Note - Case rev'd on D Ct appeal

DOCKET NO. 579776

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	ALCOHOLIC
D.S.S.S. ARIAMERICA, INC.	§	
D/B/A SOLID PLATINUM	§	
PERMIT NOS. MB-277330 & LB-277331	§	
HARRIS COUNTY, TEXAS	§	
(SOAH Docket No. 458-01-2190)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 25th day of February, 2002 the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Stephen J. Burger. The hearing convened on August 9, 2001, and the record closed on September 10, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on November 9, 2001. This Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. Exceptions to the Administrative Law Judge's Findings of Fact and Conclusion s of Law and a Request for Additional Findings of Fact and Conclusions of Law was filed by the Respondent on December 20, 2001.

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.

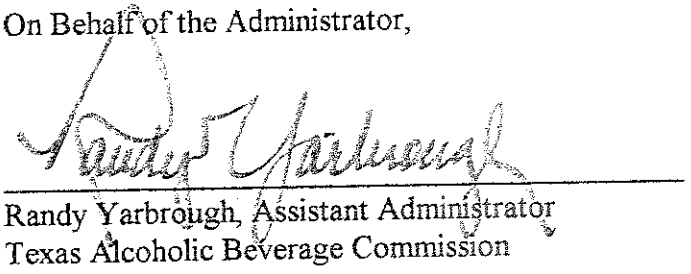
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. MB-267330 and LB-267331 are hereby **CANCELED FOR CAUSE, and its renewal applications DENIED.**

This Order will become final and enforceable on <u>March 18, 2002.</u> unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 25th day of February, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
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DAB/yt

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SOAH DOCKET NO. 458-01-2190

TEXAS ALCOHOLIC BEVERAGE COMMISSION ("TABC"),	§	BEFORE THE STATE OFFICE
	§	
VS.	§	OF
	§	
D.S.S.S. ARIAMERICA, INC. D/B/A SOLID PLATINUM PERMIT NOS. MB-267330 & LB-267331 HARRIS COUNTY, TEXAS (TABC CASE NO. 579776)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission ("Staff"), brought this enforcement action against D.S.S.S. Ariamerica, Inc., d/b/a Solid Platinum ("Respondent"), alleging that Respondent violated the TEX. ALCO. BEV. CODE (Code) § 11.46 (a) (8) by conducting business in a place or manner against the public's general welfare, health, peace, morals, safety, and sense of decency. The Staff requests that the Respondent's renewal application be denied. Respondent appeared at the hearing, and after both sides rested, its counsel asserted that the evidence presented was insufficient to support the Staff's allegation.

This Proposal for Decision recommends that Respondent's permits be canceled.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are addressed in the findings of fact and conclusions of law, below, without further discussion here. The hearing was held in Houston on August 9th, 2001, with the record closing on September 10, 2001, for the parties to submit briefs and closing arguments.

II. ALLEGATIONS, STATUTORY PROVISIONS, AND PARTIES' POSITION

There was one allegation contained in the Staff's Notice of Hearing, dated March 13, 2001, asserting that Respondent violated § 11.46 (a) (8) of the Code by conducting its business against the public's general welfare, health, peace, morals, safety, and sense of decency, because Respondent's premises was "in receipt of an excessive amount of calls for service from the City of Houston Police Department." The Staff also alleged that state representative Ken Yarbrough, and the surrounding neighborhood subdivisions of Shephard Forest and Lazy Brook, oppose the premises on safety, moral, and decency grounds.

Section 11.46 (a) (8) of the Code states:

General Grounds for Refusal

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

The Staff argued that the excessive amount of calls for service from the police, as well as the state representative's and the surrounding neighborhood subdivision members' opposition to the premises, based on safety, moral, and decency grounds, warrant the denial of Respondent's renewal application, or in the alternative, the cancellation of Respondent's permits.

The Respondent argues that since the Commission renewed Respondent's license in January of 2001, it cannot thereafter refuse to issue the renewal. It also argues that the Respondent has not conducted its business contrary to the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

At the hearing, the Respondent presented a Motion for Summary Judgment, stating that since there is no pending application for renewal (the last application being renewed prior to the Notice of Hearing in this matter), there is nothing for the TABC to deny. The Motion was denied.

