

Respondent was represented by Pat Thurman, Manager of Ramblin Rose. The record was closed on that date.

II. LEGAL STANDARDS AND APPLICABLE LAW

The Commission may refuse to issue a renewal permit if it has reasonable grounds to believe, and finds, that the place or manner in which the applicant may conduct its business warrants a 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); 16 TEX. ADMIN. CODE § 31.1(a)(3).

The Commission may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that the place or manner in which the permittee conducts his business warrants the cancellation or suspension of the permit 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. § 11.61(b)(7).

The Commission may also cancel an original or renewal permit if it is found, after notice and hearing, that the permittee maintains a noisy establishment. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(9).

III. EVIDENCE

A. PROTESTANTS' EVIDENCE

Protestant, Michael Foster, testified that he lives across the street from Respondent's establishment and that the noise from Respondent's establishment on Friday, Saturday, and Sunday nights is excessively loud, so loud that it sometimes causes the walls of his house to shake. The noise frequently lasts until 1:30 a.m. He has complained repeatedly over approximately two years to the City of Rowlett, including numerous complaints to the Rowlett Police Department.

On November 28, 2000, he filed a Complaint against Respondent in the Municipal Court of the City of Rowlett alleging unreasonable noise because of the loud music. On January 23, 2001, Respondent was found Not Guilty, because, according to the Judgment, "no evidence of noise level [was] presented at trial." (Respondent Ex. No. 6).

Mr. Foster also testified that a Commission agent once conducted a noise level check at Respondent's establishment, but did not find the noise level loud enough to warrant correcting.

B. RESPONDENT'S EVIDENCE

Pat Thurman testified that he and his wife opened the Ramblin Rose Club approximately ten years ago, and that the only complaints they have received from the neighborhood are those from

Protestant. Mr. Thurman presented evidence showing that Protestant complained about the noise to the Rowlett Police Department 11 times between November 11, 2000, and December 29, 2001, (Respondent Ex. No. 7). However, Respondent testified that the police never did anything more than issue warnings, and only issued warnings on four of those occasions, because the noise was never excessive. In fact, one police report states in its narrative that although the Protestant complained that his house was shaking from the noise, the officer, upon arriving at the scene, found that the, “[m]usic was not excessive. Could faintly hear from outside.” (Respondent Ex. No. 7, 3/16/2001).

Mr. Thurman also testified he installed insulated steel doors in his establishment and insulation around the windows to lower the noise level, even though there was never any actual showing that the noise levels from his establishment violated City of Rowlett standards.² He also presented a copy of the judgment of Not Guilty arising from the complaint filed by Protestant in the matter of *State of Texas v. George Patrick Thurman*, City of Rowlett Municipal Court, Case No. 113547.

C. PETITIONER’S EVIDENCE

On October 21, 1992, Respondent Ramblin Rose, 3594 Elm Grove Road, Rowlett, Dallas County, Texas, was issued a Private Club Registration Permit N-233178, Private Club Late Hours Permit NL-233179, and Beverage Cartage Permit PE-233180 by the Commission. On October 7, 2002, Respondent filed a renewal application with the Commission for these permits. By letter dated October 8, 2002, Protestant submitted a complaint to the Commission complaining of loud music originating from Respondent’s establishment, particularly on Friday, Saturday, and Sunday nights. Staff presented no other evidence and took no formal position in this matter.

IV. ANALYSIS

A noisy club is certainly subject to discipline by the Commission. Whether it is due to the location of the club (place) or the activities occurring at the club (manner), an establishment may, by virtue of its noise, be subject to discipline based on the general welfare, health, peace, morals, and safety of the people and its effect on the public sense of decency. This is true even if the number of people immediately effected by the noise is limited. The noise may still effect the “general” well-

