

DOCKET NO. 589698

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
NUTTY BROWN ENTERPRISES L.P. D/B/A NUTTY BROWN CAFE, Respondent	§	ALCOHOLIC
	§	
PERMIT NOS. RM670582, FB	§	
	§	
HAYS COUNTY, TEXAS (SOAH DOCKET NO. 458-10-1643)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 27th day of July, 2011, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Roy G. Scudday presiding. The hearing convened on May 4, 2011 and the SOAH record closed May 27, 2011. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on June 7, 2011. 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. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, determines that:

- (1) the typographical error in Finding of Fact No. 6 should be corrected to read:

Respondent has not been cited for any noise violations by either the TABC or the Hays County Sheriff's Department.

- (2) Finding of Fact No. 12 should be deleted for several reasons. First, it is not really a Finding of Fact but is instead a Conclusion of Law. Second, it is not an accurate statement of the law. Third, it is unnecessary to support the decision in this case.

With this correction to Finding of Fact No. 6 and the deletion of Finding of Fact No. 12, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

IT IS THEREFORE ORDERED that the application of Nutty Brown Enterprises L.P. d/b/a Nutty Brown Cafe for the renewal of its Mixed Beverage Restaurant Permit with a Food and Beverage Certificate be **GRANTED**.

This Order will become final and enforceable on the 22nd day of August, 2011, unless a Motion for Rehearing is filed **before** that date.

SIGNED this the 27th day of July, 2011, at Austin, Texas.



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 27th day of July, 2011.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Roy G. Scudday
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Texas Alcoholic Beverage Commission

Alisa Nessler, and Michael and Stephanie Sestak. Protestants Robert Stormberg and Linda Goldman appeared on their own behalf. TABC Staff Attorney Judith L. Kennison represented Staff, but Staff took no position on the protest. The record closed on May 27, 2011. Notice and jurisdiction are addressed more completely in the Findings of Fact and Conclusions of Law.

II. DISCUSSION

A. Summary of Evidence

Respondent operates a restaurant and bar that hosts live outdoor concerts up to three nights a week from March through November. The Cafe is located west of the Austin city limits on Highway 290 West. The concerns raised about the operation of the facility at the hearing relate almost exclusively to the nights on which there are outdoor concerts on the big stage. The outdoor concerts began in May 2006. Respondent has scheduled 46 concerts for the 2011 season, 26 on Wednesday nights, and 20 on Fridays, Saturdays and holidays. These are large events, featuring performers such as Reckless Kelly, Gretchen Wilson, Del Castillo and the Eggmen. These outdoor concerts are important to Respondent's business because of the high volume of beverage sales that occur on these evenings.

Protestants presented the testimony of several witnesses who find the noise on live concert nights objectionable. They complained, in particular, about the persistent booming sound of the bass music. Carmen Bolanos, Michael Sestak, Mike Overton, Linda Goldman, Owen Grad, Alisa Nessler, Anna Pena, Druese Lewis, Rudolf Bettelheim, Robert Stormberg, and Lisa Gahagan all testified that they found the noise level objectionable on outdoor concert nights.

Lisa Gahagan lived a quarter mile south of the Cafe for 20 years until she and her family moved on September 30, 2010. She stated that the music from the Cafe was so loud that her two sons could not sleep. She testified that if it had not been for the noise from the Cafe, the family would not have moved.

Carmen Bolanos lives about 1.7 miles from the Cafe in the Heritage Oaks subdivision. She testified that her three daughters had been awakened numerous times because of the noise from the Cafe, and once one of her daughters was in tears because she could not sleep. She stated that she went to Mr. Farr to seek having the music turned down but that he was rude and belligerent.

Michael Overton testified that he lives about a quarter mile from the Cafe, and the loud music has destroyed his enjoyment of live music and the summers. He stated that his young son cannot sleep during the concerts and is not ready for school the next day as a result.

Anna Pena testified that she and her husband have lived in their home which is about one mile from the Cafe for 25 years. She stated that on concert nights the bass is so strong in her bedroom that it causes a vibration in her chest and makes her heart beat irregularly. She, like most of the other protestant witnesses, denied that she wants to close the Cafe down. She simply wants the noise level on outdoor concert nights reduced to an acceptable level.

The Penas hired David Nelson, an acoustical consultant, to check the decibel level of the sound reaching locations north and west of the Cafe during a live concert on April 9, 2010. Mr. Nelson made observations at Owen Grad's house, Jaime Orina's house, Manuel Pena's house, and Michael Sestak's house. He testified that, based on his observations, the noise was definitely loud.

Mr. Nelson stated that the noise travels forward from the speakers which point toward the northwest and which also happen to line up with the prevailing winds in the area. He testified that how much sound is at low frequency and how much sound is at high frequency are things that influence how people react, and that the reaction to the noise would differ in the area based on weather, time of day, and topography. He stated that people who live in the lee of the hills in the area are less affected than those on top of the hills. On cross-examination, Mr. Nelson admitted that at none of the homes where he made the observations did the noise level ever measure over 75 decibels.

The Respondent countered with the testimony of Josh Leasure, a logistical engineering consultant experienced in sound measurements. Mr. Leasure had originally conducted sound measurements around the Cafe on November 6, 2009, when outside bands were playing, and determined that the sound from the Cafe was found to exceed certain noise disturbance criteria by substantial margins. After posting his findings on his website, Mr. Leasure was contacted by Mr. Farr and agreed to try to come up with some ideas to remediate the noise. As a result of his observations, the subwoofers which primarily pump out the bass were moved from the top of the stage to the ground to use the buildings and crowd to block some of the sound, the speakers were raised but pointed down at an extreme angle toward the crowd, and the sound mixer board was moved closer to the stage to be more exposed to the noise. Mr. Leasure testified that he determined that installing a noise wall would not be beneficial because it could not be placed close enough to the stage to be effective. He stated that the last time he measured the noise at the property line it was in the low 70 decibels, or about a 10-decibel decrease in sound from his prior measurements.

Respondent presented the testimony of Kevin Aston, Rebecca Haden, Julie Harrington, and Herman L. Wilkins who are all residents in the affected area who did not find the noise level objectionable on outdoor concert nights. In addition, in sign-in sheets from the public at the hearings, 93 persons registered in support of the renewal and six spoke in favor of it while 11 registered as opposed to the renewal and three spoke in opposition.

Mike Farr, the operator of the Cafe, also testified on the Respondent's behalf. In addition to the background information regarding the nature and location of the Cafe, Mr. Farr testified that the Cafe regularly hosts charitable events on behalf of entities such as the Burke Foundation for Youth, the Dripping Springs High School Booster Club, and the Dripping Springs Youth Soccer Association, as well as hosting children's concerts. Mr. Farr testified that the Cafe has never been cited by any authority for excessive noise and that it desires to be a good neighbor to area residents. Toward this end, he stated that he has committed to getting the noise level down to 70 decibels at the property line. He testified that he has placed noise limits on the bands that perform and several bands have refused to come back as a result.

Mr. Farr testified that the outdoor stage is used for concerts on Fridays and Saturdays during the summer, usually between 30 and 40 concerts. He stated that a 26 night KVET music series was added for Wednesday nights from 7 to 10 p.m. (the weekend shows run until 11 p.m.), many of which will be acoustic shows. Mr. Farr stated that he limits the hours of those concerts in order to be a good neighbor and that he did not want to expand the shows to later times to try to make up for the income that would be lost if the permit were not renewed.

Thomas Smith owns a company that provides audio, lights, and staging to concert events. He testified that before each show at the Cafe, he checks the sound level at the property line and has the sound board operator make any noise level adjustments necessary to attain the appropriate sound levels, which are in the low 70's.

Chris Cobler is the general manager of the Cafe. He testified that he ensures that the sound men for each band know the rules regarding noise levels and takes noise measurements from eight different points around the property every 30 minutes during a concert. He stated that if the noise ever starts to get over 75 decibels at the property line, he contacts the sound engineer and tells him to turn the noise level down.

Mark Gohlke is an agent of the Commission. He testified that, although he has received noise complaints about the music from the Cafe, he has never issued a citation or warning to the Cafe.

B. The Legal Standard

The sole basis raised for the denial of the Respondent's renewal in the Notice of Hearing is for violation of Texas Alcoholic Beverage Code (Code)§ 11.46(a)(8), which provides as follows:

- (a) The commission or administrator may refuse to issue an original or renewal permit with or without a hearing if it has reasonable grounds to believe and finds that any of the following circumstances exists:

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

Code § 11.61(b)(7) which is also cited in the Notice of Hearing is not applicable to this case as it only regards the cancellation or suspension of permits, not the renewal of permits.

The Commission rule at 16 TEX. ADMIN. CODE (TAC) § 35.31(b) provides that a permittee violates Code § 11.46(a)(8) if it commits “(11) any disorderly conduct or related offenses described in Chapter 42 of the Texas Penal Code.” Section 42.01 of the Penal Code pertaining to disorderly conduct provides in part:

(a) A person commits an offense if he intentionally or knowingly: . . . (5) makes unreasonable noise in a public place . . . or in or near a private residence that he has no right to occupy. . .

(c) For purposes of this section: (1) an act is deemed to occur in a public place or near a private residence if it produces its offensive or proscribed consequences in the public place or near a private residence; and (2) a noise is presumed to be unreasonable if the noise exceeds a decibel level of 85 after the person making the noise receives notice from a magistrate or peace officer that the noise is a public nuisance.

The primary basis asserted by Protestants for Respondent’s alleged violation of Code § 11.46(a)(8) is the noise issue. The only statutory provision specifically regarding noise is found in the General Criminal Provisions chapter at Code § 101.62, which provides as follows:

OFFENSIVE NOISE ON PREMISES. No licensee or permittee, on premises under his control, may maintain or permit a radio, television, amplifier, piano, phonograph, music machine, orchestra, band, singer, speaker, entertainer, or other device or person that produces, amplifies, or projects music or other sound that is loud, vociferous, vulgar, indecent, lewd, or otherwise offensive to persons on or near the licensed premises.

C. Analysis

The statutory provisions pertaining to the amount and type of sound that may permissibly escape a licensed premises are rather broad and highly subjective. Basically they provide that the sound level must not be unreasonable. The 85 decibels criminal standard is the only objective benchmark provided by the statutes, and is the only standard that the Commission has recognized in its rule. Inasmuch as the Notice of Hearing does not cite Code § 101.62 as the basis for the protest, its provisions are not directly applicable to this case.

As argued by Respondent, the only issue raised in this hearing is whether the noise from the Cafe is contrary to the public peace. From the objective standard set forth in the rule and Penal Code provision, there is no violation because the sound has not been shown to have exceeded the 85-decibel level. In fact, the evidence shows that the levels at the property line of the Cafe are now in the low 70s. As a result, the issue must be looked at from the subjective standard, which would include a consideration of the factors set forth in Code § 101.62.

The ALJ acknowledges the very real problems caused by the outdoor performances on the big stage that cause distress for some of the neighboring residents--the disruption of sleep, the vibrations from the low frequency pounding of the bass, the interference with the enjoyment of the outside areas--all of which could reasonably be expected to be offensive to them. However, the ALJ does not believe the situation rises to a level that warrants denial of the renewal application on the basis that it is a violation of the public peace.

The evidence shows that Respondent has made reasonable efforts to ameliorate the noise--placing restrictions on the bands, limiting the concert hours, trying different equipment arrangement, and constantly monitoring the noise levels. Respondent has had no enforcement actions against it by either the TABC or the Hays County Sheriff's Department. The outdoor concerts provide a public entertainment forum that is both popular in the area and profitable to the Respondent. They occur three nights a week in the summer months and are only, based on the registrations, disturbing to a small number of residents. Clearly it would be hard for some people in the vicinity to sleep while an

outdoor concert was playing, particularly with the pounding bass beat, but the noise levels of these events appear to be generally reasonable for what they are--popular outdoor concerts.

The ALJ finds that the sound from the outdoor concerts does not violate the 85 decibel presumptive criminal standard for unreasonable noise. While both sound consultants who testified were knowledgeable and credible witnesses, Mr. Leasure's testimony that the noise level has substantially improved and the level of sound off the Respondent's property has consistently been below the 75 decibel level carries considerable weight.

As addressed above, the standard pertaining to noise level is subjective. The bass level, in particular, has been a source of irritation to neighboring residents. The ALJ in no way seeks to minimize the distress honestly felt by the Protestants and their families as was shown by their testimony. However, their individual discomfort is not sufficient to constitute a violation regarding the public peace, which is the only standard at issue in this proceeding. The ALJ does suggest that the music from the licensed premises should continue to be monitored on outdoor concert nights and limited to 75 decibels at the property line. With these limitations, the ALJ recommends that the renewal application be granted.

III. FINDINGS OF FACT

1. Manuel and Anna Pena and other concerned individuals protested the renewal application filed by Nutty Brown Enterprises L.P. d/b/a Nutty Brown Cafe (Respondent or Cafe), with the Texas Alcoholic Beverage Commission (TABC or Commission). The Cafe is located west of the Austin city limits on Highway 290.
2. TABC's staff sent notice of hearing concerning the protest to the Respondents and Protestants on January 6, 2010. The notice included the time, date, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
3. The hearing was held on May 4 and 10, 2011, in Austin, Texas. Respondent, Protestants, and Staff were represented at the hearing.

4. Respondent operates a restaurant and bar that, since May 2006, hosts outdoor concerts on its big stage. Respondent generally has from 20 to 30 such concerts from March through November, and has scheduled 46 concerts for the 2011 season. These consist of 26 concerts on Wednesday nights, and 20 on Fridays, Saturdays and holidays. The Wednesday night concerts run from 7 to 10 p.m. while the weekend shows run until 11 p.m.
5. The sound from the outdoor concerts is often audible and irritating to some area residents, particularly those who live northwest of the Cafe. The level of the bass music is the most consistent source of irritation.
6. Respondent has not been cited for any noise violations by either the TACB or the Hays County Sheriff's Department.
7. After being criticized for excessive noise levels on November 6, 2009, in a website blog by Josh Leasure, a logistical engineering consultant experienced in sound measurements, Mike Farr, operator of Respondent, contacted Mr. Leasure to try to come up with some ideas to remediate the noise.
8. As a result of Mr. Leasure's observations, the subwoofers which primarily pump out the bass were moved from the top of the stage to the ground to use the buildings and crowd to block some of the sound, the speakers were raised but pointed down at an extreme angle toward the crowd, and the sound mixer board was moved closer to the stage to be more exposed to the noise.
9. Installing a noise wall would not be beneficial because it could not be placed close enough to the stage to be effective.
10. The level of sound at the property line of the licensed premises is currently below 75 decibels on outdoor concert nights.
11. Respondent monitors the decibel level of the music during each live performance and requires the bands to comply with Respondent's noise restrictions limiting the sound levels to 75 decibels. Several bands have refused to return to the venue because of the noise restrictions.
12. In order to comply with the statutory requirements prohibiting loud and noisy establishments, music from the licensed premises must be limited to 85 decibels at the property line of the licensed premises.

IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this case. TEX. ALCO. BEV. CODE §§ 5.31, 5.33, 5.35, and 11.61.

2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law. TEX. ALCO. BEV. CODE § 5.43 and TEX. GOV'T CODE ANN. §§ 2003.021(b).
3. Proper and timely notice of the hearing was provided as required in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the Findings of Fact and Conclusion of Law, the manner in which the Respondent operates the licensed premises was not shown to be detrimental to the public peace in violation of TEX. ALCO. BEV. CODE §11.46(a)(8).
5. The Applicant's permits should be renewed with the provision that the music from the licensed premises should continue to be monitored on outdoor concert nights and limited to 75 decibels at the property line.

SIGNED June 7, 2011.



ROY G. SCUDDAY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS