

DOCKET NO. 610870

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
RENEWAL APPLICATION OF FUNFARE, INC	§	
D/B/A BABY DOLLS SALOON--ARLINGTON	§	ALCOHOLIC
PERMIT/LICENSE NO(s).	§	
MB484796, LB484797., PE484798 & CB484799	§	
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-05-6353)	§	BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION this 29 day of November 2007, 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 August 3, 2005 and the record closed on January 31, 2006. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on April 3, 2006. The 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 and Replies were filed to which the Administrative Law Judge recommended that no changes be made to the Proposal for Decision.

The Assistant Administrator of the Texas Alcoholic Beverage Commission after review and due consideration of the Proposal for Decision, Exceptions and Replies, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, that are contained in the Proposal for Decision and incorporates those Findings of Fact and Conclusions of Law into this Order. This permit expired on February 6, 2007, however, because specific findings were made regarding Steven W. Craft, and Mr. Craft is an officer in "sister corporations" that continue to hold permits, entry of an order in this matter is appropriate as to the findings of fact and conclusions of law as they relate to the conduct of Mr. Craft and the sister corporations of this permit holder.

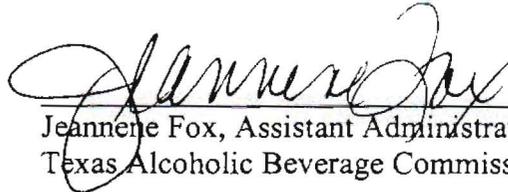
IT IS THEREFORE ORDERED by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 and §11.46(a)(8) of the Texas Alcoholic Beverage Code, that Respondent's renewal application is hereby **REFUSED**.

This Order will become final and enforceable on December 27, 2007 unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED on November 29, 2007.

On Behalf of the Administrator,


Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

JCB/

ADMINISTRATIVE LAW JUDGE
Honorable Robert F. Jones, Jr.
State Office of Administrative Hearings
VIA FACSIMILE: (817) 377-3706

Charles J. Quaid
ATTORNEY FOR RESPONDENT
VIA FACSIMILE: (214) 940-2498

Arlington Police Department
Attn: Kathleen Weisskopf
PROTESTANT'S CO-COUNSEL
VIA FIRST CLASS MAIL

Judith Kennison
SENIOR ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Enforcement Division

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

April 3, 2006

Alan Steen, Administrator
Texas Alcoholic Beverage Commission

VIA FACSIMILE 512/206-3498

lls

RE: Docket No. 458-05-6353; Texas Alcoholic Beverage Commission & Protestant, David & Janet Myres and Arlington Police Department vs Funfare, Inc d/b/a Baby Dolls Saloon- Arlington (TABC Case No. 610870)

Dear Mr. Steen:

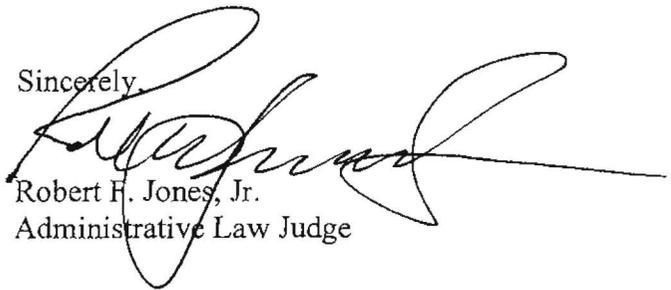
Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Tim Griffith, attorney for Texas Alcoholic Beverage Commission, Bart Behr, attorney for Protestants, Kathleen Weisskopf of the Arlington Police Department, Protestant, Charles Quaid, attorney for the Respondent. Funfare, Inc. d/b/a Baby Dolls Saloon - Arlington (Respondent) holds mixed beverage permit MB-484796, mixed beverage late hours permit LB-484797, beverage cartage permit PE-484798, and caterer's permit CB-484799 (the permits) . Respondent operates a nightclub called Baby Dolls Saloon - Arlington (the club or Baby Dolls) located at 2300 West Division in Arlington, Tarrant County, Texas. Respondent's permits were due to expire on February 7, 2004. In January 2004, Respondent filed an application to renew. Dr. Theron Bowman, Arlington Police Chief, and David and Janet Myres protested renewal of the permits. After an investigation, the Staff of the Texas Alcoholic Beverage Commission (Staff) joined in the protest.

Chief Bowman protested on behalf of the Arlington Police Department (APD) on the basis of the number of calls for service at the club, the number and type of arrests made at the club, and the inordinate use of police resources to monitor the club. The Myres protested the renewal because their daughter, a short-time employee of Respondent, died after working at the club for a week. The Staff protested the renewal based upon the accumulated administrative history of Respondent and certain other sister corporations.

This proposal finds (1) that there are reasonable grounds to believe that the place or manner in which Respondent will conduct its business warrants refusal of the renewal application, and (2) the chief of police of the city in which the premises are located recommended against renewal of the permits. The Administrative Law Judge (ALJ) recommends the permits not be renewed.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings, located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas 76116. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert F. Jones, Jr.", written over the typed name and title.

Robert F. Jones, Jr.
Administrative Law Judge

RJ/dd
Tim Griffith, TABC Staff Attorney, VIA FACSIMILE 214/678-4001; Kathleen Weisskopf, Arlington Police Dept, VIA FACSIMILE 817/459-5353; Bart Behr, Attorney for Protestant, VIC FACSIMILE 512/754-1698; Charles Quaid, Attorney for Respondent, VIA FACSIMILE 214/373-6688

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This proposal finds (1) that there are reasonable grounds to believe that the place or manner in which Respondent will conduct its business warrants refusal of the renewal application, and (2) the chief of police of the city in which the premises are located recommended against renewal of the permits. The Administrative Law Judge (ALJ) recommends the permits not be renewed.

II. JURISDICTION AND PROCEDURAL HISTORY

On or about January 19, 2004, Respondent filed an application to renew its permits.¹ On July 13, 2004, Staff informed Respondent that the Texas Alcoholic Beverage Commission (TABC) had received a protest against renewing the permits. The matter was referred to the State Office of Administrative Hearings (SOAH). The case was set for hearing on June 6, 2005. On May 27, 2005, Respondent filed a Motion for Continuance. The Motion was granted, and by agreement the case was reset for hearing on August 3, 2005. Respondent filed a second and a third Motion for Continuance. Both were denied.

On August 3, 2005, a public hearing was convened before ALJ Robert F. Jones Jr., at 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. Staff was represented by Timothy E. Griffith, an attorney with the TABC Legal Division. Protestants David and Janet Myres appeared through their attorney of record Bart Behr. Protestant Theron Bowman and the APD appeared through Arlington Assistant City Attorneys Kathleen Weisskopf and Asem Eltiar. Respondent appeared through its Vice-President Steven W. Craft and its counsel, Charles Quaid and Stephen Shaw. The hearing ended on August 4, 2005. The record was closed on January 31, 2006, after allowing Respondent and APD to file additional documentary evidence and allowing the parties to file final argument and replies.

Notice and jurisdiction were not contested issues, and those matters are addressed only in the Findings of Fact and Conclusions of Law.

¹ T.A.B.C. Exhibit 3, *Renewal Application*.

III. BACKGROUND

Baby Dolls is located at 2300 West Division Street, Arlington, Tarrant County, Texas. A sexually oriented business (SOB) has operated at that address since the middle of the 1980s. The Baby Dolls operated by Respondent opened in 1991. Baby Dolls was operating as a legal business in 1992 when Arlington's SOB ordinance took effect. Under the ordinance, Baby Dolls was in a non-conforming location. The ordinance provided a three-year amortization period for non-conforming locations. The ordinance further allowed non-conforming locations a license under a "good neighbor" exemption. Respondent appeared before the appropriate board in 1995 through 2002 and received an exemption.² Respondent lost the December 2002 "good neighbor" hearing. The matter was appealed to Tarrant County District Court. A summary judgment was rendered in favor of the city in December 2003. Respondent filed a motion for new trial within 30 days of the entry of the summary judgment.³ Respondent did not appeal the trial court's decision and the matter became final. Baby Dolls has not operated as an SOB since April 2004.⁴

Steven W. Craft is Respondent's vice-president. Respondent and a number of other SOBs located in Dallas, Fort Worth, and Houston share common officers, ownership, and management. For example, Mr. Craft:

- is the secretary of TTNA Inc. d/b/a Baby Dolls Topless Saloon.
- is the vice president of Millennium Restaurants Group Inc. d/b/a Cabaret Royale.
- is the vice president of 2300 Club Inc. d/b/a Baby Dolls Saloon – Arlington.
- is the vice president of Centerfolds Inc. d/b/a Chicas Locas.

² Transcript (Tr.) Vol. 2, pp. 192-97.

³ *Id.*, pp. 200-04.

⁴ *Id.*, p. 218.

- is the vice president of T and N Inc. d/b/a Fare Arlington.
- is the vice president of Respondent Funfare Inc. d/b/a Baby Dolls Saloon – Arlington.
- is the president of SB Entertainment Inc. d/b/a Michael’s International.
- is the president of DB Entertainment Inc. d/b/a Baby Dolls – Fort Worth.
- is the vice president of Duncan Birch Inc. d/b/a Michael’s International.
- is the vice president of MD II Entertainment Inc. d/b/a Chicas Locas.
- is the vice president of Baby Dolls Topless Saloons Inc. d/b/a Baby Dolls – Fort Worth.
- is the vice president of D. Burch Inc. d/b/a Baby Dolls Topless Saloon.⁵

The Arlington Police (APD) are familiar with the Baby Dolls location.⁶ APD considered Baby Dolls a “hot spot,” that is, “a location where a disproportionate amount of criminal activity and crime occurs requiring a disproportionately large percentage of . . . police resources to address the problems” for years.⁷ The interaction between Respondent and the APD has been long and difficult. For context, some of the testimonies of APD officers Hines, Depoma, Yantis, and Paschall are presented now.

Lt. Barry Hines has been employed by the APD for 20 years. He has been a lieutenant for three years, and before that a sergeant for six years. He is familiar with the Baby Dolls location at 2300 West Division in Arlington, Tarrant County, Texas. He has responded to calls at that location as a patrol officer and now supervises calls to that location. Baby Dolls is located in Beat 240 of the

⁵ Tr. Vol. 1, p. 28-33.

⁶ Tr. Vol. 1, pp. 97-99; Tr. Vol. 2, pp. 5-7; p. 49; pp. 68-70.

⁷ Tr. Vol. 2, p. 123.

North District;⁸ the north patrol district is his responsibility since his promotion to lieutenant. He is the midnight shift manager. He reads reports associated with the Baby Dolls location and is briefed on matters of concern in the patrol district.⁹ Baby Dolls was a sexually-oriented business (SOB) when Hines began his duties as a lieutenant. The business' certificate of occupancy changed to a bar/restaurant in the 2004.¹⁰

Lt. Hines related that APD maintains what are called DWI/PI logs. The logs are based upon statements made by persons under arrest for alcohol offenses identifying where they had been drinking.¹¹ Lt. Hines stated that APD considers the location identified by the arrested person as the location where the arrested person became intoxicated.¹² The logs are summarized on a monthly basis by the traffic division. The summaries are distributed to the APD supervisors and the information briefed to patrol officers.¹³ Hines uses the summaries to determine the existence of patterns or problems with businesses within his district.¹⁴

⁸ Tr. Vol. 1, pp. 112-13. Beat 240 is north from the railroad tracks to Randol Mill and west from Fielder to the city limits. Tr. Vol. 2, p. 39. It is one of the smaller districts in Arlington. Tr. Vol. 1, p. 221.

⁹ *Id.*, pp. 97-99. The north district is "everything north of Mitchell Street, " or "30 percent of the population of the City." *Id.*, pp. 220-21. Lt. Hines described the north district as having the majority of alcohol-related businesses and SOBs in Arlington. *Id.*, p. 157.

¹⁰ *Id.*, pp. 133-34.

¹¹ *Id.*, pp. 101-05; 107-08. APD has a protocol to be followed with respect to each driving while intoxicated (DWI) and public intoxication (PI) arrest. After any arrest for DWI or PI, an arresting officer notes the date, time, location of drinking, name of the arrestee, arresting officer's name, and report number in a log (the DWI/PI log). The report number is a unique number that is assigned to the incident and correlates to the report the officer writes about the incident. This log has been kept by APD for a number of years. The logs are used to allocate resources. They are summarized monthly. Tr. Vol. 1, pp. 101-05. APD Sgt. Depoma was asked to estimate the length of time APD has used the DWI/PI logs to allocate resources. He stated it had been a number of years. The logs are intended to "keep track of where the PIs occur and where the DWIs occur or where they originate from." Tr. Vol. 2, pp. 28-29.

¹² Tr. Vol. 1, pp. 113-14. Hines acknowledged that another Baby Dolls is located in Fort Worth north of Arlington on FM 157 (also called North Collins). One Baby Dolls could be confused with the other. *Id.*, pp. 114-15.

¹³ *Id.*, p. 108.

¹⁴ APD Exhibits E and F.

Sgt. Doug Depoma is a 20-year veteran of the APD. He has been a sergeant since May 1997, and has been long involved in enforcement in the north district, including Baby Dolls. He has been in charge of the midnight shift since 2001. Sgt. Depoma is familiar with Baby Dolls and its management, and has been in the club 20 or 30 times since 2002.¹⁵ Sgt. Depoma has entered Baby Dolls to perform bar checks, on dispatched calls, or as a consequence of activity observed in the Baby Dolls parking lot.¹⁶ Sgt. Depoma stated that the Baby Dolls management has been cooperative with him when he has been involved in an investigation.¹⁷

Sgt. Depoma testified he observed dancers at Baby Dolls violate the Arlington SOB ordinance. He would bring these infractions to the attention of the management. Depoma would, at times, direct a patrol officer to issue citations for the violations he observed. He would not have a citation issued for every violation he observed because he desired “to try to work with management, give them a warning and let them know that's something they need to work on and correct.” Sgt. Depoma acknowledged that he has concerns about “potential criminal activity” in the Baby Dolls parking lot and within the club. According to the sergeant, calls for service (CFS) to the Baby Dolls location tend to require more than one officer. For example, bar checks would involve Depoma and two or more officers; a DWI typically requires two to four hours of work by one or two officers. A bar check is conducted to look for “obvious public intoxication,” health code violations, or “any kind of lewdness or obscenity.”¹⁸

Sgt. Michael Yantis has been with the APD for 26 years, a sergeant for 14. He is currently the supervisor of the APD vice unit. He has supervised the vice unit since January 2002, when APD reinstated it after a three or four year hiatus. Yantis supervises the three detectives assigned to the

¹⁵ Tr. Vol. 2, pp. 5-7; 39.

¹⁶ Tr. Vol. 2, pp. 9-10. Lt. Hines asserted that parking lot activity should be considered in determining law compliance. Tr. Vol. 1, p. 157.

¹⁷ Tr. Vol. 2, p. 24.

¹⁸ *Id.*, pp. 24-25; 26-28; 11; 28.

unit. The vice unit investigates “prostitution, liquor law violations, gambling” and “violations of the sexually-oriented business ordinance.”¹⁹ Vice investigations at SOB’s usually involve violations of the “Arlington touching ordinance.” According to Yantis

It’s a violation where an employee while in the state of nudity touches the clothing or the person of a customer. Or the reverse would be a customer touching an employee of the club who is in a state of nudity touching the person or the clothing of that person, of that employee.²⁰

During a vice investigation at Baby Dolls (or any other SOB) two to four officers spend 30 minutes to two hours in the club. Generally, officers would observe a number of violations, the number increasing as the length of time in the club increased. Although the officers might see numerous violations, typically each officer would limit his citations to two per visit. Generally, the details of two violations were the most that an officer could accurately recall when he turned to writing his reports later that shift. The officer had to recall details such as

what the person was wearing or not wearing, what the violator looked like, identifying tattoos or marks or anything that would identify the violator at a later time, the description of the other person that was involved, a description of what exactly transpired, what touching occurred, what was -- where they were in the club, about what time it was, things like that.²¹

The officers might go to one club once a week, might visit six clubs during a week, or might

¹⁹ *Id.*, pp. 41-42.

²⁰ *Id.*, pp. 43-44. The Arlington SOB ordinance in § 5.01(A) states that an employee of a Sexually Oriented Cabaret, while appearing in a state of nudity, commits an offense if the employee touches a customer or the clothing of a customer. § 5.01(B) states a customer at a Sexually Oriented Cabaret commits an offense if the customer touches an employee appearing in a state of nudity or the clothing of an employee appearing in a state of nudity. Section 2.01 defines “nudity or a state of nudity” as: (1) the appearance of a human bare buttock, vulva, anus, anal cleft with less than a full opaque covering, male genitals, female genitals or female breast; or (2) a state of dress which fails to completely and opaquely cover a human buttock, vulva, anus, male genitals, female genitals or any part of the female breast or breasts that is situated below a point immediately above the top of the areola of the female breast.

²¹ Tr. Vol. 2, pp. 44-4.

go to three clubs in one night. The officer typically issue citations for the most “blatant” or “most active” violations. The officers are undercover and as a consequence citations are not issued when the violations occur. The dancers would have to be identified, which could be troublesome at times. Clubs such as Baby Dolls are required to keep a file on each employee’s identification. A uniform officer would visit the club after the fact to identify to dancer based upon the vice officer’s description and the club’s files. The vice officer would review the identified individual’s driver’s license picture by computer to verify the correct person had been identified. If so, a citation would be issued. Sgt. Yantis testified that Baby Dolls management was cooperative in identifying dancers. Citations were generally issued at the end of the month in which the violation was observed in order to maintain the vice officers’ covert status.²²

Officer Kreyton Paschall has been employed by the APD for six years. Paschall was a member of the vice unit from January 2003 to January 2005. Paschall estimated he investigated SOBs “probably a hundred times” during his stint with the vice unit, and Baby Dolls in particular 40 or 45 times. He explained that undercover officers attempt to blend in with the club’s patrons, *i.e.*, they would stay in a club as long as an average patron, for 2 or 3 hours. Officer Paschall stated that the number of violations he would observe would depend on the number of dancers that were working. He and his colleagues attempted not to concentrate on one dancer but to cite different dancers and so enforce the law uniformly. He stated:

Generally any girl that’s received a monetary tip or doing a table dance is committing a violation. So just -- it could be just about any girl in the club.²³

When Paschall observed a violation he would make a mental note of the time, what the dancer was wearing, a description, tattoos that were visible, and the dancer’s stage name. He would then call in and leave himself this information on his voice mail to prepare his report later the same

²² *Id.*, pp. 45-50.

²³ Tr. Vol. 2, pp. 70-71.

night. Several weeks later a patrol officer would be sent to the club with the vice officer's information to identify the dancer. He explained that sending an officer in the next day to identify the dancer and issue a citation would compromise the vice officer's covert status, because the dancers would most likely recall a customer from the previous night and time as set out in the citation. As a rule, Baby Dolls management was cooperative in identifying a dancer. Occasionally the uniformed officer was not given the correct record, or were given a record without a good address.²⁴ In other instances, the patrol officer would be sent into the club while the vice officers waited outside; the officer would be told the dancer did not work at Baby Dolls any longer. Subsequently, the vice officers would see the same dancer in Baby Dolls a week later, and have to send the patrol officer back to the club. Paschall testified, "Sometimes it's taken us four to six months to try to get correct information."²⁵

IV. DISCUSSION AND ANALYSIS

A. The Myres Protest

1. The Governing Law

The TABC may refuse to renew a 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."²⁶ Under TABC regulation, a permittee may violate §11.46(a)(8) in a number of ways. A person commits an offense if with criminal negligence he sells²⁷ or purchases

²⁴ *Id.*, pp. 73-75.

²⁵ *Id.*, pp. 86-88.

²⁶ TEX. ALCO. BEV. CODE ANN. (the Code) §11.46(a)(8)(Vernon 2003).

²⁷ § 106.03(a) of the Code.

for or gives or makes available²⁸ an alcoholic beverage available to a minor.²⁹

2. Protestants Evidence

a. David Myres

Mr. Myres and his wife Janet Myres are the parents of Jennifer Myres. Jennifer died December 4, 2003. Jennifer had worked as a dancer at Baby Dolls the week before she died. Jennifer went to work at Baby Dolls the evening of December 3 and returned home the morning of December 4 at approximately 2:30 a.m. Jennifer was intoxicated and yelling that she hated her job. Jennifer drank a bottle of drain cleaner. Jennifer was 18 years old when she died.³⁰ A letter the Myres provided to the Staff alleged that Jennifer “came home intoxicated” every night she worked at Baby Dolls.³¹

b. TABC Agent Nichole Hamilton

Agent Hamilton conducted a protest investigation of Baby Dolls on February 5, 2004.³² She concluded that the protest made by the Myres would not have been sufficient for TABC to “accept the protest.”³³ Agent Hamilton was not asked, by any party, to explain how she had reached that conclusion.