² Mr. Thurman presented evidence that he purchased a “sound meter” to measure the noise level coming from his establishment. On December 15, 2000, between 10:00 p.m. and 2:00 a.m., he and four named witnesses determined, using this meter, that the sound coming from his establishment, as measured at the corner of Foster Lane and Elm Grove Road, was below 50 “decimals” (sic). He also presented a copy of the City of Rowlett noise ordinance (Article 9-9, Performance Standards for Noise, January 2000) showing that, under this ordinance, a violation only occurs if a sound creates, “a tenth percentile level or a ninetieth percentile sound level that exceeds the limits [as set forth in the ordinance] ... for a measurement period [of] ... not less than ten minutes nor more than sixty minutes.” Measurements must be made on “a sound level meter, Type II or better, using the A-weighting network in accordance and conforming with the noise measurement standards promulgated by the American National Standards Institute.” (Respondent Ex. No. 5, Article 9-9, Performance Standards for Noise, Sections 9-9-3 and 9-9-4). Since the evidence does not show that the sound meter used by Mr. Thurman met the applicable requirements, or that the readings were done in a matter consistent with the ordinance, no weight can be given to this evidence.

being of “the people,” and the “public” sense of decency, even if it does not immediately effect every person in the entire public. The fact, then, that Protestant, as a single individual, has, alone, complained about the establishment does not, for that reason, make the complaint any less valid. However, the weight of the evidence is certainly impacted by the fact that Protestant is alone in his protest without corroborating or substantiating witnesses; that he has presented no objective evidence in the form of noise measurements or expert witnesses to support his claim that Respondent is conducting a noisy establishment; and that the testimony offered by Protestant is frequently rebutted by the evidence in the record.

Protestant stated that on certain occasions his house shook from the noise originating from Respondent’s establishment. However, a police report made on a date when Protestant made that very complaint showed that the responding officer could only “faintly” hear the noise coming from Respondent’s establishment.³ The officer’s observations, made at the scene, do not support Protestant’s allegations, and, in fact, tend to rebut the allegations.

According to Protestant’s testimony, an agent from the Commission measured the sound coming from Respondent’s establishment. However, the agent did not find the noise to be excessive. Again, the evidence does not support or corroborate Protestant’s allegation but, instead, tends to rebut it.

Protestant filed a complaint against Respondent in the Rowlett Municipal Court because of the loud noise. However, Respondent was found not guilty, because, apparently, Protestant presented no evidence that Respondent violated the City of Rowlett noise ordinance. This evidence, again, does not support, but in fact tends to rebut, Protestant’s allegations.

For Protestant to meet his burden of proof in the instant matter, Protestant must present objective evidence that Respondent is conducting a noisy establishment. The evidence presented in the instant case, however, makes no showing that the noise was objectively excessive or that it constituted a violation of any existing city ordinance, state law, or Commission regulation. Although Protestant is convinced that Respondent’s establishment is noisy, and is certainly convinced that the noise is excessive, Protestant failed to present evidence that shows, by a preponderance of the evidence, that Protestant’s allegation is correct. Protestant presented no evidence that the noise coming from Respondent’s establishment has ever been measured as excessively loud, that other similarly situated neighbors had ever complained or were likewise effected by the noise, that other witnesses had been present at his residence during the times the noise was excessively loud or during the times the walls of his house allegedly shook from the noise, or that the noise from Respondent’s establishment caused or contributed to the deterioration of the general welfare, health, peace, morals, and safety of the surrounding neighborhood or public sense of decency. Absent such evidence, Protestant has failed to meet his burden of proof in the instant matter.

³Rowlett Police Department, Call Detail Information, March 16, 2001, (Respondent Ex. No. 7).

V. RECOMMENDATION

The ALJ recommends that Respondent's renewal application for its Private Club Registration Permit N-233178, Private Club Late Hours Permit NL-233179, and Beverage Cartage Permit PE-233180, be granted.

FINDINGS OF FACT

1. All parties received notice of the hearing, all parties appeared at the hearing, and no objection was made to jurisdiction, venue, or notice.
2. On October 21, 1992, Respondent Ramblin Rose, 3594 Elm Grove Road, Rowlett, Dallas County, Texas, was issued a Private Club Registration Permit N-233178, Private Club Late Hours Permit NL-233179, and Beverage Cartage Permit PE-233180 by the Commission.
3. Protestant complained to the Rowlett Police Department 11 times between November 11, 2000, and December 29, 2001, about loud noise coming from Respondent's establishment. Repeated visits by the Rowlett police to Respondent's establishment at Protestant's request resulted in no civil, criminal, or administrative disciplinary action being initiated by the City of Rowlett against Respondent.
4. A noise measurement taken by a Commission agent showed that the noise originating from Respondent's establishment was not excessive.
5. On November 28, 2000, Protestant filed a Complaint against Respondent in the Municipal Court of the City of Rowlett alleging unreasonable noise because of the loud music. On January 23, 2001, Respondent was found Not Guilty. *State of Texas v. George Patrick Thurman*, City of Rowlett Municipal Court, Case No. 113547.
6. On March 16, 2001, Protestant complained to the Rowlett Police Department that his house was shaking from the noise originating from Respondent's establishment. The police report concerning that call stated that the responding officer could only "faintly" hear the noise coming from Respondent's establishment.
7. The noise originating from Respondent's establishment was not measured at any time by Protestant as being in violation of any city ordinance, state law, or Commission regulation.
8. On October 7, 2002, Respondent filed a renewal application with the Commission for these permits.
9. By letter dated October 8, 2002, Protestant submitted a complaint to the Commission complaining of loud music originating from Respondent's establishment, particularly on Friday, Saturday, and Sunday nights.

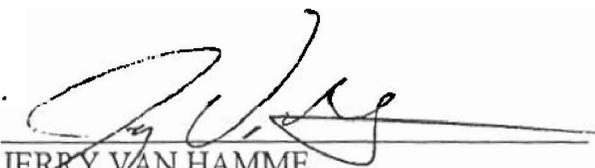
No similarly situated neighbor of Protestant submitted a complaint in this matter concerning the noise originating from Respondent's establishment.

11. By letter dated November 13, 2002, the Commission notified Respondent that a protest had been received by the Commission protesting Respondent's renewal application.
12. On March 5, 2003, an Order Setting Hearing and Establishing Requirements for Participation was sent by SOAH to the parties.
13. By letter dated March 27, 2003, Respondent notified SOAH and the Commission that it did not believe the noise levels at Respondent's establishment were excessive, and that construction had been done on Respondent's establishment to lower the sound level.
14. On April 10, 2003, an evidentiary hearing was held before Jerry Van Hamme, ALJ, at 6333 Forest Park Road, Suite 150-A, Dallas, Dallas County, Texas. Staff was represented by its attorney, Timothy Griffith. Protestant, Michael Foster, appeared personally. Respondent was represented by Pat Thurman, Manager of the Ramblin Rose. The record was closed on that date.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Subchapter B of ch. 5, §§ 6.01 and 11.61. 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, under TEX. GOV'T CODE ANN. §2003.021.
2. No reasonable grounds exist to believe that the place or manner in which Respondent has conducted or will conduct its business warrants a refusal of Respondent's renewal application or a suspension of its permits based on the general welfare, health, peace, morals, and safety of the people or the public sense of decency. TEX. ALCO. BEV. CODE ANN. §§ 11.46(a)(8), 11.61(b)(7); 16 TEX. ADMIN. CODE § 31.1(a)(3).
3. No reasonable grounds exist to believe that Respondent maintains a noisy establishment. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(9).
4. Based on the foregoing Findings and Conclusions, Respondent's application should be granted.

SIGNED this 2 day of May, 2003.



JERRY VAN HAMME
Administrative Law Judge
State Office of Administrative Hearings

DOCKET NO. 602296

IN RE RAMBLIN ROSE	§	BEFORE THE
D/B/A RAMBLIN ROSE	§	
PERMIT NOS. N-233178, NL233179,	§	
PE233180	§	TEXAS ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-2357)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 27th day of May 2003, 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 April 10, 2003, and adjourned on April 10, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 2, 2003. 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.

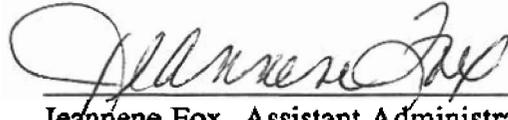
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's Permit Nos. N-233178, NL233179 and PE233180 are hereby **GRANTED**.

This Order will become final and enforceable on June 13, 2003, 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 through the U.S. Mail, as indicated below.

SIGNED this 27th day of May, 2003.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

/bc

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

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