

TG
prolet

DOCKET NO. 499573

IN RE SSRA ENTERPRISES INC.	§	BEFORE THE
D/B/A MOBIL FOOD BEER & WINE	§	
ORIGINAL APPLICATION BQ	§	
	§	
	§	TEXAS ALCOHOLIC
	§	
DENTON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-0459)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 20th day of February 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Jerry Van Hamme. The hearing convened on December 6, 2005 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 January 31, 2006. This Proposal For Decision (**attached hereto as Exhibit "A"**), 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.

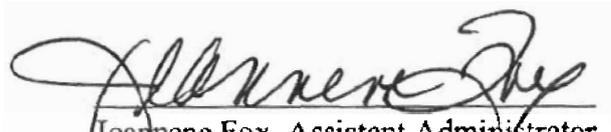
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's Original Application for a BQ be **GRANTED**.

This Order will become final and enforceable on March 13, 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 or by U.S. Mail as indicated below.

SIGNED this 20th day of February 2006.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Jerry Van Hamme
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (214) 956-8611

SSRA Enterprises Inc.
d/b/a Mobil Food Beer & Wine
998 North Garden Ridge
Lewisville, Texas 75067
CMRRR#7001 2510 0000 7274 2826

Don McLeod
Protestant
1501 n. Valley Parkway
Lewisville, Texas 75077-2401
CMRRR#7001 2510 0000 7274 2819

Brian and Jamie Bacon
Protestants
1632 Niagra
Lewisville, Texas 785077
CMRRR#7001 2510 0000 7274 2802

Kevin Janse
Protestant
Senior Corporal Dallas Police Department
9801 Harry Hines
Dallas, Texas 75220
CMRRR#7001 2510 0000 7274 2796

Jane Byers, M.S.
Protestant
650 S. Edmonds, Suite 120
Lewisville, Texas 75067
CMRRR#7001 2510 0000 7274 2789

Mark and Jennifer Lehman
Protestants
Via Fax 972 420 6883

Terry Taylor
Protestant
Primrose School
1480 North Valley
Lewisville, Texas 75077
CMRRR#7001 2510 0000 7274 2772

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Dallas District Office

SOAH DOCKET NO. 458-06-0459

PROPOSAL FOR DECISION

PAGE 2

Therefore, these matters are set out in the findings of fact and conclusions of law without further discussion here.

On December 6, 2005, a public hearing was held before Jerry Van Hamme, ALJ, at the offices of the State Office of Administrative Hearings, Dallas, Dallas County, Texas. Staff was represented by Timothy E. Griffith, attorney. Protestants Don McLeod and Brian Bacon appeared *pro se*. Seema Merchant appeared *pro se* for Applicant. The record was closed on that date.

II. LEGAL STANDARDS AND APPLICABLE LAW

An application for a wine and beer retailer's off-premise permit is governed by the same provisions which apply to the application for and issuance of a retail dealer's off-premise license. TEX. ALCO. BEV. CODE ANN. § 26.03. An application for a retail dealer's license shall be refused by the county judge if the place or manner in which the applicant conducts business warrants a refusal based on the general welfare, health, peace, morals, safety, and sense of decency of the people. TEX. ALCO. BEV. CODE ANN. § 61.42. If the county judge approves an application for a license as a retail dealer the Commission or administrator may refuse to issue a license for any reason which would have been grounds for the county judge to have refused to approve the application. TEX. ALCO. BEV. CODE ANN. § 61.47.

III. EVIDENCE

A. Staff's Evidence and Contentions

1. Pleadings

Staff noted in its Notice of Protest Hearing that Applicant had met all Commission requirements for holding the permits at the premises, Applicant had properly posted or published all

SOAH DOCKET NO. 458-06-0459

PROPOSAL FOR DECISION

PAGE 3

required notices, and Applicant had complied with all applicable Texas Alcoholic Beverage Code requirements.

2. Beth Gray

Beth Gray, a Staff agent, testified she conducted an investigation and prepared a report concerning Applicant's permit application pursuant to protest letters received by Staff. The premises for which the permit was requested is a Mobil service station. Her report shows that on May 3, 2005, the City of Lewisville approved the application for the permit; on May 5, 2005, the Denton County Clerk approved the application; and on June 14, 2005, the Denton County Judge delegated official approved the application.

