

DOCKET NO. 595444

IN RE LEON GANESH ENTERPRISES, INC. §
D/B/A FRATERNITY HOUSE §
ORIGINAL APPLICATION MB & LB §

DALLAS COUNTY, TEXAS §
(SOAH DOCKET NO. 458-01-3866) §

BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 1st day of April, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Robert F. Jones, Jr. The hearing convened on November 15, 2001. The hearing recessed on November 15, 2001 and was completed on December 21, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on February 11, 2002. 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 were filed by Respondent and Petitioner responded to Respondent's Exceptions.

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.

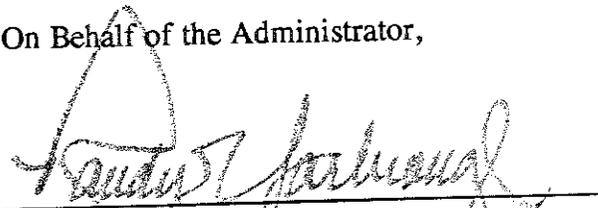
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the Original Application of Leon Ganesh Enterprises, Inc. d/b/a Fraternity House, for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit is hereby **DENIED**.

This Order will become final and enforceable on April 22, 2002, 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 1st day of April, 2002.

On Behalf of the Administrator,


Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Robert F. Jones, Jr.
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (817) 377-3706

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Licensing Division

DOCKET NO. 458-01-3866

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

VS.

OF

LEON GANESH ENTERPRISES, INC.
D/B/A FRATERNITY HOUSE
DALLAS COUNTY, TEXAS
(TABC CASE NO. 595444)

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Leon Ganesh Enterprises, Inc. d/b/a Fraternity House (Respondent or Frat House) sought an original Mixed Beverage Permit and Mixed Beverage Late Hours Permit. The Staff of the Texas Alcoholic Beverage Commission (Staff) protested issuing the permits. This proposal finds (1) the Respondent did not fail to answer and did not falsely or incorrectly answer a question in its original application, (2) that Ramesh Ganesh, an officer of Respondent, is not disqualified or unsuitable to hold a permit based upon his criminal history, and (3) there are reasonable grounds to believe the place or manner in which Respondent conducts its business warrants refusal of the permits. The Administrative Law Judge (ALJ) recommends the permits be denied.

I. PROCEDURAL HISTORY & JURISDICTION

On December 5, 2000, Respondent filed an original application for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit with the Texas Alcoholic Beverage Commission (TABC). On July 30, 2000, Staff informed Respondent that TABC had received a protest against issuing the permits. The matter was referred to the State Office of Administrative Hearings. On November 15, 2001, a public hearing was convened before ALJ Robert F. Jones Jr., at 6333 Forest Park Road, Suite 150-A, Dallas, Dallas County, Texas. Staff was represented by Timothy E. Griffith, an attorney with the TABC Legal Division. Respondent appeared through its President Dhanesh D. and its counsel, David C. Hill and Steve Shaw. The hearing recessed on November 15, and was completed on December 21, 2001. Five exhibits were admitted into evidence. The record was closed on January 18, 2002. Because notice and jurisdiction were not contested issues, those matters are addressed only in the Findings of Fact and Conclusions of Law.

II. RESPONDENT'S MOTION TO SUPPLEMENT RECORD

On January 11, 2002, Respondent filed its Motion to Supplement Record in connection with its post-hearing brief. Respondent offered an affidavit made by Dhanesh Ganesh in answer to Question J on the original application which asked "List the names of any persons, firms, or corporations that have or will advance any money, . . . , or financially assisted this business for which you are seeking a permit." The answer submitted was none. Respondent noted that the affidavit was requested by the TABC in June of 2001, as disclosed in TABC Exhibit 2, and was submitted by the Respondent and received by TABC on August 7, 2001. The Staff replied that the affidavit was not

submitted in a timely manner. Respondent also offered a copy of the concealed handgun permit issued to Ramesh Ganesh. The permit is offered to rebut the argument made by the Staff that since Ramesh Ganesh has a criminal history, more fully described below, he is disqualified from having a liquor permit. TABC objects to the permit on the grounds of relevance, arguing that Ramesh Ganesh's qualification for a concealed handgun permit does not prove or disprove his qualification for a liquor permit.

The application was originally filed with the TABC in December of 2000. The application and the personal history sheets were signed and notarized in April 2001. A notice of protest letter was sent to Respondent on July 30, 2001, and the case was referred to SOAH in August of 2001. The affidavit was not filed with the TABC until after the protest had been made. Even though tardy, the affidavit provides the information necessary to complete the application, and to assure the TABC of the source of the capital for the Frat House.

To be eligible to carry a concealed weapon the applicant must not (among other criteria) have been convicted of a felony, not be charged with the commission of a Class A or Class B misdemeanor or an offense under Section 42.01, Penal Code, or of a felony under an information or indictment, and not be in the five years preceding the date of application, convicted of a Class A or Class B misdemeanor or an offense under Section 42.01, Penal Code. TEX. GOV'T CODE ANN. § 411.172(a)(3), (4), & (8)(Vernon 2002). Section 42.01 of the Penal Code defines "disorderly conduct" as discharging or displaying a firearm. TEX. PENAL CODE ANN. § 42.01(a)(9) & (10)(Vernon 2002). The TABC may deny an application if it "determines that a previous criminal conviction or deferred adjudication indicates that the applicant is not qualified or suitable for a license or permit." TEX. ALCO. BEV. CODE ANN. § 109.532(b)(1)(Vernon 2002)(the Code). "Deferred adjudication for [any firearm or weapons offense] may indicate that the applicant is not qualified or suitable to hold a permit or license under the Alcoholic Beverage Code, §§109.532(b)(1), and may be grounds for denial. . . ." 16 TEX. ADMIN CODE (TAC) § 33.1(a)(3). The evidence is undisputed that Ramesh Ganesh was arrested for "unlawful carrying of a weapon," a violation of § 46.02(a) of the Penal Code.¹ Ramesh Ganesh made a plea bargain and received deferred adjudication for an attempt to commit a display of firearm, a Class C Misdemeanor.² Considering the similar criteria, the concealed handgun permit is relevant to an inquiry under § 109.532 of the Code and 16 TAC § 33.1(a)(3).

