

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
and	§	
ORLANDO ROMERO,	§	
JOSEPH BOYLE, AND CONCERNED	§	
RESIDENTS OF SHADY ACRES,	§	
Protestants	§	
V.	§	
	§	
ORIGINAL APPLICATION OF	§	OF
LA HACIENDA ENTERPRISES INC.	§	
D/B/A LA HACIENDA ESCONDIDO	§	
MEXICAN RESTAURANT,	§	
Applicant	§	
HARRIS COUNTY, TEXAS	§	
TABC NO. 508162	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

La Hacienda Enterprises Inc., D/B/A La Hacienda Escondido Mexican Restaurant (Applicant) filed an original application with the Texas Alcoholic Beverage Commission (Commission or TABC) for a Mixed Beverage Permit for the premises located at 1431 W. 26th Street, Houston, Harris County, Texas. Orlando Romero, Joseph Boyle, and Concerned Residents of Shady Acres, filed a protest to the original application asserting that the permit should be denied based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.¹ The Administrative Law Judge (ALJ) recommends that the Commission not grant Applicant the original permit.

¹ The TABC appeared only as a jurisdictional petitioner, had no independent evidence to protest the issuance of the permits, and is neutral on the issues. Additionally, the TABC asserted the Applicant is qualified to hold the permit at the location.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No contested issues of notice, jurisdiction, or venue were raised in this proceeding. Therefore, these matters are set out in the findings of fact and conclusions of law without further discussion here.

On May 19, 2006, a public hearing was held before Stephen J. Burger, ALJ, in Houston, Harris County, Texas. Protestants were represented by attorney Joseph Boyle. The TABC attorneys were Lindy Hendricks, Ramona Perry, and Sandra Patton. Applicant was represented by attorneys Ron Monshaugen, Al Van Huff, and Debbi Garnt.

II. LEGAL STANDARDS AND APPLICABLE LAW

The Commission or Administrator may refuse to issue a permit if it has reasonable grounds to believe that the place or 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). Additionally, case law states that in order to deny a permit to a qualified applicant proposing to operate a lawful business in a wet area and in compliance with zoning laws, an unusual condition or situation must be shown. Kermit Concerned Citizens Committee v. Colonial Food Stores, Inc., 650 S.W.2d 208 (Tex. App. 8 Dist., 1983).

III. EVIDENCE AND PUBLIC COMMENT

A. Protestants' Comments and Evidence

1. Public comments

Approximately 53 Protestants appeared at the hearing, of which approximately 25 gave public comments. Nearly all live or work in the surrounding area of Applicant's proposed restaurant,

and included State Representative Bohac, and City Councilman Adrian Garcia. In summary, the public commentators were opposed to the permit being granted based on safety, health, peace, and general welfare concerns, which include but are not limited to the following:

The proposed building is inadequate; the business will be in the middle of a residential area; there are no sidewalks on the street, and the street is narrow; the business and its alcohol sales will bring noise, increase traffic on the street, and create traffic safety issues for children living on the street. Other concerns were restaurant patrons parking along the narrow street; possible increased crime; and interference with the open drainage ditches on both sides of the street.

The public comments also mentioned an anticipated decline in quality of life. Several of the commentators are new homeowners near the proposed restaurant who are concerned with a decline in property values. Several commentators mentioned the area is being revitalized, and they have recently moved into new houses near or next to the proposed restaurant; they stated they would not have done so had they known about the proposed restaurant. Meredith Roberson commented that her new home is immediately next to the proposed restaurant (the proposed restaurant location is presently a private residence), and her child's nursery will be next to the restaurant. Courtney Zavala-Romero moved within about 50 feet of the proposed restaurant, and learned of the proposed restaurant the day she moved in. Ms. Zavala-Romero cited her safety concerns, including the hours the restaurant will be open, and contended the restaurant will be an eye-sore, and could affect her property value.

There are two churches on the street; one, a Quaker Meeting House, is up the block and across the street from the proposed restaurant. Mary Griffiths and Barbara Cowan, appearing for the Quaker Meeting House, commented that the meetings are held in silence. They cited many of the other commentator mentioned concerns, in addition to stating the tranquility of the area will be affected, and that vermin will be attracted to the restaurant's garbage. Jane Mulholland stated that the street is now quiet, the proposed restaurant would be in the middle of a growing residential area,

and would present safety problems. She also commented that tourists on occasion visit the Meeting House.

