

DOCKET NO. 590310

IN RE ORIGINAL APPLICATION BE & BL §	BEFORE THE
FELICIA AND RONNIE JOHNSON §	
D/B/A BLACK PEARL §	
§	
§	TEXAS ALCOHOLIC
§	
TARRANT COUNTY, TEXAS §	
(SOAH DOCKET NO. 458-00-2236) §	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 20th day of April, 2001, the above-styled and numbered cause.

This case was heard by Administrative Law Judge Tanya Cooper on September 20, 2000. Judge Cooper made and filed a Proposal for Decision containing the Findings of Fact and Conclusions of Law on January 4, 2001. On February 23, 2001, the Texas Alcoholic Beverage Commission (Commission) adopted Findings of Fact Nos. 1-13 and Conclusions of Law Nos. 1-4 from the Proposal for Decision issued by Judge Cooper. On that date, the Commission also remanded this matter back to the State Office of Administrative Hearings (SOAH) for further proceedings. Judge Cooper reopened the record in this cause for the limited purpose of obtaining evidence and considering argument from the parties. Supplemental documents were received into the record from Protestants by an Order issued by Judge Cooper on November 2, 2000. Based upon the foregoing Supplemental Findings of Facts and Conclusions of Law, Judge Cooper has recommended that Respondent's licenses be issued.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Supplemental Findings of Facts and Conclusions of Law, 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, Supplemental Findings of Facts and Conclusions of Law 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 licenses be issued.

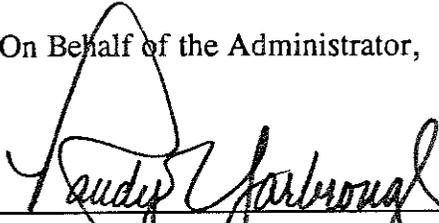
IT IS FURTHER ORDERED that Respondent's licenses be **ISSUED**.

This Order will become final and enforceable on May 11, 2001, 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 20th day of April, 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc --

The Honorable Tanya Cooper
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (817) 377-3706

Holly Wise, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
VIA FACSIMILE (512) 475-4994

Michael J.W. Remme
ATTORNEY FOR RESPONDENT
915 W. Mitchell Street
Arlington, Texas 76013
CERTIFIED MAIL NO. 7000 1530 0003 1927 3807

Mollie Childs
ATTORNEY FOR PROTESTANTS
City of Arlington Texas
Office of the City Attorney
200 West Abram Street
Box 231
Arlington, Texas 76004-0231

Felicia and Ronnie Johnson
d/b/a Black Pearl

RESPONDENTS

622 W. Cedar St.

Arlington, Texas 76011

CERTIFIED MAIL NO. 7000 1530 0003 1927 3814

Timothy E. Griffith

ATTORNEY FOR PETITIONER

TABC Legal Section

Licensing Division

Fort Worth District Office

DOCKET NO. 458-00-2236

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

§
§
§
§
§
§
§
§
§
§

BEFORE THE STATE OFFICE

V.

OF

FELICIA AND RONNIE JOHNSON
D/B/A BLACK PEARL
TARRANT COUNTY, TEXAS
(TABC CASE NO. 590310)

ADMINISTRATIVE HEARINGS

**SUPPLEMENTAL FINDINGS OF FACTS AND CONCLUSIONS OF LAW
AS REQUESTED IN REMAND ORDER FROM
THE TEXAS ALCOHOLIC BEVERAGE COMMISSION**

On February 23, 2001, the Texas Alcoholic Beverage Commission (Commission) adopted Findings of Fact Nos. 1- 13 and Conclusions of Law Nos. 1 - 4 from a Proposal For Decision issued by the undersigned Administrative Law Judge (ALJ). On that date, the Commission also remanded this matter to the State Office of Administrative Hearings (SOAH) for further proceedings.

I. PROCEDURAL MATTERS ON REMAND

The Commission authorized reopening the record to obtain further findings of fact and conclusions of law. Several questions were listed in the Commission's Remand Order to be resolved through the additional findings and conclusions. The Commission's questions were as follows:

1. When was the City of Arlington's ordinance prohibiting sales of alcoholic beverages within three hundred feet of a church enacted, and is it valid?
2. Has the City of Arlington granted a formal variance to its ordinance in relation to Black Pearl, as opposed to waiving the ordinance through its acts or omissions?
3. Regardless of whether a variance to the ordinance has been granted or not, is the premise of Black Pearl "grandfathered" pursuant to the provision of Section 109.59(b) of the Texas Alcoholic Beverage Code?

The ALJ reopened the record in this cause for the limited purpose of obtaining evidence and considering argument from the parties on the questions listed above. Protestants filed the following documents which are admitted into evidence and made a part of the record in this proceeding:

1. Exhibit 4, City of Arlington ordinance adopted in 1934 prohibiting the sale of beer within three hundred (300) feet of any church, school or other educational institution;
2. Exhibit 5, City of Arlington ordinance amendment adopted in 1996 prohibiting sales of alcoholic beverages within three hundred (300) feet of any church, public school or public hospital, and establishing scheme for measuring distances.
3. Exhibit 6, affidavit of Cindy Kemp, City Secretary of the City of Arlington, listing ordinances regulating the manufacture, sale and distribution of vinous and malt beverages within the City of Arlington, outlining actions related to these ordinances by the Arlington City Council from 1934 to the present, and describing actions of her staff in relation to this application.
4. Exhibit 7, affidavit of Tommy Uzee, Field Inspectors Supervisor/Residential and Acting Office Administrator for the Building Inspections Department of the City of Arlington, relating to the approval of an alcoholic beverage license request submitted for Black Pearl at 510 Indiana Street, Arlington, Texas.
5. Exhibit 8, affidavit of J.J. Daniels, pastor of Arlington Church of God in Christ, located at 513 Indiana Street, Arlington, Texas.

Prior to the ALJ issuing the Proposal for Decision in this case, supplemental documents were received into the record from Protestants by an Order issued by the ALJ on November 2, 2000. The ALJ considered these documents' contents in the initial determinations of findings of facts and conclusions of law, but the documents were not identified as Exhibits in the case. At this point, to clarify the record, the following items are also assigned Exhibit numbers:

1. Exhibit 9, letter from Elder J.J. Daniels protesting the application for Retailer's Permit or License, Cousin's Café, 510 Indiana Street, Arlington, TX 76011; and
2. Exhibit 10, letter from Rev. N.L. Robinson, Senior Pastor of Mount Olive Baptist Church, 301 W. Sanford St., Arlington, TX 76011, protesting application for alcoholic beverage license of Felicia Johnson d/b/a Black Pearl.

As ordered by the ALJ on remand, Applicant filed the following document which is admitted into evidence and made a part of the record in this proceeding:

1. Exhibit 3, affidavit of Tommy Uzee, Interim Administrative Services Coordinator for the City of Arlington, certifying various records of the City of Arlington relating to applications for Certificate of Occupancy and Certificates of Occupancy issued for 510 Indiana Street, Arlington, Texas.

Prior to the ALJ issuing the Proposal for Decision in this case, a supplemental document was also received into the record from Applicant on November 2, 2000. The ALJ considered this document's contents in the initial determinations of findings of facts and conclusions of law, but it

was not identified as an Exhibit in the case. At this point, to clarify the record, the following item is assigned an Exhibit number:

1. Exhibit 4, Special Warranty Deed dated November 30, 1999, from Douglas Taylor, Jr. to Felicia Johnson, conveying property located at 510 North Indiana, Arlington, Texas.

II. EVIDENCE RECEIVED

Protestants' Exhibit 4 is the first ordinance adopted by the City of Arlington relating to the sale or distribution of vinous or malt beverages. It was adopted in 1934 and provides, in part, as follows:

It shall be unlawful for any person, firm, corporation, or association of persons whose principal business is the sale of beer to sell beer where the place of business of any such dealer is within three hundred (300) feet of any church, school, or other educational institution, the measurements to be along the property lines of the street fronts and from front door to front door and in a direct line across intersections where they occur.

Amendments to the initial ordinance occurred in 1964, 1968, 1983, and 1996. In 1964, regulation of beer sales was extended to include alcoholic beverages when the City Council enacted the Occupation Taxes and Licenses Chapter of the Code of Ordinances, which states:

It shall be unlawful for any person, firm, corporation, or association of persons whose principal business is the sale of alcoholic beverages to sell alcoholic beverages where the place of business of any such dealer is within three hundred (300) feet of any church, school, or other educational institution, the measurements to be along the property lines of the street fronts from front door to front door in a direct line across intersections where they occur.

The 1968 amendment removed the "principal business" criteria from the ordinance and made it unlawful to engage in the business of the sale of alcoholic beverages within three hundred (300) feet of any church, public school, or public hospital. In 1983, an amendment was enacted dealing with measurement requirements applicable for public schools, but the amendment did not revise the prohibition of sales of alcoholic beverages within three hundred feet of any church. The final revision of this ordinance in 1996 also dealt with measurement calculations for public schools and did not change the provisions of the ordinance relevant to the considerations in this proceeding.

The affidavit of Tommy Uzee submitted by Protestants described the current application's approval by the City of Arlington. Initially another City of Arlington inspector, Mike Perkins, noted on Black Pearl's license request that 510 Indiana Street was "too close to church" and denied the request. Mr. Uzee reviewed this document and changed the determination from denied to approved because he knew that 510 Indiana Street had been a premises where alcoholic beverages had been sold in the past. He also knew that a church had always been across the street and within three

hundred feet of the building at that address. Mr. Uzee stated that he did not believe he had the authority to deny Mr. and Mrs. Johnson's application, but did not consult with the City's legal staff or place the item on the City Council's agenda for consideration.

J.J. Daniels' affidavit described acquisition of the property by Emmanuel Church of God in Christ, now known as Arlington Church of God in Christ, through a Quit Claim Deed in 1949. However, the building at the location, 513 (formerly 511) Indiana existed as early as 1918 and has been utilized for church services since that time. Reverend Daniels stated that he has been the pastor at Arlington Church of God in Christ since 1984. During that time, he had reviewed records and spoken with numerous members of the congregation and the community. From these sources, he believes that a church was established at this portion of Indiana Street well before construction of the building at 510 Indiana Street.

Applicant also provided an affidavit from Mr. Uzee, certifying copies of certificates of occupancy for 508 and 510 Indiana Street from the records of the City of Arlington. Lou Henry Taylor had Certificates of Occupancy for both addresses. The initial Certificate was for 508 N. Indiana, listing the use of the premises as a café in 1957. Ms. Taylor was issued a Certificate of Occupancy for 510 N. Indiana Street for Laus Blue Lounge, also known as Lou's Blue Lounge in 1981. In the application for this Certificate under the section "Office Use Only," it is noted that the premises was non-conforming as of that date.

The next Certificate of Occupancy issued for 510 Indiana Street was to Club BYOB in 1991. It contained a notation on the Certificate under special conditions: "non-conforming and no expansion." The application for this Certificate indicated that food and alcoholic beverage would be sold on the premises, indicated that the activity was a "club," and that the business was an "existing business, new owner."

In 1993, Marzetta Austin applied for and received a Certificate of Occupancy for the location. She indicated her business was a tavern named "Poor Monkey's Lounge," and acknowledged that food and alcoholic beverages would be sold at the business. Again, special conditions were noted on her Certificate showing that the use was non-conforming and could not be expanded.

Teressa Lampkin applied for a Certificate of Occupancy for the 510 Indiana Street in 1997. She indicated that she would be using the premises for fast food sales, but also noted that alcoholic beverages would be sold. No Certificate of Occupancy was provided from the Arlington records for this business.

Cousin's Café was the next business located at 510 Indiana Street. The application for this business was filed in 1998 and again showed the premises being used for food and alcoholic beverage sales. The Certificate of Occupancy issued in this instance did not include any special conditions that were applicable.

Felicia Johnson, Applicant in this proceeding, obtained the last Certificate of Occupancy issued for a business at 510 Indiana Street in 2000. The Certificate issued by the City of Arlington

in this instance showed the premises used as a café and did not include any special conditions. Because Mrs. Johnson had obtained a Certificate of Occupancy and Arlington's Building Inspections Division had approved Black Pearl's Alcoholic Beverage Request form, the City Secretary's staff indicated the City's approval on Applicant's application for a Beer Retail Dealer's On-Premises License and Retail Dealer's On-Premises Late Hours License through the Commission.

III. DISCUSSION AND ANALYSIS

The ALJ's discussion and analysis of evidence received on remand will focus on the three questions submitted by the Commission for resolution.

1. When was the City of Arlington's ordinance prohibiting sales of alcoholic beverages within three hundred feet of a church enacted, and is it valid?

Arlington's initial alcoholic beverage sales regulation was enacted in 1934. Through various amendments, Arlington continues regulation of alcoholic beverage sales. These ordinances are regular on their face, properly adopted, and are presumed valid.

The 1934 ordinance included, among other things, a prohibition against persons or corporations whose "principal business is the sale of beer" from selling beer within three hundred feet of a church. It was not until 1964 that the sale of alcoholic beverage was prohibited within three hundred feet of a church by the City of Arlington; and then, the ordinance applied only to persons whose principal business was the sale of alcoholic beverage. In 1968, the condition of "principal business" was removed from the ordinance and all sales of alcoholic beverages were prohibited within three hundred feet of a church. The current ordinance's language is virtually unchanged in this regard.

2. Has the City of Arlington granted a formal variance to its ordinance in relation to Black Pearl, as opposed to waiving the ordinance through its acts or omissions?

No evidence was produced to show that the Arlington City Council has granted a formal variance to its ordinance prohibiting sale of alcoholic beverage within three hundred feet of a church to the Applicant in this case for the premises, Black Pearl. This matter has not been placed before the Council for its consideration. Additionally, there is no evidence to show that any other persons operating businesses selling alcoholic beverages from that location have ever received a formal variance through Council action. However, the evidence does show that City of Arlington staff members charged with interpreting and enforcing the City's regulations have long recognized the usage of the property at 510 Indiana as a non-conforming use because of the sale of alcoholic beverages from that location.

In 1957, Mrs. Lou Henry Taylor was issued a Certificate of Occupancy for 508 Indiana. The premises at that time was listed as a café. The 500 block of Indiana Street was renumbered by the City and her property became known as 510 Indiana. In 1981, Ms. Taylor was issued a second Certificate of Occupancy for Lou's Blue Lounge at 510 Indiana. This Certificate of Occupancy noted that the use was non-conforming at that time because of the 1968 amendment to Arlington's

ordinance regulating all alcoholic beverage sales within three feet of a church. From then until the present, the premises has continued to been utilized in approximately the same manner, businesses that sell food and beverages, including alcoholic beverages, and provide entertainment.

From 1918 to the present, a church, Arlington Church of God in Christ (or its predecessor, Emmanuel Church of God in Christ), has been across the street from these various businesses. The measurement from front door of the church to the front door of the 510 Indiana property is 216 feet.

3. Regardless of whether a variance to the ordinance has been granted or not, is the premise of Black Pearl "grandfathered" pursuant to the provisions of Section 109.59(b) of the Texas Alcoholic Beverage Code?

Section 109.59 of the Texas Alcoholic Beverage Code (the Code) addresses the application of distance requirements.¹ In 1957 when Ms. Taylor received her first Certificate of Occupancy for Lou's Blue Lounge, she was in compliance with City of Arlington regulations. Her business offered food, drinks, social interaction, and entertainment, and was not primarily for the sale of beer. If the business at Lou's Blue Lounge had been considered by City staff as primarily for the sale of beer, Mrs. Taylor's business would have been prohibited by Arlington's 1934 ordinance due to its proximity to the church. At this point, the use for this premises was established.

Ms. Taylor was also in compliance with the City of Arlington's ordinance involving alcoholic beverage sales within three hundred feet of a church, as amended in 1964, because her business was not primarily from the sale of alcoholic beverages. Therefore, when she applied for her original license to sell beer at the premises, it was properly issued from the Texas Alcoholic Beverage Commission on January 25, 1965.