²⁸ § 106.06(a) of the Code.

²⁹ A minor is a person under 21 years of age. § 106.01 of the Code.

³⁰ Tr. Vol. 1, pp. 88-96.

³¹ TABC Exhibit #3, Myres Letter to TABC, February 9, 2004.

³² Tr. Vol. 1, p. 25-28.

³³ *Id.*, p. 54.

3. Arguments and Analysis

a. The Myres Family

Mr. and Mrs. Myres offered no argument for or analysis of their protest.

b. Staff

The Staff offered no argument for or against or analysis of Mr. and Mrs. Myres protest.

c. Respondent

Respondent argued that since no evidence was admitted with respect to Mr. and Mrs. Myres protest it should be denied.

d. Protestant APD

APD offered no argument for or against or analysis of Mr. and Mrs. Myres protest.

4. Analysis

No evidence was admitted documenting that Jennifer Myres became intoxicated at Baby Dolls. Ms. Myres took her life and no evidence was admitted linking that act with any wrong committed by Respondent, its management, or employees. Ms. Myres' suicide was an independent act.

The ALJ concludes that there are not reasonable grounds to believe that manner in Respondent operated its business was a cause of Ms. Myres death.

The ALJ recommends that the Commission dismiss Mr. and Mrs. Myres protest.

B. Staff's Protest: Question 14

1. Governing Law

Section 11.46(a)(4) of the Code states:

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:

the applicant failed to answer or falsely or incorrectly answered a question in an original or renewal application.³⁴

Section 11.46(a)(3) of the Code states:

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:

within the six-month period immediately preceding his application the applicant violated or caused to be violated a provision of this code or a rule or regulation of the commission which involves moral turpitude, *as distinguished from a technical violation of this code or of the rule.*³⁵

2. Evidence

Question 14 of the renewal application inquires:

³⁴ § 11.46(a)(4) of the Code.

³⁵ § 11.46(a)(3) of the Code (emphasis supplied).

Has the applicant violated or caused to be violated during the six-month period immediately preceding the date of this application any provision of the Texas Alcoholic Beverage Code or any Rule of the Commission which involves moral turpitude?³⁶

Respondent answered “yes.”³⁷

Eugene G. LeClaire is an officer of Respondent as well as of a number of Respondent’s sister corporations. He prepared the renewal application at issue. He testified he had, in past applications, answered Question 14 “no.” Mr. LeClaire stated he had spoken to Loretta Green of the Fort Worth TABC office and Kim Ross in the Dallas TABC office. Ms. Ross confirmed to Mr. LeClaire that Question 14 was a two-part question, and Respondent had to answer it “yes.”³⁸ As a consequence, Mr. LeClaire has answered Question 14 “yes” on Respondent’s and all subsequently prepared renewal applications for the sister corporations. Respondent’s aside, none of the other renewals have been protested by the TABC on this basis.³⁹ On cross-examination Mr. LeClaire explained the two-part nature of Question 14:

It says has the applicant violated or caused to be violated during the six-month period immediately preceding the date of the application any provision of the Texas Alcoholic Beverage Code or any Rule of the Commission which involves a question of moral turpitude.

We had violations of the Texas Alcoholic Beverage Code. We did not have any violations of -- concerning moral turpitude.

³⁶ TABC Exhibit #2, p. 21, Renewal Application.

³⁷ *Id.*

³⁸ Tr. Vol. 2, pp. 182-86. The discussion arose out of the fact that one of Respondent’s sister corporations had its permits cancelled for cause. Mr. LeClaire was informed that as a consequence Respondent had to answer Question 16 “yes.” Question 16 inquires whether the “applicant ever owned or had an interest in a permit or license cancelled for cause.” TABC Exhibit #2, p. 21, Renewal Application. Mr. LeClair was told that “applicant” as used in Question 14 meant everyone identified in answers to Questions 4 and 5. Tr. Vol. 2, pp. 189-91. Once such person identified in Question 4 and 5 was Mr. Craft. TABC Exhibit #2, p. 21, Renewal Application.

³⁹ Tr. Vol. 2, p. 186.

Hence he answered the question “yes.”⁴⁰ Mr. LeClaire continued:

I read it as have you violated or caused to be violated during the six months to date -- of this date of the application any provision of the Texas Alcoholic Beverage Code the answer was yes. Or have you violated or caused to be violated during the six-month period immediately proceeding the date of the application any provision or any rule of the Commission which involves a question of moral turpitude it would have been no.⁴¹

Mr. LeClaire agreed that Respondent’s “yes” answer to Question 14 would be incorrect if Question 14 was “one question” concerning moral turpitude. Mr. LeClaire stated that he was confused, sought advice from the TABC, and followed it.⁴²

Agent Hamilton acknowledged that the Code contains no definition of “moral turpitude.” She stated that “I would contact headquarters if I had questions whether a specific violation would constitute moral turpitude.”⁴³ She agreed that the matter would be decided on a case-by-case basis.⁴⁴ Hamilton stated she was uncertain, “given the way [Question 14] is phrased,” whether “you had at least been alleged to have violated a provision of the Texas Alcoholic Beverage Code but not involved in moral turpitude, you would still have to answer that question yes.”⁴⁵ She agreed that the question was confusing and that she would have sought clarification from her superiors.⁴⁶

⁴⁰ *Id.*, p. 187.

⁴¹ *Id.*, p. 188.

⁴² *Id.*, p. 189.

⁴³ *Id.*, pp. 72-73.

⁴⁴ *Id.*, p. 73.

⁴⁵ *Id.*, p. 75.

⁴⁶ *Id.*, p. 75.

3. Arguments and Analysis

a. Staff

Citing the Code and a memorandum letter from the Commission's Administrator,⁴⁷ Staff asserts each applicant has an "affirmative obligation" to "insure the accuracy of [the] application responses, and to make such inquiries as are necessary to insure that accuracy." The Staff argued that Respondent's renewal application should be denied since Respondent admitted it incorrectly answered Question 14.⁴⁸ Respondent replied that Question 14 confused both the Staff and Respondent. Respondent contacted Staff with its questions and followed its input.

b. Respondent

Respondent describes the Staff's reliance on the Question 14 ground as "misplaced" and contrary to TABC practice. Respondent asserts that Question 14 is so vague and confusing that even Agent Hamilton and Mr. LeClaire were uncertain as to its correct meaning. Mr. LeClaire also testified that agents in the TABC's Fort Worth and Dallas field offices were uncertain. Other businesses represented by Mr. LeClaire have also answered Question 14 "yes" for the same reasons given by Mr. LeClaire, and none have had their applications denied for this reason.⁴⁹ The Staff notes that Respondent did not deny that it answered Question 14 incorrectly.

c. Protestant APD

APD offered no argument for or against or analysis of this issue of the protest.

⁴⁷ § 112:46(a)(4); *In re Carolyn Rave Crow d/b/a C.C.'s Bar*; TABC No. 614005; SOAH Docket No. 458-05-4393 (Letter Memorandum, May 27, 2005).

⁴⁸ Tr. Vol. 2, p. 189.

⁴⁹ *Id.*, p. 186.

d. The Myres

Mr. and Mrs. Myres offered no argument for or against or analysis of this issue of the protest.

4. Analysis

Grammatically, Respondent's (or the Commission's agents') parsing of Question 14 cannot be sustained.⁵⁰ Question 14, standing alone, inquires whether the applicant has violated any provision of the Texas Alcoholic Beverage Code which involves moral turpitude or violated any Rule of the Commission which involves moral turpitude. Respondent also answered "Yes" to Questions 15 and 16 which inquire:

At this time, is there a court case or administrative hearing pending against the applicant involving an alleged violation of the Texas Alcoholic Beverage Code?

Has the applicant ever owned or had an interest in a permit or license cancelled for cause by the Commission or Administrator?

Further, Respondent admitted in its answer to Question 7b that its officers and shareholders (listed in its answers to Questions 4 and 5) had been finally convicted or received deferred adjudication for violations of the Texas Alcoholic Beverage Code resulting in cancellation of a license or permit or a fine. In a supplement to its answer to Question 7b, Respondent indicated that the officers and shareholders (listed in its answers to Questions 4 and 5) had been officers of corporations at the time the violations of the Texas Alcoholic Beverage Code resulted in cancellation of a license or permit or a fine. Those corporations included 2300 Club Inc. d/b/a Baby Dolls Saloon – Arlington; D. Burch Inc. d/b/a Baby Dolls Topless Saloon; DB Entertainment Inc. d/b/a Baby Dolls – Fort Worth;

⁵⁰ The phrase "or any Rule of the Commission" is not presented as an independent clause by separating it from the phrase "any provision of the Texas Alcoholic Beverage Code" using a comma. Further, the phrase "which involves moral turpitude" is not restrictive.

Duncan Burch Inc. d/b/a Michael's International; Funfare Inc. d/b/a Baby Dolls Saloon – Arlington; MD II Entertainment Inc. d/b/a Chicas Locas; Millennium Restaurants Group Inc. d/b/a Cabaret Royale; and, T and N Inc. d/b/a Fare Arlington; identified earlier.⁵¹

In fact, Respondent took the action the Staff alleged it had not: it made “inquiries” concerning the accuracy of its answer and followed the advice it received from Staff agents. Considering the confusion engendered by Question 14 on both sides of this contested case, the ALJ cannot recommend faulting Respondent for a technical violation of § 11.46(a)(4), especially since the information upon which the answer was based was also a part of the application.

The ALJ recommends that the Commission not deny Respondent's renewal on the basis of Respondent's incorrect answer to Question 14.

C. Staff's Protest: Sister Corporations

1. Law Governing

Section 11.46(a)(8) states:

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:

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.⁵²

§ 11.45 defines an “applicant” as “with respect to a corporation, each officer and the owner or

⁵¹ TABC Exhibit #2, p. 20-26, Renewal Application.

⁵² § 11.46(a)(8) of the Code.

owners of a majority of the corporate stock.”⁵³

2. Staff's Evidence

a. Agent Nicole Hamilton

Agent Hamilton testified that the term “applicant” with respect to a corporation includes all officers of the corporation. Using that meaning of applicant, Hamilton investigated the “violation history”⁵⁴ of one officer of Baby Dolls, Steve Craft.⁵⁵ Hamilton focused on the relationship of Steve Craft to Baby Dolls and other corporate permit holders. Mr. Craft is an officer of Respondent’s “sister corporations,” noted above. Agent Hamilton concluded that Mr. Craft’s “violation history” totaled 109 violations, 698 days of violations, one cancellation, and \$337,700 in penalties.⁵⁶

On cross-examination by Respondent, Agent Hamilton acknowledged that Baby Dolls permits were renewed the year prior to the renewal application being currently protested, but refused to agree that this indicated that the TABC had determined “that anything that happened prior to that renewal the TABC didn't believe justified the denial of that renewal.”⁵⁷ She agreed that between “January 19th, 2004, [the date of the renewal application] and the time the City of Arlington gave its protest [February 19, 2004],⁵⁸ there's nothing in your file that indicates that the TABC was going

⁵³ § 11.45 of the Code; *compare* § 11.45 with § 11.61(a).

⁵⁴ The term is set out in quotation marks as a textual reminder that the history referred to is not necessarily the of Mr. Craft personally but that of the corporations with which he is associated.

⁵⁵ Tr. Vol. I, p. 28.

⁵⁶ *Id.*, p. 39. *See* TABC Exhibit #17.

⁵⁷ Tr. Vol. I, pp. 48-52.

⁵⁸ APD Exhibit A.

to protest this license.”⁵⁹ She agreed that but for the Arlington protest the renewal application “would have been renewed in the normal course of the TABC’s process.”⁶⁰ Agent Hamilton emphasized that the Staff’s protest is focused on the violation history rather than the APD protest. She described Mr. Crafts “violation history” as standing out in her mind and extensive.⁶¹ She stated:

Whether or not TABC joins in a protest we look at history, we look at calls for service reports and in this particular case, in particular our administrative history. Whether or not the City decides to protest a permit, TABC may or may not join in that protest. It’s not a given that TABC will join in a protest when the City is involved in any other format.⁶²

Agent Hamilton was aware of no other protest in which “the fact that there was a common officer between applicants was used against one of those applicants, *i.e.* location X violations were used against Y on Y’s application solely because they had a common officer.”⁶³ Agent Hamilton acknowledged that three non-SOB business in which Steve Craft was involved, Two New Millennium Group Inc. d/b/a Sports City Café, Doc’s Private Club Inc., Dallas Pizza Company II Inc. d/b/a Spiatza’s Italian Grill and Bar, had no administrative history of violations. She agreed that Baby Dolls as currently operating has no administrative history of violations during 2004 to June 2005.⁶⁴

⁵⁹ *Id.*, p. 52.

⁶⁰ *Id.*, p. 54.

⁶¹ *Id.*, pp. 77-79.

⁶² *Id.*, p. 80.

⁶³ Tr. Vol. 1, p. 62.

⁶⁴ *Id.*, pp. 64-66. Agent Hamilton did note that applicants tend to “clean up their act” and stall for time to build a clean administrative record when they are being protested. *Id.*, p. 77.

b. Sister Corporations' Administrative History

The Staff offered 16 exhibits concerning the violation histories of the various sister corporations. The information can be summarized⁶⁵ as follows:

Table 1 Steven Craft's "Violation History"		
Sister Corporation	Violation(s)	Suspension/Penalty
2300 Club Inc. d/b/a Baby Dolls Saloon – Arlington ⁶⁶	1 Drink Solicitations 1 Intoxicated Employee	7/ \$1,050 5/ \$750
Funfare Inc. d/b/a Baby Dolls Saloon – Arlington ⁶⁷	1 Drink Solicitations 1 Ordinance Violation 1 Sale to Intox. Person 3 Minor Offenses 1 Intoxicated Employee	20/ \$3,000 7/ \$1,050
Baby Dolls Topless Saloons Inc. d/b/a Baby Dolls – Fort Worth ⁶⁸	3 Sexual Contacts	15/ \$2,250 10/ \$1,500

⁶⁵ Table 1 is based in part on TABC Exhibit #17.

⁶⁶ TABC Exhibit #7; Mr. Craft executed the "agreement and waiver of hearing" contained in the exhibit as an officer of the corporation in August 1995 and April 1997. The acts complained of occurred in 1995 and 1996.

⁶⁷ TABC Exhibits #2 or #10; do not mention Mr. Craft by name, aside from identification of Mr. Craft as secretary of the corporation in the custodial affidavit.

⁶⁸ TABC Exhibit #15; Mr. Craft executed the "agreement and waiver of hearing" contained in the exhibit as an officer or president of the corporation in January 1998. The acts complained of occurred in 1997.

Table 1 Steven Craft's "Violation History"		
Sister Corporation	Violation(s)	Suspension/Penalty
DB Entertainment Inc. d/b/a Baby Dolls – Fort Worth ⁶⁹	3 Sexual Contacts 1 Drink Solicitations 2 Intoxicated Employee 1 Bond Forfeiture 2 Minor Offenses 1 Breach of Peace	30/ \$4,500 10/ \$1,500 10/ \$5,000 15/ \$1,500 25/ \$2,250, \$3,750
D. Burch Inc. d/b/a Baby Dolls Topless Saloon ⁷⁰	6 Sexual Contacts 2 Drink Solicitations 2 Bond Forfeiture	Cancellation 60/ \$5,000, \$5,000, & \$9,000
TTNA Inc. d/b/a Baby Dolls Topless Saloon ⁷¹	16 Sexual Contacts	15 days/ \$2,250
MD II Entertainment Inc. d/b/a Chicas Locas ⁷²	10 Sexual Contacts 6 Drink Solicitations 1 Prostitution 1 Bond Forfeiture 1 Minor Offenses	60/ \$85,000 60/ \$9,000 7/ \$5,000, \$1,050
Centerfolds Inc. d/b/a Chicas Locas ⁷³	3 Breach of Peace	45/ \$6,750 10/ \$1,500 10/ \$1,500

⁶⁹ TABC Exhibit #12; Mr. Craft executed the "agreement and waiver of hearing" contained in the exhibit as an officer or president of the corporation in January 2001 and November 2001. The acts complained of occurred in 1999 and 2001.

⁷⁰ TABC Exhibit #16; Mr. Craft executed the "agreement and waiver of hearing" contained in the exhibit as an officer or president of the corporation in January 2003. The acts complained of occurred in 1998-2003.

⁷¹ TABC Exhibit #5; does not mention Mr. Craft by name, aside from identification of Mr. Craft as secretary of the corporation in the custodial affidavit. The acts complained of took place in 2003.

⁷² TABC Exhibit #14; Mr. Craft executed the "agreement and waiver of hearing" contained in the exhibit as an officer or president of the corporation in February 1997. The acts complained of occurred in 1996.

⁷³ TABC Exhibit #8; does not mention Mr. Craft by name, aside from identification of Mr. Craft as secretary of the corporation in the custodial affidavit.

Table 1 Steven Craft's "Violation History"		
Sister Corporation	Violation(s)	Suspension/Penalty
Duncan Burch Inc. d/b/a Michael's International (Houston, Harris County, Texas) ⁷⁴	4 Sexual Contacts 1 Prostitution	15/ \$2,250 10/ \$1,500
SB Entertainment Inc. d/b/a Michael's International (Houston, Harris County, Texas) ⁷⁵	1 Sexual Contacts 1 Drink Solicitations 1 Ordinance Violation 1 Sale to Intox. Person 1 Prostitution 1 Intoxicated Employee 1 Minor Offenses	30/ \$4,500 20/ \$3,000
Millennium Restaurants Group Inc. d/b/a Cabaret Royale ⁷⁶	10 Sexual Contacts 2 Drink Solicitations 1 Prostitution	45/ \$6,750 30/ \$4,500
T and N Inc. d/b/a Fare Arlington ⁷⁷	4 Sexual Contacts 2 Drink Solicitations 3 Intoxicated Employee 2 Minor Offenses 3 Breach of Peace	60/ \$80,000 60/ \$75,000 7/ \$1,050

Agent Hamilton's research in the Commission's files revealed the following about the three Baby Dolls:

⁷⁴ TABC Exhibit #13; it does not mention Mr. Craft by name.

⁷⁵ TABC Exhibit #11; Mr. Craft executed the "agreement and waiver of hearing" contained in the exhibit as President of the corporation in July 2003. The acts complained of occurred in 2002.

⁷⁶ TABC Exhibit #6; Mr. Craft executed the "agreement and waiver of hearing" contained in the exhibit as President of the corporation in January 2002. The acts complained of occurred in 2000.

⁷⁷ TABC Exhibit #9; it does not mention Mr. Craft by name, aside from identification of Mr. Craft as secretary of the corporation in the custodial affidavit.

(1) **The Fort Worth Baby Dolls**

The permit belonging to Baby Dolls Topless Saloons Inc. d/b/a Baby Dolls – Fort Worth, located at 3601 Highway 157, Fort Worth, Tarrant County, Texas, was allowed to expire on July 26, 1999.⁷⁸ Steve Craft, Eugene LeClaire, Bert Stair, and Duncan Burch were listed as officers and/or shareholders. A new permit was issued to DB Entertainment Inc. d/b/a Baby Dolls – Fort Worth, at the same location on August 10, 1998.⁷⁹ Steve Craft, Eugene LeClaire, Bert Stair, and Duncan Burch are listed as officers and/or shareholders.

The violations for which Baby Dolls Topless Saloons Inc. was cited took place on August 14, 1997. They were resolved by a waiver order signed by Mr. Craft on May 27, 1998.⁸⁰

(2) **The Dallas Baby Dolls**

The permit belonging to D. Burch Inc. d/b/a Baby Dolls Topless Saloon, located at 3039 West Northwest Highway, Dallas, Dallas County, Texas, was cancelled for cause May 25, 2003.⁸¹ Steve Craft, Eugene LeClaire, Bert Stair, and Duncan Burch were listed as officers and/or shareholders. A permit was issued to TTNA Inc. d/b/a Baby Dolls Topless Saloon, located at 10250 Shady Trail, Dallas, Dallas County, Texas, on June 21, 2002.⁸² Steve Craft, Eugene LeClaire, Bert Stair, and Duncan Burch are listed as officers and/or shareholders.

The violations for which D. Burch Inc. was cited took place between April 8, 1998, and

⁷⁸ TABC Exhibit #3, Investigative Narrative, p. 4.

⁷⁹ TABC Exhibit #3, Investigative Narrative, p. 4.

⁸⁰ TABC Exhibit #15.

⁸¹ TABC Exhibit #3, Investigative Narrative, pp. 4-5.

⁸² TABC Exhibit #3, Investigative Narrative, p. 6.

January 31, 2003. They were resolved by a waiver order on May 5, 2004.⁸³

(3) The Arlington Baby Dolls

The permit belonging to 2300 Club Inc. d/b/a Baby Dolls Saloon – Arlington, located at 2300 West Division Street, Arlington, Tarrant County, Texas, was “placed in suspense” on February 6, 2001.⁸⁴ Steve Craft, Eugene LeClaire, Bert Stair, and Duncan Burch were listed as officers and/or shareholders. A permit was issued to Respondent Funfare Inc. d/b/a Baby Dolls Saloon – Arlington, at the same location on February 7, 2001.⁸⁵ Steve Craft, Eugene LeClaire, Bert Stair, and Duncan Burch are listed as officers and/or shareholders.⁸⁶

The violations for which 2300 Club Inc. was cited took place April 21, 1995 and November 19, 1996. They were resolved by waiver orders signed by Mr. Craft on August 11, 1995 and April 9, 1997.⁸⁷

(4) Respondent’s Current History

A comparison of four of Staff’s exhibits⁸⁸ reveal the current status of Respondent with the Commission.

In Docket 600177, Respondent allegedly allowed: the sale or delivery of alcoholic beverage

⁸³ TABC Exhibit #16.

⁸⁴ TABC Exhibit #3, Investigative Narrative, p. 6.

⁸⁵ TABC Exhibit #3, Investigative Narrative, p. 7.

⁸⁶ TABC Exhibits #2 & #10.

⁸⁷ TABC Exhibit #7.

⁸⁸ TABC Exhibits # 3, 4, 7, & 10.

to an intoxicated person on March 24, 2002, a violation of § 11.61(b)(14); the sale or delivery of alcoholic beverage to a minor on March 24, 2002, violations of §§ 106.03 & 106.13; the solicitation of a drink on April 21, 2002, a violation of §§ 11.61(b)(2) & 104.01(4); the sale or delivery of alcoholic beverage to a minor on April 21, 2002, a violation of §§ 106.03 & 106.13; and possession or consumption of alcoholic beverage by a minor on April 21, 2002, a violation of § 106.13. These were consolidated and disposed of by a 20 days suspension or \$3,000 civil penalty.

In Docket 598900, an employee of Respondent was allegedly intoxicated on the premises on January 25, 2002, a violation of § 11.61(b)(13). This was disposed of by a seven day suspension or \$1,050 civil penalty.

The Staff has issued administrative notice P 181279 citing four violations (June 30, 2002: Misc POM & Solicitation; March 16, 2002, Misc POM & Solicitation), which remains unresolved.

The Staff has issued citation: A 613362 for four alleged violations (February 19, 2004: Misc POM [failure to comply with ordinance], 2 Public Lewdness) (January 7, 2004: Public Lewdness); A 610870 (docketed) January 19, 2004: POM; A 609725 (3 Public Lewdness: September 9, 2003, October 22, 2004, & November 5, 2003). These remain unresolved.⁸⁹

The Staff has imposed three summary suspensions: Notice No. 204879 for a Minor Possession on September 9, 2003; Notice No. 204549 for three Misc POM June 10, 2003, August 1, 2003, & September 9, 2003; and, Notice No. 190139 for BOP February 27, 2003; Solicitation February 13, 2003; Public Lewdness January 11, 2003.

The Staff has issued the following warnings: W 204990 (possession of A/B July 11, 2004); W 181359 (Misc POM March 23, 2002); W 181428 (possession of A/B March 22, 2002); W

⁸⁹ The lewdness citations for January 7, 2004 and February 19, 2004 are the subject of a contested case hearing in SOAH Docket Number 458-06-0760, *TABC v. Funfare, Inc. d/b/a Baby Dolls Saloon - Arlington*, TABC Case No. 613362. The case is currently scheduled for hearing on May 19, 2006.

181357 (Misc POM March 8, 2002); W 181356 (Misc POM March 7, 2002); W 181358 (Misc POM March 7, 2002); W 181049 (Misc POM February 5, 2002); and, W 181050 (Misc POM February 5, 2002).

3. Arguments and Analysis

a. Staff

The Staff argues that since the word “applicant” as concerns a corporation includes “each officer”⁹⁰ an officer’s “violation history” can be imputed to the applicant corporation. The purpose of the Code is to prevent officers of corporations “from hiding behind a multitude of corporate veils and disguising their violation histories.” Staff’s witness, Agent Hamilton, accordingly constructed Steven Craft’s violation history: \$337,700 in penalties and forfeitures, 698 days of suspensions, one cancellation, and 109 violations. Staff notes that Mr. Craft admitted he was actively involved in the operations of these corporations.⁹¹

Respondent replies that the Staff did not plead or prove that Respondent had a bad violation history at the premises. Respondent’s license was in good standing and Agent Hamilton testified that there were no apparent plans to protest Respondent’s renewal application.

b. Respondent

Respondent describes the Staff’s “violation history” ground as unsupported by law and as violating due process. Respondent notes that both Steve Shaw and Agent Hamilton testified that TABC has never previously asserted this ground for denial. The proposed attribution would violate

⁹⁰ § 11.45 of the Code.

⁹¹ Tr. Vol. 2, pp. 236-38.

long-standing Texas law which forbids disregarding corporate existence in the absence of fraud.⁹² Since the Staff did not plead or prove fraud, Respondent says that these corporate entities cannot be ignored and their past imputed to Respondent *via* Mr. Craft.

The Staff counters that Respondent has confused the requirements of the Business Corporation Act with the Code. Staff is asserting a claim under the specific provisions of the Code, which does not require proof of fraud, only a common officer. Respondent insists that the Code does not abrogate general Texas corporation law. Respondent says the broad definition of “applicant” is “to avoid use, of ownership or control of the license by those who are not qualified.” Respondent also noted that no evidence exists of the extent Mr. Craft was involved in day-to-day management of the various corporations.

c. Protestant APD

APD offered no argument for or against or analysis of this issue of the protest.

d. The Myres

The Myres offered no argument for or against or analysis of this issue of the protest.

4. Analysis

Respondent’s current administrative history includes citations for the sale or delivery of alcoholic beverage to an intoxicated person, sale or delivery of alcoholic beverages to a minor, allowing possession or consumption of alcoholic beverage by a minor, an employee of Respondent

⁹² See *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1987); *Lucas v. Texas Ind.*, 696 S.W.2d 372 (Tex. 1984); Tex. Bus Corp Act Ann. art. 2.21 (Vernon 2006). Neither case explicitly forbids the Staff’s proposed “violation history” theory.

intoxicated on the premises, and allegations of public lewdness. Respondent has been warned, cited, fined, and suspended.

Respondent's predecessor in Arlington, the 2300 Club Inc., had its permits "placed in suspense" in February 2001 for similar infractions. The next day Respondent (admittedly a different corporation) began operating, in the same fashion as before. Both corporations had the same officers: Mr. Craft, Eugene LeClaire, Bert Stair, and Duncan Burch. The two other Baby Dolls locations, one in Dallas and one in Fort Worth, have disturbingly similar histories. The other "sister corporations" follow the pattern.

Respondent would build a wall of corporate insularity around each of these businesses. The Staff insists that the language of § 11.45 allows an examination of the connections between Respondent and the other corporations. Certainly, the record shows that Mr. Craft was active enough in 2300 Club Inc. d/b/a Baby Dolls Saloon – Arlington; Baby Dolls Topless Saloons Inc. d/b/a Baby Dolls – Fort Worth; DB Entertainment Inc. d/b/a Baby Dolls – Fort Worth; D. Burch Inc. d/b/a Baby Dolls Topless Saloon; MD II Entertainment Inc. d/b/a Chicas Locas; SB Entertainment Inc. d/b/a Michael's International; and Millennium Restaurants Group Inc. d/b/a Cabaret Royale, to sign waivers and agreements of settlement subjecting them to a collective 439 days of suspensions, \$160,000 in fines, and one cancellation.⁹³ The Legislature wrote both the Business Corporation Act and the Alcoholic Beverage Code and can be assumed to know the terms of each. The fact that the language of the Code allows the Commission to go behind the corporate fiction in deciding whether a privilege should be accorded or renewed to a corporation does not abrogate the corporation's identity with respect to the rest of the community, which has no such power.

⁹³ See Table 1, above.

Respondent asserted that TABC has never previously allowed such a "violation history" examination, and as near as the ALJ can determine this is the case.⁹⁴ Given the relative novelty of the Staff's position, and the dearth of any other application of this theory, the ALJ cannot recommend that it be given dispositive effect without a review by the Commission. That point being made, the ALJ does believe that the "violation history" of Mr. Craft could be an "unusual circumstance" justifying a finding that the manner in which Respondent will conduct its business in the future warrants refusal of the renewal application.

D. Recommendation of Public Official

The following sections on the recommendation of Chief Bowman, the good neighbor hearings, and the use of police resources should be read as a whole. First, a large volume of factual data in the form of arrest reports, citations, and municipal records was introduced. While the ALJ has attempted to reduce that volume to a manageable form, a great deal of detail remains. Second, although the case has been divided into sections for the sake of discussion, the divisions are not sensible without some reference to or knowledge of the others. Finally, the contentions of the antagonists (especially that of Respondent) only come into focus when the evidence is considered as a whole.

1. The Governing Law

§ 11.41(a) of the Code states

When a person applies for a permit, the commission or administrator may give due consideration to the recommendations of the . . . chief of police . . . of the city or town in which the premises sought to be licensed are located If a protest against

⁹⁴ In SOAH Docket No. 458-01-3866, *TABC v. Leon Ganesh Enterprises Inc. d/b/a Fraternity House*, TABC Case No. 595444, issued on February 11, 2002, *adopted without change*, April 1, 2002, the Staff protested a new application for permits made by a corporation for a new location, based upon the histories of five other locations operated by the same applicant. *Fraternity House* is factually dissimilar, however, and makes no mention of § 11.45 of the Code.

⁹⁷ *Id.*, pp. 118-19; APD Exhibit A.

Baby Dolls had no sexually-oriented business license at the time. The license and then the renewal request had been denied. And the appeal had been denied. And they had no license. And that also was a concern.⁹⁸

Chief Bowman supplemented his initial protest on April 21, 2004. He included an affidavit reviewing the issues raised in the first letter.⁹⁹ The affidavit was prepared and was based upon reports, summaries, and briefings.¹⁰⁰ Chief Bowman believed the information in the affidavit was true and correct, but in the course of this contested case he learned that some of the information did not relate to Baby Dolls. Chief Bowman acknowledged he did not expect the TABC to consider irrelevant information.¹⁰¹

Chief Bowman's affidavit sets out the following:

Citations January 1, 2004 to March 31, 2004:

- 5 Employee Touching Customer While in State of Nudity
- 5 Operating a SOB without a License
- 3 Operating a Business without a Valid Certificate of Occupancy

Citations January 1, 2003 to December 31, 2003:

- 60 Employee Touching Customer While in State of Nudity
- 5 Customer Touching Employee Who Was in State of Nudity
- 1 Minor in Possession
- 1 Fail to Keep Food/Liquor Containers
- 1 Evidence of Insects or Pests

⁹⁸ Tr. Vol. 2, pp. 119-20.

⁹⁹ *Id.*, p. 120; APD Exhibit A.

¹⁰⁰ Tr. Vol. 2, p. 121.

¹⁰¹ *Id.*, pp. 121-22.

Citations January 1, 2002 to December 31, 2002:

- 47 Employee Touching Customer While in State of Nudity
- 2 Customer Touching Employee Who Was in State of Nudity
- 2 Minor in Possession
- 1 Fail to Protect Food Stuff ¹⁰²

Chief Bowman considers the Baby Dolls Arlington location a “hot spot.”¹⁰³ Chief Bowman testified the DWI/PI logs are used to identify “what locations tend -- tend to be problematic from -- from alcohol service, because alcohol offenses such as DWI and PI directly impact others in the community. The reports are reviewed monthly, and police administrators are expected to “read, review and react and respond to the information on that report.” The reports have been used by the APD to support liquor license protests against Sherlock’s (a north Arlington pub) and Escapade 2001(a now-closed club on South Cooper). Chief Bowman emphasized that the monthly reports are only one source used to evaluate the need to protest a business.¹⁰⁴

Chief Bowman averred that APD is concerned with all crime, but at a location such as Baby Dolls:

especially assaultive crimes. We're concerned about alcohol-related crimes; public intoxication-type crimes, which by their definition people become a danger to themselves and/or other people. We're concerned about the whole gamut of criminal activity and the impact of -- of those crimes as well as health code issues that the -- the impact they have on the public safety and health and welfare.

...

¹⁰² APD Exhibit A; Chief Bowman notes that the man hours set out in the affidavit do not include vice operations or administrative time. Tr. Vol. 2, p. 122. These statistics have not been adjusted for the errors acknowledged by Chief Bowman. *Id.*, pp. 121-22.

¹⁰³ A “location where a disproportionate amount of criminal activity and crime occurs requiring a disproportionately large percentage of our police resources to address the problems at that location.” *Id.*, p. 123.

¹⁰⁴ *Id.*, pp. 123-24; 130; 124-25; 125-26.

Criminal activity, illegal activity, I believe that that occurs at these types of locations and have an adverse secondary effect on surrounding neighborhoods around those location.¹⁰⁵

Chief Bowman identified violations of the SOB ordinance as basis for the APD protest, based upon “protecting the general welfare, health, peace, morals and safety of the people.”¹⁰⁶ The APD vice unit observed violations of the SOB and reported those offenses.¹⁰⁷ As a consequence, Baby Dolls lost its “good neighbor” exemption hearing in December 2002. Baby Dolls appealed that decision to the Tarrant County District Court. During that appeal, the Arlington SOB ordinance allowed Baby Dolls to continue to operate as a SOB. The district court overruled Baby Dolls’ appeal in December 2003. That, in Chief Bowman’s understanding, terminated Baby Dolls’ right to operate as a SOB. After the beginning of 2004, Baby Dolls was not granted a SOB license, but continued to act as a SOB and was cited by APD for that activity. Baby Dolls submitted a new request for a SOB license in 2004 which was not granted by Chief Bowman.¹⁰⁸

Chief Bowman agreed that APD has seen a significant decline in CFS for Baby Dolls after April 2004. This decline did not change Chief Bowman’s request that Baby Dolls permit renewal be denied:

the basis for the original information, the original protest holds. I believe that this is the same business that operated a sexually-oriented business without a license. It's the same business that continued to operate in that manner even after a court had made the determination that the -- that the denial was legal.

¹⁰⁵ *Id.*, pp. 128-29.

¹⁰⁶ *Id.*, pp. 126-27.

¹⁰⁷ Tr. Vol. 2, pp. 127-28.

¹⁰⁸ Chief Bowman cited a letter of March 5, 2004, which he alleged contained a recital of the “the basic history of the sexually-oriented business license of Baby Dolls.” Tr. Vol. 2, pp. 130-33; APD Exhibit B.

It's the same business that has been subject to the codes and ordinances of the City recognizing the impact of criminal activity, of violations of the ordinance on the general health, safety, morals, welfare of citizens and their customers yet continued to operate in violation of those laws and those ordinances. And I've not seen anything to indicate that that has changed.¹⁰⁹

On cross-examination Chief Bowman averred that Baby Dolls was a hot spot for a number of years, it "wasn't just something that changed overnight in 2004." He agreed that "there was an increase in police resources dedicated to that location" in the time prior to the good neighbor hearing related to no-touch violations.¹¹⁰ Chief Bowman acknowledged that the decision to make a protest to the TABC is discretionary,¹¹¹ but specified the factors he examined in his decision-making process:

We evaluate offenses, reports, logs, summaries and other -- and other information every single month. We evaluate that information, and in making these decisions, we -- we look at the totality of information. We look at the implications to public health and safety and welfare. We look at the impact of -- of these kinds of violations on the community. And so when we -- we're in a mode of continually evaluating these incidents at all locations that come to our attention.¹¹²

3. Respondent's Evidence – The Cowboy's Documents

On October 3, 2005, the ALJ issued Order Number 12, permitting Respondent to file what the order termed the "Cowboy's documents," *i.e.*, documents Respondent obtained from APD concerning a business establishment in Arlington, Tarrant County, Texas, called Cowboy's. Respondent offered the Cowboy's documents as evidence relevant to APD Chief Bowman's exercise

¹⁰⁹ Tr. Vol. 2, p. 135.

¹¹⁰ *Id.*, pp. 140-41. No touch violations (without regard to convictions) were admissible in "good neighbor" hearings. *Id.*, pp. 141-42.

¹¹¹ *Id.*, p. 156.

¹¹² *Id.*, p. 157.

of discretion in making a protest of Respondent's renewal application. Respondent asserted that Chief Bowman did not exercise his discretion "consistently to afford due process, due course of law and the [sic] prevent use of the same for improper motives." Respondent asserted that Chief Bowman did not exercise his discretion to protest any renewal of Cowboy's liquor license, even though, Respondent alleged, "Cowboy's has substantially more and more serious police calls for service, public intoxication, criminal events and DWI's" than did Baby Dolls. Respondent alleged that Chief Bowman's protest was in part motivated by the fact that Respondent has been "at battle" with Arlington while Cowboy's has not.

The Cowboys documents were admitted¹¹³ to aid the Commission in their due consideration of Chief Bowman's recommendation.

Mr. Craft estimated Baby Dolls had three to four thousand customers a week during the years 2000 and 2002. Mr. Craft testified he had consulted with the owners of Cowboys, and had reviewed their business documents. He used this knowledge as his basis for comparing Baby Dolls to Cowboy's. He testified that Baby Dolls and Cowboy's served about the same number of customers per year. The clientele was, according to Mr. Craft, "similar," despite the fact that 30 to 40 percent of Cowboy's customers were female. He stated that the male customer-type was the same in both establishments, and that the dancers at Baby Dolls had played country music every third set or more frequently.¹¹⁴

¹¹³ The Cowboy's documents were admitted as Exhibit 13, Sub-Exhibits H, J, K, R, and 2005 DWI/PI Offense Reports. See (Posthearing) Order Number 14, January 31, 2006. Two additional sets of documents, proffered Exhibits 11 and 12 were not admitted, but are a part of the record.

¹¹⁴ *Id.*, pp. 219-21; 253-54.

Baby Dolls' premises is 7,036 square feet and allows a maximum occupancy of 240.¹¹⁵ By contrast, Cowboy's occupies a building 41,900 in area at a maximum occupancy of 3,000.¹¹⁶ In 2003, Baby Dolls had total sales of sales of \$1,541,764, consisting of \$1,339,337 in liquor, \$44,124 in food, and \$158,303 in other sales. In 2004, Baby Dolls had total sales of sales of \$1,156,931, consisting of \$996,423 in liquor, \$39,884 in food, and \$120,624 in other sales.¹¹⁷ In 2003, Cowboy's had total sales of sales of \$3,631,922, consisting of \$2,223,487 in liquor, \$0 in food, and \$1,408,435 in other sales. In 2004, Cowboy's had total sales of sales of \$3,354,910, consisting of \$2,253,860 in liquor, \$0 in food, and \$1,101,049 in other sales.¹¹⁸

a. 2004 Public Intoxication Offense Reports¹¹⁹

In 19 incidents, a suspect(s) was arrested for PI after Cowboy's bouncers stopped the suspect from driving and the suspect refused a cab. The bouncers called or flagged down police. The suspect(s) demonstrated the usual indicia of intoxication (alcoholic beverage on breath, slurred speech, bloodshot eyes, and impaired balance).¹²⁰ In 10 other incidents, APD officers observed an individual in the Cowboy's parking lot and after investigation arrested the suspect for PI.¹²¹ Other

¹¹⁵ APD Exhibit W, City of Arlington Fire Inspection Building Inventory Record, BabyDolls Saloon.

¹¹⁶ APD Exhibit V, City of Arlington Fire Inspection Building Inventory Record, Cowboy's Dance Hall.

¹¹⁷ APD Exhibit X, TABC Renewal Applications for 2003 & 2004 - BabyDolls Saloon.

¹¹⁸ APD Exhibit Y, Renewal Applications for 2003 & 2004 - Cowboy's Dance Hall.

¹¹⁹ Respondent's Exhibit 13, Sub-Exhibit H. Reports 040049654 and 040051353 were excluded by ALJ because they were not in the packet. 040061240 and 040079978 were excluded by ALJ because they were media tearsheets with no details.

¹²⁰ Exhibit 13, Sub-Exhibit H, reports 040001822; 040004965; 040006645; 040008784; 040012106 (February 21, 2004, suspect assaulted a bouncer); 040018241; 040017261; 040021396; 040039250; 040044972; 040051637; 040056256; 040057878; 040061251; 040073391; 040073387; 040075168; 040076807; & 040078397.