Ms. Gray presented photos showing the proximity of Applicant's service station to an assisted living residence (Alterra Sterling House Assisted Living Residence), a Montessori day care center (Parkview Academy), an additional day care center (Primrose School of North Lewisville), and a middle school (Huffines Middle School). She testified that while she did not personally know the actual distance from Applicant's premises to any nearby schools, she did know that an application for a premise located within 1,000 feet of a school is not denied by Staff based on that fact alone. Applicants in such cases are required by Commission regulations to post a \$10,000 bond, which Applicant did in the instant case. She further stated that while Staff took no formal position on the protest, Staff had no evidence showing that granting the application would constitute a threat to the general welfare, health, peace, morals, safety, and sense of decency of the community.

3. City of Lewisville Ordinance

An Ordinance passed by the City of Lewisville City Council on March 21, 2005, (Ordinance No. 3188-03-2005(Z)) was presented into evidence by Staff showing, among other things, that a majority of the voters of Lewisville had voted in favor of the sale of certain alcoholic beverages in

SOAH DOCKET NO. 458-06-0459

PROPOSAL FOR DECISION

PAGE 4

the City of Lewisville. It also prohibits the sale of alcoholic beverages in a retail establishment with a permit for the off-premise consumption of beer and wine within 300 feet of a public or private school.

4. Letter, City of Lewisville, Director of Community Development

Staff presented into evidence a letter from the Director of Community Development for the City of Lewisville to the Primrose Private School. The letter states that the school has fewer than 100 students and that "State law provisions" as they relate to adjacent or nearby properties seeking permits for the sale of beer and wine for off-premise consumption "do not apply for private school facilities that have an enrollment of 100 students or less."

5. Protest Letters

Staff also offered into evidence six protest letters. The letters expressed concerns about the potential dangers associated with increased traffic at Applicant's location resulting from the sale of beer and wine on the premises; the threat that the number of intoxicated drivers in the area might increase and thereby endanger children at a nearby park; and the concern that Applicant's premises are located close to two daycare centers and a middle school. One of the letters, written by Protestant Don McLeod, stated that while he voted in favor of allowing the sale of beer and wine in Lewisville, he believed such sales would be prohibited within 1,000 feet of schools.

B. Protestants' Evidence and Contentions

1. Brian Bacon

Brian Bacon testified he was concerned that granting Applicant's permit would make alcoholic beverages more accessible to middle-school students who congregate at Applicant's

SOAH DOCKET NO. 458-06-0459

PROPOSAL FOR DECISION

PAGE 5

location after school, and he offered photos into evidence showing middle-school students present on Applicant's premises. In addition, he felt Applicant's premises were an inappropriate location for alcohol sales because, he believed, Applicant's location is within 250 feet of the Primrose School daycare center, is in the same complex as the Parkview Montessori School daycare center, is within 600 feet of the Huffines Middle School, and is adjacent to a city park. Mr. Bacon was the author of one of the six protest letters received by Staff.

2. Don McLeod

Don McLeod testified that in his opinion the sale of alcoholic beverages on Applicant's premises will cause home values in the area to decline. He also shared the concerns expressed by Mr. Bacon and was the author of one of the six protest letters received by Staff.

C. Applicant's Evidence and Contentions

1. Seema Merchant

Seema Merchant testified that Applicant requested the permit in order to compete with similar service stations in the area that already sell beer and wine on their premises. In addition, she presented a document listing the names of 138 persons who support Applicant's request to receive the permit.

IV. ANALYSIS

In order to justify a finding that the place or manner in which the applicant conducts business warrants a refusal of the permit based on the general welfare, health, peace, morals, safety, and sense of decency of the people, some unusual condition or situation must be shown. Texas Alcoholic Beverage Commission v. Jack E. Mikulenska d/b/a Frigate Club, 510 S.W.2d 616, 619 (Tex.App.--San Antonio 1974). Such "unusual conditions" have been found to include a "sexually-themed"

