

SOAH DOCKET NO. 458-08-0033

**IN RE THE ORIGINAL APPLICATION § BEFORE THE STATE OFFICE
OF ALMA ALICIA LUNA D/B/A §
LIPSTICK LATINO BAR, § OF
APPLICANT §
HARRIS COUNTY, TEXAS §
(TABC CASE NO. 565089) § ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

Alma Alicia Luna d/b/a Lipstick Latino Bar (Applicant) has applied to the Texas Alcoholic Beverage Commission (Commission) for a mixed beverage permit and a mixed beverage late hours permit for a premises located at 12819 N. Houston Rosslyn, Houston, Harris County, Texas. Willowood Maintenance Association and Vance-Sandoval Enterprises d/b/a Children's Academy (Protestants) filed a protest to the issuance of the permits. The Commission's staff (Staff) remained neutral on the application. Applicant argued that the application should be approved. Protestants argued that approval of the application would violate the Harris County ordinance (ordinance) creating an alcohol-free zone in the territory of Harris County outside of incorporated cities and towns prohibiting the sale of alcoholic beverages by any dealer within 300 feet of any day-care center. After considering the arguments and evidence presented by the parties, the Administrative Law Judge (ALJ) finds that there is sufficient basis for denying the application and recommends that the permits not be issued.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

On September 11, 2007 Staff sent Notice of Hearing to Applicant that Willowood Maintenance Association had filed a protest to the requested permits based upon concerns for the general welfare, health, peace, moral, and safety of the people in the community, and that a hearing would be held on October 19, 2007 at the State Office of Administrative Hearings (SOAH). At the hearing on October 19, 2007 Vance-Sandoval Enterprises d/b/a Children's Academy filed a protest to the requested permits based upon its child-care center abutting the premises of the Applicant, and

requested a continuance. The ALJ granted the continuance and the parties requested that the hearing be held on the first available date. The hearing was re-set to November 2, 2007. On October 24, 2007 Staff sent Amended Notice of Hearing to Applicant that Willowood Maintenance Association and Vance-Sandoval Enterprises d/b/a Children's Academy had filed a protest to the requested permits based upon concerns for the general welfare, health, peace, moral, and safety of the people in the community, and that a hearing would be held on November 2, 2007 at SOAH.

On November 2, 2007, a public hearing was convened on this matter in Houston, Harris County, Texas, before ALJ Don Smith. Applicant was represented by Sam Deane, attorney. Staff was represented by Ramona Perry, attorney. Protestants were represented by attorneys Michael Treece, Karren Maxwell, and Vanessa Vance. The hearing concluded on November 2, 2007, and the record remained open until November 12, 2007 for the Protestants to produce a certified copy of the ordinance.

II. DISCUSSION AND ANALYSIS

At the hearing Protestants stated that they were protesting the issuance of the permits based on the ordinance creating an alcohol-free zone in the territory of Harris County outside of incorporated cities and towns prohibiting the sale of alcoholic beverages by any dealer within 300 feet of any day-care center. Applicant acknowledged in the application that the business will be located within 300 feet of a day-care center, but argued that Applicant received a certificate that issuance of the license "is not prohibited by any valid order of the Commissioner's Court." The deputy who made the measurement between the business premises and the day-care center testified that she made a mistake when measuring. Applicants argue that issuing the permits would violate the ordinance and be against the public's general welfare, health, peace, morals, safety and sense of decency.

A. Applicable Law

Protestants challenge the application on the basis of § 11.46(a)(8) of the Texas Alcoholic Beverage Code (Code), which provides:

The commission or administrator may refuse to issue an original or renewal permit with or without a hearing if it has reasonable grounds to believe and finds that any of the following circumstances exist:

...
(8) the place or manner in which the applicant may conduct his business warrants the refusal of a permit based on the general welfare, peace, morals, and safety of the people and on the public sense of decency.

Harris County ordinance. [E]ffective September 25, 2001, ... in the territory of Harris County outside of incorporated cities and towns, the sale of alcoholic beverages by any dealer is prohibited within 300 feet of any church, public school, day-care center, child-care facility, or public hospital. The measurement of the distance between the place of business where alcoholic beverages are sold and the public schools, day-care centers or child-care facilities shall be in a direct line from the property line of the public school, day-care center or child-care facility to the property line of the place of business, and in a direct line across intersections.

Sales near day-care center or child-care facility. The commissioners court of a county may enact regulations applicable in areas in the county outside an incorporated city or town ... prohibiting the sale of alcoholic beverages by a dealer whose place of business is within 300 feet of a church, public school, or public hospital. § 109.33 Code. The provisions of Section 109.33 relating to a public school also apply to a day-care center and a child-care facility. § 109.331 Code.

Measurement of distance. The measurement of the distance between the place of business where alcoholic beverages are sold and the public schools shall be in a direct line from the property line of the public school to the property line of the place of business. § 109.33 Code.

Refusal by Commission if any reason county judge had grounds to refuse. 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 a ground for the county judge to have refused to approve the application. § 61.47 Code.

In a municipality with a population of 1,500,000 or more, on the assertion by any person of any justiciable grounds for a suspension, denial, cancellation, or refusal of a mixed beverage permit or a wine and beer retailer's permit, the commission or county judge, as applicable, shall hold a hearing if any point of the property line of the premise is less than 300 feet from the nearest point on a property line of a residence, church, school, hospital, day-care facility, or social service facility, as measured in a straight line; and 75 percent or more of the permittee's or licensee's actual or anticipated gross revenue is from the sale of alcoholic beverages. § 11.52 Code.

B. Evidence

Protestants' Case

The property and building in which Lipstick Latino Bar would be located abuts the playground of Children's Academy, a day-care facility for over 100 children. Deputy Medina, Harris County Constable's Office, Precinct 1, made the measurement for the county and testified that she improperly measured. Deputy Medina testified that the measurement was one of the first measurements that she had ever made, and that she did it incorrectly from the front door of the business to the front door of the day care, rather than from the property line to the property line. Deputy Medina testified that when she went back and did a second measurement for the purposes of this hearing, she observed that the back property line of the business adjoins the back property line of the day care and that there are less than twelve inches from property line to property line.

Deputy Medina testified that if she would have made the measurement correctly, the application for the permits would not have been approved by Harris County.

Deputy Medina also testified that she would not put a child in a day-care center that was next to a bar. Her opinion was a personal opinion, as well as a professional opinion based upon the increased law enforcement activity that occurs in the area every time a new bar opens. Deputy Medina did not give any specific evidence as to the increased law enforcement activity that occurs in an area where a new bar opens.

Applicant's Case

Applicant properly filed its application, truthfully answered all the questions in the application, and received all the certifications required for the permits to be issued. The premises are located in an unincorporated area of Harris County, Texas, so the Applicant argued that they did not need a certificate from the City of Houston that the premises are not located within 300 feet of any day-care center. Applicant answered yes to the question "will your business be located within 300 feet of any school, including private schools, day care center or day care facility?" Applicant is not aware of the Harris County ordinance.

C. Analysis

Deputy Medina made a mistake in the way she made the measurement from the business property to the day-care property. That mistake resulted in the County Clerk's certificate (the certificate) that the issuance of the license "is not prohibited by any valid order of the Commissioner's Court." The correct measurement from property line to property line places the business property within 300 feet of the day-care property. Applicant acknowledged in the application that the business will be located within 300 feet of a day-care center. Therefore, to issue the requested permits would violate the Harris County ordinance, and the Commission should refuse to issue the permits.

The Code and the administrative rules adopted by the Commission to implement the Code allow the Commission to refuse to issue the permits. First, if it is shown that an offense in any ordinance will occur on the premise that is detrimental to the general welfare, health, peace and safety of the people it shall be regarded as grounds to deny the application for such under Section 11.46 (a)(8) Code. 16 Tex. Admin. Code § 35.31 (b)(9). The Code allows the commissioners court, for the general welfare, to prohibit the sale of alcoholic beverages by a dealer whose place of business is within 300 feet of a day-care center. Harris County has an ordinance prohibiting the sale of alcoholic beverages by any dealer within 300 feet of any day-care center. Applicant is a dealer

applying for permits to sale alcoholic beverages at its premises within 300 feet from a day-care center. Therefore, to issue the permits would be detrimental to the general welfare, health, peace and safety of the people because it would violate the ordinance. Second, if Deputy Medina would have made the correct measurement, the certificate would not have issued and the county judge could have issued an Order to deny the application. Violation of the ordinance would have been grounds for the county judge to deny the application. The commission may refuse to issue a license for any reason which could have been a ground for the county judge to have refused to approve the application. § 61.47 Code. Since the county judge could have issued an Order to deny the application based upon the violation of the ordinance, the Commission also has the authority, and should deny the application.

III. FINDINGS OF FACT

1. Alma Alicia Luna d/b/a Lipstick Latino Bar (Applicant) filed an original application with the Texas Alcoholic Beverage Commission (the Commission) for a mixed beverage permit and a mixed beverage late hours permit for a premises located at 12819 N. Houston Rosslyn, Houston, Harris County, Texas.
2. Protests to the application were filed by Willowood Maintenance Association and Vance-Sandoval Enterprises d/b/a Children's Academy (Protestants).
3. The Commission's staff (Staff) issued a notice of hearing on September 11, 2007 that Willowood Maintenance Association had filed a protest to the requested permits based upon concerns for the general welfare, health, peace, moral, and safety of the people in the community, and that a hearing would be held on October 19, 2007.
4. On October 19, 2007 Vance-Sandoval Enterprises d/b/a Children's Academy filed a protest, and Protestants requested a continuance. The Administrative Law Judge (ALJ) granted the continuance, and the parties requested that the hearing be held on the first available date. The hearing was re-set to November 2, 2007.
5. On October 24, 2007 Staff sent Amended Notice of Hearing to Applicant that Protestants had filed a protest to the requested permits based upon concerns for the general welfare, health, peace, moral, and safety of the people in the community, and that a hearing would be held on November 2, 2007.

6. The notices of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
7. The hearing was held on November 2, 2007, in Houston, Harris County, Texas, before Don Smith, an Administrative Law Judge with the State Office of Administrative Hearings (SOAH). The Applicant was represented by Sam Deane, attorney. The Commission's staff appeared and was represented by Ramona Perry, attorney. Protestants appeared and were represented by Michael Treece, Karren Maxwell, and Vanessa Vance, attorneys. The hearing concluded on November 2, 2007, and the record closed on November 12, 2007.
8. The requested permits are for a bar in a location in an unincorporated area of the city of Houston, Harris County, Texas.
9. The requested permits are for a bar whose property abuts the property of a day-care center.
10. The deputy who made the measurement for the County Government measured the distance between the property of the bar and the day-care center from the front door of the bar to the front door of the day-care center rather than from property line to property line.
11. Harris County has an ordinance (ordinance) prohibiting the sale of alcoholic beverages by any dealer within 300 feet of any day-care center.
12. The ordinance concerns the general welfare, health, peace, and safety of the people in the community.

IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO BEV. CODE ANN. Chapters 1 and 5 and §§ 6.01, 11.41, 11.46, and 32.01.
2. SOAH has jurisdiction over all matters related to conducting 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. Chapter 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 measurement of the distance between the Applicant's property and the day-care center was not done correctly. TEX. ALCO. BEV. CODE ANN. § 109.33.

5. Harris County has an ordinance (ordinance) prohibiting the sale of alcoholic beverages by any dealer within 300 feet of any day-car center.
6. Because the measurement for the distance between the Applicant's property and the day-care center was not done correctly, the County Clerk's certificate that the issuance of the license "is not prohibited by any valid order of the Commissioner's Court" is incorrect.
7. Vance-Sandoval Enterprises d/b/a Children's Academy is a day-care center whose property is within 300 feet of Applicant's property.
8. Violation of the ordinance is a ground on which the permits could be denied by the county judge and by the Commission. TEX. ALCO. BEV. CODE ANN. § 61.47.
9. Based on the foregoing findings of fact and conclusions of law, issuance of the requested permits will adversely affect the safety of the public, the general welfare, peace, or morals of the people, and violate the public sense of decency, as described in TEX. ALCO. BEV. CODE ANN. § 11.46.
10. Based on the foregoing findings and conclusions, the application of Alma Alicia Luna d/b/a Lipstick Latino Bar should be denied.

Signed this 6th day of December, 2007.

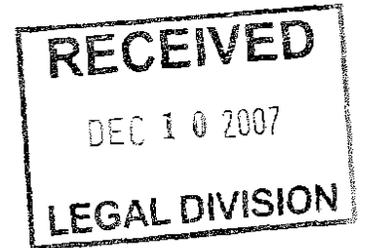


DON SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



December 6, 2007

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

VIA REGULAR MAIL

RE: Docket No. 458-08-0033/Texas Alcoholic Beverage Commission vs. Alma Alicia Llna d/b/a Lipstick Latino Bar

Dear Mr. Steen:

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

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

Sincerely,

A handwritten signature in cursive script that reads "Don Smith".

Don Smith
Administrative Law Judge

DS/mr
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- VIA REGULAR MAIL
Ramona Perry, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W 20th Street, Suite 600, Houston, TX 77008- VIA REGULAR MAIL
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA REGULAR MAIL
Sam Deane, Attorney for Respondent, 1612 Richmond Avenue, Houston, Texas, 77006 -VIA REGULAR MAIL
Michael Treece and Karren Maxwell, Attorney for Protestants, 1020 Bay Area Blvd, Suite 200, Houston, Texas 77058- VIA REGULAR MAIL
Vanessa L. Vance, Attorney for Respondent, 919 Milam Street, Suite 1700, Houston, Texas 77002 - VIA REGULAR MAIL