Other concerns were voiced, including that once the permit is granted, subsequent owners could use the liquor permit for other establishments, and the restaurant will not succeed in the area. John Montgomery, a developer of shopping sites and a nearby resident, stated that the proposed site is unusual, as this is not a commercial area; traffic problems will ensue, and the 48 proposed parking spots will be inadequate, leading to parking on the narrow street.

2. Protestant's Witnesses

Rosemary Abbouchi

Rosemary Abbouchi lives on W. 26th Street, and is an accountant. She has a six-year-old child, and she moved to the area because it was quiet, and was being revitalized. She is concerned about increased traffic on the narrow street, possibly intoxicated drivers, noise from deliveries to the restaurant, parking problems, and reduced property values. She moved in about one year ago, and admitted there are other commercial businesses on the street, but that the area is mainly residential. There are no deed restrictions prohibiting the proposed restaurant.

Orlando Romero

Orlando Romero lives on W. 26th Street, across the street from the proposed restaurant. He is a project manager for a developer, chose this area because it was on the "upswing," and believes property values will rise. He stated that if the permit is granted, houses will be devalued within a three to four block area. The area is composed of a church, new and older homes, and is very residential. There is a commercial business on the corner of Ella Blvd. and 26th. Next to the proposed restaurant are single family homes and townhouses.

He also stated there are no deed restrictions prohibiting the proposed restaurant, and that the area is wet.

B. Applicant's Evidence

Applicant presented the testimony of three witnesses, and Exhibits 1-13. The testimony is summarized below.

1. Arturo Ramirez

Arturo Ramirez is an attorney for Applicant, and presented the exhibits. On Ex. 2, the yellow lots are listed under Houston County Appraisal records as commercial property areas. The red lot is the proposed restaurant. In summary, and as pointed out by Mr. Ramirez and shown in the photos and video, the general location is W. 26th Street, which runs east/west, with Ella Blvd. being a through street running north/south on the west side. Moving in an easterly direction are the following north/south streets of Couch, Bevis, Beall, and Brinkman, with N. Durham Dr. being the through street bordering on the east that runs north/south. The photos and the video show the various businesses from Lowe's and the Circle Saw Shop at the west (Ella Blvd.) side of W. 26th Street, to Newton's Nursery and an unidentified commercial property at 810 W. 26th Street, the east (N. Durham Dr.) side of W. 26th St. Behind the Home Depot on W. 26th Street are empty lots. Other various businesses are Klinger and Associates; Prime Source Office Solutions; Office Supply and Printing; McDugald Steele; Trabajadores Con Experiencia Aqui D En; and other businesses whose names are unknown. Additional photos of businesses on W. 20th Street are in evidence. (See Ex. 5.)

On cross-examination, Mr. Ramirez admitted that there are no bars or restaurants on W. 26th Street between Ella and N. Durham. He also admitted that the video did not show many of the residences that are on W. 26th Street between Ella and N. Durham; and that there are residences south and east of the proposed restaurant. The two houses of worship previously referred to are on the opposite side of the street from the proposed restaurant, at 1330 and 1614 W. 26th Street. Presently,

there is an occupied residence (owned and occupied by Applicant) at the site of the proposed restaurant.

Photos of Applicant's other operating restaurants were entered. Mr. Ramirez took other photos of various restaurants in Houston that operate in residential areas.

2. Ernesto Cabrera

Mr. Cabrera is Applicant's owner and president. He owns three other restaurants. Mr. Cabrera has lived at the proposed restaurant site for 13 years. The proposed restaurant will be about 5,800 square feet, with 48 parking spaces (city requirements are 46); a fence and sidewalk will be installed; all dining will be inside (no patio); and the maximum number of diners will be 100 to 150. The restaurant will be open seven days a week; Monday through Thursday 11 a.m. to 10 p.m.; Friday through Saturday 11 a.m. to 11 p.m.; and Sunday 11 a.m. to 9 p.m. The restaurant will be family oriented, with no plate over about \$14.00. There will be no outside music, and garbage trucks will come two to three times per week, while delivery trucks may arrive daily.

Regarding alcohol, Mr. Cabrera stated there will be no bar; alcoholic drinks will be served from a station; and all servers will be TABC certified. Based on his figures from his other restaurants, sales from alcohol will be approximately 15 to 18%, the remainder of sales will be from food.

Mr. Cabrera did not give a reason for replacing his residence with a restaurant, and stated he "may" build it without a liquor license.

3. Philipp Nathans

Mr. Nathans has been a CPA for Mr. Cabrera since 1996. He is familiar with the sales figures of the Applicant's restaurants, as represented by Applicant's Ex. 13.