It was not until the City of Arlington amended its ordinance to prohibit all sales of alcoholic beverage within three feet of a church in 1968 that the premises became non-conforming in its status. All renewals of Ms. Taylor's license subsequent to 1968, however, were proper pursuant to Section 109.59(a) of the Code.

Ms. Taylor ceased operating Lou's Blue Lounge in 1990, but continued to own the premises leasing the property to various tenants until her death in 1999. These tenants operated the premises obtaining Certificates of Occupancy from the City of Arlington and licenses to sell alcoholic beverages through the Commission. Applicant Felicia Johnson was transferred the ownership of

¹Section 109.59 provides as follows:

(a) If at the time an original alcoholic beverage permit or license is granted for a premises the premises satisfies the requirements regarding distance from schools, churches, and other types of premises established in this code and any other law or ordinance of the state or a political subdivision of the state in effect at that time, the premises shall be deemed to satisfy the distance requirements for all subsequent renewals of the license or permit.

(b) On the sale or transfer of the premises or the business on the premises in which a new original license or permit is required for the premises, the premises shall be deemed to satisfy any distance requirements as if the issuance of the new original permit or license were a renewal of a previously held permit or license.

the premises through settlement of Ms. Taylor's estate.

Mrs. Johnson and her husband are required to obtain a new original license for the premises, Black Pearl, in order to lawfully sell beer to customers. This proposed premises is a café with the primary business of selling food and beverages and providing entertainment for customers. Black Pearl meets the requirements established in 1957 when Mrs. Taylor was first issued a Certificate of Occupancy for her café and in 1965 when the first license to sell beer was obtained from the Commission.

Black Pearl's business is not primarily for selling beer. Beer would be only one of several beverage choices for customers upon obtaining the requested license in this case. Therefore, the premises Black Pearl should be considered "grandfathered" pursuant to the provisions of Section 109.59(b), regardless of whether any variance has been granted.

Supplemental findings of facts and conclusions of law in support of these responses to the Commission's questions are contained below. The ALJ further recommends the requested permits be issued.

IV. SUPPLEMENTAL FINDINGS OF FACT

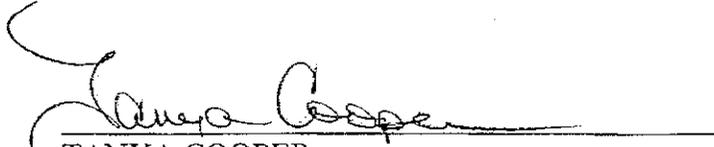
1. In 1934, the City of Arlington enacted an ordinance regulating alcoholic beverage sales by prohibiting any business whose primary business was selling beer from being located within three hundred feet of a church; subsequent amendments to this ordinance have occurred in 1964, 1968, 1983, and 1996 and all ordinances are presumed valid.
2. No formal variance has been granted by the Arlington City Council to the business, Black Pearl, in relation to any of its ordinances; but the premises' location, 510 Indiana Street, has been considered by City staff members as non-conforming in its usage since 1981.
3. Black Pearl is 216 feet from a church, Arlington Church of God in Christ; however, the premises meets the City of Arlington's distance requirements that were applicable in 1957 when the premises' use was established as a café by Lou Henry Taylor. The use of this premises has also lawfully included beer sales incident to the café's operation under a license issued by the Commission since 1965 because the premises complied with the City's distance requirements at that time as well.
4. Black Pearl's alcoholic beverage license request was examined by appropriate City of Arlington staff members and approved.

V. SUPPLEMENTAL CONCLUSIONS OF LAW

1. Based upon the foregoing supplemental findings of facts, a preponderance of the evidence shows that this premises meets distance requirements pursuant to TEX. ALCO. BEV. CODE ANN. § 109.59(b).

2. Based upon the foregoing supplemental findings of fact and supplemental conclusion of law, the application of Felicia and Ronnie Johnson d/b/a Black Pearl for a Beer Retail Dealer's On-Premises License and Retail Dealer's On-Premises Late Hours License should be granted.

SIGNED on the 19th day of April, 2001.



TANYA COOPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS