

CASE NO. 588227

Texas Alcoholic Beverage Commission,	§	TEXAS ALCOHOLIC
Petitioner,	§	
VS.	§	
DANIEL SERNA	§	BEVERAGE
D/B/A	§	
SERNA'S BACKYARD, RESPONDENT	§	
SOAH No. 458-10-0832	§	COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 14th day of October, 2010, the above-styled and numbered cause.

A hearing in the above matter was conducted by the State Office of Administrative Hearings, with Administrative Law Judge Steven M. Rivas presiding, on November 20, 2009. A Proposal for Decision was issued on January 15, 2010, recommending that the application be granted. An Order Modifying Proposal for Decision was issued on April 1, 2010, refusing the application. Respondent filed a Motion for Rehearing on April 26, 2010. An Order Withdrawing Order Modifying Proposal for Decision and Granting Applicant's Motion for Rehearing was issued on May 20, 2010.

In response to the May 20, 2010 Order, the Administrative Law Judge held a Pre-Hearing Conference on August 20, 2010. The parties agreed that the Administrative Law Judge would close the record that day and consider only the evidence already in the record. Accordingly, on September 9, 2010, the Administrative Law Judge issued a Proposal for Decision on Remand. He considered no new evidence or argument in preparing the Proposal for Decision on Remand, which recommends that the application be granted. The Proposal for Decision on Remand contains Findings of Fact and Conclusions of Law.

Petitioner's Exceptions to the Proposal for Decision were filed on September 24, 2010. Applicant's Exceptions and Response to Petitioners Exceptions were filed on September 30, 2010. On October 5, 2010, the Administrative Law Judge filed a letter indicating that he recommends no changes to the Proposal for Decision on Remand.

The Administrator of the Texas Alcoholic Beverage Commission reviewed and considered the Proposal for Decision on Remand, Petitioner's exceptions, Applicant's response, and the Administrative Law Judge's reply. After such review, the Administrator adopts the Findings of Fact and Conclusions of Law made and entered into the Proposal for Decision on Remand by the Administrative Law Judge. The adopted Findings of Fact and Conclusions of Law are incorporated into this Order as if such were fully set out and separately stated herein. All exceptions, submitted by any party are overruled. All proposed findings of fact and conclusions of law submitted by any party that are not specifically adopted herein are denied.

IT IS THEREFORE ORDERED that Respondent's application for a Mixed Beverage Permit and Mixed Beverage Late Hours Permit be **GRANTED**.

This Order will become final and enforceable on the 8th day of November, 2010, unless a Motion for Rehearing is filed **before** that date.

SIGNED this the 14th day of October 2010, at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that service shall be made upon all parties in the manner indicated below on this the 14th day of October, 2010.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Honorable Judge Steven M. Rivas
Administrative Law Judge
State Office of Administrative Hearings
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TABC Legal Division

Licensing Division

San Antonio District Office

SOAH DOCKET NO. 458-10-0465

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner

MARGOT SALAZAR,
Protestant

VS.

DANIEL SERNA
D/B/A SERNA'S BACKYARD
Applicant

ORIGINAL APPLICATION
PERMIT NO. MB & LB
BEXAR COUNTY, TEXAS
(TABC CASE NO. 588227)

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION ON REMAND

Daniel Serna d/b/a Serna's Backyard (Respondent), filed an original application with the Texas Alcoholic Beverage Commission (Commission) for a mixed beverage and late hours permit for the premises located at 12023 Potranco Road, San Antonio, Bexar County, Texas. Previously, Mr. Serna held a permit for another bar (Backyard Sports Bar) at the same location with an individual named Lorenzo L. Lailson. Mr. Serna has cut all ties with Mr. Lailson and seeks to obtain a permit in his name only.

Margot Salazar, a concerned resident (Protestant), filed a protest of the original application based on general welfare, health, peace, moral, and safety concerns of the neighborhood. The Commission's staff (Staff) joined in the protest and requested the permits be denied.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

On November 20, 2009, a public hearing was convened on this matter in San Antonio, Texas, before ALJ Steven M. Rivas. Protestant appeared and represented herself. Respondent appeared and

was represented by Leah Bates, attorney. Staff was represented by Emily Helm, attorney, and joined in the protest. Because the Notice of Hearing lacked any factual allegations, Staff presented testimony and evidence. The hearing concluded and the record closed that same day.

After considering the arguments and evidence presented, the Administrative Law Judge (ALJ) issued a Proposal for Decision (PFD) on January 15, 2010. The PFD found there was insufficient basis to deny the application and recommended TABC issue the permits to Respondent.

On April 1, 2010, the Commission's Assistant Administrator, Sherry K-Cook, issued an Order Modifying PFD, which included additional findings of fact and ultimately refused to grant the permits. On April 26, 2010, Respondent filed a Motion for Rehearing with the Commission. On May 20, 2010, Ms. K-Cook issued an Order Withdrawing Order Modifying Proposal for Decision and Granting Applicant's Motion for Rehearing.

On August 20, 2010, the ALJ convened a pre-hearing conference to discuss how to move forward in light of the Commission's order granting rehearing. It was decided by the parties that the ALJ would issue a PFD on Remand and consider only the evidence already in the record. It was also decided that the record in this matter would again close on August 20, 2010, the day of the pre-hearing conference. The ALJ considered no new evidence or argument in preparing this PFD on Remand.

II. DISCUSSION AND ANALYSIS

A. Applicable Law

TABC and Protestant challenge the application on the basis of TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8), which provides that 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:

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.

In a protest hearing, the burden is on the protestants to show by a preponderance of the evidence that the permit(s) should not be issued.

B. Arguments and Evidence

1. Protestants' Case

TABC and Protestant oppose the issuance of the permits contending the place or manner in which Respondent operates its business is detrimental to the general welfare, health, and peace of the community. The basis of their opposition stems from a traffic accident that occurred on March 8, 2008, which involved patrons who had just left the bar when it was known as Backyard Sports Bar.

Carlos Leal testified that he arrived at the bar just after midnight on March 8, 2008, to meet his friend Jose Morales, who had just gotten off work at the bar. Once inside, Mr. Leal and Mr. Morales played pool, drank beer, and socialized. Mr. Leal recalled leaving the bar with Mr. Morales at approximately 2 a.m. Mr. Leal testified that on their way to the car, Mr. Morales vomited in the parking lot but assured Mr. Leal that he was fit to drive. Moments after leaving the bar, the vehicle driven by Mr. Morales hit a motorcyclist, Greg Salazar, as Mr. Morales and Mr. Leal were tuning the car's CD player. Mr. Salazar was killed in the accident. An investigation into the crash revealed that Mr. Morales had a blood alcohol concentration (BAC) level of .22.

Mr. Leal admitted to TABC agent Raul Ruiz that both he and Mr. Morales had "plenty to drink" that evening. Agent Ruiz also reviewed Mr. Morales' bar tab and interviewed the bartender who served Mr. Morales and determined that he had been over-served and should have been cut-off long before he left the bar. Mr. Morales' bar tab totaled \$84.00 and indicated that he purchased over 20 drinks in less than two hours.

Agent Ruiz testified he is concerned that Mr. Serna will continue to operate in the same manner as before by over-serving the patrons of the bar. Agent Ruiz is also concerned that Mr. Serna will not implement procedures to monitor the number of drinks purchased and oversee the overall condition of the bar's patrons. Agent Ruiz further asserted that if TABC issued the permits, he would like to see Mr. Serna serve food at the bar because he believes food would slow down the rate at which alcohol is absorbed in the body.

Michael Ghere, the door man who was working on March 8, 2008, recalled both Mr. Morales and Mr. Salazar being at the bar. He remembered talking to Mr. Salazar that night about Mr. Salazar's motorcycle. He remembers Mr. Leal and Mr. Morales were playing pool that night and did not have any significant contact with Mr. Salazar at the bar. He also remembers nothing unusual happening at the bar before the accident occurred.

Protestant, whose husband was killed in the accident, argued that she does not want TABC to issue the permits because she fears that other members of the community would be in danger if the bar continues to over-serve its patrons before they leave the bar. Protestant was married to Mr. Salazar for nearly 12 years before the night he was killed. She remembers that her husband left their house that night and promised he would return later. She believes the bar's "destructive ways" led her husband to his grave. She also believes that if the bar had implemented more thorough methods to monitor the intoxication level of its patrons, her husband would be alive today. Protestant is still saddened by her loss and asserted that she will continue to fight for her husband and does not want another family to go through what her family has endured.

2. Respondent's Case

Mr. Serna testified that he feels horrible over what happened the night of the accident. He recalls Mr. Morales, a part-time bartender at the time, got off work that night around midnight and remained at the bar to socialize with other patrons. He did not notice anything unusual at the bar that night except that Mr. Morales' debit card was declined when he attempted to pay his tab.

According to Mr. Serna, the bar is located in an area of San Antonio surrounded by both businesses and subdivisions. Because of its location, Mr. Serna refers to the bar as a "neighborhood sports bar." Mr. Serna asserted he is prepared to make far-reaching changes to the manner in which the bar operates. He has assured TABC that his staff will be double that from the night of the accident and that each staff member will be required to attend TABC training once-a-year even though TABC requires training only once every two years.

Mr. Serna also testified that he will implement a new point of sale system that will track the number of drinks each patron purchases and consumes. Mr. Serna will also require his staff to walk through the crowd at the bar to monitor the condition of the patrons.

In addition, Mr. Serna will not allow any employee to consume alcohol while on the job, or to remain at the bar more than 20 minutes after the employee has clocked out. Mr. Serna will also install better lighting in the parking lot and will offer food for the bar patrons. Mr. Serna also mentioned that no staff member (other than himself) who was present on the night of the accident will be employed at the new bar.