Respondent's Motion to Supplement the Record is GRANTED. The Affidavit of Dhanesh Ganesh is ADMITTED as Respondent's Exhibit #2 and the copy of the concealed handgun permit issued to Ramesh Ganesh is ADMITTED as Respondent's Exhibit #3 .

¹ TEX. PENAL CODE ANN. § 46.02(a). Chapter 46 of the Penal Code deals with weapons offenses, and is a part of Title 10, Offenses Against Public Health, Safety, And Morals.

² "Display of a firearm" is the crime. TEX. PENAL CODE § 42.01(a)(10). The crime of display of a firearm is a Class B Misdemeanor. *Id.* § 42.01(d). Punishment for a criminal attempt is "is one category lower than the offense attempted." *Id.* § 15.01(d). Chapter 42 of the Penal code governs disorderly conduct and related offenses, and is a part of Title 9, Offenses Against Public Order And Decency.

III. DISCUSSION

A. Applicable Law

The TABC may refuse to issue an original permit if it has "reasonable grounds to believe" and finds that "the applicant failed to answer or falsely or incorrectly answered a question in an original . . . application." §11.46(a)(4) of the Code.

The TABC may refuse to issue a permit to if it finds that a previous deferred adjudication indicates that the applicant "is not qualified or suitable for a license or permit." §109.532(b)(1) of the Code. The TABC has determined that deferred adjudication for a firearms offense may be a disqualification. In general, the deferred adjudication may be grounds for denial unless three years have elapsed since the termination of probation. 16 TAC § 33.1(a)(3). An "applicant" must not have been finally convicted of a felony" or a violation of the Code within the "two years immediately preceding the filing of an application." 16 TAC § 33.1(a); *see also* §§ 61.42(a)(6) & 61.43(1) of the Code.

The TABC may refuse to issue an original permit 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, health, peace, morals, and safety of the people and on the public sense of decency." §11.46(a)(8) of the Code. Generally, to deny a permit to a qualified applicant to operate a lawful business in a wet area, some "unusual condition or situation must be shown so as to justify a finding that the place or manner in which the applicant may conduct his business warrants a refusal of a permit." *Texas Alcoholic Beverage Com'n v. Mikulenska*, 510 S.W.2d 616, 619 (Tex.Civ.App.-San Antonio 1974); *Elliott v. Dawson*, 473 S.W.2d 668, 670 (Tex.Civ.App.--Houston [1 Dist.] 1971).

The Code does not define how the place or manner in which a business might be operated would jeopardize the general welfare, health, peace, morals, or sense of decency of the people, giving the TABC discretion in making this decision. There is no "set formula." *Brantley v. Texas Alcoholic Beverage Com'n*, 1 S.W.3d 343, 347 (Tex.App.--Texarkana 1999). The evidence concerning the unusual condition or situation must be more than mere conclusions. *In re Simonton Gin, Inc.*, 616 S.W.2d 274, 276 (Tex.Civ.App.-Houston [1st Dist.] 1981).

B. Evidence

TABC Agent Fred Oden and Dallas Police Department (DPD) Officer James L. Thompson were sworn and testified. Agent Oden spoke against issuing the permits. Officer Thompson is a member of the DPD SAFE³ Team and testified as to his unit's experience with the Respondent.

1. The Licensed Premises

The Frat House is located at 2525 Wycliff, Suites 120-123, Dallas, Dallas County, Texas (the

³ SAFE is an acronym and means "Support, Abate, Forfeit, and Enforce."

premises). No evidence was submitted concerning the physical layout of the premises, or the type of business and clientele (such as a discotheque or sports bar) to which the Frat House caters. The application filed with the TABC listed two principals for Frat House: Dhanesh D. (Dan) Ganesh and Ramesh U. (Ram) Ganesh (the Applicants).⁴ The Staff did not dispute that the premises are located in an area of Dallas, Texas, and Dallas County where sales of mixed beverages are legal. No evidence was submitted concerning the nature and character of the neighborhood surrounding the premises.

2. The Original Application

The Staff pointed out three portions of the original application, admitted as TABC Exhibit 2.

First, Question E(1)(a)(8) of the original application asks, "Has any [shareholder] been finally convicted or received deferred adjudication for any of the following offenses?" The Applicants left answer "(8) any offense involving firearms or a deadly weapon," blank. TABC Exhibit 2.

Second, the Staff notes Questions I and J of the application.

Question I: "What is the amount of total investment for this business?"
Answer: "\$ 125,000.00"

Question J: "List the names of any persons, firms, or corporations that have or will advance any money, . . . , or financially assisted this business for which you are seeking a permit."
Answer: "None"

Finally, the Staff points out Question 10 on the personal history sheets filed with the application which inquires about the Ganeshes' employment for the past three years. Dhanesh Ganesh indicated employment at Las Chulas from March 1993 to the present, as the bar owner. Ramesh Ganesh indicated employment at Del Mar from January 1999 to present as restaurant owner, and at Las Chulas from August 1994 to present as a bar manager.

3. Agent Oden's Testimony

Agent Oden has been an agent investigator with the TABC for four years. He has protested original applications for permits for three years. Protests are a part of his regular, day-to-day job. He has trained in the mechanics of protests and has attended instructional TABC classes dealing with protest guidelines and criteria.

Agent Oden testified that Senior DPD Corporal Tom Nolte with the DPD SAFE Team contacted the Staff with concerns about the Frat House application made by the Applicants. Officer

⁴ § 11.45 of the Code defines "applicant" as including "with respect to a corporation, each officer and the owner or owners of a majority of the corporate stock."

Nolte informed Agent Oden of numerous investigations of the various premises owned and controlled by Dan and Ram Ganesh. The contact occurred on December 6, 2000. Corporal Nolte told Agent Oden the DPD wished to protest the application.⁵

Following his training, Agent Oden reviewed the application, and requested criminal histories of the two principals. Agent Oden reviewed the administrative history of each of the licensed premises owned or operated by the Ganeshes as reflected in TABC computer records. The Ganeshes' six licensed premises in Dallas are:

- Restaurante Y Ostioneria Del Mar (the Del Mar) at 3400 Lombardy Lane
- Jack's Mark II at 10865 Harry Hines Boulevard
- Fiebre Latino at 10879 Harry Hines Boulevard
- Las Chulas Club, 10976 Harry Hines Boulevard
- El Reventon, 10976 Harry Hines Boulevard
- El Paraiso Restaurante & Bar (El Paraiso), 3373 Lombardy Lane

Oden did a "call study" on five⁶ of the licensed premises.⁷ The call studies were from the first quarter of 2000 to the first quarter of 2001. Agent Oden requested DPD review its records for calls for service or reports made at the permitted locations controlled by the Applicants. He testified that calls for service indicate or substantiate a manner or method of operation business, which could affect the health, safety, or general welfare.

Agent Oden testified he has no personal knowledge of the incidents reflected in calls for service. He made a request for a call list to the DPD, providing the address, the trade name, and the permit name as required by the DPD. He assumed DPD enters an address into their database, and what the database has on that address is what is printed out. He does not know the actual procedure, or whether the DPD relies on the trade name or permit name. He testified he regularly relies upon such lists in determining whether to protest an application. Agent Oden testified the call list does not reflect the final result of the call. The nature of the call given to the officer can be determined from the Uniform Crime Reporting (UCR) number or signal number as it appears for each call. Agent Oden was not certain a reader could determine from the call list what the officer determined to be the true problem once the officer arrived on the scene.

Agent Oden prepared a report dated April 19, 2001. The report was admitted into evidence.

⁵ Agent Oden later learned that the SAFE Team had concluded its investigation of the Ganeshes, and that they had satisfied DPD's concerns. Upon learning this, he contacted Corporal Nolte. Officer Nolte told him that SAFE still wanted to be involved in the protest. Agent Oden was not aware that the Ganeshes and DPD had settled their differences in a lawsuit, or that they had entered into an agreed order.

⁶ The Las Chulas Club and El Reventon share the same address according to the report filed by Agent Oden. Las Chulas Club operates under wine and beer retailer's permit BG282951. El Reventon operates or operated under wine and beer retailer's permit BG293777. TABC Exhibit 3. The call list for Las Chulas would yield the same results as the call list for El Reventon.

⁷ Since the Fraternity House was permitted to another individual during the inquiry period and neither of the Ganeshes were in control of the property, no call list was done on the Wycliff address.

It includes a synopsis of the call lists on five Ganesh premises prepared by Agent Oden, a copy of the application, criminal history reports for Dan and Ram Ganesh, the call lists for the five locations, and arrest reports.

Agent Oden found 261 calls for service during the year 2000. He classified the calls according to the information in the call list. He found crimes against persons or property, including robbery, aggravated assault, assault, burglary, theft, and malicious mischief. There were some drug offenses, generally possession of narcotics by Applicants' patrons and employees, and sales or distribution of narcotics by Applicants' employees. Oden testified that some of the offense reports were pulled, and are a part of the report. A DPD arrest report is included for Las Chulas Club, at 10976 Harry Hines.⁸ This dealt with possession of narcotics at the location. Agent Oden's analysis of the call lists is as follows:

Name	Calls	Crimes against persons	Property
Del Mar	202	65	49
Jack's Mark II	19	07	03
Fiebre Latino	07	02	00
Las Chulas Club	15	07	00
El Paraiso	18	04	03

Agent Oden testified that there were a disproportionate number of calls to Del Mar. Del Mar, located at 3400 Lombardy Lane, is in a strip mall, with at least ten other businesses. Del Mar has its own suite number, possibly #104. Agent Oden is aware of another restaurant in the strip mall that is also permitted to sell alcohol and which is open at late hours on occasion. There is a pool hall next door to Del Mar that does stay open as late as 2:00 a.m. on occasion. He is not aware of every businesses' closing time in the strip center. Agent Oden testified there might have been a liquor store in the mall. There is a convenience store that sells alcoholic beverages in the mall, and a Kentucky Fried Chicken (the KFC) which is open late.

Agent Oden acknowledged that the Del Mar call list is not restricted to a suite but reflects calls from the entire strip center. The call list contains several listings for the KFC. Oden stated he

⁸ Oden's report identifies the crime location as the El Reventon. The offense or arrest report referred to the location as Las Chulas.

did not include the KFC entries in his count.⁹ He averred that the KFC might appear on the call list because the dispatcher was given that name by the caller or the caller ID box (location of the phone) identified the call as coming from the KFC. In that case the KFC would not necessarily be the location of the problem. Agent Oden acknowledged that nothing in the call sheet demonstrates the Del Mar trade name was taken into consideration in running the list. He did not independently verify that every call concerned Del Mar. He could not deny that some number of the calls involved other businesses at the strip mall.