IV. ANALYSIS

Protestants seek denial of Applicant's permit on the basis that the "place or manner in which the applicant may conduct his business" warrants the refusal of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. Protestants must prove their case by a preponderance of the evidence. Additionally, where a qualified applicant requests to operate in a wet area, some unusual condition or situation must be shown to exist. In re Simonton Gin., Inc., Tex. Civ. App. 616 SW2d 274 (1981).

The Applicant's proposes to build his Mexican restaurant on his property where he now lives. Applicant provided blueprints of the proposed restaurant, which have been approved by the city of Houston. Applicant owns several other restaurants in the Houston area, and no evidence of any problems to the public was produced. As Applicant argued, there are no zoning or other governmental prohibitions against building the restaurant where proposed, and the TABC submits that all its requirements for the permit have been met. Applicant argues that the restaurant will not be a cantina or nightclub; that only about 15 to 18% of its sales will be from alcohol; there will be adequate parking; other commercial operations are located on the street; and that the Protestants are trying to regulate the use of Applicant's land. Applicant also argues that the Protestants' case is all speculation.

The Protestants argue that there are unusual conditions or situations warranting denying the permit, such as: two churches nearby, one of which requires quiet for its daily services (the Quaker Meeting House); the narrow roadway, with no sidewalks; the non-compatibility with the community; the increased noise and traffic on the residential street; and that there are no other bars or restaurants on the street. Additionally, Protestants believe that homeowners property values in the area will be reduced if the permit is granted. Several of the Protestants and witnesses stated that they live immediately next to the proposed restaurant site, and are upset that what is now a private residence will be converted to a Mexican restaurant selling alcoholic drinks, with all the above-mentioned problems to other nearby residents.

The ALJ, after reviewing all the evidence, finds that the place or manner in which Applicant proposes to conduct his business warrants the refusal of the permit based on the general welfare, peace, and safety of the surrounding residents. Further, granting the permit would cause an unusual condition or situation relating to the general welfare, peace, and safety of the surrounding residents. There is insufficient evidence that the permit should be denied based on the health or morals of the people, or on the public sense of decency.

The Applicant, pursuant to local authority, may immediately build his restaurant without applying for an alcohol permit; no permission from the TABC would be required to build such a restaurant. However, Applicant has chosen to build and operate his restaurant, and serve alcohol. Applicant therefore is subject to TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8), which states the permit will not be granted if the “place or 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. (Emphasis added). Therefore, the effects of serving alcoholic drinks at the restaurant relating to parking, traffic pedestrian safety, and noise, on people in the immediate area (“place or manner”) must be considered. There is no restaurant (or any other business) serving alcohol on W. 26th Street now, so the effect the mixed beverage permit would have on the people in the immediate area must be based on reasonable inferences derived from the evidence.

On W. 26th Street, between Ella Blvd. and N. Durham, there are presently no businesses that sell alcohol. In this approximately five block stretch of road, there are approximately 19 businesses that front W. 26th Street. Most are small commercial entities such as architects, lawn services, and office suppliers. In the video taken by Applicant, very little traffic was noted at these businesses. The Lowe’s store does not have its entrance on W. 26th Street. There is insufficient evidence, with the exception of Lowe’s, that any of these businesses are open past normal business hours, as opposed to Applicant’s restaurant, which will be open seven days a week, until 9:00 to 11:00 p.m., depending on the day of the week. Therefore, Applicant’s restaurant will have customers, some of whom will have consumed alcohol, leave the restaurant to drive off at hours later in the day, seven days a week. This condition does not exist now on W. 26th Street.

Additionally, while there are about 19 businesses on W. 26th Street between Ella Blvd. and N. Durham, there are numerous residences in this area. In fact, according to Applicant's own map, Exhibit 2, there are presently no commercial entities of any sort on the whole block Applicant intends to build the restaurant and sell alcohol. Only residences are on this block. On the block immediately south of the proposed restaurant, there is only one business, the remainder being private residences and a Quaker Meeting House. The other approximately 18 businesses cited by Applicant are spread over an approximate 10 block area; the remainder are predominately private residences and apartments, except for the empty lots behind Home Depot.

The great number of residences, and the relatively small number of businesses in this area was also born out by the public comments, and the Protcstants' witnesses. Also, non of the businesses on W. 26th Street between Ella Blvd. and N. Durham sell alcohol. The granting of the permit to operate the restaurant and sell alcohol in this residential area, on property now a private residence, presents an unusual condition or situation relating to the genrcal welfare, peace, and safety of the surrounding residents.