¹²¹ *Id.*, reports 040012112; 040012114; 040016632; 040061020; 040071638; 040081434; 040081445; 040081669; 040085411; & 040086871.

incidents involving the possible use of drugs, minors under the influence, public urination, and fights were reported.¹²²

b. 2004 Incident Reports (Non DWI/PI)¹²³

On February 20, 2004, a “White Trash” party was produced at Cowboy’s, sponsored in part by a radio station. One police report¹²⁴ asserted that Cowboy’s intentionally oversold the event. In one incident that night, Cowboy’s security observed and reported a drug (Xanax) sale inside Cowboy’s to APD.¹²⁵ In another, an APD officer on directed patrol at Cowboy’s was told by alleged the victim that he was assaulted by Cowboy’s security. Victim was presented to officer by Cowboy’s security, who related victim was in a restricted access area of Cowboy’s and when approached had assaulted security. One Cowboy’s bouncer was arrested for assault.¹²⁶ Another APD officer on directed patrol at Cowboy’s was approached by Cowboy’s security concerning a suspect that had taken a photograph of a female’s genital area.¹²⁷ A fanny pack that had been given to Cowboy’s security for safe-keeping was stolen.¹²⁸ Finally, an alleged victim advised APD that he and his wife were assaulted by persons at while he was at a concert at the Cowboy’s. The victim indicated he was choked to unconsciousness by an unknown assailant, and by Cowboy’s security. He also asserted an APD officer had choked him to unconsciousness.¹²⁹

¹²² *Id.*, reports 040010643; 040017276; 040053066; 040054650; & 040086869.

¹²³ Respondent’s Exhibit 13, Sub-Exhibit J. Reports 040006645, 040044972, 040061020, 040073391, 040076807, 040086869 are excluded as already covered in Respondent’s Exhibit 13, Sub-Exhibit Exhibit H. Reports 040072795 and 040078886 are excluded because they are media tearsheets and lack detail.

¹²⁴ Respondent’s Exhibit 13, Sub-Exhibit J, Report 040012845.

¹²⁵ Respondent’s Exhibit 13, Sub-Exhibit J, 040011864.

¹²⁶ *Id.*, 040012097.

¹²⁷ *Id.*, 040012113.

¹²⁸ *Id.*, 040012524.

¹²⁹ *Id.*, 040012845.

During the year, five motor vehicle thefts were reported. These were mainly thefts from the parking lot.¹³⁰ There were nine reports of burglary to a motor vehicle.¹³¹ There were four reports of damage to a motor vehicle.¹³² A number of thefts and other minor crimes were reported to APD by telephone.¹³³

In other incidents outstanding arrest warrants were executed, and assaults, thefts from vehicles, PI's, drug poisoning, drug arrests, counterfeiting, and theft were reported.¹³⁴

c. 2005 Non-DWI/PI Offense Reports¹³⁵

Cowboy's was the scene of numerous assaults and threats during January to July 2005. One police officer stated that "in the past [APD] have had problems on Thursday nights reference fights and disturbances at this location."¹³⁶ On the memorable night of March 18, 2005,¹³⁷ an officer described the scene as follows: "I noticed that several people were in the parking lot, several hundred, who were fighting, and that several fights were breaking out in small clusters throughout the parking lot," and "we were completely out numbered."¹³⁸ Several weeks later, a third officer

¹³⁰ *Id.*, reports 040005959; 040006657; 040014765; & 040068985; *but see* 040041071; 040046422; & 040064706.

¹³¹ *Id.*, reports 040066214; - in direct proximity - 040066215; 040068464; 040069725; 040069743; 040069900; 040073897; 0400814319; & 040083676 (December 10, 2004).

¹³² *Id.*, reports 040009169; 040017277; 040026384; & 040081675.

¹³³ *Id.*, reports 040004429; 040012524; 040015787; 040019309; 040022162; 040033245; 040046869; 040056397; 040060359; 040080035; 040085917; & 040037389.

¹³⁴ *Id.*, reports 040002068; 040024966; 040039771; 040049652; 040051363; 040051361; 040053062; 040058177; 040061083; 040066988; 040068780; 040079183; 040084904; & 040085413.

¹³⁵ Respondent's Exhibit 13, Sub-Exhibit K. Report 050016682 was excluded because no report data was found.

¹³⁶ Respondent's Exhibit 13, Sub-Exhibit K, report 050017832.

¹³⁷ There were four incident reports covering a number of arrests that night.

¹³⁸ *Id.*, report 050017831.

noted "high propensity for violence" at Cowboy's.¹³⁹ The assaults were frequently mutual combats between two or more persons.¹⁴⁰ Other assaults involved a single victim, sometimes with multiple assailants.¹⁴¹ In an number of instances a firearm was allegedly involved.¹⁴²

During the period, four motor vehicle thefts were reported. These were mainly thefts from the parking lot.¹⁴³ There were three reports of burglary to a motor vehicle.¹⁴⁴ There were three reports of damage to a motor vehicle.¹⁴⁵ A number of thefts and other minor crimes were reported to APD by telephone.¹⁴⁶

In other incidents outstanding arrest warrants were executed, and assaults, PI's, drug possession, sale to a minor, and disorderly conduct were reported.¹⁴⁷

¹³⁹ *Id.*, reports 050021213; 050022904 (large group fighting).

¹⁴⁰ *Id.*, reports 050000029; 050003192; 050011185; 050016132; 050016134; 050016148; 050017832; 050017838; 050017831; 050017833; 050021213; 050021704; 050022904; 050044165; & 050033572.

¹⁴¹ *Id.*, reports 050000661; 050008037; 050011429; 050013208; 050014265; 050014507; 050014506; 050024670; & 050038974.

¹⁴² *Id.*, reports 050016868; 050043123; & 050044155.

¹⁴³ *Id.*, reports 050003486; 050020963; & 050043948.

¹⁴⁴ *Id.*, reports 050019532; 050031992; & 050038616.

¹⁴⁵ *Id.*, reports 050004331; 050005075; & 050010956.

¹⁴⁶ *Id.*, reports 050008047; 050011750; 050014734; 050015017; 050016942; 050017829; 050019924; 050020140; 050023871; 050036038; 050036076; & 050044654.

¹⁴⁷ *Id.*, reports 050028263(April 28, 2005, APD Vice observed Cowboy's bartender serve alcohol to an intoxicated person who was arrested for PI; bartender was arrested for sale to an intoxicated person; TABC was on hand and assisted in the arrest.); 050006475; 050011176; 050011186; 050016682; 050021213; 050026477 (April 22, 2005, APD was called to Cowboy's by in-house security who had taken a suspect into custody for selling GHB. Gamma hydroxy butyrate or Gamma hydroxybutyric acid, also called Sodium Oxybate. GHB and its analogs are "date rape" drugs; GHB is a clear odorless liquid (usually mixed with alcohol) or a white powder (usually made into tablets or capsules.); 050026747; & 050036053.

d. 2005 DWI/PI Offense Reports¹⁴⁸

In 8 incidents, a suspect(s) was arrested for PI after Cowboy's bouncers stopped the suspect from driving and the suspect refused a cab. The bouncers called or flagged down police. The suspect(s) demonstrated the usual indicia of intoxication (alcoholic beverage on breath, slurred speech, bloodshot eyes, and impaired balance).¹⁴⁹ In 13 other incidents, APD officers observed an individual in the Cowboy's parking lot and after investigation arrested the suspect for PI.¹⁵⁰

e. 2004 Calls for Service¹⁵⁷

The 2004 "calls for service" were not analyzed in depth. The Respondent's summary indicates that there were 392 calls for service assigned to Cowboy's. There were as few as 22 (in March 2004) and as many as 58 (in December 2004). The average was 32 or 33 each month.¹⁵⁸ The APD argued that the numbers represented by these CFS logs have not been adjusted to exclude calls such as BOLOs (be on the lookout), assist motorist, traffic stop, major or minor accidents, and hit and run accidents, as the CFS logs entered against Respondent were. APD notes that 88 traffic stops, 9 major/minor accidents or hit and run accidents, and 20 other calls should be excluded. That adjustment would reduce the CFS to 285, or 23 or 24 per month.

¹⁴⁸ Respondent's Exhibit 13, Sub-Exhibit 2005 DWI/PI Offense Reports. 040071638 and 050006475 were excluded by ALJ because they were not in the packet. Reports 050009361, 050017838, and 050042111 were excluded by ALJ because they were media tearsheets with no details.

¹⁴⁹ Respondent's Exhibit 13, Sub-Exhibit 2005 DWI/PI Offense Reports 050001423; 050009585; 050014505; 050017820; 050038866; 050038868; 050042133; & 050017821.

¹⁵⁰ *Id.*, reports 050013164; 050014265; 050014506; 050016138; 050016682; 050019246; 050028263; 050033571; 050033832; 050035350; 050035354(May 27, 2005, recites this as a Thursday 'college night' at which '[h]istorically,' 'there have been several instances of fights outside' in the parking lot); 050037087; 050017830; & 050017831.

¹⁵⁷ Respondent's Exhibit 13, Sub-Exhibit 2005 DWI/PI Offense Reports..

¹⁵⁸ *Id.*

f. Arguments and Analysis

(1) The Myres

Mr. and Mrs. Myres offered no argument for or against or analysis of this issue of the protest.

(2) Staff

The Staff offered no argument for or against or analysis of this issue of the protest.

(3) Protestant APD & Respondent

APD bases its arguments on §§ 11.46 and 11.41 of the Code. APD says that upon due consideration, the Commission should follow the recommendation of Chief Bowman that the renewal application be denied.¹⁵⁹ APD argues that, undeniably, dancers at Baby Dolls violated the Arlington “no touch” ordinance, that Respondent operated a SOB without a license; and that numerous persons were arrested for DWI or PI after drinking at Baby Dolls. Further, minors were served alcohol at the premises, and Respondent’s customers were disorderly. APD states that as of January 2004, Baby Dolls did not have a SOB license, and was cited on a number of occasions for operating as an SOB without a license through May 29, 2004. Chief Bowman opined that the combination of the offenses led to the protest.

Respondent argues that Chief Bowman’s justification of his protest “can not, upon exacting and rational scrutiny survive both the direct and circumstantial fact that the timing of the protest was made three days after the City was notified that Baby Dolls would attempt to change its attire so as

¹⁵⁹ § 11.41 of the Code.

to fall outside the regulation of a sexually oriented business but still feature some form of erotic dance.”¹⁶⁰

APD responds that Chief Bowman’s protest was based upon the criteria established by the Code. Those bases are stated in Chief Bowman’s protest letter, its supplements, and addenda. Chief Bowman was concerned about (1) the number of hours spent by APD at Baby Dolls; (2) the number of violations of the SOB ordinance; (3) the number of alcohol-related offenses connected to Baby Dolls; and, (4) the other types of criminal offenses occurring on Baby Dolls’ premises. APD emphasized that there was no set or designated number of offenses that will trigger a protest. “Each case is unique and must stand on its own merits.” Chief Bowman retained a concern that Baby Dolls, “with no change in the business structure, would continue to have a negative impact on police resources and the public interests.”

Respondent says that the Commission should not accord much or any weight to Chief Bowman’s protest because it is “based upon at worst false, and at best extremely misstated and overblown allegations.” Respondent’s point is that some of the misdeeds assigned to Respondent could not be reliably said to or did not involve Respondent, its employees, or its patrons. Further, Chief Bowman’s position is “not logical or viable when viewed in the context of all evidence and a ‘business’ such as Cowboy’s, the suspect timing of the protest and the prior and current operation of Baby Dolls.” Respondent asserts that APD is “defending” illegal conduct at Cowboy’s evidenced by its failure or refusal to protest Cowboy’s. Accordingly the Commission should give Chief Bowman’s protest no weight, as he is acting under direction of the political Arlington City Council.

Respondent concedes that during the years prior to the protest, Baby Dolls was a SOB, had many customers, and was very busy. Respondent asserts that the criminal activity at Baby Dolls was “constant” (by which Respondent means the same from year to year), aside from “no touch”

¹⁶⁰ Citing Mr. Craft’s testimony at Tr. Vol. 2, p. 218. In fact, the original protest letter was dated February 19, 2004, and the follow-up letter was sent in April. This was some two weeks after the notification letters which were sent on January 29, 2004 and February 2, 2004. Respondent’s Exhibits 5 and 7.

violations. “There are no prostitution, drug, riots, felony assault allegations (like at Cowboy’s).” Respondent’s plaintive question is that if things were so bad at Baby Dolls as to require a protest, why has APD not protested Cowboy’s? Respondent’s answer is “politics.” Respondent says that the Commission should not exercise its discretion to further a political agenda (an improper political agenda that seeks to punish Respondent for operating a business under First Amendment protection). The protest was made three days after the City was notified that Baby Dolls would attempt to change its attire so as to fall outside the regulation of a sexually oriented business but still feature some form of erotic dance.¹⁶¹

APD responds that it has protested three other businesses¹⁶² in recent years and none of those businesses held SOB licenses. APD asserts that the Cowboy’s documents are not relevant to Baby Dolls and do not show that Chief Bowman had some ulterior motive in protesting Respondent’s renewal. A major concern motivating the Baby Dolls protest was its SOB ordinance violation history; Cowboy’s is not an SOB. Cowboy’s has not been cited for operating a SOB without a license. The two clubs are very different: Cowboy’s is a dance hall and Baby Dolls offers erotic dancers. No evidence was submitted showing Cowboy’s “refused to comply with City of Arlington Ordinances or State Law.”

(4) Analysis

To an extent, Chief Bowman’s decision to protest Respondent’s renewal application may involve political and policy factors that are beyond the review of a licensing agency.¹⁶³ The

¹⁶¹ Respondent cites to *MD II Entertainment Inc. v. City of Dallas*, 935 F.Supp.1394 (N.D.Texas 1994) aff’d, (*per curiam*), as authority for the proposition that the Respondent’s proposed “latex” costume, described in Tr. Vol. 2, p. 211-14, would and did fall outside the Arlington SOB definitions.

¹⁶² Stallions, Sherlocks, and Escapade 2001.

¹⁶³ See, e.g., *Texas Alcoholic Beverage Com'n v. Mikulanka*, 510 S.W.2d 616, 619 (Tex.Civ.App.– San Antonio 1974).

Commission is, however, required to give Chief Bowman's protest "due consideration."¹⁶⁴ "Due consideration" is a term of art that is not defined in the Code. "Due consideration" means to accord such weight or significance to Chief Bowman's recommendation as the Commission deems merited under the circumstances.¹⁶⁵ The "due consideration" to be given to these recommendations is addressed to the Commission's discretion. It is an honest judgment weighing conflicting claims¹⁶⁶ and all the facts and circumstances present in the case.¹⁶⁷

The ALJ recommends that the Commission give little if any weight to the Cowboy's documents in judging Chief Bowman's recommendation. The evidence, especially the Cowboy's documents, shows that Baby Dolls and Cowboy's are two dissimilar businesses. Cowboy's is a dance hall; Baby Dolls was a cabaret. Cowboy's is many times larger than Baby Dolls and promotes large concerts and shows (such as the 'White Trash' party). These shows attract in one night as many or more people than Baby Dolls might see in a week: the police described a parking lot filled with "hundreds" of people. Baby Dolls's allowed maximum occupancy is 230. Accordingly, Cowboy's parking lot is much larger than Baby Dolls and affords a larger field of play for illegal activities. The liquor sales for each establishment highlight the differences in the amount of persons attending each establishment: Cowboy's sells roughly twice as much liquor as Baby Dolls.

Mr. Craft asserted that the male clientele for Baby Dolls and Cowboy's was "similar." The basis for that assertion was that they were male and the dancers at Baby Dolls played country music on some schedule. The attractions at Cowboy's and Baby Dolls were distinctly different, and the differences in customers outweighed the similarities, especially with respect to female customers.

¹⁶⁴ TEX. ALCO. BEV. CODE ANN. § 11.41(a)(Vernon 2005)(the Code).

¹⁶⁵ See *Black's Law Dictionary* (Rev. 4th ed. 1968).

¹⁶⁶ *Bailey & Williams v. Westfall*, 727 S.W.2d 86, 90 (Tex.App.-Dallas 1987); *Grand Int'l Bro. of Locomotive Engrs. v. Wilson*, 341 S.W.2d 206, 210-211 (Tex.Civ.App.--Fort Worth 1960, writ ref'd n.r.e.).

¹⁶⁷ *Barrientos v. Texas Employers' Ins. Ass'n*, 507 S.W.2d 900, 904 (Tex.Civ.App.--Amarillo 1974, writ ref'd n.r.e.); *Brown v. Low. Col. Riv. Auth.*, 485 S.W.2d 369, 371 (Tex.Civ.App.--Austin 1972, no writ); see also *Jasso v. Robertson*, 771 S.W.2d 231, 234 (Tex.App.-Hous. [1st Dist.] 1989).

The evidence does not suggest that Chief Bowman intentionally based his recommendation on falsified data. He acknowledged that some errors were made in the original presentation and the follow-on affidavit. However, as will be seen in the review of the evidence with respect to the use of police resources, a reasonable person would acknowledge that there was hard information to support Chief Bowman's concerns. The evidence will show that dancers at Baby Dolls violated the Arlington "no touch" ordinance, that numerous persons were arrested for DWI or PI after drinking at Baby Dolls, and minors were served alcohol at the premises. Whether that Respondent operated a SOB without a license is a closer question, but one on which reasonable persons could disagree.

Finally, Respondent raised a "three day" connection between the City's notification that Baby Dolls would attempt to change its attire so as to fall outside the SOB ordinance and Chief Bowman's protest. This is contrary to the record. Respondent's notifications were made on January 29, 2004 and February 2, 2004. The protest was made on February 19, 2004. The sinister implication Respondent wishes to draw has no substance, the timing is not "suspect," and Respondent's political argument is without merit.

The ALJ recommends that the Commission find Chief Bowman has recommended that the Commission deny Respondent renewal of its permits.

The Commission should find Chief Bowman's recommendation to the Commission is entitled to due consideration under § 11.41(a) of the Code.

E. The "Good Neighbor" Hearings & Operating an Unlicensed SOB

The Arlington SOB "good neighbor" hearings are related to the issue of whether Respondent operated Baby Dolls without a SOB license, one of the bases for Chief Bowman's protest. The hearings are, in a sense, proceedings beyond the ALJ's or the Commission's authority to question. The board which conducted the "good neighbor" hearings was investigating and determining issues arising under the Arlington SOB ordinance. How the board was constituted, how it reached its

decisions, and what evidence it deemed relevant are not subject to the ALJ's or the Commission's review. Nevertheless, the outcome of that hearing as it affected Baby Dolls license to operate a SOB, Chief Bowman's protest based on that outcome, and Respondent's subsequent conduct are.

1. Chief Bowman

Chief Bowman, under the SOB ordinance, makes the decision to grant or deny an application for a SOB. All other requirements of the ordinance being met, if a business is denied a SOB license on the basis of its location it may apply for a "good neighbor" hearing. Arlington has determined that SOBs "cause an increase in crime, they attract an undesirable clientele, they cause secondary effects that they need to be regulated as far as who can have a license and where those locations can be established." SOBs, however, cannot simply be outlawed. The "good neighbor" hearing was the forum chosen by Arlington to adjudicate the matter. Chief Bowman acknowledged that "there was an increase in police resources dedicated to [Baby Dolls]" related to no-touch violations in the two years prior to the 2004 liquor protest. No touch violations (without regard to convictions) were admissible against a SOB such as Baby Dolls in "good neighbor" hearings.¹⁶⁸ Respondent suggests that the no touch violations were "used to prevent the business from getting its exemption in the exemption hearing," and that "one way of insuring that exemptions were [not] granted was to go in there and insure there were a lot of no touch violations made."¹⁶⁹

2. APD Lieutenant Barry Hines

Lt. Hines knew that Baby Dolls had lost a "good neighbor" hearing, but did not participate in that hearing. Lt. Hines was aware that APD had contested Baby Dolls' good neighbor hearings. Lt. Hines was unaware that "until March 31st, 2004, the litigation involving Baby Dolls' appeal of

¹⁶⁸ Tr. Vol. 2, pp. 138-42.

¹⁶⁹ Tr. Vol. 2, p. 141.

its denial was still not final in the district court,” as claimed by Respondent.¹⁷⁰ He asserted he was not instructed to issue citations to Baby Dolls but rather

we were instructed that their license had been revoked and the court proceedings had reached the point where the City was going to go ahead and we were to take any enforcement action that was necessary at that business.¹⁷¹

He recalled being told this “sometime in March.”¹⁷² Lt. Hines was aware that citations were issued (on March 27, 2004) for operating without a SOB license and for operating without a valid certificate of occupancy, but was not certain of the date.¹⁷³

3. APD Sergeant Doug Depoma

Sgt. Depoma acknowledged testifying at the Baby Dolls “good neighbor” hearings. He testified about levels of criminal activity at Baby Dolls. He acknowledged that Arlington opposed granting an exemption to Baby Dolls.¹⁷⁴

4. Steven W. Craft

Mr. Craft testified Respondent appeared before the appropriate board in 1995 through 2002 and received an exemption. The city of Arlington contested each requested exemption. Mr. Craft characterized each succeeding contest as “more vigorous.”

¹⁷⁰ Tr. Vol. 1, pp. 135-36; 163; 168.

¹⁷¹ *Id.*, p. 168.

¹⁷² *Id.*, p. 173.

¹⁷³ *Id.*, pp. 168-69.

¹⁷⁴ Tr. Vol. 2, pp. 32-33; 36.

When the no touch provision of the ordinance was introduced the city used that as evidence in the “good neighbor” hearings. Mr. Craft attended and participated in each of Respondent’s “good neighbor” hearings. He believed that no touch violations became the “focal point of their whole case.” In Mr. Craft’s opinion, no touch violations became important to the board as well. Mr. Craft noticed that in the 30 to 60 days prior to the 2001 and 2002 “good neighbor” hearings the number of no touch violations increased.¹⁷⁵ Mr. Craft testified that the management and the dancers at Baby Dolls were acting differently during this same time period:

Because the new ordinance had come into place and we were a lot more -- as time went on we became a lot more proficient in making sure people were observing the ordinance, putting signage up. So I think they were acting differently in that they were not touching as much and staying further away from the customer than they had been in the past.¹⁷⁶

Respondent lost the December 2002 “good neighbor” hearing. The matter was appealed to Tarrant County District Court. A summary judgment was rendered in favor of the city in December 2003. Respondent filed a motion for new trial within 30 days of the entry of the summary judgment. Mr. Craft understood he could continue to operate pending a resolution of the motion for new trial. Instead, Respondent filed a new application for a SOB license with Chief Bowman on January 14, 2004. Mr. Craft asserted that under the Arlington SOB ordinance if the chief did not act on the application within 30 days he had to issue a provisional license “upon request.” According to Mr. Craft, when Chief Bowman did not act within 30 days Respondent’s attorney requested a provisional license. Chief Bowman refused, which action Mr. Craft believes is a violation of the

¹⁷⁵ Tr. Vol. 2, pp. 192-97. Mr. Craft referred to Respondent’s Exhibit 3, a portion of the SOB ordinance. He noted Section 4.11, E., 4, which states that: The License and Amortization Appeal Board may grant an exemption from the location restrictions of Section 3.01, if it makes the following findings: 4. That all other applicable provisions of this Chapter will be observed, and Section 4.11, F, 1, which states that: In making the findings specified in Section 4.11(E), the Board may take into account among other things: Crime statistics of the location and its 1,000 foot radius maintained by the appropriate law enforcement agency for the previous twelve (12) month period. Tr. Vol. 2, pp. 199-200.

¹⁷⁶ *Id.*, p. 255.

ordinance. Instead on March 5, 2004, Chief Bowman sent a letter giving notice of his intent to deny the January 14, 2004 application.¹⁷⁷

Mr. Craft testified he attended “good neighbor” hearings for the other non-conforming SOBs in Arlington. He states that CFS were lowest for Baby Dolls, followed by Chicas Locas. The other locations had “substantially” more, “three and four times” more, than Baby Dolls.¹⁷⁸ Mr. Craft asserted that the SOBs in Arlington got their exemptions every year. Mr. Craft claimed that the hearing board was reconstituted prior to November 2002 to make denying the exemption easier. The size of the board was increased, new members were appointed, and the non-conforming SOBs lost their exemption hearings.¹⁷⁹

Mr. Craft stated that although Baby Dolls was cited for operating an SOB without a SOB license, in his opinion Baby Dolls was “not operating as a sexually-oriented business at that point in time.” He explained,

We -- in my opinion, we had the girls outside the state of nudity. They were wearing shorts and latex covering from the top of the areola to the bottom of the breast and covering their entire buttocks with a pair of shorts not even leaving it up to chance with a bathing suit bottom that you see at a public park.¹⁸⁰

He claimed that Baby Dolls had stopped acting as a SOB prior to that time.¹⁸¹

¹⁷⁷ *Id.*, pp. 200-04.

¹⁷⁸ *Id.*, pp. 225-26.

¹⁷⁹ *Id.*, pp. 204-08. Mr. Craft stated that under the latest Arlington ordinance Baby Dolls cannot get a SOB license. He agreed “there's no possibility that this location could ever become that kind of business again,” unless “the City changes an ordinance or is struck down or -- there has to be some changes made to be an SOB.” When asked about possible litigation, “any litigation trying to strike down the locational issues of the Arlington ordinance pending at the present time,” Mr. Craft referred to a federal case, but did not mention the appellate case in the Fort Worth court of appeals. *Id.*, pp. 234-35.

¹⁸⁰ *Id.*, pp. 258-59.

¹⁸¹ *Id.*, p. 259.

5. APD Exhibits M, N, & O

APD Exhibits M, N, & O revealed the following information concerning vice investigations and citations issued:

Table 2									
Vice Squad Visits and "No Touch" Citations (APD Exhibits M, N, & O)									
Month	2002			2003			2004		
	Visits	CP ¹ 82	OC ¹ 83	Visits	CP	OC	Visits	CP	OC
January	1	1	0	4	2	3	2	0	2
February	1	1	0	6	3	1	2	0	5
March	5	6	1	6	1	6	5	2	1
April	3	1	3	2	0	3	0	0	0
May	2	3	2	4	3	5	1	0	1
June	5	2	1	5	3	5	0	0	0
July	4	3	6	4	4	3	0	0	0
August	1	2	2	4	2	3	0	0	0
September	5	2	2	8	0	7	0	0	0
October	3	1	2	5	2	3	0	0	0
November	3	2	2	4	0	3	0	0	0
December	2	2	0	1	2	2	0	0	0
Monthly Totals	35	26	21	53	22	44	10	2	9

¹⁸² "CP" indicates citations plead no contest or adjudicated guilty.

¹⁸³ "OC" indicates citations issued but not resolved by plea or adjudication.

In 2002, the vice squad made approximately 3 visits a month and wrote about 4 citations a month. In 2003, the squad made on average 4 visits a month issuing 5 citations a month. The squad increased its visits 51% from 2002 to 2003, and wrote 40% more citations.

In 2002, Baby Dolls dancers were cited for 46 touching violations, one customer was cited for touching a dancer, and two minor were cited for possession of alcohol.¹⁸⁴ In 2003, Baby Dolls dancers were cited for 65 touching violations, six customers were cited for touching a dancer, and one minor was cited for possession of alcohol.¹⁸⁵ Finally, in 2004, Baby Dolls dancers were cited for 10 touching violations.¹⁸⁶

6. Arguments and Analysis

a. Staff

The Staff offered no argument for or against or analysis of this issue of the protest.

b. The Myres

Mr. and Mrs. Myres offered no argument for or against or analysis of this issue of the protest.

¹⁸⁴ APD Exhibit M.

¹⁸⁵ APD Exhibit N.

¹⁸⁶ APD Exhibit O.

c. Respondent & Protestant APD

Respondent contends that the increase in criminal activity at Baby Dolls related “solely” to “no touch” violations.¹⁸⁷ Respondent asserts that although Arlington’s no touch ordinance has been upheld against First Amendment complaints¹⁸⁸ the identical Dallas no touch provision was held unconstitutional by the Dallas Court of Appeals in *Howard v. State*.¹⁸⁹ APD responds that Baby Dolls was cited not only for “no touch” violations but for other violations such as public intoxication, minors in possession, urinating in public, food contamination, open container violations, and food service violations. Baby Dolls dancers amassed 129 “no touch” violations in the 2002 to 2004 period.¹⁹⁰ Further, APD argues that the *Howard* case is not controlling with respect to the Arlington SOB ordinance.

Respondent argues that the record “clearly establishes” that the “no touch” tickets were an illegal means to an improper end: to prevent operation of “non conforming sexually oriented locations by denying them their good neighbor exemption.”¹⁹¹ APD responds that the testimony of Sgt. Depoma, Sgt. Yantis, and Officer Paschall demonstrate that the no touch violations were widespread and “occurred in the presence of management.”

Respondent says that “no touch” violations are Class C misdemeanors which are not offenses against the general welfare, health, peace, morals, and safety of the people and on the public sense of decency and cannot be used to justify a denial of Respondent’s license. Respondent insists that

¹⁸⁷ Citing the record at Tr. Vol. 1, p. 140-41. The record at that location consists of argument and not testimony.

¹⁸⁸ *Hang On v. City of Arlington*, 65 F.3rd 1248 (5th Cir. 1995).

¹⁸⁹ *Howard v. State*, 172S.W.3d 190 (Tx.Ct.App.– Dallas 2005, no pet. hist.).

¹⁹⁰ The count is actually 121 touching violations by Baby Dolls Dancers and seven touching violations by customers.

¹⁹¹ Citing the testimony found at Tr. Vol. 1, pp. 163-65; Tr. Vol. 2, pp. 56-57, 62, 140-41, 194-97.

culpable mental state” to be proved.¹⁹³ Since the Arlington ordinance does not stipulate a mental state, the Respondent argues that the Arlington ordinance is unconstitutional. However, § 6.02 of the Texas Penal Code states that

If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b), intent, knowledge, or recklessness suffices to establish criminal responsibility.¹⁹⁴

The *Howard* court acknowledged the existence of § 6.02. The prosecution in *Howard* had alleged only a “reckless” mental state against Ms. Howard and the court held that a conviction based on a reckless mental state was “a greater restriction on free expression than is essential to further the City's interests.”¹⁹⁵ The *Howard* case should be restricted to its facts and the particular allegation made by the State. The ALJ recommends that the Commission consider the Arlington SOB ordinance to be legal and constitutional.

Table 2 does not completely support Mr. Craft’s testimony concerning the operation of the APD vice unit against Baby Dolls. He testified that in the 30 to 60 days prior to the 2001 and 2002 “good neighbor” hearings the number of no touch violations increased. “Good neighbor” hearings were conducted in November and December of 2002. In August, September, and October 2002, vice visits to Baby Dolls were 1, 5, and 3, respectively, and show no increase over the earlier months, *i.e.*, 8 for three months (about 2 per month) compared with 23 for the 7 months (about 3 per month) of January through July. The total no touch citations for each month were 4, 4, and 3, respectively. In August, September, and October 2003, vice visits to Baby Dolls were 4, 8, and 5, respectively, and show a modest increase over the earlier months, *i.e.*, 17 for three months (5 per month) compared with 31 for the 7 months (4 per month) of January through July. The total no touch citations for each month were 5, 7, and 5, respectively. As noted, in 2002, the vice unit made approximately 3 visits

¹⁹³ *Id.* at 193.

¹⁹⁴ Tex. P. Code Ann. § 6.02(c)(Vernon 2006).

¹⁹⁵ *Id.* at 193.

a month and wrote about 4 citations a month. In 2003, the squad made on average 4 visits a month issuing 5 citations a month. In 2002, Baby Dolls dancers were cited for 46 touching violations and one customer was cited for touching a dancer. In 2003, Baby Dolls dancers were cited for 65 touching violations and six customers were cited for touching a dancer. The record, as discussed below, shows that Respondent was also cited for violations other than no touch.

Mr. Craft made assertions that the SOB ordinance was amended so that the board which made the “good neighbor” decisions was reconstituted prior to November 2002 to make denying the exemption easier. According to Respondent, the size of the board was increased and new members were appointed. However, the materials presented by Respondent¹⁹⁶ and APD¹⁹⁷ both show the board to have the same size and to be chosen in the same way, and to require the same quorum for action at all times relevant to this contested case.

The parties flatly disagree on the effect of the filing of a motion for new trial in the Tarrant County District court after Respondent lost its appeal of the “good neighbor” exemption denial. Respondent takes the position that the operation of the Texas Rules of Civil Procedure extended its right to operate as a SOB under the Arlington SOB ordinance until April 2004. APD takes the position that the action of the trial court was final for its purposes without respect to the Rules of Civil Procedure.

Section 4.09 of the Arlington SOB in force when Respondent appealed stated:

¹⁹⁶ Respondent’s Exhibit 3. Respondent’s Exhibit 4, a November 14, 2002, letter from David Barber, Arlington Assistant City Attorney, to Duncan Burch, makes reference to “a copy of proposed revisions” to the Arlington SOB ordinance, of which “it is anticipated that these revisions will be in effect for the upcoming ‘good neighbor’ hearings.” The attachment to the letter shows a change in from 2 three-person panels to 1 six-person panel, that a quorum of five (instead of three) was required, and that crime statistics for the previous 12 month (instead of six months) period could be considered. While the changes appear to have been made, *see* Respondent’s Exhibit 3 & APD Exhibit T, the reasons for the changes are matters not disclosed in the record.

¹⁹⁷ APD Exhibit T.

Upon receipt of written notice of the denial, suspension or revocation of a license, the applicant whose application for a license has been denied or whose license has been suspended or revoked shall have the right to appeal by filing suit in the appropriate district court within thirty (30) calendar days after the receipt of **notice of the decision** of the Chief of Police or decision of the License and Amortization Appeal Board, as applicable. The filing of such suit shall have the effect of staying denial, suspension or revocation for the Sexually Oriented Business licensed under this Chapter at such location, *pending a judicial determination of the appeal*. The City shall grant a provisional license upon the filing of a court action to appeal the denial of a Sexually Oriented Business license if the applicant is not currently licensed for such business at the subject location. The provisional license will expire upon *the court's entry of judgment on such appeal*.¹⁹⁸

Neither party examined or analyzed this language for support of their positions. Respondent could focus on the words “pending a judicial determination of the appeal,” to argue that the appeal would not be judicially determined until the district court judgment was final and **unappealable**. APD could rely on the language that the “provisional license will expire upon the court’s entry of judgment on such appeal,” to argue that any provisional license or stay ends when the district court enters judgment regardless of its finality.

Respondent acted as if the district court judgment was enforceable against it: on January 14, 2004, it filed a new application for a new permit. A few days later, on January 28, 2004, Baby Dolls was cited for operating a SOB without a license. Mr. Craft testified that by that time Baby Dolls was no longer acting as a SOB and its dancers were using opaque latex costumes. Respondent had its attorney send letters APD and the city on January 29, 2004 and February 2, 2004.¹⁹⁹ Neither letter asserts that Respondent had a present right to operate as a SOB and emphasize that Baby Dolls is attempting to operate outside the SOB ordinance.

¹⁹⁸ APD Exhibit T (emphasis supplied).

¹⁹⁹ Respondent’s Exhibits 5 and 7.

The ALJ recommends that the Commission find that Respondent was operating Baby Dolls as an SOB without a SOB license.²⁰⁰

F. Use Of Police Resources

1. The Governing Law

As noted above, the TABC may refuse to renew a 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, no writ); *Elliott v. Dawson*, 473 S.W.2d 668, 670 (Tex.Civ.App.--Houston [1 Dist.] 1971, no writ).

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, no writ); *see, e.g., Helms v. Texas Alcoholic Beverage Com'n*, 700 S.W.2d 607, 611 (Tex.App.--Corpus Christi 1985, no writ) ; *Ex parte Velasco*, 225 S.W.2d 921, 923 (Tex.Civ.App.-Eastland 1949, no writ).

²⁰⁰ In 2004, Baby Dolls dancers were cited for 10 touching violations. The violations took place in January, February, March, and May. APD Exhibit O.

2. APD's Evidence

a. Patrol Officer Testimony

(1) APD Lieutenant Barry Hines

Lt. Hines stated that Baby Dolls Arlington caused the APD concerns due to the number of DWI cases related to it, the number of PI cases related to it, and the SOB ordinance violations occurring there. In his opinion, Baby Dolls uses an undue amount of police resources, even if the CFS are mainly Class C Misdemeanors. After Baby Dolls converted from an adult cabaret to a bar/restaurant the investment of police resources declined "significantly." The parking lot was full during the cabaret period and now has only a few cars. The CFS declined. Lt. Hines attributed these declines to the change in business type.²⁰¹ Despite the fact that Baby Dolls Arlington changed its business format in 2004, Lt. Hines stated he is concerned that Baby Dolls might receive a renewal from the TABC. He opined that

Based on their past actions that their future actions will continue and we'll continue to have problems there.²⁰²

Lt. Hines asserted that there is no way

to assess or determine that this is a changed business in terms of their compliance with either city ordinances or regarding being proactive regarding other activities that may occur on the premise based on their decline in business.²⁰³

²⁰¹ Tr. Vol. 1, pp. 151-53.

²⁰² *Id.*, p. 156.

²⁰³ *Id.*, p. 156.

On cross-examination by Respondent, Lt. Hines was referred to the DWI/PI logs summaries for 2003, and asked if Arlington had taken any action against the liquor license of T.G.I. Fridays,²⁰⁴ Desperados,²⁰⁵ the Ballpark,²⁰⁶ Cowboy's,²⁰⁷ and Bennigans.²⁰⁸ Hines stated he was not aware of any actions.²⁰⁹ He was also referred to the DWI/PI logs summaries for 2004, and asked if Arlington had taken any action against the liquor license of the Ballpark,²¹⁰ Cowboy's,²¹¹ Desperados,²¹² T.G.I. Fridays,²¹³ Bennigans,²¹⁴ Moose and Vinny's,²¹⁵ and Hooligan's.²¹⁶ Hines stated he was not aware of any actions based on those statistics.²¹⁷

²⁰⁴ Which had 6 DWI and 12 PI according to APD Exhibit E.

²⁰⁵ 12 DWI and 65 PI. *Id.*

²⁰⁶ 7 DWI and 19 PI. *Id.*

²⁰⁷ 11 DWI and 46 PI. *Id.*

²⁰⁸ 5 DWI and 6 PI. *Id.*

²⁰⁹ Tr. Vol. 1, pp. 174-76.

²¹⁰ Which had 15 DWI and 32 PI according to APD Exhibit F.

²¹¹ 15 DWI and 44 PI. *Id.*

²¹² 5 DWI and 38 PI. *Id.*

²¹³ 5 DWI and 5 PI. *Id.*

²¹⁴ 2 DWI and 6 PI. *Id.*

²¹⁵ 6 DWI and 4 PI. *Id.*

²¹⁶ 11 DWI and 8 PI. *Id.*

²¹⁷ Tr. Vol. 1, pp. 177-786.

Lt. Hines was referred to a number of arrest reports and questioned concerning their attribution to Baby Dolls. As a result of that questioning, the ALJ finds that these incidents (save one) should not be attributed to Baby Dolls and the reports should be disregarded.²¹⁸

²¹⁸ Respondent asserts these incidents should not be attributed to Baby Dolls. The ALJ agrees: APD Exhibit G, report 030010315(February 13, 2003, a suspect was arrested for DWI. The suspect stated he had two or three beers at Baby Dolls, then went to Fast Freddy's on Division Street, and had a few more. Lt. Hines agreed that whether the suspect became intoxicated at Baby Dolls cannot be determined from the text of the report. He speculated that the officer might have attributed the arrest to both Baby Dolls and Fast Freddy's. Tr. Vol. 1, pp. 179-81. A review of APD Exhibit C, the relevant DWI/PI log, shows the officer attributed the arrest to Baby Dolls alone. APD Exhibit C); APD Exhibit G, report 030044238; Tr. Vol. 1, pp. 184-86(June 26, 2003, several suspects were arrested at the Ray Motel on Division street for PI. The suspects advised the officers they had been drinking at Baby Dolls. Citations 1S3496A & 1S3496B were issued to the suspects.); APD Exhibit G, report 030071282; Tr. Vol. 1, pp. 187-89(October 10, 2003, a suspect was arrested for PI at Arlington Memorial Hospital on Randol Mill. The suspect told officers he had been drinking at Baby Dolls.); APD Exhibit G, report 030081175; Tr. Vol. 1, p. 189(November 19, 2003, PI suspect told police he had been drinking at a topless bar, "possibly Baby Dolls."); APD Exhibit G, report 030090244(December 27, 2003, a suspect was arrested for PI after being found asleep in a vehicle. Citation 1S1742. Suspect told officer "he was coming from a topless bar on W. Division." Lt. Hines agreed that Chicas Locas also fits the description of a topless bar on West Division. Tr. Vol. 1, pp. 189-90. He again speculated that the officer might have attributed the arrest to both Baby Dolls and Chicas Locas. Tr. Vol. 1, pp. 190. A review of APD Exhibit C, the relevant DWI/PI log, shows the officer attributed the arrest to Baby Dolls alone. APD Exhibit C.); APD Exhibit H, report 040002050; Tr. Vol. 1, pp. 190-92(January 9, 2004, a suspect was arrested for DWI. Two passengers in the vehicle were arrested for PI; Citations 2A1001A and 1J8825A. The suspects told officers they were drinking at Baby Dolls. The driver provided a breath specimen of 0.200 grams of alcohol per 210 liters of breath.); APD Exhibit H, report 040002333; Tr. Vol. 1, pp. 192-93(January 11, 2004, suspect was arrested for DWI. Suspect told officer he had consumed "8 to 9" beers at Baby Dolls.); APD Exhibit H, report 040005889; Tr. Vol. 1, pp. 193-95(January 25, 2004, a suspect was arrested for DWI. The suspect told officer she had consumed a "Mind Eraser and a shot" at Baby Dolls. The suspect also indicated she had taken prescription medication. The suspect driver provided a breath specimen of 0.065 grams of alcohol per 210 liters of breath. The suspect's passenger was arrested for PI. The passenger was semi-conscious at one point. The passenger was taken to Arlington Memorial Hospital and a subsequent blood alcohol test showed a level of 0.470 grams of alcohol per 100 milliliters of blood. It is not clear that the passenger had been to Baby Dolls or consumed alcohol there. Respondent's counsel speculated that the officer might have attributed the arrest to both Baby Dolls and Bennigans. Tr. Vol. 1, p. 194. A review of APD Exhibit D, the relevant DWI/PI log, shows one officer attributed the arrest of Marissa Thompson to Bennigans then marked out "Bennigans" and wrote in "Baby Dolls." Another officer attributed "Brandy"'s PI to Baby Dolls. APD Exhibit D. Marissa Thompson was the driver and Brandy was her passenger. APD Exhibit H.); APD Exhibit I, report 030042219; Tr. Vol. 1, p. 198(June 17, 2003, Dancer "Eileen" (Lisa Andrews) was called at work by wife of a Baby Dolls patron and threatened.); APD Exhibit I, report 030067946; Tr. Vol. 1, pp. 200-02(September 26, 2003, at about 1:00 a.m. APD officers recognized a Baby Dolls dancer as being under 18 years of age. The dancer had given Baby Dolls management a false name and ID. Dancer was fired.)

On April 3, 2003, a suspect arrested for DWI. The suspect was extremely intoxicated and told officers several times he had been drinking at a club. The suspect had run a \$116.50 bar tab at Baby Dolls. APD Exhibit G, report 030022241; Tr. Vol. 1, pp. 181-84. Respondent asserts this incident should not be attributed to Baby Dolls. The ALJ disagrees: the evidence shows the suspect had spent \$116 at Baby Dolls and he more likely than not became intoxicated there.

Lt. Hines refused to agree that even with the decline in criminal activity at Baby Dolls, the business “is not against the peace and morals and safety of the citizens of the City of Arlington.” Instead, Hines asserted that “based on the totality of the offenses that have happened there since the business has been in place I would have to say that they still are.”²¹⁹

(2) APD Sergeant Doug Depoma

Sgt. Depoma has made DWI and PI arrests that were attributed to Baby Dolls. He testified concerning those arrests relating them to documentary evidence:

- On January 18, 2003, a suspect was arrested for PI on the licensed premises. Citation 0X2059 was issued.²²⁰ This was an offense discovered by Depoma. He observed an illegally parked vehicle in the Baby Dolls parking lot and found the driver in the club, intoxicated.²²¹
- On March 23, 2003, Depoma observed a suspect leaving Baby Dolls’ parking lot, and subsequently arrested him for DWI. Depoma determined the suspect had been drinking at Baby Dolls.²²² Depoma observed the vehicle leave the Baby Dolls parking lot at a high rate of speed and also observed it drift or weave out of and back into its traffic lane. The suspect exhibited the typical signs of intoxication: slurred speech and heavy, bloodshot eyes.²²³
- On September 20, 2003, a female suspect arrested for PI in Baby Dolls parking lot. The suspect told Depoma she had consumed seven beers. Citation 1U7770 was issued.²²⁴ Depoma related that he was dispatched to Baby Dolls on a report that two people were having sex in a vehicle parked in the back parking lot. Depoma did not observe any sexual activity but did locate the female arrestee in the company of a male.²²⁵ Sgt. Depoma testified

²¹⁹ Tr. Vol. 1, p. 219.

²²⁰ APD Exhibit G, report 030004122.

²²¹ Tr. Vol. 2, pp. 11-14.

²²² APD Exhibit G, report 030019518.

²²³ Tr. Vol. 2, pp. 14-15.

²²⁴ APD Exhibit G, report 030066472.

²²⁵ Tr. Vol. 2, pp. 16-18.

that in his experience patrons of SOBs consume alcohol in the SOB parking lot due to the expense of alcohol in SOBs.²²⁶

- On September 3, 2003, at 1:24 a.m., Depoma observed a male urinating in the front parking lot of Baby Dolls. A citation was issued.²²⁷ Depoma observed this activity from West Division Street as he drove by Baby Dolls.²²⁸ Sgt. Depoma identified this call as one of the arrests cited by Chief Bowman in his April 21, 2004 letter to the TABC.²²⁹
- On February 19, 2004, Depoma was flagged down by Manager Larry Millikan as the officer drove through Baby Dolls' parking lot. Millikan told Depoma he believed two males in the club were pimps and were attempting to induce the club's dancers to work for them.²³⁰ The suspects "were handing out cards offering girls to come make a thousand dollars a day working for them. The card had two pictures of two females that stated, big money, you got the cash and I'll make the call. It also gave two phone numbers. It also said below the phone numbers, unless you are afraid of having big money, nude modelling escort, all fantasies and fetishes, Greek and role playing." Depoma believed the cards were used to solicit prostitution.²³¹

Sgt. Depoma has noted a "dramatic decrease in customers and business" at Baby Dolls Arlington since mid-2004. He has observed an average of two or three vehicles in the parking lot on a night. On a busy night in 2002 the front and back parking lots at Baby Dolls would be full. Since the change in business format Sgt. Depoma believed he had conducted two bar checks in 2004. He recalled seeing a manager and another employee and two or three customers. There has also been a decrease in CFS and "potential criminal activity" since the change of format. Further, Sgt. Depoma

²²⁶ Tr. Vol. 2, p. 18.

²²⁷ APD Exhibit I, report 030062170.

²²⁸ Tr. Vol. 2, pp. 19-20.

²²⁹ APD Exhibit A. Tr. Vol. 2, p. 21.

²³⁰ APD Exhibit J, report 040011594.

²³¹ Tr. Vol. 2, pp. 21-24.

believes there is a correlation between the change in format and the decrease in CFS and crime at the location.²³²

On cross-examination by Respondent, Sgt. Depoma acknowledged the Baby Dolls parking lot is well lit, better lit than some other liquor establishments in Arlington.²³³ He agreed that Baby Dolls has through the years had the “same problems.” He was not willing to say it had been the same amount of crime, or that it had spiked in 2002 and 2003. In a similar fashion, he was not willing to say the same amount of police resources had been allocated to the Baby Dolls location each year.²³⁴ In response to questions from the ALJ, Sgt. Depoma indicated that the size of Beat 240 has decreased. The size of a beat is based on CFS; if they increase the size of a beat will decrease.²³⁵

b. Vice Officer Testimony

(1) APD Sergeant Michael Yantis

Sgt. Yantis testified that he had been in Baby Dolls undercover 75 to 100 times from 2002 to 2004.²³⁶ He noted that the managers at Baby Dolls dress alike, in dark slacks, a white shirt, and a tuxedo-like vest. As a consequence he was able to confirm that violations of the touching ordinance occurred in their presence to which they made no reaction and took no overt action. He also noted that if the managers were aware uniformed police were entering the premises one manager would greet the police at the door and stall them while other managers “would go around and warn customers and dancers that the police were in there.” Further, “We've had dancers come up to us

²³² *Id.*, pp. 29-31.

²³³ *Id.*, p. 34.

²³⁴ *Id.*, pp. 34-37.

²³⁵ *Id.*, p. 38.

²³⁶ *Id.*, p. 57.

and say, the cops are here. They come up to the dancers that are performing lap dances and tell them to get dressed that the cops were here.”²³⁷ As a consequence, Sgt. Yantis has a continuing concern that “management at Baby Dolls will continue to disregard the rules of law with the City and the State.”²³⁸

On cross-examination by Respondent, Sgt. Yantis acknowledged that there have been no vice violations or citations since Baby Dolls changed its format in early 2004. The vice unit does not go into Baby Dolls as frequently now as it did in 2002 and 2003.²³⁹

(2) APD Officer Kreyton Paschall

Officer Paschall estimated that the vice unit might visit Baby Dolls once a week, and from that visit he might issue one or two citations although he might have observed more than one or two violations. Paschall agreed with Sgt. Depoma that the Baby Dolls management wore distinctive clothes, and added that the waitresses wore a uniform of sorts (leotard with contrasting panties) as well as a name tag. Officer Paschall stated that management was always present when he observed violations. He described their attitude as indifferent. Paschall also related that the Baby Dolls club had two corners where table dances were offered which were out of sight to persons (such as police officers) entering the club. The club’s offices were located near one of those corners. Paschall observed the reaction of management when uniformed police officers entered the club:

you'll see the management and you'll see waitresses, they'll run to all the separate tables where the girls are dancing, where girls are sitting, whisper in their ear. You'll see the girls abruptly stand up and start trying to put their tops on, doing something like that. Then you'll see officers start coming through the door, which is one of the reasons we started taking police officers and telling them that, hey -- you know, that

²³⁷ *Id.*, pp. 50-52.

²³⁸ *Id.*, p. 55.

²³⁹ *Id.*, pp. 56-58; 65-66.

they need to park somewhere out of site where they're not visible to any patrons going into the club or any waitresses or any employees that might be standing outside the club. Walk up on foot so that way they can locate some violations.²⁴⁰

Officer Paschall described a number of investigations he had conducted or observed at Baby Dolls and related those to documents in the record:

- Paschall issued a citation to Gail Breshers (stage name Jade) for a touching offense which occurred at Baby Dolls on February 21, 2003. The citation was issued March 7, 2003.²⁴¹ Paschall noted that the dancer was

straddling the customer, from my recollection, while nude and grinding her buttocks onto his genital area in a sexual manner. From there she would turn and face the customer also rubbing her exposed breasts into the customer's face which was in plain view throughout the club.²⁴²

Officer Paschall asserted this type conduct was usual at Baby Dolls.²⁴³

- Paschall issued a citation to Shannon Letchworth (stage name Innocence) for a touching offense which occurred at Baby Dolls on May 17, 2003. The citation was issued July 7, 2003.²⁴⁴ He observed her dancing on the main stage and

a customer approached her on the main stage, usually with a dollar tip. Well, what I vaguely recollect is she turned around and bent over, I believe had all four -- her knees and her hands on the stage and bounced her buttocks into the customer's chest area kind of in a sexual manner making impact with the customer while topless and wearing a T-back and shoes.²⁴⁵

²⁴⁰ *Id.*, pp. 71-73.

²⁴¹ APD Exhibit N, 2003 Municipal Court Records Relating to Baby Dolls, Citation IK6450A.

²⁴² Tr. Vol. 2, pp. 79-83.

²⁴³ *Id.*, p. 83.

²⁴⁴ APD Exhibit N, 2003 Municipal Court Records Relating to Baby Dolls, Citation IT4206A.

²⁴⁵ Tr. Vol. 2, pp. 84-86.

Paschall again described this as “the type of conduct you normally see at Baby Dolls.”²⁴⁶

- Paschall issued a citation to Amy Selada (stage name Chloe) for a touching offense which occurred at Baby Dolls on May 17, 2003. The citation was issued July 3, 2003.²⁴⁷ Paschall was very familiar with Ms. Selada having issued her citations at Baby Dolls and other clubs prior to May 17, 2003. Paschall observed Ms. Selada:

dancing a table dance. Again, just like the previous girl where she had a customer sitting in a chair. She was -- what brought my attention to her is she had removed her top and bottoms and I believe was wearing a T-back, can't remember the color, with knee-high kind of black stockings and I think black shoes. She was straddling the customer, rubbing her vaginal area in the customer's genital area when she again was topless wearing a T-back. She would then turn away from the customer, grinding her buttocks on the customer in a sexual manner, as well as face the customer rubbing her breasts on the customer in a sexual manner and just slowly kind of rubbing down the customer with her breasts all the way down to his genital area.²⁴⁸

This was common conduct at Baby Dolls and in this instance, according to Paschall, occurred in the corner near the office of the club, “where the management frequently goes in and out of.”²⁴⁹

- Paschall issued a citation to Shannon Letchworth for minor in possession of alcohol which occurred at Baby Dolls on September 9, 2003. The citation was issued December 10, 2003.²⁵⁰ Paschall related that Ms. Letchworth had been identified as a minor, *i.e.*, a person 20 years of age. Paschall observed her drinking a bottle of Bud Lite beer.²⁵¹ Again, he

²⁴⁶ *Id.*, p. 86.

²⁴⁷ APD Exhibit N, 2003 Municipal Court Records Relating to Baby Dolls, Citation 1T8994A.

²⁴⁸ Tr. Vol. 2, pp. 88-90.

²⁴⁹ *Id.*, p. 90.

²⁵⁰ APD Exhibit N, 2003 Municipal Court Records Relating to Baby Dolls, Citation 1Y9164A.

²⁵¹ Tr. Vol. 2, pp. 91-92.

recalled having difficulties in obtaining address information from Baby Dolls and ultimately obtained a useable address from another club where Ms. Letchworth danced.²⁵²

- On February 13, 2003, waitress Lana solicited a shot of tequila for dancer Blaze from Detective Paschall at a cost of \$6.25. “Lana” is Lana Lee Scarborough, “Blaze” is Jamie Kristine Gallagher according to Respondent’s employment records.²⁵³ Paschall prepared the offense report for this incident. He stated that he was partnered with Detective Gabe Valdez. He reported that the club employee specifically

asked do you want to buy her a drink, referring to the dancer Blaze. Actually said, do you want to buy her a shot. I asked her what did she say. She replied, do you want to buy her a shot.²⁵⁴

Paschall identified his offense report as one used by Chief Bowman in support his affidavit in APD Exhibit A.²⁵⁵

- On February 21, 2003, waitress Jessie solicited a Budweiser beer for dancer Blaze from Detective Valdez at a cost of \$5.50. “Jessie” is Jessie Lee Lawson according to Respondent’s employment records. Jessie also uses the name of “Tori.”²⁵⁶ Paschall identified as an incident at which he was present.²⁵⁷ Paschall was unable to identify this offense report as one used by Chief Bowman in support his affidavit in APD Exhibit A.²⁵⁸
- On April 4, 2003, dancer Courtney solicited a drink from Detective Valdez at a cost of \$7.50. Detective Valdez confirmed it contained alcohol by taste. “Courtney” is Cassidy Ann Chavez according to from Respondent’s employment records.²⁵⁹ Paschall was present with Detective Valdez.²⁶⁰

²⁵² *Id.*, p. 92.

²⁵³ APD Exhibit I, report 030010328.

²⁵⁴ Tr. Vol. 2, pp. 91-96.

²⁵⁵ *Id.*, pp. 96-97.

²⁵⁶ APD Exhibit I, report 030012310.

²⁵⁷ Tr. Vol. 2, pp. 97-98.

²⁵⁸ *Id.*, pp. 98-99. A review of APD Exhibit A shows it is not. APD Exhibit A.

²⁵⁹ APD Exhibit I, report 030022847.

²⁶⁰ Tr. Vol. 2, pp. 99-101.

- On April 4, 2003, dancer Blaze solicited “purple shooters” for herself and another dancer from Detective Valdez at a cost of \$22.50. Valdez confirmed it contained alcohol by taste. Blaze also solicited a Budweiser beer from Detective Valdez at a cost of \$5.50.²⁶¹ Paschall was present with Detective Valdez.²⁶²
- On September 9, 2003, waitress Fancy 22 or Purity solicited a shot of Hennessey for dancer Taylor from Detective Paschall at a cost of \$7.50. “Fancy 22” or “Purity” is Brittany N. Gordon according to Respondent’s employment records.²⁶³ Paschall identified this offense report as one used by Chief Bowman in support his affidavit in APD Exhibit A.²⁶⁴

Officer Paschall stated that based on his experience he has a continued concern that Baby Dolls will disregard the laws and the rules of the City and the State.²⁶⁵

(3) APD’s Documentary Evidence

The following reports were not discussed by the witnesses but are relevant to the APD’s claims:

(a) 2003 DWI/PI Offense Reports

- On February 27, 2003, a suspect arrested for PI. The suspect and a witness (a dancer at Baby Dolls) told officers he had been drinking at Baby Dolls. Suspect was extremely intoxicated and had tried to jump out of a moving car while on Interstate Highway 30.²⁶⁶

²⁶¹ APD Exhibit I, report 030022848.

²⁶² Tr. Vol. 2, p. 101.

²⁶³ APD Exhibit I, report 030063869.

²⁶⁴ Tr. Vol. 2, pp. 102.

²⁶⁵ *Id.*, pp. 102-03.

²⁶⁶ APD Exhibit G, report 030013704.

- On March 7, 2003, a suspect was observed leaving Baby Dolls' parking lot, and subsequently arrested for DWI. Suspect had been drinking at Baby Dolls. A passenger was arrested for PI on Citation 0X2073.²⁶⁷
- On May 5, 2003, a suspect was found asleep in a vehicle parked on the shoulder of Interstate Highway 20, and subsequently arrested for PI. Suspect told officers he was drinking at Baby Dolls.²⁶⁸
- On June 22, 2003, a suspect observed leaving Baby Dolls' parking lot, and subsequently arrested for DWI. The suspect had been drinking at Baby Dolls. The suspect provided a breath specimen of 0.116 grams of alcohol per 210 liters of breath.²⁶⁹
- On July 2, 2003, a suspect arrested for PI after a fight with Baby Dolls security guard. This was a call for service by Baby Dolls employees.²⁷⁰
- On August 23, 2003, one suspect was arrested for DWI, and his three passengers were arrested for PI. The suspects were first observed in the Baby Dolls parking lot and were warned not to drive. The suspects were subsequently observed driving and were stopped. The suspects had been drinking at Baby Dolls.²⁷¹
- On September 6, 2003, a suspect arrested for PI. The suspect and his wife told officers he was drinking at Baby Dolls.²⁷²
- On September 27, 2003, a suspect arrested for public urination and PI in Baby Dolls parking lot. The suspect told officers he had been drinking at Baby Dolls.²⁷³
- On October 11, 2003, a suspect was observed leaving Baby Dolls' parking lot, and subsequently arrested for DWI. The suspect had been drinking at Baby Dolls and told officer

²⁶⁷ *Id.*, report 030015451.

²⁶⁸ *Id.*, report 030030596.

²⁶⁹ *Id.*, report 030043441.

²⁷⁰ *Id.*, report 030045887.

²⁷¹ *Id.*, report 030059487.

²⁷² *Id.*, report 030062894.

²⁷³ *Id.*, report 030068424.

he had only consumed two beers. Suspect provided a breath specimen of 0.088 grams of alcohol per 210 liters of breath.²⁷⁴

- On November 13, 2003, an APD officer in the parking lot of Baby Dolls located a stolen vehicle, and after the suspect exited Baby Dolls and drove off in the stolen vehicle, the suspect was stopped. The suspect was arrested for DWI.²⁷⁵
- On November 27, 2003, APD responded to a service call to the Baby Dolls parking lot. The suspect, who had fallen asleep in his vehicle, was arrested for PI.²⁷⁶

(b) 2004 DWI/PI Offense Reports²⁷⁷

- On July 10, 2004, a suspect was arrested for DWI. He was found unconscious in his vehicle at a stop light on Division Street. The suspect driver provided a breath specimen of 0.213 grams of alcohol per 210 liters of breath. Suspect told officer he had consumed "more than I care to mention" and "more than a case" at Baby Dolls.²⁷⁸
- On October 12, 2004, a suspect was stopped for speed in excess of 100 miles per hour on Interstate Highway 20 and arrested for DWI. The suspect said he had been drinking at Baby Dolls "but did not specify which city."²⁷⁹

(c) 2003 Incident Reports (Non-DWI/PI)²⁸⁰

²⁷⁴ *Id.*, report 030071529.

²⁷⁵ *Id.*, report 030079523.

²⁷⁶ *Id.*, report 030083071.

²⁷⁷ APD Exhibit H, report 040067570 was excluded by ALJ because the motor vehicle accident which lead to a DWI arrest took place on North Collins Street and Green Oaks near Baby Dolls - Fort Worth on North Collins. Further the incident report did not mention any Baby Dolls by name.

²⁷⁸ *Id.*, report 040046420.

²⁷⁹ *Id.*, report 040069217.

²⁸⁰ APD Exhibit I, 2003 Incident Reports (Non-DWI/PI).