SOAH DOCKET NO. 458-06-0459

PROPOSAL FOR DECISION

PAGE 6

business located in a primarily residential neighborhood, Texas Alcoholic Beverage Commission v. Twenty Wings, LTD and TWI XXV, Inc., Judy Hall, Director, as Partners d/b/a Hooters, 112 S.W.3d 647 (Tex.App.–Ft. Worth 2003); a previously licensed applicant with a history of disciplinary problems, RRZ, Inc. d/b/a Club R & R, v. Texas Alcoholic Beverage Commission, 510 S.W.2d 616 (Tex.App.–San Antonio 2001); a history of an unacceptable and pervasive amount of criminal activity in the location for which the permit had been requested, Texas Alcoholic Beverage Commission v. Carlos Sanchez, d/b/a Tierra Caliente Bar and Grill, 96 S.W.3d 489 (Tex.App.–Austin 2002); a location where the only exit from the premises was onto a frontage road at the “gore area” (i.e. the triangular section between a freeway exit ramp and the service road striped with white paint and designed to keep cars from moving off the exit ramp too soon or from moving from the service road into the exit lane too quickly), Bavarian Properties, Inc. v. Texas Alcoholic Beverage Commission, 870 S.W.2d 686 (Tex.App.– Fort Worth 1994); where the Mayor, Chief of Police, Sheriff, and property owners from three subdivisions opposed the permits, Dienst v. Texas Alcoholic Beverage Commission, 536 S.W.2d 667 (Tex.Civ.App 13 Dist. 1976); and where the Mayor, Chief of Police, Sheriff, members of the Board of a nearby public school, and nearby property owners and church members opposed the permits, Helms d/b/a The Thirsty Turtle v. Texas Alcoholic Beverage Commission, 700 S.W.2d 607 (Tex. App.–Corpus Christi 1985).

No such evidence of an unusual condition or situation was presented by Protestants in the instant case. No evidence was presented showing Applicant’s premises is within a prohibited distance from a public or private school, and although Applicant’s business may result in additional traffic in the area, there is no requirement that Applicant must select a location virtually free of traffic hazards in order to qualify for a permit. Potential traffic congestion and the presence of nearby schools, when Applicant has met all the necessary legal requirements, do not alone constitute an unusual condition or situation warranting the denial of the permits. Kermit Concerned Citizens Committee v. Colonial Food Stores, Inc., 650 S.W.2d 208 (Tex.App.–El Paso 1983). In addition, the evidence fails to show that school-age children will, of necessity, be impacted by the sale of alcoholic beverages on Applicant’s premises or have greater access to alcoholic beverages as a result of this permit.

SOAH DOCKET NO. 458-06-0459

PROPOSAL FOR DECISION

PAGE 7

Furthermore, Applicant has met all the requirements of the law to receive the permit, Applicant's location is in an area where beer and wine may be legally sold, Applicant's premises are not within a prohibited distance from a public school, and other similarly situated service stations in the vicinity already sell beer and wine. A denial of a permit in such a case may constitute improper discrimination between Applicant and its competitors. See Elliot v. Dawson, 473 S.W.2d 668, (Tex.Civ.App.—Houston [1st Dist.] 1971).

Protestant's concerns, albeit understandable, do not rise to the level of an unusual condition or situation that justifies a finding that the place or manner in which the applicant conducts business warrants a refusal of the permit based on the general welfare, health, peace, morals, safety, and sense of decency of the people. Accordingly, based on the evidence on the record, the Protestants have failed to show, by a preponderance of the evidence, that Applicant's application should be denied because the place or manner in which the applicant conducts business warrants a refusal of the permit based on the general welfare, health, peace, morals, safety, and sense of decency of the people.

V. RECOMMENDATION

The ALJ recommends that Applicant's application for a Wine and Beer Retailer's Off-Premise Permit for 998 N. Garden Ridge Boulevard, Lewisville, Denton County, Texas, be granted.

VI. FINDINGS OF FACT

1. SSRA Enterprises, Inc. d/b/a Mobil Food Beer & Wine (Applicant) filed an original application with the Texas Alcoholic Beverage Commission for a Wine and Beer Retailer's Off-Premise Permit for 998 N. Garden Ridge Boulevard, Lewisville, Denton County, Texas.
2. On May 3, 2005, the City of Lewisville approved Applicant's application for the permit.

