a beer license has been held. In that time Silver Star has operated without the right to sell beer. Customers are allowed to bring their own alcoholic and non-alcoholic beverages into the cafe. In the six years that have elapsed, the café has been operating without a single incident or occurrence that elicited complaints from the surrounding community or calls to local law enforcement officials.

"It continues to be a clean, well maintained and peacefully run establishment where people come to listen to music, play pool, have parties, eat barbecue and congregate. It is a safe and secure place where the majority of the patrons are now over 40 years of age. I have been the sole operator of Silver Star for the last six plus years and I have greatly matured and continue to be a law abiding and respectable member of this community.

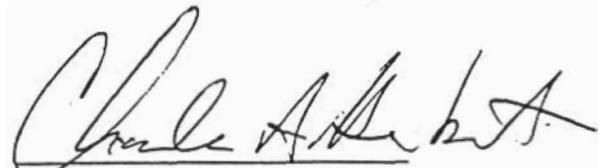
Nov 25 1997

“These facts clearly indicate that a substantial change in whatever circumstances that existed in August of 1992 which may have justified denying a beer permit to Silver Star then, has occurred, and the changes are significant enough to make a hearing on whether to deny another application for a beer permit necessary.”



Earnest Taylor

SWORN TO and SUBSCRIBED before by EARNEST TAYLOR on the 25th day of November, 1997.



Charles A. Herbert