III. EVIDENCE

Staff's documentary evidence consisted of :

Exhibit 1- Affidavit of Jeannene Fox regarding Respondent's permits.
Exhibit 2- July 9, 1998, TABC memo regarding receipt of protest.
Exhibit 3- July 5, 1998, letter from Ken Yarbrough to the TABC regarding protests against Respondent.
Exhibit 4- July 6, 1998, Case Transactions report from Bellaire Police Department.

Exhibit 5- Location Inquiry from 4/1/98 to 5/27/99 referencing the location on 02732 to 02744 TC Jester (Respondent's address).
Exhibit 6- July 6, 1998, Case Transactions report from Bellaire Police Department, and Houston Police Department Current Information Reports.
Exhibit 7- Incident Offense reports from 2/23/99 to 2/23/01.
Exhibit 8- Offense reports and Current Information Reports.

Respondent's documentary evidence consisted of:

Exhibit 1- Large poster-board map.
Exhibit 2- Small map, folded.

A. Public Comment

Two persons gave public comments. Betty Hansen lives about 4 blocks away from Respondent's club. She has lived there about 45 years. She does not frequent the Baskin-Robbins ice cream store located near Respondent's club, and has heard about public urination and patrons of Respondent's club "approaching" residents.

Darryl Tidwell lives a bit closer to Respondent's club than Ms. Hansen. He stated he has lived in the area about 35 years, and is the president of the Shepard Forest Civic Club. He does not want Respondent's club operating at its present location.

B. Parties' Witnesses

The following is a brief summary of testimony, and is not intended to be exhaustive, nor intended to be the only testimony the ALJ relied upon in the formulation of his decision.

The Staff presented five witnesses. Brenda Brummett lives less than 15 blocks from Respondent's club, and is the Security Director for Lazybrook Citizen's Patrol. The Lazybrook community is approximately 800 feet from the club, according to the admitted map exhibits. Ms. Brummett stated she has seen what appears to be lewd conduct, and drug deals, in Respondent's parking lot. The lewd conduct includes "intense embraces." She also states that there has been a "club" at Respondent's location since at least 1984, and that residents protested the original application of the club. She stated there are other businesses next to Respondent's, including a sandwich and convenience store, a florist, dry cleaners, ice-cream store (Baskin-Robbins), and a Mexican restaurant. She does not frequent these businesses, because she does not want to expose her children to the Respondent's club. She also stated that there is a private school nearby, as well as a Junior Achievement building across the street from the club.

Delinda Holland testified that she has lived nearby for about 23 years, and is a member of the Shepard Forest Civic Club. She lives about four blocks from the Respondent's club. She does not frequent businesses next to the club, and has seen people "laying around" the back of the club. She has noted police cars at the club, and is scared to bring her children to the businesses next to the club. There is also a park near the club. At the Civic Club monthly meetings, about one or two members complain about the club. She also believes the value of her house has declined because of the club.

Stan Jensen testified that he lives about five to six blocks from the club. He drives past the club daily, and has noticed loitering at night near the club. On cross examination, he confirmed that there is another topless club nearer his house than Respondent's, but it is smaller, and he has not noticed any problems with it.

State representative Ken Yarbrough's district includes the club and the surrounding areas mentioned above. He has received complaints from constituents, and his political opponents have used the presence of the club against him. He stated that about 2000 people have petitioned against the club based on public safety concerns. He was the author of a June 5, 1998, letter to the TABC regarding the club, TABC Ex. 3, which contains over 150 resident signatures requesting a hearing protesting the club's permits, based on prostitution solicitation charges. He stated there had been a hearing regarding the club in 1993, that apparently did not succeed in canceling the club's permits.

Agent Michael Barnett, with the TABC, testified that he has investigated the club. He gave a brief recitation of the suspensions and fines garnered by the club. He does not believe that the police reports concerning this club are excessive in number, and that when compared to other similar establishments, this club is about average, that is, there are worse clubs, and better clubs, from a law enforcement stand point.

David Saffari, since 1996 the president of the Respondent's corporation, testified for Respondent. He stated that the club was a topless bar when he bought it. It had public lewdness problems prior to his purchase.