Agent Oden testified that the number of calls at 3400 Lombardy were abnormal or higher as compared to other businesses in the same general area, even though Agent Oden did not run call lists for other permitted locations in the general area. His opinion is based upon discussions with DPD officers who patrol the area. He averred that the Del Mar calls are greatly disproportionate to Jack's Mark II with 19, Fiebre Latino with seven, Las Chulas Club with 15, and El Paraiso with 18. On cross-examination, he was asked whether the lower calls at the other Ganesh premises prove that the Ganeshes do not have a habitual or regular type of problem at those locations. Agent Oden responded that the call lists show they have a need for police assistance. Agent Oden admitted that considering Fiebre Latino alone, its seven calls in one year was not excessive.

In processing the application, the application department in the Dallas TABC office performed a criminal background check with the Texas Department of Public Safety (TDPS) on the Ganeshes. As noted above, Ramesh Ganesh was arrested for "unlawful carrying of a weapon," a violation of § 46.02(a) of the Penal Code. He made a plea bargain and received deferred adjudication for an attempt to commit a display of firearm, a Class C Misdemeanor.

4. Officer Thompson's Testimony

Officer Thompson testified at the request of the Ganeshes. Thompson is a 12 year officer with the DPD and is a member of the SAFE Team. The SAFE Team is an abatement unit. They investigate properties that have problems with narcotics, prostitution, or TABC violations. A team member escorts fire code inspectors to properties. The team oversees correction of problems, and halts criminal activities on the properties.

The SAFE Team has conducted two investigations relating to two separate Ganesh businesses. The SAFE Team carried out the initial investigations, met with the Applicants, and explained the criminal violations (drug possession by employees) that were taking place. The team acquainted the Applicants with fire code violations. The team requested Applicants make changes in their business, which they did. The SAFE Team closed the two investigations in 2000 and early 2001.

Officer Thompson testified that when a call sheet is requested on an address within a strip center, the report will not distinguish between suite numbers in the strip center, but will reflect every call in the strip center. He averred that to determine if a call refers to a particular business the investigator would have to pull each arrest or offense report or its narrative and review it. He stated

⁹ In fact, the KFC calls are included in the Del Mar call list. See Table 4 – Offense Calls.

that is what the SAFE Team has to do at times.

Officer Thompson explained how to read the call sheets. There are four types of entry: A, O, MIR, and N.

- A is an "arrest" entry. The name on the entry is the arrested person. The nature of the crime is reflected in the UCR (Uniform Crime Report) Number. For example, 18 indicates a drug arrest and 16 indicates a prostitution arrest.
- O is an "offense" entry. The name is the complaining party. The nature of the call is reflected in the "signal" number. For example, 11 is a burglary, 6X is a disturbance, 40 is an "other", 9 is a theft, and 16 is a fire. Most drug offenses are issued as a 40.
- MIR is a "miscellaneous incident report" entry. The name is the complaining party. The nature of the call is reflected in the "signal" number.
- N is a "no action" entry. The name is the complaining party. The nature of the call is reflected in the "signal" number.

Officer Thompson testified all of the call sheets reflect a use of police resources.

5. Oden's Protest Report

Agent Oden's report contains the call lists for the five locations as well as the TDPS criminal histories for Dhanesh and Ramesh Ganesh, and arrest reports for incidents at what Oden identifies as the El Reventon premises. TABC Exhibit 3. Dhanesh Ganesh had no relevant criminal history.¹⁰ As discussed above, the history disclosed that Ramesh Ganesh was arrested for "unlawful carrying of a weapon" and received deferred adjudication for an attempt to commit a display of firearm. The arrest reports indicate that on September 20, 2000, DPD officers entered the Las Chulas Club (as opposed to the El Reventon as reported by Agent Oden), and discovered the bartender in possession of cocaine. The officers also located a patron in the bar who was publically intoxicated and in possession of cocaine.

As described by Officer Thompson, the call lists for each location are divided into four categories: arrests, offenses, miscellaneous incident reports (MIR), and no action entries (N). In tabular form the call lists provide the following information:

¹⁰ The criminal histories are privileged information. § 109.532(c) of the Code. Since this proposal for decision is a public document, criminal histories will be discussed in the most general terms possible.

	Del Mar	El Paraiso	Fiebre Latino	Jack's Mark II	Las Chulas
Arrests	35	6	0	2	0
Offenses	45	5	3	5	2
Misc Incident Reports	20	2	1	2	3
No Action	102	5	1	10	6
Totals	202	18	5 ¹¹	19	11 ¹²

Concerning arrests, the call lists indicated only that named individuals had been arrested,¹³ as follows:

UCR	Means	Del Mar	El Paraiso	Fiebre Latino	Jack's Mark II	Las Chulas
06	Larceny	2	0	0	1	0
07	Motor vehicle theft	1	0	0	0	0
18	Drugs	6	3	0	0	0
21	DUI/DWI	2	0	0	0	0
23	Drunkenness	15	0	0	0	0
26	Other	5	0	0	1	0
45	Simple Assault	4	3	0	0	0

¹¹ Agent Oden noted seven total incidents, but the call lists show only five.

¹² Agent Oden noted 15 total incidents, but the call lists show only 11.

¹³ The call lists for arrests reflected a "UCR" or Uniform Crime Report classification number. Briefly, the UCR system is coordinated by the Federal Bureau of Investigation. The Texas Department of Public Safety gathers information submitted to it by local police departments, and transmits it to the F.B.I. The UCR classification numbers can be found at the TDPS website at www.txdps.state.tx.us.

The offense reports¹⁴ yield the following information:

UCR	Means	Del Mar	El Paraiso	Fiebre Latino	Jack's Mark II	Las Chulas
6X	Major disturbance	11 ¹⁵	2 ¹⁶	0	1	0
7	Minor accident	3	1	0	0	1
8	Drunk	6	0	0	0	0
9	Theft	4	1	0	2	0
11	Burglary	1 ¹⁷	0	0	2	0
16	Injured person	1 ¹⁸	0	1	0	1
19	Shooting	1	0	0	0	0
20	Robbery	1 ¹⁹	0	0	0	0
24	Abandoned Property	1	0	1	0	0
31	Criminal Mischief	1	0	0	0	0
38	Meet Complainant	1	0	0	0	0
40	"Other" ²⁰ (includes drugs)	11	1	1	0	0
41	Felony	4 ²⁰	0	0	0	0

Aside from the reporting parties footnoted in Table 4, calls concerning the Del Mar location came from named individuals, from the Swift T Mart, from the Fina, or on three occasions were initiated by the DPD. The other four locations had a similar pattern: calls were made by individuals, a security

¹⁴ The call lists for offenses, MIR, and N reflect a DPD radio signal code number. The DPD radio signal codes can be found at the DPD website at www.dallaspolice.net.

¹⁵ Two incidents were reported from the Del Mar.

¹⁶ One incident was reported by a person with the surname Ganesh.

¹⁷ This incident was reported by a person with the surname Ganesh.

¹⁸ This incident was reported by a person with the surname Ganesh.

¹⁹ This incident was reported by a person from the Kentucky Fried Chicken.

²⁰ One incident was reported by a person from the Kentucky Fried Chicken, none from Del Mar.

company, or by the DPD.

The MIR call lists reveal the following:

UCR	Means	Del Mar	El Paraiso	Fiebre Latino	Jack's Mark II	Las Chulas
6X	Major disturbance	6	0	0	0	2 ²¹
7	Minor accident	2	0	0	0	1
8	Drunk	1	0	0	0	0
11	Burglary	1	0	0	0	0
30	Prisoner	1	0	0	0	0
32	Suspicious Person	2	0	0	0	0
38	Meet Complainant	1	0	0	0	0
40	"Other"(includes drugs)	4 ²²	2	1	2	0
41	Felony	2	0	0	0	0

Aside from the reporting parties footnoted in Table 5, calls concerning the Del Mar location came from named individuals, from the Swift T Mart, from Pecan Plaza (which the ALJ assumes is the landlord), or were initiated by the DPD. The other four locations had a similar pattern: calls were made by individuals, or by the DPD.

The N call lists reveal the following:

UCR	Means	Del Mar	El Paraiso	Fiebre Latino	Jack's Mark II	Las Chulas
3	Hang up call	18	0	0	0	0
4	911 Hang up	5 ²³	0	0	0	0

²¹ One incident was reported from Las Chulas.

²² The La Fantasia Bar reported one of these incidents.

²³ One incident was reported from Del Mar.

Table 6 - N Calls						
UCR	Means	Del Mar	El Paraiso	Fiebre Latino	Jack's Mark II	Las Chulas
6X	Major disturbance	35 ²⁴	2	1	5	3
7	Minor accident	6	1	0	0	1
9	Theft	2	0	0	1	0
11	Burglary	4	0	0	0	0
12	Burglar Alarm	7	0	0	2	0
13	Prowler	1	0	0	0	0
20	Robbery	3	0	0	0	0
31	Criminal Mischief	1	0	0	0	0
32	Suspicious Person	3 ²⁵	0	0	0	0
38	Meet Complainant	2	0	0	0	0
40	"Other"(includes drugs)	13 ²⁶	1	0	2	0
DH	Drug House	1	1	0	0	2 ²⁷

Aside from the reporting parties footnoted in Table 6, calls concerning the Del Mar location came from named individuals, from the Swift T Mart, from Sunland Inc., from First Watch Security, other named businesses, or were initiated by the DPD. The other four locations had a similar pattern: calls were made by individuals, a security company, or by the DPD.

C. The Parties' Arguments

1. The Staff argues that Applicants "failed to answer or falsely or incorrectly answered a question" in violation of § 11.46(a)(4) of the Code.

Question E(1)(a)(8) inquired whether the Ganeshes had been "finally convicted or received deferred adjudication for . . . any offense involving firearms or a deadly weapon." TABC Exhibit 2.

²⁴ One incident was reported from Del Mar.

²⁵ One incident was reported by a person with the surname Ganesh.

²⁶ One incident was reported from Del Mar.

²⁷ One incident was reported from the El Reventon.

As noted above the TDPS Criminal History for Ramesh Ganesh indicates an arrest for "unlawful carrying of a weapon" which was reduced an attempt to commit a display of firearm, a disorderly conduct charge. TABC Exhibit 3. The Staff TABC noted that since Question E(1)(a)(8) was left blank it was not answered.

The Respondent noted that the personal history sheet filed for Ramesh Ganesh with the application discloses the arrest and deferred adjudication. Applicants argued this disclosure was filed with the application, and in effect answers the question.

The TABC replied that the application must be true in all particulars, and was sworn to be true by the Applicants. Ramesh Ganesh's personal history sheet merely disclosed the falsehood of the answer to Question E(1)(a)(8), and does not remedy Applicants' failure to answer completely.

The Staff then turned to Questions I and J of the application, which in effect told the TABC \$125,000 had been invested in the business, but that no "persons, firms, or corporations [had or would] advance any money" or financially assist Frat House. The Staff asked if \$125,000 was invested, where did it come from? The Staff argued that the question was unanswered in violation of the Code. The Respondent answered, first, that by responding "none" the answer "obviously" meant that the money came from applicant. The Staff replied that the question asked who advanced the money; the answer "none" means that no one advanced the money. The Staff insisted that the application must be true in all particulars, and was sworn to be true by the Applicants. The Respondent then pointed to the correspondence in TABC Exhibit 3 requesting an affidavit "giving the original source of the money shown" in Applicants' answer to Question I. Respondent has supplemented the record with an affidavit which was supplied to the Staff detailing the original sources of the funds.

The Staff then turned to Question 10 on the personal history sheets filed with the application which inquired about the Ganeshes' employment for the past three years. Dhanesh Ganesh indicated employment at Las Chulas from March 1993 to the present, as the bar owner. Ramesh Ganesh indicated employment at Del Mar from January 1999 to present as restaurant owner, and at Las Chulas from August 1994 to present as a bar manager. This was insufficient according to the Staff as Dhanesh Ganesh failed to list El Reventon, Del Mar, Jack's Mark II, Fiebre Latino, and El Paraiso, and that Ramesh Ganesh failed to list El Reventon, Jack's Mark II, Fiebre Latino, and El Paraiso. The Staff concluded the answers were incomplete, and false and misleading. Respondent noted that merely because the Ganeshes own the various establishments it does not mean they work at all of them. TABC replied that the "question in the original application seeks to determine places of employment; not the status as an employee." "The respondent was obligated to disclose all places of employment; whether as an owner, waiter, supervisor, manager, bookkeeper, officer or a dishwasher."

2. The Staff argued that Applicant Ramesh Ganesh received deferred adjudication for an attempt to commit a display of firearm and is disqualified under § 109.532(b)(1) of the Code and 16 TAC § 33.1(a)(3). The Respondent argued that the offense is not an automatic disqualification, under the language of the regulation, which states "deferred adjudication . . . may indicate that the applicant is not qualified or suitable to hold a permit or license . . ." Respondent argued that "may" makes

the regulation discretionary. Respondent also urged that Ramesh has a concealed handgun permit, and argued that if the deferred adjudication did not prevent him from obtaining or keeping a handgun license it should not prevent him from obtaining a liquor license. The Staff replied that "may" as used in the regulation is not discretionary when considered with the place and manner in which the Applicants have conducted business in the past. For example, the Staff noted that El Paraiso was judicially declared to be a public nuisance. Applicants' Exhibit #1.²⁸ Further, the Staff insists that whether Ramesh has a concealed handgun permit is not relevant to the proceeding.

3. The Staff argued that Respondent should not receive its permits because of the 250 plus police service calls at the premises owned by the Applicants. The Staff noted that at the El Reventon (or the Las Chulas Club) the bartender was in possession of cocaine. In general, the Staff argued 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." § 11.46(a)(8) of the Code.

The Respondent countered that Del Mar is listed only a few times on the call sheets. The call sheets list individuals who are not otherwise linked to Del Mar. Other businesses in the 3400 block of Lombardy were listed on the call sheets. Respondent noted a wide disparity between the number of calls attributed to Del Mar and to the other Ganesh properties. Further, Respondent notes that Officer Thompson testified that when reviewing the call sheets the individual service reports would have to be examined to be sure the call related to a particular business. Officer Thompson also demonstrated that the call sheets have to be distinguished by category of arrest, offense, miscellaneous incident report, and no action reports. Agent Oden did not take these factors into account in his testimony.

The Staff responds that the District Court enjoined Dhanesh Ganesh from maintaining El Paraiso as a place "where persons habitually go for the possession, delivery or use of a controlled substance," and "maintaining, causing, or permitting the existence of a general public nuisance" at El Paraiso. Applicants' Exhibit #1.

D. Analysis, Conclusion, and Recommendation

1. Failure to answer or falsely or incorrectly answered a question in violation of § 11.46(a)(4) of the Code.

Did Applicants fail to answer whether Ramesh Ganesh had received deferred adjudication?

The personal history sheet, sworn to by Ramesh Ganesh, adequately disclosed the information that Question E(1)(a)(8) sought. If the Applicant had marked the question as required by the form, they would have had to repeat the information that the personal history sheet contained.

Did Applicants fail to disclose "the original source of the money" identified in their answer

²⁸ The exhibit is a certified copy of the "Final Judgement Nunc Pro Tunc" in Cause No. DV-99-100879, in *City of Dallas versus Dhanesh Ganesh*, entered on March 14, 2001.

to Questions I and J?

The Affidavit of Dhanesh Ganesh, admitted as Applicants' Exhibit #2, adequately discloses the source of the Frat House's capital.

Did Applicants fail to disclose their employment for the past three years?

The Applicants disclosed where they worked in the past three years. The TABC asserts that the "question in the original application seeks to determine places of employment; not the status as an employee." The ALJ is unable to draw much of a distinction between the two. One is an employee at the places where one is employed. The TABC's definition of employment as including "an owner, waiter, supervisor, manager, bookkeeper, officer or a dishwasher," is not supported in the Code or the TABC's regulations.

2. Disqualification of Applicant Ramesh Ganesh because of a deferred adjudication under § 109.532(b)(1) of the Code and 16 TAC § 33.1(a)(3).

The TABC's regulation provides discretion in determining whether deferred adjudication for "any firearm or weapons offense" indicates that the applicant is not qualified or suitable to hold a permit and is a ground for denial of the permit. 16 TAC § 33.1(a)(3). As Applicants point out, this is the effect of the word "may."²⁹ Since this involves an exercise of discretion, the Staff is correct to urge consideration of such a fact as El Paraiso being a public nuisance. The Applicants are equally justified in asserting that if the deferred adjudication did not prevent Mr. Ganesh from obtaining or keeping a handgun license it should not prevent him from obtaining a liquor license.

Did Mr. Ganesh receive deferred adjudication for "any firearm or weapons offense?" As noted above, Ramesh Ganesh was arrested for "unlawful carrying of a weapon", an offense under § 46.02(a) of the Texas Penal Code. Section 46.02 is a part of Chapter 46, entitled "Weapons," and Title 10, "Offenses Against Public Health, Safety, And Morals." Mr. Ganesh received deferred adjudication for an attempt to commit a display of firearm, a violation defined by § 42.01(a)(10) of the Texas Penal Code. Section 42.01 is a part of Chapter 42, entitled "Disorderly Conduct And Related Offenses," and Title 9, "Offenses Against Public Order And Decency." An attempt to commit a display of firearm is properly defined as a "disorderly conduct" offense rather than a "weapons" offense.³⁰

The ALJ doubts that Mr. Ganesh received deferred adjudication for a firearm or weapons offense in the strict sense. However, considering Mr. Ganesh's offense a firearm or weapons offense

²⁹ "May" creates discretionary authority or grants permission or a power. TEX. GOV'T CODE ANN. § 311.016(1)(Vernon 2002). The Code Construction Act, Chapter 311 of the Government Code, "applies to each rule adopted under a code." *Id.* § 311.002(4).

³⁰ "The heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute." TEX. GOV'T CODE ANN. § 311.024. "In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the . . . title (caption), preamble, and emergency provision." *Id.* § 311.023(7).

for the sake of argument, since Mr. Ganesh has received a permit to carry a concealed weapon from the relevant licensing authority, the ALJ cannot recommend that Mr. Ganesh is unsuitable or disqualified because of the offense. This is particularly true where the record does not disclose the circumstances of Mr. Ganesh's arrest.

3. "Place or Manner" under § 11.46(a)(8) of the Code.

The record discloses that El Paraiso was judicially declared a public nuisance. Applicants' Exhibit #1. There were three drug arrests and three assaults in the year examined. Offense calls included major disturbances, a theft, and a possible drug matter. Drugs were the sources of two MIR reports, and the police were called out four times for disturbances, a possible drug matter, and a complaint of a "drug house." Most of the 18 calls for service were for serious matters.

Fiebre Latino had no arrests, had one offense call for a possible drug matter, had one possible drug matter in its MIR calls, and had one N call for a major disturbance. It had only five calls.

Jack's Mark II had two arrests, neither of which involved a disturbance, intoxication, nor drugs. It had offense calls for one disturbance and four crimes of stealing. It had two possible MIR calls for drugs. It had N calls for five disturbances, and two possible drug offenses. Jack's Mark II had 19 total calls, 15 of which were problematic.

Las Chulas / El Reventon had no arrests in the period in question. Of its two offense calls, one involved a minor accident and the other an injured person. It had two disturbance calls. It had N calls for three disturbances, and two complaints of a "drug house." Seven of its 11 calls for service were troubling.

Applicants have correctly pointed out that the Del Mar list is disproportionate to the other locations. It is also true that not all of the calls can be definitively connected with Del Mar. But the Staff is correct in pointing out that the list demonstrates a high use of police resources. There were six drug arrests, 15 for drunkenness, and four for assaults, out of 35 total arrests. There were 11 major disturbance calls, two reported from Del Mar. An individual named Ganesh reported a burglary and an injured person. There were 11 possible drug complaints in the area. The MIR list shows six major disturbances, and three unattributed possible drug offenses. The N list shows a 911 hang up call, one disturbance call, and one possible drug call from Del Mar, and a suspicious person call from an individual named Ganesh. The N list shows 34 other disturbance calls, 12 other possible drug calls, and one complaint of a "drug house."

Seven calls can be attributed directly to Del Mar. The calls related to disturbances and drugs. While the ALJ agrees that not all of the calls are attributed to Del Mar, it is certain that some of these calls can be attributed to Del Mar. The exact number is not dispositive. As Agent Oden testified, and Officer Thompson agreed, these calls show a high use of police resources. As Agent Oden testified, the calls indicate or substantiate a manner or method of operation business, which could affect the health, safety, or general welfare. This is especially true when all of the locations are considered together. Aside from Fiebre Latino, all of the Applicants' locations are scenes of disturbances,

assaults, and drug problems.³¹ The ALJ finds that the high use of police resources by Applicants' establishments are a "unusual condition or situation" which justify refusing to allow them to open another licensed premises. *Texas Alcoholic Beverage Com'n v. Mikulenska*, 510 S.W.2d 616, 619 (Tex.Civ.App.-San Antonio 1974); *Elliott v. Dawson*, 473 S.W.2d 668, 670 (Tex.Civ.App.-Houston [1st Dist.] 1971). Once analyzed, the call lists and the other evidence demonstrate that either Applicants operate their business oblivious to disturbances, assaults, and drug problems, or do not take steps to alleviate these problems unless forced to do so. The evidence constitutes more than Agent Oden's conclusions. *In re Simonton Gin, Inc.*, 616 S.W.2d 274, 276 (Tex.Civ.App.-Houston [1st Dist.] 1981).

The ALJ recommends that the permits be denied because the "manner in which the [Applicants' conduct their] 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." §11.46(a)(8) of the Code.

IV. FINDINGS OF FACT

1. On December 5, 2000, Respondent filed an original application for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit with the Texas Alcoholic Beverage Commission (TABC) to operate a business called the Fraternity House (the Frat House).
2. The Frat House is located at 2525 Wycliff, Suites 120-123, Dallas, Dallas County, Texas (the premises).
3. The application listed Dhanesh D. (Dan) Ganesh and Ramesh U. (Ram) Ganesh (the Applicants) as principals for the Frat House.
4. The Frat House is located in an area of Dallas, Texas, and Dallas County where sales of mixed beverages are legal.
5. The Staff of the Texas Alcoholic Beverage Commission (Staff) protested issuing the permits.
6. The Applicants operate six licensed premises in Dallas, which are:
 - a. Restaurante Y Ostioneria Del Mar (the Del Mar) at 3400 Lombardy Lane;
 - b. Jack's Mark II at 10865 Harry Hines Boulevard;
 - c. Fiebre Latino at 10879 Harry Hines Boulevard;
 - d. Las Chulas Club (Las Chulas), 10976 Harry Hines Boulevard;

³¹ As noted above, all of the clubs in question are in the same general geographic area, being located on Lombardy Lane and Harry Hines Boulevard. The Frat House, on Wycliff, is some distance to the southeast of the Applicants' other locations. No evidence was received concerning the character of Frat House neighborhood, and the ALJ cannot find that the "place" in which Applicants propose to open a new bar "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." §11.46(a)(8) of the Code.

- e. El Reventon, 10976 Harry Hines Boulevard; and
 - f. El Paraiso Restaurante & Bar (El Paraiso), 3373 Lombardy Lane.
7. El Paraiso was judicially declared a public nuisance in that one certain "Final Judgement Nunc Pro Tunc" in Cause No. DV-99-100879, in *City of Dallas versus Dhanesh Ganesh*, entered on March 14, 2001.
 8. El Paraiso had three drug arrests and three assaults from the first quarter of 2000 to the first quarter of 2001 (the year).
 9. El Paraiso had calls for major disturbances, a theft, and possible drug matters.
 10. El Paraiso had 18 calls for service, most of which were for serious matters.
 11. Fiebre Latino had only five service calls in the year, no arrests, with two possible drug matters and one major disturbance.
 12. Jack's Mark II had no arrests in the year which involved a disturbance, intoxication, or drugs.
 13. Jack's Mark II had service calls for disturbances, stealing, and possible drug offenses.
 14. Jack's Mark II had 19 total calls, 15 of which were for serious matters.
 15. Las Chulas and El Reventon have the same address.
 16. Las Chulas / El Reventon had no arrests in the year.
 17. Las Chulas / El Reventon had five disturbance calls, and two complaints of a "drug house."
 18. Las Chulas / El Reventon had 11 service calls, seven of which were for serious matters.
 19. Del Mar is in a strip mall, with at least ten other businesses.
 20. The strip mall contains another restaurant that is permitted to sell alcohol and which is open at late hours on occasion.
 21. The strip mall contains a pool hall, next door to Del Mar, that is open as late as 2:00 a.m.
 22. The strip mall contains a convenience store that sells alcoholic beverages.
 23. The strip mall contains a Kentucky Fried Chicken restaurant which is open late.
 24. The call list for Del Mar shows 202 service calls, including 35 arrests, 45 offense reports, and 122 other service calls.

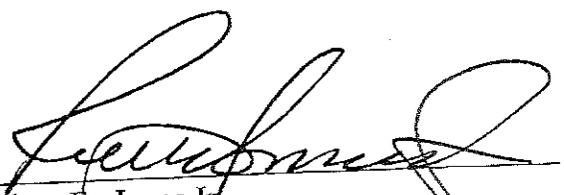
25. The call list for Del Mar includes arrests, reports, and service calls for the entire strip mall, and not just Del Mar.
26. The "Del Mar" call list shows six drug arrests, 15 arrests for drunkenness, and four for assaults.
27. The "Del Mar" call list shows 11 disturbance calls, two reported of which were from Del Mar.
28. The "Del Mar" call list shows an individual named Ganesh reported a burglary and an injured person.
29. The "Del Mar" call list shows 11 possible drug complaints in the area.
30. The "Del Mar" call list shows service calls for 41 major disturbances, 16 possible drug offenses, and one complaint of a "drug house."
31. The "Del Mar" call list shows service calls such as a 911 hang up call, one disturbance call, and one possible drug call from Del Mar.
32. The "Del Mar" call list shows a suspicious person call from an individual named Ganesh.
33. Del Mar had seven calls related to disturbances and drugs.
34. Del Mar had other calls on the call list that could be attributed to it.
35. The calls to all of the Applicants' locations show a high use of police resources.
36. Applicants' locations are scenes of disturbances, assaults, and drug problems.
37. The high use of police resources by Applicants' establishments are an "unusual condition or situation" which justify refusing to allow them to open another licensed premises.
38. On August 22, the Staff served its Notice of Hearing (the NOH) on Respondent by certified mail.
39. The NOH alleged Respondent had violated the Code in several specified instances. It informed the Respondent the hearing would be held on November 15, 2001, at 6333 Forest Park Road, Suite 150-A, Dallas, Dallas County, Texas. The NOH made reference to the legal authority and jurisdiction under which the hearing was to be held, referenced the particular sections of the statutes and rules involved, and included a short, plain statement of the matters asserted.
40. On November 15, 2001, a hearing convened before Administrative Law Judge Robert F. Jones Jr., State Office of Administrative Hearings (SOAH). Staff was represented by

Timothy E. Griffith, an attorney with the TABC Legal Division. Respondent appeared through its President Danesh D. Ganesh and its counsel, David C. Hill and Steve Shaw. The hearing recessed on November 15, and was completed on December 21, 2001. Five exhibits were admitted into evidence. The record was closed on January 18, 2002.

V. CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code), TEX. ALCO. BEV. CODE ANN. §1.01 et seq. (Vernon 2000).
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of 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 (Vernon 2000).
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 2000).
4. Based upon Findings of Fact Nos. 6 - 37, the manner in which the Applicants' conduct their 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. §11.46(a)(8) of the Code.
5. Based upon Conclusion No. 4, the Mixed Beverage Permit and Mixed Beverage Late Hours Permit for which Leon Ganesh Enterprises, Inc. d/b/a Fraternity House applied should be denied.

SIGNED February 11, 2002.



Robert H. Jones Jr.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION
CASE: Leon Ganesh Enterprises Inc. d/b/a Fraternity House
DOCKET NUMBER: 458-01-3866
AGENCY CASE NO: 595444

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