C. Analysis and Conclusion

There is no question that Ms. Salazar's family suffered a great tragedy in the accident that occurred on March 8, 2008. Mr. Serna acknowledged he felt horrible about what happened and did not dispute the deficiencies cited by Agent Ruiz that no system was in place to monitor Mr. Morales' intoxication level.

However, the ALJ believes Mr. Serna has learned a great deal from the events of March 8, 2008, and will implement the necessary procedures to prevent another tragedy from occurring. Mr. Serna has taken seriously all of the directions that Agent Ruiz and the TABC have given in order to be in a position to be issued a permit in his name. Mr. Serna is committed to hiring more and better trained staff to effectively monitor the level of intoxication of the bar patrons. A new system to better monitor the number of drinks purchased will also be implemented. The bar will

also offer food and have better lighting in the parking lot. Mr. Serna has also devised a new policy whereby no employee will be allowed to remain at the bar 20 minutes after clocking out. All of these new policies show Mr. Serna is committed to operating an establishment that takes into account the safety of its patrons and the community. In addition, Mr. Serna's demeanor at the hearing also persuaded the ALJ that he is serious about operating an establishment that goes above and beyond the requirements set out by the Commission. Ms. Serna's specificity of the new procedures was also very persuasive.

Staff's case against Respondent relied primarily on the incidents that occurred on March 8, 2008. The ALJ was moved by Ms. Salazar's testimony about her loss, but in weighing all of the evidence finds that she and TABC did not meet their burden to show Mr. Serna should not be issued the permits. Based on the evidence, the ALJ finds Protestants have not proven that issuing the permits would be detrimental to the general welfare, health, and peace of the community. For this reason, the ALJ recommends that Respondent's original application be granted.

III. FINDINGS OF FACT

1. Daniel Serna d/b/a Serna's Backyard (Respondent) filed an original application with the Texas Alcoholic Beverage Commission (Commission) for a mixed beverage permit and mixed beverage late hours permit for the premises located at 12023 Potranco Road, San Antonio, Bexar County, Texas.
2. Margot Salazar, a concerned resident (Protestant), protested the original application, asserting that the manner in which Respondent operates its business is detrimental to the general welfare, health, and peace of the community.
3. On October 5, 2009, the Commission's staff issued a notice of hearing to the parties. The notice included the time, date, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
4. On November 20, 2009, a public hearing was convened in San Antonio, Texas, before Administrative Law Judge Steven M. Rivas. Protestant appeared and represented herself. Staff appeared and was represented by Emily Helm, attorney. Respondent appeared and was represented by Leah Bates, attorney. The hearing concluded and the record closed that same day.

5. The original Proposal for Decision (PFD) was issued on January 15, 2010. On April 1, 2010, the Commission's Assistant Administrator, Sherry K-Cook, issued an Order Modifying PFD. On April 26, 2010, Respondent filed a Motion for Rehearing. On May 20, 2010, the Commission issued an Order Withdrawing Order Modifying Proposal for Decision and Granting Applicant's Motion for Rehearing.
6. The ALJ convened a pre-hearing conference on August 20, 2010, to discuss on how proceed in this matter. The record again closed that same date.
7. Daniel Serna previously held a permit for the same location with another individual.
8. On March 8, 2008, while the bar was known as Back Yard Sports Bar, Greg Salazar was killed when the motorcycle he was riding was hit by a vehicle driven by Jose Morales. Both individuals had left the bar moments before the accident.
9. While at the bar, Mr. Morales was served more than 20 drinks over a two-hour period.
10. Mr. Morales had a blood alcohol concentration level of .22 at the time of the accident.
11. TABC Agent Raul Ruiz determined after an investigation that Mr. Morales had been over-served while at the bar.
12. Deficiencies existed at the bar at the time of the accident.
13. At the new bar, Mr. Serna will implement a system that keeps track of the number of drinks a patron has purchased.
14. The staff at the new bar will be required to walk through the crowd of patrons to monitor the condition of the patrons.
15. No employee at the new bar will be allowed to drink on duty nor will any staff member be allowed to stay at the bar more than 20 minutes after clocking out.
16. Each staff member will be required to undergo TABC training once a year, even though TABC requires training only once every two years.
17. The new bar will have better lighting in the parking lot and will offer food for its patrons.
18. The manner in which Respondent will operate the bar will not disturb the peace of the community, nor will it adversely affect the health and welfare of the residents.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. chapters 1 and 5 and §§ 6.01 and 11.46.
2. The State Office of Administrative Hearings 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. ch. 2003.
3. Proper and timely notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the foregoing findings of fact, a preponderance of the evidence shows that granting the original application and the issuance of the permits will not adversely affect the general welfare, health, and peace of the community. TEX. ALCO. BEV. CODE ANN § 11.46(a)(8).
5. The original application of Daniel R. Serna d/b/a Serna's Backyard for its mixed beverage permit and mixed beverage late hours permit should be approved.

SIGNED September 9, 2010.



**STEVEN M. RIVAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**