Saffari states that he has worked on eliminating the problems by putting up cameras and having meetings with the employees regarding lewd dancing and drugs. He has also increased security, and fires employees if they cause trouble. He stated there have been no stabbings or shootings in his club since he purchased it, although there have been a few fights. He has about 31 employees, and pays over $5,000 in liquor taxes per month.

IV. DISCUSSION

A. Procedural arguments

Respondent first argues a procedural point. It contends that the TABC cannot proceed under section 11.46(a)(8), because Respondent already had its permits renewed by the time this action had been taken by the TABC.

The Staff responds that the renewal was issued to allow the club to operate without the confusion that might occur if the permit was not renewed because of the protest; in other words, the TABC issued the renewal to allow the Respondent to operate until the matter was finally disposed.

The ALJ finds little legal merit to this argument, although it is of practical advantage for Respondent.

Additionally, at the hearing the Staff, in the alternative, brought up the matter of a trial amendment, offering to go forward under Section 11.61(b)(7) of the Code. The Staff argued that whether the renewal is denied, or the permit is canceled, the effect is the same.

The ALJ notes that Section 11.61, Cancellation or Suspension of Permit, subsection (b)(7), is virtually identical to section 11.46(a)(8). Section 11.61(b)(7) allows the TABC to suspend or cancel an original or renewal permit if "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." Whether proceeding under either section, the Respondent would have to prepare for the hearing similarly, as the issue is identical under either section.

While the Notice of Hearing was not sent until March 13, 2001, on June 5, 1998, a request for a hearing was forwarded to the Commission by Representative Ken Yarbrough, which protested the renewal of Respondent's protest. See TABC Ex. 3.

The ALJ agrees with the Staff arguments, and that the Staff could proceed under either section.

B. Overview of the Case

The evidence shows that the Respondent operates a sexually oriented business, commonly known as a "topless" bar. The club is located in a small strip-mall center in Houston, and is surrounded by a residential area to the north and south. Neither residential area is immediately adjacent to the club; a freeway separates the south residential area from

the club, while a small bayou and bike trail separates the north residential area from the club. The club backs up to a bayou and a bike and hiking trail. The strip mall also has a Mexican restaurant, convenience store, ice cream store, and several other small businesses immediately adjacent to the club.

The Respondent has owned the club since 1996, but apparently the club has been in operation since about 1984.

C. Legal Criteria

Section 11.46(a)(8) of the Code states that the Commission may refuse to issue an original or renewal permit if it has reasonable grounds to believe that the place or manner in which the applicant may conduct his business warrants the refusal of a permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. Section 11.61(b)(7) contains analogous language. Some unusual condition or situation must be shown to justify a finding that the place or manner in which the business may be conducted warrants refusal or cancellation of a permit, or its renewal. In re: Simonton Gin, Inc. 616 S.W.2d 274 (Tex. Civ.App.-Houston 1981, no writ).

The burden of proof is on the party contending the permit should be denied.

D. Discussion of the Evidence

A club such as Respondent's has unique attributes, and inherent problems, when compared to bars and clubs that may serve alcohol, but do not have topless dancers. Many of these problems are present after reviewing the evidence. The statements from the two public commentors, Ms. Hansen and Mr. Tidwell, do not provide sufficient evidence alone showing that the Respondent was conducting his business contrary to the general welfare, health, et al, contained in Section 11.46(a)(8). Both of these protesters did not provide any specific instances of problems with the club, other than that they did not approve of this type of club, (topless dancing).

Witnesses Ms. Brummett and Ms. Holland stated that they have witnessed what appeared to be lewd acts, such as people "embracing" near the club, and people "laying down" behind the club. They do not want this type of club located this close to where they live, and they do not patronize businesses near the club, since they do not want to expose their children to the club. Apparently other residents have complained about the club at various civic meetings.

Stan Jensen, who passes by the club everyday, has noticed loitering near the club, as well as police cars, and believes the club is "bad" for that area. There is a Junior Achievement building across the street from the club, where children are periodically bussed

in, and there is a private school located nearby (but not near enough to violate any proximity laws).