- On March 7, 2003, a locked motor vehicle, which belonged to one of Respondent's employees, parked in Respondent's parking lot was burglarized during Respondent's business hours.²⁸¹
- On March 22, 2003, at approximately 2:10 a.m., the victim was assaulted in the parking lot of Baby Dolls. The assault was observed and then broken up by Respondent's private security.²⁸²
- On March 26, 2003, a customer was publicly intoxicated on the premises and was arrested for outstanding warrants.²⁸³
- On July 3, 2003, Baby Dolls dancer "Innocence," Shannon Elizabeth Letchworth, was arrested for outstanding warrants for speeding and failure to appear in Forney, Texas.²⁸⁴
- Between 10:30 p.m. August 12, 2003, and 3:00 a.m. August 13, 2003, a locked motor vehicle belonging to one of Respondent's patrons which was parked in Respondent's parking lot was burglarized during Respondent's business hours.²⁸⁵
- On August 24, 2003, at 1:50 a.m. one vehicle leaving the Baby Dolls parking lot struck another vehicle parked in the lot.²⁸⁶
- On September 9, 2003, at 10:20 p.m. , APD officers found an individual in motor vehicle in Baby Dolls parking lot without the owners consent. The owner of the vehicle was a patron of Baby Dolls. A witness had called APD to inform them that the suspect was going around the parking lot trying the door handles of vehicles looking for an open door. The suspect told police he had been at Baby Dolls "for some time" and "decided to hit some licks because of his shortage of cash."²⁸⁷

²⁸¹ *Id.*, report 030015677.

²⁸² *Id.*, report 030019219.

²⁸³ *Id.*, report 030020231.

²⁸⁴ *Id.*, report 030046144.

²⁸⁵ *Id.*, report 030057579.

²⁸⁶ *Id.*, report 030059709.

²⁸⁷ *Id.*, report 030064365.

- On September 21, 2003, two members of the cleaning crew at Baby Dolls had their motor vehicles' tires slashed. The suspects were believed to be disgruntled former members of the cleaning crew.²⁸⁸
- A complainant told APD that on September 26, 2003, between 8:00 and 11:15 p.m. he was at Baby Dolls and someone at Baby Dolls failed to return his Arizona driver's license to him.²⁸⁹
- On September 29, 2003, between 5:35 and 6:10 p.m. a locked motor vehicle belonging to a person seeking employment with Respondent which was parked in Respondent's parking lot was burglarized during Respondent's business hours.²⁹⁰
- On October 4, 2003, at 12:30 a.m. APD officers made a bar check at Baby Dolls. They found three bottles of liquor with "foreign objects" floating in the liquid. Citation 1X0677 was issued.²⁹¹
- On October 9, 2003, at 1:42 a.m. APD officers made a bar check at Baby Dolls. They found four bottles of liquor with flies floating in the liquid and five bottles of liquor with "foreign objects" floating in the liquid. Dead insects were found in the kitchen and evidence was found that the cook was smoking in the kitchen. Citations were issued.²⁹²
- On October 9, 2003, a female was ejected from Baby Dolls because management believed she was intoxicated or under the influence of drugs. The suspect left personal property in the parking lot, and was found by APD when she returned to retrieve her property. The suspect was arrested for an outstanding warrant for public lewdness.²⁹³
- On October 31, 2003, a female seeking to apply for work at Baby Dolls was ejected and caused a disturbance. The suspect was arrested by APD for PI.²⁹⁴

²⁸⁸ *Id.*, report 030066769.

²⁸⁹ *Id.*, report 030068698.

²⁹⁰ *Id.*, report 030068811.

²⁹¹ *Id.*, report 030069858.

²⁹² *Id.*, report 030071055.

²⁹³ *Id.*, report 030075851.

²⁹⁴ *Id.*, report 030076341.

- On December 4, 2003, at about 9:30 p.m. a Baby Dolls patron was assaulted in the Baby Dolls parking lot. The patron was assisting his father, the general manger at Baby Dolls, eject two other patrons who had attempted to bring alcohol into the club.²⁹⁵
- A complainant told APD that on December 6, 2003, at about 1:15 a.m. a dancer at Baby Dolls had stolen his wallet during a lap dance. APD suspected Marcellina Gallegos had stolen the wallet as she was suspected of a similar crime at Chicas Locas.²⁹⁶

(d) 2004 Incident Reports (Non-DWI/PI)²⁹⁷

- On January 27, 2004, APD was called to Baby Dolls by a patron who told them he had been assaulted by Baby Dolls employees. APD's investigation showed that the patron was intoxicated and had been ejected from Baby Dolls three times.²⁹⁸
- On January 28, 2004, Citation 2A1155 was issued to Baby Dolls for operating a SOB without a license.²⁹⁹
- On February 19, 2004, APD officers descended on Baby Dolls to issue citations and make arrests for touching violations witnessed earlier by APD vice. One dancer, trade name "Avery," true name Cameron Springer was arrested for a probation violation (DWI) warrant and issued Citation 2A1145 for touching violation. One dancer, trade name "Cameron," true name Theresa Marie Ford was issued Citation 2A3544A for touching violation. One dancer, trade name "Jada," true name Mary Elizabeth Ingrum was issued Citation 2A5593A for touching violation. Citation 2A4840 was issued to Baby Dolls for operating a SOB without a license.³⁰⁰
- On March 4, 2004, APD was called to Baby Dolls by an anonymous complainant. At the club, dancer Mary Ingrum told the investigating officer that a Ms. Trimble had arrived at the club at approximately 12:30 a.m.; that between 12:30 and 1:00 a.m. Trimble had been sitting

²⁹⁵ *Id.*, report 030084815.

²⁹⁶ *Id.*, report 030085171.

²⁹⁷ APD Exhibit J, reports 040001464, 040075646, and 040078045 were excluded by the ALJ because their connection to Baby Dolls was coincidental or tangential.

²⁹⁸ *Id.*, report 040006362.

²⁹⁹ *Id.*, report 040006623.

³⁰⁰ *Id.*, report 040011850.

at a table with a customer; that between 12:30 and 1:00 a.m. Trimble was found unconscious; that Ingrum had tried to induce vomiting because Ingrum believed that Trimble had ingested GHB; and that Larry Millikan had refused to call 911 who said Trimble could "sleep it off." Trimble was transported to Arlington Memorial Hospital, where the doctors who treated Trimble believed Trimble could have ingested GHB.³⁰¹

- On March 10, 2004, during a bar check, APD discovered that three Baby Dolls dancers, Jodi Boyd, Crystal Vetter, and Brandi Barchak, were ill and had possibly been slipped GHB by two customers sitting at a table where all three dancers had consumed liquids.³⁰²
- On March 16, 2004, APD was called to Baby Dolls concerning a dancer who was having a medical emergency. The officers observed the dancer, Brittany Elaine Starks, age 19, apparently having a seizure. Other Baby Dolls employees said she had been drinking beer and tequila. The dancer was hospitalized.³⁰³
- Between 7:00 p.m. August 21, 2004, and 2:10 a.m. August 22, 2004, a locked motor vehicle belonging to one of Respondent's employees which was parked in Respondent's parking lot was burglarized during Respondent's business hours.³⁰⁴

**(e) A Comparison of Several Businesses Using the
DWI/PI Logs**

The ALJ reviewed the DWI/PI logs contained in APD Exhibits E and F and compared the statistics for Baby Dolls with those of Sherlocks, Cowboy's, Fantasy Ranch, and Chicas Locas. Sherlocks was mentioned by Chief Bowman as a business protested by the APD. Fantasy Ranch is a SOB which is not a sister corporation of Respondent; Chicas Locas is a sister corporation of Respondent.

³⁰¹ *Id.*, report 040014766. Gamma hydroxy butyrate or Gamma hydroxybutyric acid, also called Sodium Oxybate. GHB and its analogs are "date rape" drugs; GHB is a clear odorless liquid (usually mixed with alcohol) or a white powder (usually made into tablets or capsules.)

³⁰² APD Exhibit J, report 040016152.

³⁰³ *Id.*, report 040017533.

³⁰⁴ *Id.*, report 040056726.

Table 3										
2003 Driving While Intoxicated / Public Intoxication Monthly Reports (Exhibit E)										
2003	Baby Dolls		Sherlocks		Cowboy's		Fantasy Ranch		Chicas Locas	
Month	DWI	PI	DWI	PI	DWI	PI	DWI	PI	DWI	PI
January	1	0	0	0	2	4	0	0	0	0
February	1	1	0	0	0	4	0	0	0	0
March	1	1	0	0	2	10	1	1	0	0
April	1	0	0	0	3	1	3	2	0	0
May	1	2	0	0	0	4	1	2	0	0
June	2	3	2	1	0	1	1	0	0	0
July	0	1	2	7	0	2	0	0	0	0
August	1	3	0	12	0	4	1	1	0	0
September	1	4	5	9	0	3	1	1	0	2
October	1	1	6	5	2	6	0	0	2	2
November	0	2	5	7	2	1	2	1	1	0
December	1	1	15	14	0	6	4	0	2	3
Monthly Totals	11	19	35	55	11	46	14	8	5	7
Total for 2003	30		90		57		22		12	

Table 4										
2004 Driving While Intoxicated / Public Intoxication Monthly Reports (Exhibit F)										
2004	Baby Dolls		Sherlocks		Cowboy's		Fantasy Ranch		Chicas Locas	
Month	DWI	PI	DWI	PI	DWI	PI	DWI	PI	DWI	PI
January	3	1	8	5	1	6	1	0	1	0
February	1	0	2	3	1	4	0	3	0	1

March	0	0	4	8	2	4	0	0	1	1
April	0	0	4	3	0	3	0	3	0	0
May	0	0	12	4	2	2	0	0	1	0
June	0	0	4	6	2	4	1	0	1	2
July	1	0	2	6	1	5	1	4	1	0
August	0	0	4	5	0	5	1	0	0	2
September	0	0	1	9	6	2	1	0	2	1
October	2	0	2	6	1	6	0	1	1	1
November	0	0	5	4	1	2	2	5	3	0
December	0	0	7	3	3	6	1	1	4	6
Monthly Totals	7	1	55	62	20	49	8	17	15	14
Total for 2004	8		117		69		25		29	

3. Respondent's Evidence

Mr. Craft asserted that Baby Dolls was “trying to work with the City to modify [its] business [to] continue to operate with dancing girls but in such a manner as [it] would not be a sexually-oriented business.”³⁰⁵ Respondent’s plan was “to continue operating a business but not a sexually-oriented business but one featuring some form of go-go dancing.” Apparently, the dancers were topless and covered with some thickness of latex. The city disagreed with Respondent’s reading of the ordinance that “opaquely covered” could be satisfied by a latex covering. Mr. Craft testified that the SOB ordinances for Dallas and Houston were verbatim with respect to critical

³⁰⁵ Tr. Vol. 2, p. 208.

definitions and in Houston latex was considered "opaque."³⁰⁶ Arlington city officials would not meet to discuss the matter.³⁰⁷

Mr. Craft averred that Baby Dolls parking lot is the best lit parking lot in Arlington because lighting deters crime and draws attention to the club. Further, when operating as a SOB, Baby Dolls had outside security to deter crime. Mr. Craft stated he was unaware that persons would drink in the parking lot to avoid paying high prices in the club.³⁰⁸

Mr. Craft explained why dancers could not be identified for the APD:

Well, you've got to understand a patrol officer walks in and has a stage name and may have a description or may not have a description of a girl. He does not tell the managers when this incident occurred. He says I need to see records. Typically he'll go through and pull the records themselves. Sometimes he will say I need records on a Tiffany and go through and there's not a Tiffany currently working. But in the nature of our business Tiffany is a pretty common name. And we may have on file and be able to go back to our archives and pull 20 different Tiffany's that have worked there and start trying to narrow it down from there.

So that's where a confusion comes in. The confusion is not telling the manager this person worked on a specific date and this is her name and trying to pair [*sic*] it down from there. A lot of times the patrol officer does not know when the violation occurred, at least according to what they tell us.

They -- well, they say they don't know what the violation is, they were asked to come in by vice and get information on this person or these people.

Q. And have you ever had situations where the officer's name or description didn't match anybody that worked there?

³⁰⁶ *Id.*, pp. 210-14. Respondent's Exhibits 5 and 6 were admitted to show the cooperation Respondent was offering and the poor attitude of the city. Respondent's Exhibit 7 was admitted as further attempts to cooperate. *Id.*, pp. 208-10.

³⁰⁷ *Id.*, p. 214.

³⁰⁸ *Id.*, pp. 222; 252.

A. Yes, absolutely. And we've also had that same deal where through process of elimination we figured out that the officer misunderstood what her name was and we were able to match it up and say this is the person we think you're looking for. And they got that information and took it.³⁰⁹

Baby Dolls managers are trained in a six-week course on “the operation of the nightclub, the state laws that govern running the nightclub as far as the specific ordinances devoted to that nightclub.” The club managers and all waitresses are required to be TABC certified prior to starting work. Mr. Craft noted that Baby Dolls was not “cited for allowing or knowingly permitting drink solicitation to occur.” Mr. Craft states that Baby Dolls had no shootings or stabbings and few fights. He also agreed that it was common in the business for customers to buy dancers alcoholic and non-alcoholic drinks. He stated that “purple shots” are non-alcoholic and are so advertised on the table tents. He states that signs warning the dancers against drink solicitation are posted in two locations in the club.³¹⁰

Mr. Craft complained that the undercover vice officers did not point out to Baby Dolls management that dancers were violating the ordinance. He stated, “I felt like our only course is at that point we put on notice that it happened is to terminate that individual's contract. They don't work for us anymore.”³¹¹ Mr. Craft agreed that while Baby Dolls had six stages, it would “be obvious to managers in the club if a dancer was grinding her private parts into another client while she was in the state of nudity,” although it could occur that something happening in a chair might not be noticed.³¹²

³⁰⁹ *Id.*, pp. 223-24.

³¹⁰ *Id.*, pp. 227; 234; 228-29.

³¹¹ *Id.*, p. 229.

³¹² *Id.*, p. 250.

He acknowledged that a number of his dancers were between 18 and 21 years. To avoid serving these minors alcohol, Baby Dolls had and promoted non-alcoholic drinks. Further,

We do training with our bar staff and our waitstaff to make sure that their part of their job duty is to identify this and know this. Every shift a -- at the beginning of every shift a list is handed out -- posted at each register and handed out to each waitress and each bartender and each manager has it saying these people are under age; do not serve them. It's called our under age list. As people come in throughout the night, that list is updated. We don't allow off-duty employees or entertainers that work there to come in and drink there so we don't have to worry about the problem there. And all customers have to be 21 years of age to come in.³¹³

If an underage employee got possession of alcohol she was terminated and so was the server. Mr. Craft estimated that Baby Dolls would have 300 to 400 entertainers in a year like 2002. Thirty percent would be underage for drinking purposes. The dancers would work 30 to 45 per shift. The waitstaff would be 10 to 15 percent under age.³¹⁴

4. Arguments and Analysis

a. The Myres

Mr. and Mrs. Myres offered no argument for or against or analysis of this issue of the protest.

b. APD

APD states that an "inordinate" amount of police time was expended on "Baby Dolls" calls for service; Chief Bowman estimated 115 hours exclusive of vice enforcement. Taking all of the evidence into consideration, APD states that the police time attributable to Baby Dolls exceeded

³¹³ *Id.*, pp. 229-30.

³¹⁴ *Id.*, pp. 230-32.

other similar types of investment in “other similar types of business establishments in the North District.” APD notes that the North district is unique in Arlington in that all SOB establishments are located within its confines.

APD acknowledges that after Baby Dolls began to operate under its new certificate of occupancy there was a significant decline in calls for service.” It asserts, however, that “the activity tied to Baby Dolls – Arlington that occurred prior to, and occurring ast the time of the filing of the protest, are the basis for this protest. The prior conduct warrants denial of the renewal permit.”

c. Respondent

Respondent complains that §§ 11.46(a)(8) and 11.61(b)(7)³¹⁵ are vague “and lack criteria, direction, checks and balances or other procedural safeguards to protect against arbitrary and capricious decisions.”³¹⁶ Respondent asserts that APD’s justification is “extremely questionable and too self serving” to be the basis of a denial. Respondent disparages APD’s “police resources” justification stating it does not “survive factual or common sense scrutiny.” APD claims that “its resources are being unduly drained” by activity at Baby Dolls is not true because:

(1) Baby Dolls is located in a beat and district with the heaviest populations of SOBs and liquor establishments in Arlington.³¹⁷

³¹⁵ Both statutes employ the language “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.”

³¹⁶ Contrary to Respondent’s argument, Sections 11.46(a)(8) and 11.61(b)(7) of the Code are not unconstitutionally vague. *Helms v. Tex. Alco. Bev. Comm’n*, 700 S.W.2d 607, 614(Tx.Ct.App. – Corpus Christi 1985, no writ).

³¹⁷ Respondent cites Lt. Hines’ testimony at Tr. Vol. 1, pp. 156-57, in support of this assertion. Some of Respondent’s points are repetitive.

(2) APD still allocates the same resources to the beat after Baby Dolls stopped being a SOB.³¹⁸

(3) The only increased police activity at Baby Dolls was vice operations for “no touch” violations.³¹⁹

(4) APD did not quantify the increase of cost of the additional resources.

(5) Sgt. Depoma testified the police resources allocated to Baby Dolls were constant for the 16 to 17 years he had been assigned to the district.³²⁰

(6) The resource for the Baby Dolls area has been consistent and maintained even after Baby Dolls stopped being a SOB.³²¹

(7) Chief Bowman’s concerns for Baby Dolls are the amount of “no touch” violations³²² which can no longer occur, and “alcohol related crime and assault offense,”³²³ of which Baby Dolls has few or none.

(8) There were only three significant offenses at Baby Dolls in 2003 (two involving impurities to liquor).³²⁴ APD responds that the 2003 Incident reports found in APD

³¹⁸ Respondent cites Lt. Hines’ testimony at Tr. Vol. 1, pp. 160; and Sgt. Depoma at Tr. Vol. 2, pp. 35-36, in support of this assertion. Lt. Hines stated he could not testify that the same, more, or fewer resources were being invested in the north district. Sgt. Depoma did not testify that APD still allocates the same resources to the beat after Baby Dolls stopped being a SOB. The testimony at this juncture dealt with the time leading up to 2004, specifically 2002 to 2004.

³¹⁹ Respondent cites Chief Bowman’s testimony at Tr. Vol. 2, pp. 140-41, in support of this assertion. Chief Bowman testified there was an increase in police resources dedicated to Baby Dolls related to the investigation of no touch violations. He did not testify that no touch violations were the only cause of an increase in police resources.

³²⁰ Respondent cites Sgt. Depoma’s testimony at Tr. Vol. 2, p. 36, in support of this assertion. When asked if APD expended “about the same amount of resources just on average” over the 16 or 17 years Depoma had been in the north district, Depoma replied, “Then again, I don’t know. Depends on what the call is.”

³²¹ Respondent cites Lt. Hines’ testimony at Tr. Vol. 1, pp. 160, in support of this assertion. When asked, “Still allocate the same amount of effort and time into that when you did when Baby Dolls was an SOB?” Lt. Hines replied, “I would assume so. I can’t really talk about that. That’s not my area.” An examination of the context reveals the “that” referred to in both the question and answer was the APD DWI Task Force, and not enforcement efforts at Baby Dolls.

³²² Respondent cites Sgt. Yantis’ testimony at Tr. Vol. 2, p. 56, in support of this assertion.

³²³ Respondent cites Chief Bowman’s testimony at Tr. Vol. 2, p. 128, in support of this assertion.

³²⁴ Respondent cites Mr. Craft’s testimony at Tr. Vol. 2, pp. 211-12, in support of this assertion. Mr. Craft offered no data on arrests at Baby Dolls in 2003 at this point of the record.

Exhibit I include five drink solicitation offenses, on food service violation, 2 assaults, 2 vehicle burglaries, and one case of public urination.

(9) Logic would dictate that in the largest, most intense SOB/liquor area in the City that the police would be allocating general police resources, with or without Baby Dolls presence.

(10) Cowboy's has far more and more serious calls for service than Baby Dolls, and Baby Dolls' drain on the resources of the APD "is not burdensome standing alone and especially compared to a Cowboy's." In a footnote, Respondent repeats its contention that the protest is a fabrication motivated by politics: Cowboy's represents the image Arlington wishes to project (a honky-tonk night club that is a draw for conventioners & tourists) while Baby Dolls and other SOBs are not.

Respondent argues that it is no longer a SOB and that since April 2004 it has had no significant police or criminal activity. Respondent asserts the operation since April 2004 best shows how the business will be operated in the future. This is also the best evidence of its operation as a non-SOB as opposed to a SOB. Respondent says that the Commission's decision cannot be punitive or vindictive. The Staff replied to this argument insisting that § 11.64 (the mitigation statute) only applies only to cancellation or suspension actions, and not to the denial of an application. Respondent counters that § 11.64 because of (1) "the argument raised by Protestants and the Commission" that past conduct is a "good barometer of future conduct;" and (2) § 11.64(a)(8) is prospective. Hence, conduct after April 2004 is relevant.

Baby Dolls says that the allegations minors in possession and drink solicitation are "almost non-existent and in fact may be singular." Respondent offers no analysis to show why this is so, aside from asserting that none of the violations "were established to occurred under a criminal standard."

d. Analysis

Sgt. Depoma described 3 PI and 1 DWI arrests he made arising directly from activity at Baby Dolls. He testified he stopped an attempt at solicitation of prostitution at the club. Officer Paschall

described incidents of lewd behavior violating the no touch provisions of the Arlington DOB ordinance and drink solicitation by employees of Respondent. Both Sgt. Yantis and Officer Paschall told how no touch violations were committed in the presence of indifferent Baby Dolls managers. They described how Baby Dolls management schemed to avoid detection of no touch violations by posting look-outs for police and by stopping illegal activity only when it was about to be discovered by uniformed APD.

In 2003, six intoxicated drivers left Baby Dolls and were subsequently arrested. Two provided breath specimens in excess of the statutory minimum. Two other patrons were found asleep in their vehicles. In mid-and-late 2004, two other DWI's were attributed to Baby Dolls: one had a breath alcohol level of .213; the other was driving in excess of 100 miles per hour when he was stopped. In both years, APD made arrests for PI, assault, and burglary of a vehicle. In March of 2004, APD was called to investigate two incidents in which dancers had been drugged. In another incident that month, a dancer was suffering seizures after consuming beer and tequila. Tables 3 and 4, above, show that while Baby Dolls was by no means the "worst" club in Arlington, its record was not exemplary. Far from making excuses for Cowboy's or any other establishment, the record demonstrates that APD was enforcing the law at Baby Dolls, Cowboy's, and other nightclubs, and on Arlington's streets.

Turning to Respondent's ten-point argument, it is true that Baby Dolls is located in a beat and district with the heaviest populations of SOB's and liquor establishments in Arlington; that APD did not quantify the increase of cost of the additional resources; that Chief Bowman's concerns for Baby Dolls are the amount of "no touch" violations (which can no longer occur) and "alcohol related crime and assault offenses;" and, the 2003 offense reports include 5 drink solicitation offenses, 1 food service violation, 2 assaults, 2 vehicle burglaries, and 1 case of public urination.

The record does not demonstrate that APD still allocates the same resources to the beat after Baby Dolls stopped being a SOB; that the only increased police activity at Baby Dolls was vice operations for "no touch" violations; that either Sgt. Depoma or any other officer testified the police

resources allocated to Baby Dolls were constant for the 16 to 17 years Sgt. Depoma had been assigned to the district; that any officer testified the resources for the Baby Dolls area has been consistent and maintained even after Baby Dolls stopped being a SOB; that Baby Dolls has few or no “alcohol related crime and assault offenses;” or, that there were only three significant offenses at Baby Dolls in 2003 (two involving impurities to liquor).

Baby Dolls assertions that minors in possession and drink solicitation are “almost non-existent and in fact may be singular,” are incorrect. Three citations were written for minors in possession of alcohol, which were still pending as of the time of the hearing.³²⁵ One minor was found guilty of driving under the influence of alcohol.³²⁶ Officer Paschall testified to six instances of drink solicitations.

Respondent has plead that since it can no longer violate the no touch provision of the Arlington SOB ordinance and it has a “clean” administrative record since April 2004 its most recent conduct should be the determining factor in determining this case. Its “good” past should carry more weight than its “bad” past. As Agent Hamilton said, applicants tend to “clean up their act” and stall for time to build a clean administrative record when they are being protested.³²⁷

Mr. Craft claimed that Baby Dolls was not “cited for allowing or knowingly permitting drink solicitation to occur.” Section 104.01(4) of the Code, however, does not require Respondent’s actions to be knowing; Respondent may not “engage in or permit solicitation of any person to buy drinks for consumption [Respondent] or any of [its] employees.”³²⁸ Although Mr. Craft stated that signs warning the dancers against drink solicitation were posted in two locations

³²⁵ APD Exhibit M, citations 1D1996A & 1B1518B both issued to Baby Dolls’ dancers; APD Exhibit N, citation 1Y9164A, another Baby Dolls’ dancer as described by Officer Paschall.

³²⁶ APD Exhibit N, citation 2A3931A.

³²⁷ Tr. Vol. I, p. 77.

³²⁸ § 104.01(4) of the Code.

in the club it is common in Respondent's business for customers to buy dancers alcoholic [and non-alcoholic] drinks. As set out above, Respondent was assessed a 20 day suspension or \$3,000 civil penalty for the solicitation of a drink on April 21, 2002. The Staff has issued Respondent administrative notice P 181279 citing drink solicitation on June 30, 2002 and March 16, 2002; and Respondent has received a summary suspensions under Notice No. 190139 for solicitation on February 13, 2003.

Mr. Craft complained that the undercover vice officers did not point out to Baby Dolls management that dancers were violating the ordinance. He did not respond to the vice officers' explanation that "pointing out" touching violations would compromise their undercover status. He ignored Sgt. Depoma's testimony that he did point out violations to Baby Dolls management. Mr. Craft testified, "I felt like our only course is at that point we put on notice that it happened is to terminate that individual's contract. They don't work for us anymore." Mr. Craft is mistaken. APD's Exhibits M, N, and O reveal that dancer M. Torres was cited for 4 touching violations from 2002 to 2003,³²⁹ dancer T. Ford was cited for 3 touching violations from 2003 to 2004,³³⁰ and dancer R. Sikowski was cited for 3 touching violations from 2002 to 2004.³³¹ Sixteen other dancers had two touching violations each over the 2002 to 2004 period.³³² Two dancers were cited for both touching violations and possession of alcohol by a minor.³³³

³²⁹ 02/05/02, 07/02/03, 09/09/03 and 10/25/03. APD Exhibits M, N, & O.

³³⁰ 09/10/03, 01/07/04, and 02/19/04. *Id.*

³³¹ 06/20/02, 08/08/02, and 03/17/04. *Id.*

³³² L. Benitez, 02/05/03 and 05/03/03; V. Bolt, 02/08/03 and 03/26/03; S. Canales, 03/07/02 and 04/21/02; J. Gallagher, 02/13/03 and 05/03/03; K. Germany, 01/10/03 and 04/05/03; K. Gifford, 05/21/03 and 07/25/03; P. Herring, 05/03/02 and 07/21/02; M. Ingram, 02/19/04 and 05/29/04; M. Key, 03/25/03 and 04/05/03; J. Lawson, 07/17/02 and 04/30/03; S. Leone, 10/25/03 and 11/05/03; S. Montanez, 06/19/02 and 10/01/02; E. Quintanilla, 05/07/03 and 06/11/03; A. Somers, 03/07/03 and 06/03/03; M. Sugg, 11/19/03 and 12/12/03; K. Vongsouvahn, 07/17/02 and 09/03/02. *Id.*

³³³ C. Daugherty, 04/21/02 and 07/06/02, and J. Letchworth, 05/17/03 and 09/09/03. *Id.*

Chief Bowman, Lt. Hines, Sgt. Depoma, Sgt. Yantis, and Officer Paschall all agreed that if the same management, with the same attitude toward obeying the law, remained at this location with a liquor license, they expected to have continued trouble at Baby Dolls in the future. The record of this case amply supports their concern for the future.

The ALJ recommends that the Commission find that reasonable grounds exist to believe that the place or manner in which Respondent may conduct its 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.

V. SUMMARY

The ALJ makes the following recommendations to the Commission:

- The Commission conclude that there are not reasonable grounds to believe that manner in Respondent operated its business was a cause of Ms. Myres death.
- The Commission should not deny Respondent's renewal on the basis of Respondent's incorrect answer to Question 14.
- The Commission should determine whether the "violation history" issue be given dispositive effect in this case. If so, the ALJ recommends that the Commission find the "violation history" of Mr. Craft is an "unusual circumstance" justifying a finding that the manner in which Respondent will conduct its business in the future warrants refusal of the renewal application.
- The Commission should find Chief Bowman has recommended that the Commission deny Respondent renewal of its permits.
- The Commission should find Chief Bowman's recommendation to the Commission is entitled to due consideration under § 11.41(a) of the Code.
- The Commission should consider the Arlington SOB ordinance to be legal and constitutional.

- The Commission should find that Respondent was operating Baby Dolls as an SOB without a SOB license.
- The Commission should find that reasonable grounds exist to believe that the place or manner in which Respondent may conduct its 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 Commission should deny Respondent application to renew its permits.
- The parties to this contested case each filed at least two written pleadings as final argument raising numerous points and contentions some of which were based on a single brief record reference. To the extent that some point or points raised by any party are not addressed in this proposal, the ALJ hereby recommends that the Commission consider those points denied.

VI. FINDINGS OF FACT

1. Funfare, Inc. d/b/a Baby Dolls Saloon - Arlington (Respondent) holds mixed beverage permit MB-484796, mixed beverage late hours permit LB-484797, beverage cartage permit PE-484798, and caterer's permit CB -484799 (the permits).
2. Respondent operates a nightclub called Baby Dolls Saloon - Arlington (the club or Baby Dolls) located at 2300 West Division in Arlington, Tarrant County, Texas.
3. The Baby Dolls operated by Respondent opened in 1991. Baby Dolls was operating as a legal business in 1992 when Arlington's SOB ordinance took effect.
4. Under the ordinance, Baby Dolls was in a non-conforming location. The ordinance provided a three-year amortization period for non-conforming locations. The ordinance further allowed non-conforming locations a license under a "good neighbor" exemption. Respondent appeared before the appropriate board in 1995 through 2002 and received an exemption.
5. Respondent lost the December 2002 "good neighbor" hearing. The matter was appealed to Tarrant County District Court. A summary judgment was rendered in favor of the city in December 2003. Respondent filed a motion for new trial within 30 days of the entry of the summary judgment. Respondent did not appeal the trial court's decision and the matter became final.
6. Baby Dolls has not operated as an SOB since April 2004.
7. Steven W. Craft is Respondent's vice-president.

8. Respondent and a number of other SOBs located in Dallas, Fort Worth, and Houston share common officers, ownership, and management.
9. Mr. Craft:
 - a. is the secretary of TTNA Inc. d/b/a Baby Dolls Topless Saloon.
 - b. is the vice president of Millennium Restaurants Group Inc. d/b/a Cabaret Royale.
 - c. is the vice president of 2300 Club Inc. d/b/a Baby Dolls Saloon – Arlington.
 - d. is the vice president of Centerfolds Inc. d/b/a Chicas Locas.
 - e. is the vice president of T and N Inc. d/b/a Fare Arlington.
 - f. is the vice president of Respondent Funfare Inc. d/b/a Baby Dolls Saloon – Arlington.
 - g. is the president of SB Entertainment Inc. d/b/a Michael's International.
 - h. is the president of DB Entertainment Inc. d/b/a Baby Dolls – Fort Worth.
 - i. is the vice president of Duncan Birch Inc. d/b/a Michael's International.
 - j. is the vice president of MD II Entertainment Inc. d/b/a Chicas Locas.
 - k. is the vice president of Baby Dolls Topless Saloons Inc. d/b/a Baby Dolls – Fort Worth.
 - l. is the vice president of D. Burch Inc. d/b/a Baby Dolls Topless Saloon.

Mr. and Mrs. Myres Protest

10. Jennifer Myres worked as a dancer at Baby Dolls in December 2003.
11. Jennifer went to work at Baby Dolls the evening of December 3 and returned home the morning of December 4 at approximately 2:30 a.m.
12. Jennifer was intoxicated and yelling that she hated her job.
13. Jennifer drank a bottle of drain cleaner and died December 4, 2003.
14. No evidence was admitted linking Ms. Myres' suicide with any wrong committed by Respondent, its management, or employees.
15. Ms. Myres' suicide was an independent act.

The Question 14 Issue

16. Question 14 of the renewal application inquires:

Has the applicant violated or caused to be violated during the six-month period immediately preceding the date of this application any provision of the Texas Alcoholic Beverage Code or any Rule of the Commission which involves moral turpitude?

17. Respondent answered Question 14 “yes.”
18. Respondent’s Answer to Question 14 was incorrect.
19. Respondent answered Question 14 “yes” after being instructed to do so by TABC Staff.

The “Violation History” Issue

20. The corporations listed in Finding of Fact No. 9 are Respondent’s “sister corporations.”
21. The sister corporations have an aggregate violation history of 109 violations, 698 days of violations, one cancellation, and \$337,700 in penalties.
22. Mr. Craft, acting as a corporate officer, executed waivers and agreements of settlement for some of the sister corporations (2300 Club Inc. d/b/a Baby Dolls Saloon – Arlington; Baby Dolls Topless Saloons Inc. d/b/a Baby Dolls – Fort Worth; DB Entertainment Inc. d/b/a Baby Dolls – Fort Worth; D. Burch Inc. d/b/a Baby Dolls Topless Saloon; MD II Entertainment Inc. d/b/a Chicas Locas; SB Entertainment Inc. d/b/a Michael’s International; and Millennium Restaurants Group Inc. d/b/a Cabaret Royale) in the total of 439 days of suspensions, \$160,000 in fines, and one cancellation.
23. The permit belonging to Respondent’s predecessor at 2300 West Division Street, Arlington, Tarrant County, Texas, the sister corporation 2300 Club Inc. d/b/a Baby Dolls Saloon – Arlington, was “placed in suspense” on February 6, 2001.
24. Steve Craft, Eugene LeClaire, Bert Stair, and Duncan Burch were officers and/or shareholders of 2300 Club Inc. d/b/a Baby Dolls Saloon – Arlington.
25. Respondent’s permit was issued at the same location on February 7, 2001.
26. Steve Craft, Eugene LeClaire, Bert Stair, and Duncan Burch are officers and/or shareholders of Respondent.
27. The violations for which 2300 Club Inc. was cited (drink solicitations and intoxicated employee) took place April 21, 1995 and November 19, 1996. They were resolved by waiver orders signed by Mr. Craft on August 11, 1995 and April 9, 1997.
28. Respondent has been cited and penalized by TABC for drink solicitations, ordinance violation, sale to an intoxicated person, offenses involving a minor, and an intoxicated employee.

Recommendation of Public Official Issue

29. Dr. Theron L. Bowman is Arlington chief of police.
30. Chief Bowman initiated the APD protest of the Baby Dolls Arlington alcoholic beverage permit renewal on February 19, 2004.
31. Chief Bowman's protest was based upon the general welfare of health, peace and morals of the citizens of Arlington and the patrons of Respondent. In particular Chief Bowman determined that:
 - a. dancers at Baby Dolls were soliciting drinks from customers;
 - b. alcohol was being served to minors;
 - c. there were numerous violations of Arlington's no-touch ordinance; and
 - d. Baby Dolls was operating as sexually-oriented business (SOB) without a license.
32. Chief Bowman based his information upon reports, summaries, and briefings he received from the APD and asserted that in
 - a. January 1, 2004 to March 31, 2004:
 - i. 5 citations were issued for an employee touching customer while in state of nudity; and
 - ii. 5 citations were issued for Operating a SOB without a License.
 - b. January 1, 2003 to December 31, 2003:
 - i. 60 citations were issued for an employee touching customer while in state of nudity;
 - ii. 5 citations were issued for a customer touching employee who was in state of nudity; and,
 - iii. 1 citation was issued for an minor in possession of alcohol.
 - c. January 1, 2002 to December 31, 2002:
 - i. 47 citations were issued for an employee touching customer while in state of nudity;
 - ii. 2 citations were issued for an customer touching employee who was in state of nudity; and
 - iii. 2 citations were issued for a minor in possession.
33. Chief Bowman estimated that APD had expended 115 man hours, exclusive of vice investigations, in responding to the enforcement needs at Baby Dolls.
34. Baby Dolls lost its "good neighbor" exemption hearing in December 2002.
35. Baby Dolls appealed the loss of its "good neighbor" to the Tarrant County District Court.
36. During Respondent's appeal, the Arlington SOB ordinance allowed Baby Dolls to continue to operate as a SOB.
37. The district court overruled Respondent's appeal in December 2003.

38. After the beginning of 2004, Respondent was not granted a SOB license, but continued to act as a SOB and was cited by APD for that activity.
39. Respondent submitted a new request for a SOB license in 2004 which was not granted by Chief Bowman.
40. Calls for service to APD from Baby Dolls have decreased significantly since April 2004 due to Respondent ceasing to operate Baby Dolls as a SOB.
41. In 2002, Respondent's dancers were cited for 46 touching violations, one customer was cited for touching a dancer, and two minors were cited for possession of alcohol.
42. In 2003, Baby Dolls dancers were cited for 65 touching violations, six customers were cited for touching a dancer, and one minor was cited for possession of alcohol.
43. In 2004, Baby Dolls dancers were cited for 10 touching violations.

Use Of Police Resources Issue

44. In 2003, 5 DWIs and 17 PI were attributable to persons drinking at Baby Dolls.
45. In 2004, 2 DWIs and 2 PI were attributable to persons drinking at Baby Dolls.
46. In 2003 and 2004, APD made arrests for assaults and burglaries of a vehicle.
47. In March of 2004, APD was called to investigate two incidents in which Baby Dolls dancers had been drugged.
48. In March of 2004, a Baby Dolls dancer suffered seizures after consuming beer and tequila.
49. In 2002, the Arlington vice unit made approximately 3 visits a month to Baby Dolls and wrote about 4 citations a month.
50. In 2003, the Arlington vice unit made on average 4 visits a month issuing 5 citations a month.
51. The Arlington vice unit observed incidents of lewd behavior violating the no touch provisions of the Arlington SOB ordinance and drink solicitation by employees of Respondent.
52. The Arlington vice unit observed the incidents were committed in the presence of Respondent's on-site managers.

53. Respondent's management schemed to avoid detection of no touch violations by posting look-outs for police and by stopping illegal activity only when it was about to be discovered by uniformed APD.
54. If the same management remained at Respondent's location with a liquor license APD will have continued trouble at Baby Dolls in the future.

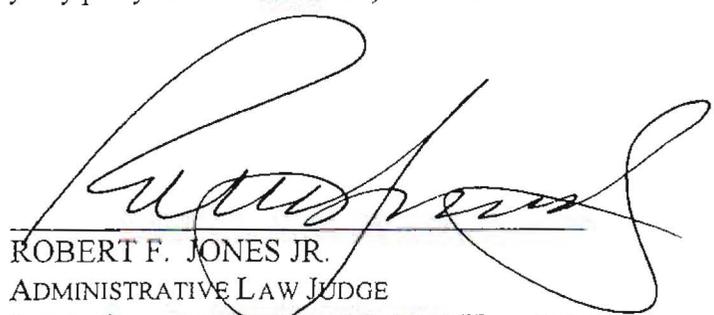
Procedural Findings

55. On or about January 19, 2004, Respondent filed an application to renew its permits.
56. On July 13, 2004, Staff informed Respondent that the Texas Alcoholic Beverage Commission (TABC) had received a protest against renewing the permits. The matter was referred to the State Office of Administrative Hearings (SOAH).
57. On May 6, 2005, Staff issued a notice of hearing notifying all parties that a hearing would be held on the application and informing the parties of the time, place, and nature of the hearing, of the legal authority and jurisdiction under which the hearing was to be held, giving reference to the particular sections of the statutes and rules involved, and including a short, plain statement of the matters asserted.
58. The case was set for hearing on June 6, 2005.
59. On May 27, 2005, Respondent filed a Motion for Continuance. The Motion was granted, and by agreement the case was reset for hearing on August 3, 2005.
60. Respondent filed a second and a third Motion for Continuance. Both were denied.
61. On August 3, 2005, a public hearing was convened before ALJ Robert F. Jones Jr., at 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. Staff was represented by Timothy E. Griffith, an attorney with the TABC Legal Division. Protestants David and Janet Myres appeared through their attorney of record Bart Behr. Protestant Theron Bowman and the APD appeared through Arlington Assistant City Attorneys Kathleen Weisskopf and Asem Eltiar. Respondent appeared through its Vice-President Steven W. Craft and its counsel, Charles Quaid and Stephen Shaw. The hearing ended on August 4, 2005.
62. The record was closed on January 31, 2006, after allowing Respondent and APD to file additional documentary evidence and allowing the parties to file final argument and replies.

VII. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code).
2. SOAH 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 2003).
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 2003).
4. There are not reasonable grounds to believe that manner in Respondent operated its business was a cause of Jennifer Myres death.
5. The “violation history” of Mr. Craft is an “unusual circumstance” justifying a finding that the manner in which Respondent will conduct its business in the future warrants refusal of the renewal application, pursuant to § 11.46(a)(8) of the Code.
6. Chief Theron Bowman of the APD has recommended that the Commission deny Respondent renewal of its permits.
7. Chief Bowman’s recommendation to the Commission is entitled to due consideration under § 11.41(a) of the Code.
8. Reasonable grounds exist to believe that the place or manner in which Respondent may conduct its 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, pursuant to § 11.46(a)(8) of the Code.
9. The Commission should deny Respondent application to renew its permits.
10. To the extent that any ground raised by any party are not addressed, the Commission should deny those grounds.

SIGNED April 3, 2006.



ROBERT F. JONES JR.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION
CASE: Funfare, Inc. d/b/a Baby Dolls Saloon - Arlington
DOCKET NUMBER: 458-05-6353
AGENCY CASE NO: 610870

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as of April 3, 2006