The video and photos reveal that W. 26th Street from Ella Blvd. to N. Durham is relatively narrow (no measurements of the breadth of this street was submitted by either side, as compared to other streets; however, the ALJ notes the narrowness of this street from the video). Furthermore, there are no sidewalks. Applicant's proposed restaurant will cause increased traffic. Patrons, some of whom will have consumed alcohol at the restaurant, will leave the restaurant and drive on Couch, and then exit the area on W. 26th Street east or west, or further down on Couch. However, it is reasonable to infer that most patrons will be using W. 26th Street. This will negatively affect any pedcstrians on W. 26th Street.

Although the restaurant plans on parking spaces for 48 vehicles, the Applicant has stated that the restaurant's capacity will be from 100 to 150. Of course, the number of patrons will vary, depending on the time of day, etc; nevertheless, it is reasonable to infer that there will be an increase

in traffic, occurring anywhere from 11:00 a.m. to 10:00 p.m., Monday through Thursday; to 11:00 p.m Friday and Saturday; and to 9:00 p.m. Sunday. With 48 parking spaces for a restaurant that can serve between a maximum 100 to 150 patrons, it is reasonable to infer that there will be times when there will be more than 48 vehicles at the restaurant. When this occurs, vehicles will be forced to park on the street, which is narrow and without sidewalks. This will increase the hazard to not only any pedestrians, but also to the many local residents driving on the street.

These safety issues do not now exist because at this time there are no similar type businesses on W. 26th Street. As noted, the ALJ finds that the approximately 19 businesses fronting W. 26th Street now are not the restaurant-type businesses that depend on numerous customers, do not keep the extended hours that a restaurant would keep, and do not serve alcohol to their customers, as Applicant proposes to do. The ALJ bases this determination on what was presented at the hearing, namely the video of the various businesses presented by Applicant, the nature of these businesses, and the lack of traffic in and out of these businesses the ALJ noted on the video.

The Applicant has stated he “may” build his restaurant even if he does not secure an alcohol permit. Since the evidence shows that about 18% of his sales come from alcohol, it can be inferred that he expects to have more customers by operating the restaurant with the alcohol license than without it. This will of course mean more traffic and parking problems, with the additional factor that some patrons will drive off after having consumed alcohol.

All the safety and general welfare issues mentioned above arising from the introduction of this proposed restaurant into the area will be exacerbated by the permit for the sale of mixed alcoholic beverages.

While Applicant argues that Protestants’ case relies on speculation, (the same could be said of several aspects of Applicant’s case) the ALJ may make reasonable inferences based on the evidence presented, and in a case such as this, where the business is replacing a residence and presently does not exist, some reasonable inferences must by necessity be made.

The ALJ has reviewed several cases presented by Applicant dealing with TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8), and the ruling that before a permit can be denied to a qualified applicant who proposes to operate a lawful business in a wet area, some unusual condition or situation must be shown. The ALJ finds, as presented above, that the instant case presents just such an unusual condition or situation.

Simonton Gin, Inc., Tex. Civ. App. 616 SW2d 274 (1981) dealt with a proposed business applying for a beer and wine permit that was to be located in a business area which included several businesses that sold beer on and off premises. Texas Alcoholic Beverage Commission v. Mikulenska, Tex. Civ. App. 510 SW2d 616 (1974) dealt with an applicant proposing to open a saloon in a small business center and on a road that was entirely commercial for a mile in either direction. There were also numerous establishments in the vicinity selling alcohol.

This is not the situation in this Applicant's case, as the proposed restaurant will be in a predominately residential area, on a narrow street, with no other similar businesses on the street, and none selling any alcohol. This presents an unusual condition or situation.

V. RECOMMENDATION

The ALJ recommends that Applicant's application for the requested permit be denied.

VI. FINDINGS OF FACT

1. La Hacienda Enterprises, Inc., D/B/A La Hacienda Escondido Mexican Restaurant (Applicant) filed an original application with the Texas Alcoholic Beverage Commission (Commission) for a Mixed Beverage Permit to be located at 1431 W. 26th Street, Houston, Harris County, Texas.
 2. The Commission, as Petitioner, filed a protest on behalf of Orlando Romero, Joseph Boyle, and Concerned Residents of Shady Acres, protesting the Application, asserting that the
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Application should be denied based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