Representative Yarbrough provided an excellent overview of the area. His constituency includes the club and surrounding area. He stated he has received numerous complaints from constituents, and that 2,000 people have petitioned against the club. The ALJ notes that there is no other evidence corroborating this number; however, there is an exhibit, TABC No. 3, dated June 5, 1998, which has about 150 signatures, which protests the permit based on Sections 11.46 of the Code, and references the club for solicitation of prostitution.

Mr. Yarbrough stated that a hearing regarding Respondent's permit was held in 1993, but apparently the permit was not canceled.

The documentary evidence containing police reports referencing calls for service to the address of the club is very persuasive. Michael Barnett, the TABC investigator, stated that from 1996 to 1998, there were about 32 calls for service to this location, including thefts, assaults, and fighting. In 1997, three female employees of Respondent were found guilty of public lewdness; in 1998, four female employees were found guilty of public lewdness. Also in 1997, officers made cases against two employees of the club for public lewdness, indecent exposure, solicitation of drinks by employees, and solicitation of prostitution. This evidence the ALJ finds highly persuasive in making his decision. A review of Staff's Exhibits 4, 5, 6, 7, and 8, shows numerous incidents of illegal and other questionable activity arising out of Respondent's club that, along with the testimony of the other Staff's witnesses, convinces the ALJ that the place or manner in which the Respondent is conducting his business warrants the refusal of a permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

1. Morals and the Public Sense of Decency

Staff's Exhibit 8 contained the following examples of violation and/or police reports of activities at Respondent's club:

Public lewdness, consisting of contact between female employees (dancers) of Respondent's club, and plainclothes police investigators. These activities consisted of contact between the partially nude female dancers, and the clothed officers, performed to arouse and gratify the sexual desires of the officers. They include indecent exposure of the female dancers genitals. The acts were usually associated with various versions of "lap dances," and "body slides" performed by the club's dancers. The police reports are graphic and self-explanatory, and will not be further illustrated in this Decision. Furthermore, these reports were based on tips to police that the various activities were being performed at Respondent's club, and therefore are not necessarily the only incidents of such activity, but only those actually seen by police officers.

The following is a list of dates of the above-referenced acts reported by the police. Some of the dates had more than one incident.

August 22, 1997
August 28, 1997
November 3, 1997
February 22, 1998
February 24, 1998
March 4, 1998
March 11, 1998
March 20, 1998
April 20, 1999
April 27, 1999
May 6, 1999
May 24, 1999
September 24, 1999
September 30, 1999
August 2, 2000

The following is a list of dates of police reports referencing solicitation of prostitution at Respondent's club.

November 3, 1997
September 24, 1997
October 7, 1999

The above police reports clearly show that Respondent is conducting his business in a manner that warrants the refusal of his permit based on the morals, health, and public sense of decency. The reports also corroborate the public statements and testimony of the Staff's witnesses. Although Respondent's owner stated that he does not condone this activity, and has improved the record of the club since 1996, the law is clear that he is responsible for the acts of his employees, as well as the activities that occur in his establishment. The proper test of whether the permittee allows certain conduct is whether he knew or should have known of the activity. The Respondent is also responsible for supervising his premises, or adjacent premises, whether he sees the actual acts or not. Wishnow v. Texas Alcoholic Beverage Commission, 757 S.W.2d 404 (Tex. App.–Houston [14th Dist.] 1988).

2. General Welfare, Peace, and Safety of the People

While many of the above-referenced activities occurred inside the Club, there were incidents originating in the club that occurred outside the club, on the parking lot adjacent to the club and shared with other businesses. While not large in number, they do

demonstrate the place or manner in which Respondent conducts his business warranting the refusal or cancellation of a permit based on the general welfare, peace, and safety of the people. The following is a list of dates of fights, assaults, and other altercations that occurred either inside or outside the club, as reported by police investigations.

