

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

RECEIVED

JUL 07 2011

**TABC HOUSTON
LEGAL**

June 30, 2011

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

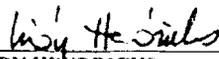
**RE: Docket No. 458-11-3334 Texas Alcoholic Beverage Commission vs. L & J
Food Services, Inc. d/b/a Smokin J's**

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,



LINDY HENDRICKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

LH/mr
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Ramona Perry, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W 20th Street, Suite 600, Houston, TX 77008- **VIA REGULAR MAIL** (with Certified Evidentiary Record and 1 hearing CD)
Emily Helm, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**
Bryan Samuelson, Attorney At Law, 5433 Westheimer Road, Suite 700, Houston, Texas 77056 -**VIA REGULAR MAIL**
Vanson Truong, Protestant, 531 Derbyshire, Houston, Texas 77034 - **VIA REGULAR MAIL**

2020 North Loop West Suite 111 Houston, Texas 77018
713.957.0010 (Telephone) 713.812.1001 (Fax)
www.soah.state.tx.us

II. DISCUSSION

A. Applicable Law

The sole basis raised for the denial of Respondent's renewal in the Notice of Hearing is for violation of Texas Alcoholic Beverage Code (Code) Section 11.46(a)(8), which provides the Commission or Administrator may refuse to issue an original or renewal application if it finds that the place or manner in which Respondent conducts 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.

B. Summary of Evidence

Scott Burton is an agent of the Commission. He testified that there were two calls for service for burglary and alarm to the licensed premises in the last two years. Agent Burton stated that Mr. Truong placed 28 calls to the Houston Police Department (HPD), complaining of loud noise from Smokin J's. These calls resulted in two citations for disorderly conduct, the adjudication of which is still pending.

Vanson Truong testified that he has lived in his house, located behind Smokin J's, since 1992. He stated did not have any problems with the previous owner. According to Mr. Truong, the noise problem has become progressively worse the last two years with the change in ownership. Mr. Truong testified he can hear the bass from live bands, acoustic guitars, and karaoke. The bass causes his walls to vibrate and awakens him and his elderly father. He testified that on May 5, 2010, the metal-spring back door was left wide open and the noise was audible from his house. He also testified that on December 23, 2010, loud music was being played between 2:00 and 2:30 a.m.

Mr. Truong further complained about the noise created by someone power-washing the building between 2 and 5:30 a.m. He provided a copy of the city ordinance and believes the noise from Smokin J's violates the ordinance. He also attached a petition signed by five residents who

protest Smokin J's. Mr. Truong does not believe Respondent will change his manner of operation because he believes the noise is only minimized when officers are investigating. He is concerned that Respondent will continue to operate as usual, and Respondent does not appear to make a genuine effort to reduce noise because it can still be heard in his house.

Deborah Brown is a neighbor of Mr. Truong and lives behind Smokin J's. She stated at one point she could hear patrons talking or playing their car radios in the alleyway behind Smokin J's. Ms. Brown testified she does not hear music from the band. She testified that when she complained to the bar about the overflowed parking in the alleyway, the problem was resolved. She spoke to the bar a second time when someone knocked over boards in her fence. Ms. Brown felt the problem was resolved because it never occurred again. The third time she went to the bar was to accompany Mr. Truong's father who complained about noise. A female bartender told them to call the police. She believed that was the resolution to the noise problem. Ms. Brown testified that after that conversation, the protest was initiated.

Mary Ann Smith testified that the changes to the bar have negatively altered the character of the neighborhood. She moved out of the neighborhood six months ago.

Paul Brown is the owner of Smokin J's. He stated that the bar has been there since 1968. He purchased the business on May 1, 2010. The bar is located next door to a convenience store that is open from 8 to 12:00 a.m. The bar hosts live bands on Saturday nights with approximately 80 to 100 patrons. Mr. Brown has met HPD officers when they responded to calls for service. Of the calls for service, Mr. Brown was told on three occasions to lower the volume. In response to the complaints of noise, Mr. Brown purchased a decibel meter. He checks the volume about a half-hour after the band begins and has adjusted their equipment. A measurement is taken behind the building, along the fence line. Mr. Brown offered a journal in which he recorded the decibel readings. The City ordinance provides a maximum permissible sound level of 68 decibels. Mr. Brown testified that the highest reading registered was 64 decibels. He stated that if the noise is over 60 decibels at the property line, he tells the band to reduce their volume. Bands are told to be aware of sound levels

and to turn the bass all the way down. He testified his business is in compliance with TABC statutes and the city ordinance.

Mr. Brown said he has never met or talked to Protestant until the hearing. He stated he is willing to work with Protestant to be a good neighbor. Additionally, Mr. Brown offered to reduce other possible sources of noise by not taking the garbage out at night or using the metal-spring door except for emergency. He is also willing to investigate the cost of sound-proofing the empty storage area, another possible escape for noise. As for the noise from the power-washing, Mr. Brown testified that he had nothing to do with power-washing the building, he is only a tenant, and the landlord probably contracted the work.

III. ANALYSIS

The primary basis asserted by Protestant for Respondent's alleged violation of Code Section 11.46(a)(8) is the noise issue. A violation of the city ordinance may be a violation of Section 11.46(a)(8). However, such is not alleged here, nor have the municipal citations been adjudicated. Even then, a violation of the ordinance or Code Section 101.62¹ would provide Respondent an opportunity to show compliance or, alternatively, serve a small suspension or pay a civil penalty.² Inasmuch as the Notice of Hearing does not allege a violation of Code Section 101.62 or city ordinance, its provisions are not directly applicable to this case. However, as presented by Protestant, the city ordinance does provide an objective standard of 68 decibels for a nonresidential property.³ Borrowing from the objective standard set out in the city ordinance, there is no violation because the sound has not been shown to have exceeded the 68-decibel level. In fact, the evidence shows the sound levels at the property line of the licensed premises have not exceeded 64 decibels. Respondent further requires its bands to turn the bass all the way down and to reduce the volume if the sound level exceeds 60 decibels.

¹ Code Subchapter D. Miscellaneous Offenses, §101.62 – Offensive Noise on Premises.

² TABC Rule 34.2 provides a 3 to 5 day suspension or civil penalty of \$300 per day for a violation of Code §101.62 or violation of city codes.

³ City Ordinance 30-6. Maximum permissible sound levels. (a)(2) Nonresidential property: 68 dB(A) at all times.

The ALJ then examines the issue from a subjective standard. The Code provides that a Respondent may not operate in a manner that warrants refusal of a permit based on the general welfare, health, peace, morals, and safety of the people. Under this subjective standard, the ALJ acknowledges that the bass from live music or karaoke can cause vibrations that can disrupt sleep and quiet enjoyment. However, the ALJ does not believe the situation rises to a level that warrants denial of the renewal application on that basis for several reasons.

First, the bar shares a common address with another alcohol-permitted business. Only two calls for service were for Respondent's suite C-E. Mr. Brown has only had the bar for one year. Respondent has had no enforcement actions against it by TABC. The protest investigation did not reveal any prior complaints for noise, the protest being the first.

Second, the petition provided the names of five additional people but does not indicate where they live in relation to the bar. The petition requested that loud music be banned unless the bar installed soundproofing. Respondent is willing to examine the cost of soundproofing the empty storage area and to change the time when garbage is dumped to prevent further noise. In the meantime, Respondent is requiring bands to comply with his restrictions limiting the sound levels to below 60 decibels. The petition requested the rear metal-spring door be closed at all times. Respondent has offered to keep the metal-spring door closed except for emergency-use. The petition sought to prohibit the use of rear parking by patrons. Ms. Brown testified she spoke with the bar about the overflow parking in the alley and the problem was resolved. The petition sought to fine Respondent for violation of the city ordinance. There is no allegation or final adjudication of a city code violation that would warrant a suspension or civil penalty under the Code.

While noise cannot be completely eliminated from a venue that offers live performances, the evidence shows Respondent is willing to work with its neighbors and make reasonable efforts to reduce the sound levels. Respondent demonstrates a desire to work and have open communications with his neighbors to address their concerns. Ms. Brown felt that her complaints were resolved when she brought them to the bar's attention. The evidence shows Mr. Truong and Ms. Brown live behind Smokin J's, but only Mr. Truong complained about the noise from the band. A few specific

incidents from an individual do not rise to the level to warrant denial based on the general welfare, health, and peace of the people in the community. At this time, the evidence is insufficient to show the manner in which Respondent operates warrants refusal of his renewal application. Therefore, the ALJ recommends his renewal application be granted.

IV. FINDINGS OF FACT

1. L & J Food Services, Inc. d/b/a Smokin J's (Respondent/Smokin J's) has filed a renewal application with the Texas Alcoholic Beverage Commission (TABC) for its mixed beverage permit MB617590 and mixed beverage late hours permit LB, for premises located at 550 FM 1959, Suite C-E, Houston, Harris County, Texas.
2. Protest to the application was filed by Vanson Truong based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency.
3. A Notice of Hearing dated February 18, 2011, was issued by TABC Staff notifying all parties that a hearing would be held on the renewal application and informing the parties of the time, place, and nature of the hearing.
4. On May 13, 2011, a hearing began before ALJ Lindy Hendricks in Houston, Texas. TABC Staff appeared at the hearing through its Staff Attorney Ramona Perry. Respondent appeared and was represented by attorney Bryan Samuelson. Vanson Truong appeared. The record closed on May 13, 2011.
5. Respondent has had no enforcement actions against it by TABC.
6. After receiving complaints of noise, Respondent purchased a decibel meter to measure sound levels.
7. The level of sound at the property line of the licensed premises below 64 decibels.
8. Respondent monitors the decibel level of the music during live performances and requires the bands to comply with Respondent's noise restrictions, limiting the sound levels to below 60 decibels.
9. Respondent has not been found in violation of any city ordinance on permissible sound levels.
10. Respondent is willing to work with his neighbors and offered to reduce noise by not dumping trash at night, limiting the use of the metal-spring door, and investigating the cost of sound-proofing an area in the back of the business, nearest the neighbors.

VI. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5, 11, 28, and 29, and §§ 6.01 and 11.46(a)(8). TEX. ALCO. BEV. CODE ANN. § 1.01 *et seq.*
2. SOAH has jurisdiction over all matters related to conducting 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.
3. Proper and timely notice of the hearing was provided to all parties pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE § 155.401.
4. There was insufficient evidence to demonstrate that renewal of the application would adversely affect the general welfare, health, peace, morals or safety of the people or violate the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).
5. Respondent's renewal application for its mixed beverage permit and mixed beverage late hours permit for the premises located at 550 FM 1959, Suite C-E, Houston, Harris County, Texas, should be granted.

SIGNED June 30, 2011.



LINDY HENDRICKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

With this correction, I incorporate the Findings of Fact and Conclusions of Law that are contained in the Proposal for Decision 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.

THEREFORE, IT IS ORDERED that the protest is denied and the application of L & J Food Services, Inc. d/b/a Smokin J's for renewal of Mixed Beverage Permit No. MB617590 and the accompanying Mixed Beverage Late Hours Permit is **GRANTED**.

This Order will become final and enforceable on the 21st day of November, 2011, unless a Motion for Rehearing is filed **BEFORE** that date.

SIGNED this the 28th day of October, 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 28th day of October, 2011.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Lindy Hendricks
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 N Loop West, Ste. 111
Houston, TX 77018
VIA FACSIMILE: (512) 322-0474

L & J Food Services, Inc.
d/b/a Smokin J's
RESPONDENT
550 FM 1959 Ste. C-E
Houston, TX 77573
VIA REGULAR MAIL

Bryan Samuelson
ATTORNEY FOR RESPONDENT
5433 Westheimer Rd., Ste. 700
Houston, TX 77056
VIA REGULAR MAIL
AND VIA FACSIMILE: (832) 864-0217

Vanson Truong
PROTESTANT
531 Derbyshire
Houston, Texas 77034
VIA REGULAR MAIL

Ramona Perry
ATTORNEY FOR PETITIONER
TABC Legal Division
Ramona.Perry@TABC.STATE.TX.US
VIA ELECTRONIC MAIL