3. A Notice of Hearing dated February 23, 2006, was issued by the Commission notifying the parties that a hearing would be held on the application and informing the parties of the time, place, and nature of the hearing.
4. On May 19, 2006, a public hearing was held before Administrative Law Judge Stephen J. Burger in Houston, Texas. The Commission appeared at the hearing and was represented by Lindy Hendricks, Ramona Perry, and Sandra Patton, attorneys. Protestants were represented by Joseph Boyle, attorney. Applicant was represented by Ronald Monshaugen, Al Van Huff, and Debbi Garnt, attorneys. Evidence was received and the record closed on the same date.
5. Approximately 53 Protestants appeared at the hearing, of which approximately 25 gave public comments opposed to the granting of the permit.
6. Applicant intends to build a family oriented Mexican restaurant serving alcohol at the proposed site.
7. The site of Applicant's proposed business is presently the residence of the Applicant's owner, Ernesto Cabrera, who has resided there for approximately 13 years.
8. The Applicant has met all Commission filing and technical requirements to hold the permit at the proposed location, and there are no zoning laws or deed restrictions prohibiting building of the proposed restaurant.
9. Applicant's Mexican restaurant will be 5,800 square feet, capacity 100 to 150 people, with 48 parking spaces; vehicular entry will be via Couch Street.
10. Applicant's Mexican restaurant will have no bar; alcoholic drinks will be picked up by wait staff at drink stations. Hours of proposed operation will be seven days a week, Monday through Thursday 11:00 a.m. to 10:00 p.m.; Friday and Saturday 11:00 a.m. to 11:00 p.m.; and Sunday 11:00 a.m. to 9:00 p.m.
11. Applicant's owns three other restaurants that have alcohol sales of about 18%, compared to food sales of 82%.
12. W. 26th Street at the Applicant's proposed location is narrow, with no sidewalks, and there are drainage ditches on both sides.

13. W. 26th Street from Ella Blvd. to N. Durham is predominately residential.
14. There are no other restaurants, bars, convenience stores, or other similar retail businesses on W. 26th Street, from Ella Blvd. to N. Durham.
15. There are no businesses serving or selling alcohol on W. 26th Street from Ella Blvd. to N. Durham.
16. There are two houses of worship across the street and approximately three quarters of a block from the proposed restaurant, one of which is a Quaker Meeting House, where services are held in silence.
17. Private family residential housing is located south and east of the proposed restaurant location.
18. The private family residential housing east of the proposed location is immediately adjacent to the proposed restaurant.
19. Because of the lack of sidewalks, the narrowness of the road, and the predominately residential nature of W. 26th Street from Ella Blvd. to N. Durham, motorists and pedestrians will have to share the narrow street with motorists from Applicant's proposed restaurant who may have consumed alcohol.
20. Because Applicant's proposed restaurant has only 48 parking spaces, but the maximum capacity will be 100 to 150 patrons, some patrons will be forced to park on W. 26th Street and Couch Street, and pedestrians and motorists will have to share the narrow street with motorists from Applicant's proposed restaurant who may have consumed alcohol.
21. The Applicant's proposed restaurant will increase traffic on W.26th Street and the adjacent residential area, exacerbated by patrons leaving the restaurant after drinking alcoholic beverages.

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 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 the Applicant proposes to conduct its business warrants the refusal of the permit based on the general welfare, peace, and safety of the people. TEX. ALCO. BEV. CODE ANN. §11.46(a)(8).
5. The place or manner in which Applicant intends to conduct its business presents an unusual condition or situation that warrants the refusal of the permit.
6. The Applicant's original application for a Mixed Beverage Permit for the premises to be located at 1431 W. 26th Street, Houston, Harris County Texas, and to be known as La Hacienda Escondido Mexican Restaurant, should not be granted.

SIGNED July 19, 2006.



STEPHEN J. BURGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

July 19, 2006

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

VIA REGULAR MAIL

RE: Docket No. 458-06-1477; Texas Alcoholic Beverage Commission and Orlando Romero, Joseph Boyle, and Concerned Residents of Shady Acres v. La Hacienda Enterprises Inc. d/b/a La Hacienda Escondido Mexican Restaurant

Dear Mr. Steen:

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

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

Sincerely,

A handwritten signature in black ink that reads "S. J. Burger".

Stephen J. Burger
Administrative Law Judge

SJB/mc
Enclosure

xc: Lindy Hendricks, Texas Alcoholic Beverage Commission, 427 W. 20th Street, Suite 600, Houston, Texas 77008 - **VIA REGULAR MAIL**
Ronald Monshaugen, Attorney at Law, 1225 N. Loop West, Suite 640, Houston, Texas 77008 - **VIA REGULAR MAIL**
Joseph Boyle and Orlando Romero, 2401 Fountainview, Suite 700, Houston, Texas 77057 - **VIA REGULAR MAIL**