March 28, 1999- altercation at parking lot involving motor vehicles and alcohol
May 14, 1999- 2 females club dancers fighting
June 13, 1999- altercation involving gunshots and gunshot customer, parking lot
November 27, 1999-fight inside club, continued outside
January 18, 2000- fight in parking lot
March 10, 2000- assault with injuries
March 14, 2000- fight
March 16, 2000- fight in parking lot
March 28, 2000- fight between female dancers and customer
September 18, 2000- fight in parking lot
December 9, 2000- fight between two employees of club

Most noticeable is the June 13, 1999, in which about three club patrons were thrown out of the club, shots were fired in the parking lot, and one of the customers was wounded in the leg. Most of the above altercations occurred in the parking lot, affecting the general welfare, safety, and peace of any residents that are either patronizing the adjacent businesses, or merely walking or driving past the club.

The evidence shows that the nature of Respondent's business is attracting employees and a clientele that engage in fights, lewd behavior, drunkenness, prostitution, assaults, and other breaches of the peace that negatively affects the surrounding residents' general welfare, health, peace, morals, safety, and the public sense of decency.

The ALJ concludes that the Staff has proved its case by a preponderance of the evidence.

V. SANCTIONS AND RECOMMENDATIONS

The Staff recommends that Respondent's renewal permit applications be denied, or that its permits be canceled. The ALJ finds that the permits should be canceled.

VI. PROPOSED FINDINGS OF FACT

1. D.S.S.S. Ariamerica, Inc., D/B/A Solid Platinum, ("Respondent"), 2732-44 W. TC Jester Boulevard, Houston, Harris County, Texas, holds a Mixed Beverage Permit, MB-267330, and

Mixed Beverage Late Hours Permit, LB-267331, that has been continuously renewed since January 17, 1997.

2. On March 13, 2001, the Staff sent a notice of hearing to Respondent by certified mail.

3. The hearing was held at the Marriot Hotel in Houston, Texas, on August 9, 2001, and all parties appeared. The Staff was represented by Christopher Burnett, and Respondent was represented by Paul Decuir, Jr.

4. The record was closed on September 10, 2001.

5. The Respondent's permits were last renewed January 17, 2001.

6. Respondent's club is a sexually oriented business in the city of Houston, Texas, that serves alcoholic drinks, and features semi-nude female dancers.

7. On June 5, 1998, state representative Ken Yarbrough forwarded a request for hearing to the TABC protesting the re-issuance of Respondent's permit, which contained the signatures of about 150 nearby residents.

8. Respondent's club is located in a strip mall, and the club is adjacent to several other businesses with whom it shares a parking lot, including an ice cream store, convenience store, Mexican restaurant, dry cleaners, and florist.

9. Respondent's club is located in front of a bayou, and a walking and biking trail.

10. Respondent's club is located within approximately 800 feet of residential areas to the north and south.

11. Across the street from the Respondent's club is a Junior Achievement building that periodically busses in children.

12. A private K-12 school is located about 940 feet from Respondent's club.

13. At least 15 police reports between August 22, 1997, and August 2, 2000, detailed instances of public lewdness by female dancers at Respondent's club.

14. At least three police report between November 3, 1997, and October 7, 1999, detailed solicitation of prostitution at Respondent's club.

15. At least 11 police reports between March 28, 1999, and December 9, 2000, detailed fights, assaults, or other violent altercations both in and outside Respondent's club, involving either club dancers and employees, or customers.

16. On June 13, 1999, a club patron was shot in the leg by other patrons, in the parking lot of the club.

17. Delinda Holland, a nearby resident, does not frequent adjacent businesses of Respondent's club because she has children, and has observed loitering around the club.

18. Brenda Brummett, a nearby resident, does not frequent adjacent businesses of Respondent's club because she has children, and has observed loitering around the club, and believes she has observed lewd behavior around the club.

19. Betty Hansen and Darryl Tidwell are nearby residents, and do not want the Respondent's club in the area, based on public morals.

VII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to Section 11.46(a)(8), and Section 11.61(b)(7) of the Code.

2. The State Office of Administrative Hearings has jurisdiction over this proceeding, including authority to issue a proposal for decision, pursuant to TEX.GOV'T CODE, Chapter 2003.

3. Notice of hearing was provided as required by TEX.GOV'T CODE § 2001.

4. The manner in which Respondent conducts its business warrants the cancellation of its permits, based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

Signed this 9th day of November, 2001.

S.J. Burger

Stephen J. Burger
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS