

DOCKET NO. 607237

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
BARBARA PITTS AND CARLA HARDEN, Protestants	§	
	§	
	§	
VS.	§	
	§	
	§	
LONESOME SPUR LLC, D/B/A LONESOME SPUR/MULE BARN SPORTS BAR & GRILL, Respondent/Applicant	§	ALCOHOLIC
	§	
	§	
PERMIT MB736613, LB, PE, AND FB	§	
	§	
	§	
DENTON COUNTY, TEXAS (SOAH DOCKET NO. 458-12-4817)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 28th day of August, 2013, 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 Monica Garza presiding. The hearing convened on June 29, 2012 and the SOAH record closed on January 31, 2013. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on March 29, 2013. 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. No exceptions were filed.

After review and due consideration of the Proposal for Decision, 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 Fact 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 Respondent's application for renewal of the above permits and certificate be **GRANTED**.

This Order will become **final and enforceable** on the 18th day of September, 2013, **unless a Motion for Rehearing is filed by the 17th day of September, 2013.**

SIGNED this the 28th day of August, 2013, at Austin, Texas.



Sherry K-Cook, 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 August, 2013.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Monica Garza
ADMINISTRATIVE LAW JUDGE
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State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

March 29, 2013

RECEIVED

APR 01 2013

**TABC HOUSTON
LEGAL**

Sherry Cook
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

RE: SOAH Docket No. 458-12-4817; TABC Case No. 607237 Texas Alcoholic Beverage Commission, Barbara Pitts and Carla Hardeman vs. Lonesome Spur LLC D/B/A Lonesome Spur/Mule Barn Sports Bar & Grill

Dear Ms. Cook:

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 § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in black ink that reads "Monica Garza".

MONICA GARZA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

[MG/LL]
Enclosure

xc: ✓ Lisa Crissman, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA REGULAR MAIL
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA REGULAR MAIL
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA REGULAR MAIL (with Certified Evidentiary Record and 1 Hearing CD/s)
✓ Mark D. Threadgill, Attorney For Respondent, 6999 East Business I-20, Odessa, TX 79762 - VIA REGULAR MAIL
✓ Bruce E. Turner, Attorney at Law for Carla Hardeman, 1603 LBJ Freeway, Suite 280, Dallas, TX 75234 - VIA REGULAR MAIL
Barbara Pitts, Protestant, P. O. Box 333, Justin, TX 76247 - VIA REGULAR MAIL

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protest. The parties were given additional time to file written closing arguments, and the record closed on January 31, 2013. Notice and jurisdiction are addressed more completely in the Findings of Fact and Conclusions of Law.

II. LEGAL STANDARDS

The sole basis raised for the denial of Respondent's renewal in the Notice of Hearing is for violation of Texas Alcoholic Beverage 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.

Further, 16 Texas Administrative Code § 35.31(b) provides that a permittee violates Texas Alcoholic Beverage Code § 11.46(a)(8) if he commits "(11) any disorderly conduct or related offenses described in Chapter 42 of the Texas Penal Code." Section 42.01 of the Texas 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.

III. EVIDENCE

Respondent operates a sports bar and grill that routinely hosts indoor entertainment, including live bands. Respondent's premises are located in a portion of a large metal warehouse. The location lies across the street from highly trafficked railroad tracks. There are six private residences within 300 feet of the premises, including the one belonging to Protestant Pitts. Protestant Hardeman's residence is approximately 479 feet from the premises. Protestants raised concerns regarding the volume of noise, especially the booming of the bass music, created by live bands. Protestant Pitts and her spouse both suffer from medical conditions. She testified that the noise level at Respondent's premises interferes with both her and her husband's ability to sleep. Protestant Hardeman also testified that the bass noise coming from Respondent's premises is excessive.

According to Protestant Pitts, she began complaining about the noise from Respondent's premises in December 2009. Citing concerns regarding the noise, she filed a protest in 2010 when Respondent filed its original application for a Late Hours Permit. Based on her communications with Respondent wherein she felt there was a verbal agreement regarding the noise levels, Protestant Pitts later withdrew that protest. At the hearing, Protestant Pitts testified that she continued to experience problems with the noise level coming from the premises. Protestant Pitts also felt that the Justin Police Department had failed to take her noise complaints seriously, possibly due to the fact that Justin police officers worked off-duty for Respondent.

Numerous noise level readings regarding Respondent's premises are documented in the table below. These readings were contained in a report prepared by TABC Agent David Doggett. In the report summary, Agent Doggett concluded that most of the decibel readings were under the state limit for statutory violations.

Date	Agency	Location	'A' Frequency Weighted Decibel Reading ² (dBA)	'C' Frequency Weighted Decibel Reading ³ (dBC)
April 16, 2010	TABC	Pitts Residence	49	67
May 8, 2010	TABC	Mule Barn	No Reading	87
May 8, 2010	TABC	Pitts Residence	No Reading	78
February 20, 2010	Justin PD	Pitts Residence	53	69
February 27, 2010	Justin PD	Pitts Residence	50	70
March 13, 2010	Justin PD	Pitts Residence	51	69
March 20, 2010	Justin PD	Pitts Residence	53	70
April 3, 2010	Justin PD	Pitts Residence	52	67
April 9, 2010	Justin PD	Pitts Residence	55	75
April 10, 2011	Justin PD	Pitts Residence	60	77
June 18, 2011	TABC	Pitts Residence	* ⁴	*
July 6, 2011	TABC	Pitts Residence	*	*
July 8, 2011	TABC	Pitts Residence	59	75
July 8, 2011	TABC	Mule Barn	61	90
October 28, 2011	TABC	Pitts Residence	60	72
October 28, 2011	TABC	Mule Barn	68	90
October 28, 2011	TABC	Hardeman Residence	44	63
November 3, 2011	TABC	Pitts Residence	*	*
November 3, 2011	TABC	Hardeman Residence	*	*
November 6, 2011	TABC	Pitts Residence	55	78
November 6, 2011	TABC	Hardeman Residence	43	60

² The most widely used weighted decibel reading, dBA is used to represent the response of the human ear to loudness.

³ This frequency weighting has a wider frequency range than 'A' weighting.

⁴ No noticeable noise level.

November 6, 2011	TABC	Mule Barn	70	86
November 18, 2011	TABC	Pitts Residence	74	86

Agent Doggett testified regarding TABC's investigation of the protest and noise complaints. He stated that the current City of Justin noise ordinance mimics the state statute, which allows noise up to 85 decibels. When questioned about certain noise level readings in excess of 85 decibels, Agent Doggett testified that those levels would be a violation if taken at a residence; however, the levels would not be a violation if taken on Respondent's premises. Agent Doggett also testified that, at no time, were the readings sustained at the highest numbers. Agent Doggett was also questioned about the equipment used to measure noise levels, as well as the interpretation of the decibel readings. He testified that the equipment manual describes the "dBA" reading as the general noise level, the "dBA" reading should be relied upon in determining the noise level. Agent Doggett also testified that he has no way of knowing the accuracy of the equipment that was used in the tests.

In response to Protestant Pitts' noise complaints, Respondent secured the services of a sound barrier professional. Matt Kipp of Liberty Eco Seal Insulation testified that he assessed the sound insulation needs of Respondent and installed several inches of insulation on the doors and walls of the premises. He testified that the ceiling contained four inches of insulation that had been previously installed. According to Mr. Kipp, the installed insulation created a sound barrier that was capable of cutting the noise level by 50% or greater.

Dakon and Amy Doggett are Respondent's owners. Mr. Doggett testified that the live music stage is located near the front of the premises, further away from the residential area. According to an aerial map, there is also a warehouse separating the premises from the residential area. Mr. Doggett testified that he tries to keep the sound level under 70 decibels and that he utilizes a sound professional to monitor the indoor and outdoor noise levels.

IV. ANALYSIS

Protestants cite excessive noise created on Respondent's premises as a basis for denying Respondent's renewal application. In regard to "excessive noise," the 85-decibel criminal standard is the only objective benchmark provided by the statutes, and it is the only standard that TABC has recognized in its rule. The general prohibitions against unreasonable noise (Penal Code § 42.01) and place and manner (Alco. Bev. Code § 11.46(a)(8)) are clarified by the presumption that noise is unreasonable if it exceeds 85 decibels.

Numerous noise-level readings have been taken in the course of an ongoing dispute between Protestant Pitts and Respondent. Regarding the benchmark of 85 decibels, only five documented noise-level readings were in excess of 85 decibels. According to Agent Doggett's testimony, the only readings relevant to a noise violation would be readings taken at a residence as opposed to Respondent's premises. Of the five readings that were in excess of 85 decibels, only one reading was actually taken at a residence. That particular reading at Protestant Pitts' residence was an 86-decibel "dBC" reading that was not sustained. Further, according to Agent Doggett's testimony, the noise-level readings are of unknown accuracy. Finally, the manual accompanying the TABC-issued noise-level-reading equipment suggests that the "dBA" reading as opposed to the "dBC" reading should be used to determine the noise level. Given that standard, no documented noise-level readings, either at a residence or on Respondent's premises, were in excess of 85 decibels.

The ALJ acknowledges the distress for certain neighboring residents caused by the live band performances, including the disruption of sleep caused by the vibrations from the low frequency pounding of the bass. However, given the 85-decibel threshold, the ALJ cannot find that Respondent's noise levels are unreasonable. Given the legal framework, it seems that the legislature intended to balance the good of community health and peace against that of legitimate business interests and found the 85-decibel standard was an appropriate dividing line.

Based on the preceding analysis, the ALJ cannot find that Respondent's actions warrant a denial of the renewal application. Therefore, the ALJ recommends renewal of Respondent's permits.

V. FINDINGS OF FACT

1. Barbara Pitts and Carla Hardeman (Protestants) protested the renewal application filed by Lonesome Spur LLC d/b/a Lonesome Spur/Mule Barn Sports Bar & Grill (Respondent) with the Texas Alcoholic Beverage Commission (TABC).
2. TABC's Staff (Petitioner) sent notice of hearing concerning the protest to the Respondent and Protestants on February 29, 2012. 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 June 29, 2012 and January 15, 2013, in Fort Worth, Texas. Respondent, Protestants, and Petitioner were represented at the hearing. The record closed on January 31, 2013.
4. Respondent holds a Mixed Beverage Permit, Beverage Cartage Permit, Mixed Beverage Late Hours Permit, and Food and Beverage Certificate for the premises located at 218 Highway 156 South, Justin, Denton County, Texas.
5. Respondent operates a sports bar and grill that routinely hosts indoor entertainment, including live bands. The sound from the live entertainment is often audible and irritating to Protestants, especially Protestant Pitts, whose residence is located within 300 feet of the premises. The level of the bass music is the most consistent source of irritation.
6. In response to Protestants' noise concerns, both TABC and the Justin Police Department took numerous noise-level readings. Collectively, those readings demonstrate that the impact of Respondent's noise levels at Protestants' residences do not exceed the objective standard of 85 decibels.
7. In order to minimize any noise impact to nearby residents, Respondent has installed significant insulation to create a sound barrier.
8. Respondent also retains a sound professional to monitor the sound level during live performances.

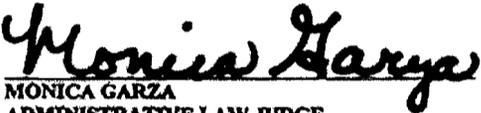
VI. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this case. Tex. Alco. Bev. Code §§ 5.31, 5.33, 5.35, and 11.46.
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 § 2003.021(b).

3. Proper and timely notice of the hearing was provided. Tex. Gov't Code §§ 2001.051 and 2001.052.
4. Respondent has not created unreasonable noise on the licensed premises. Tex. Admin. Code § 35.31(b) and Tex. Penal Code § 42.01.
5. The manner in which Respondent operates the licensed premises was not shown to be detrimental to the public peace. Tex. Alco. Bev. Code § 11.46(a)(8).
6. Respondent's permits should be renewed.

SIGNED March 29, 2013.


MONICA GARZA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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SERVICE LIST

AGENCY: Alcoholic Beverage Commission, Texas (TABC)
STYLE/CASE: LONESOME SPUR/ MULE BARN SPORTS BAR & GRILL
SOAH DOCKET NUMBER: 458-12-4817
REFERRING AGENCY CASE: 607237

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ MONICA GARZA**

REPRESENTATIVE / ADDRESS

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