SOAH DOCKET NO. 458-06-0459

PROPOSAL FOR DECISION

PAGE 8

3. On May 5, 2005, the Denton County Clerk approved Applicant's application for the permit.
4. On June 14, 2005, the Denton County Judge delegated official approved Applicant's application for the permit.
5. Protests to the application were filed by residents of the neighborhood and other interested citizens asserting that the application should be denied based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency.
6. A Notice of Protest Hearing dated November 3, 2005, was issued by Staff notifying all parties that a hearing would be held on the application and informing the parties of the time, place, and nature of the hearing.
7. On December 6, 2005, a public hearing was held before Jerry Van Hamme, ALJ, at the offices of the State Office of Administrative Hearings, Dallas, Dallas County, Texas. Staff was represented by Timothy E. Griffith, attorney. Protestants Don McLeod and Brian Bacon appeared personally. Seema Merchant appeared *pro se* for Applicant. The record was closed on that date.
8. Applicant has met all Commission requirements for holding the permit at the location.
9. Applicant's location is in an area in the City of Lewisville where it is legal to sell beer and wine.
10. Applicant's location is not within a prohibited distance from a public park or a public or private school.

VII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, §§ 6.01 and 11.46(a)(8).
2. The State Office of Administrative Hearings has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law

SOAH DOCKET NO. 458-06-0459

PROPOSAL FOR DECISION

PAGE 9

pursuant to TEX. GOV'T CODE ANN. ch. 2003.

3. Proper and timely notice of the hearing was effected on all parties pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE § 155.55.
4. The place or manner in which Applicant conducts its business does not warrant a refusal of the permit based on the general welfare, health, peace, morals, safety, and sense of decency of the people. TEX. ALCO. BEV. CODE ANN. § 61.42.
5. Applicant's application for a Wine and Beer Retailer's Off-Premise Permit for SSRA Enterprises, Inc. d/b/a Mobil Food Beer & Wine, 998 N. Garden Ridge Boulevard, Lewisville, Denton County, Texas should be granted.

SIGNED January 31, 2006.



**JERRY VAN HAMME
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION
CASE: TABC vs. SSRA Enterprises Inc. d/b/a Mobil Food Beer & Wine
DOCKET NUMBER: 458-06-0459
AGENCY CASE NO: 499573

Timothy Griffith
Staff Attorney
8700 Stemmons Freeway, Ste. # 460
Dallas, Texas 75247
Telephone No: (214) 678-4000

AGENCY COUNSEL
VIA FAX (214) 678-4001

Don McLeod
1501 N. Valley Parkway
Lewisville, TX 75077-2401

PROTESTANT
VIA REGULAR MAIL

Brian and Jamie Bacon
1632 Niagra
Lewisville, Texas 75077

PROTESTANTS
VIA REGULAR MAIL

Kevin Janse
Senior Corporal Dallas Police Department
9801 Harry Hines
Dallas, TX 75220

PROTESTANT
VIA REGULAR MAIL

Jane Byers, M. S.
650 S. Edmonds, Ste. 120
Lewisville, TX 75067

PROTESTANT
VIA REGULAR MAIL

Terry Taylor
Primrose School
1480 North Valley
Lewisville, TX 75077

PROTESTANT
VIA REGULAR MAIL

SSRA Enterprises Inc.
D/b/a Mobil Food Beer & Wine
998 North Garden Ridge
Lewisville, TX 75067

RESPONDENT
VIA REGULAR MAIL

as of January 31, 2006

2-16

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

January 31, 2006



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

RE: Docket # 458-06-0459
TABC, PETITIONER, VARIOUS PROTESTANTS VS. SSRA
ENTERPRISES INC., D/B/A MOBIL FOOD BEER & WINE

Dear Ms. Fox:

Please find enclosed a PROPOSAL FOR DECISION in this case. It contains my recommendation and underlying rationale.

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

Sincerely,

Jerry Van Hamme
Administrative Law Judge

JVH/sr
Enclosure

cc: Timothy Griffith, Agency Council for Texas Alcoholic Beverage Commission, **Via Fax**, Don McLeod, Protestant, **Via Mail**, Brian and Jamie Bacon, Protestant, **Via Mail**, Kevin Janse, Protestant, **Via Mail**, Jane Byers, M.S., Protestant, **Via Mail**, Terry Taylor, Protestant, **Via Mail**, and SSRA Enterprises, Inc., D/B/A Mobil Food Beer & Wine, Respondent, **Via Mail**