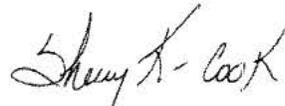


All motions, requests for entry of Proposed Findings of Fact and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied unless specifically adopted herein.

IT IS THEREFORE ORDERED that Respondent's renewal application for the above permits be **GRANTED**.

This Order will become **final and enforceable** on the 19th day of May, 2015, **unless a Motion for Rehearing is filed by the 18th day of May, 2015.**

SIGNED this the 23rd day of April, 2015, at Austin, Texas.



Sherry K-Cook, Executive Director
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 23rd day of April, 2015.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Craig R. Bennett
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
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RESPONDENT/APPLICANT
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There are no contested issues of notice or jurisdiction in this proceeding. Therefore, those matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

II. DISCUSSION AND ANALYSIS

A. The Issue Presented

Often, when Staff opposes the renewal of a permit, it is based upon past violations of the permittee or specific incidents of conduct attributable to the permittee. However, in this case, the opposition by Staff to the permit renewal is based upon the number of times between January 2011 and November 2012 that a driver was arrested for driving while intoxicated (DWI) and identified Respondent's business as a place the driver had been prior to being stopped and arrested. Essentially, Staff contends that Respondent's place of business is the source of a high number of DWI arrests and, as such, constitutes a nuisance and is contrary to the general welfare, health, peace, morals, and safety of the people of San Antonio.¹

In this case, no evidence has been offered showing any specific acts of wrongdoing by Respondent or its employees. Despite this, Staff contends that Respondent's permit should not be renewed because of the high association of DWI stops in connection with its premises. Staff relies on the "place or manner" and "common nuisance" provisions of the Texas Alcoholic Beverage Code, which are set out in Section B below.

Thus, the issue presented is whether Respondent's permit should not be renewed—even if there is no showing of wrongful conduct by or allowed by Respondent. Ultimately, the ALJ finds that Staff has failed to establish a sufficient basis for denying renewal of the permit. Therefore, the ALJ recommends that the permit be renewed.

¹ Although SAPD protested the renewal of the permit, it did not appear at the hearing or submit any closing arguments. Accordingly, the ALJ cannot discuss its position or arguments in this case and, thus, limits his discussion to Staff's and Respondent's arguments.

B. Applicable Law

Staff opposes Respondent's renewal application on the basis of Section 11.46(a)(8) and Chapter 81 of the Texas Alcoholic Beverage Code. Section 11.46(a)(8) provides that the Commission or administrator may refuse to issue an original or renewal permit if it has reasonable grounds to believe and finds that "the place or manner in which the Respondent may conduct his business warrants the refusal of a permit based on the general welfare, peace, morals, and safety of the people and on the public sense of decency." Chapter 81 provides that TABC may refuse to grant a renewal permit if a common nuisance exists on Respondent's premises. Specifically, Texas Alcoholic Beverage Code § 81.004 states that:

The commission, administrator, or county judge, as applicable, may refuse to issue an original or renewal permit, after notice and an opportunity for a hearing, if the commission, administrator, or county judge finds, that, at any time during the 12 months preceding the permit or license application, a common nuisance existed on the premises for which the permit or license is sought, regardless of whether the acts constituting the common nuisance were engaged in by the applicant or whether the applicant controlled the premises at the time the common nuisance existed.

"Common nuisance" is defined in Texas Civil Practice and Remedies Code § 125.0015 and Texas Alcoholic Beverage Code § 101.70. In particular, under those statutes, a common nuisance exists (1) when someone maintains a place to which persons habitually go to engage in any of a number of criminal activities, including various offenses involving drugs, gambling, prostitution, firearms, and engaging in organized criminal activity; or (2) at a place where alcoholic beverages are sold, bartered, manufactured, stored, possessed, or consumed in violation of the Alcoholic Beverage Code or under circumstances contrary to the purposes of the Alcoholic Beverage Code. So, TABC may choose not to renew a club's permit when a nuisance exists at the premises, even apart from any wrongdoing by the licensee.

In a protest hearing such as this, the burden is on the protesting parties to show by a preponderance of the evidence that the permit should not be renewed. So, it is Staff's burden to prove that the evidence, considered in light of the cited provisions, justifies non-renewal of the permit.

C. Evidence and Arguments²

1. Staff's Evidence and Arguments

At the outset, it is important to reiterate that this case does not involve any evidence of a particular violation or other wrongdoing by any employee or agent of Respondent. Rather, Staff bases its entire case on the accumulation of DWI stops and arrests of people who self-identified as being at Respondent's premises prior to being arrested. Staff contends that the sheer number of DWI arrests associated with Respondent's business warrants a denial of its permit renewal on the basis of the "place or manner" or "common nuisance" provisions cited above. As Staff has acknowledged, this is a case of first impression, as it has not previously relied on a high incidence of DWI stops and arrests as the basis for denial or non-renewal of a permit.

To support its position, Staff called as witnesses eight SAPD officers, who testified as to specific stops and arrests they made for DWI that involved drivers who identified that they had been drinking alcohol at Respondent's bar. Further, Staff offered approximately 70 SAPD police reports for DWI arrests between January 21, 2011, and November 28, 2012, that contained statements by the arrested persons that they had been at Respondent's bar prior to being arrested. Staff contends that the high number of DWI arrests associated with Respondent's business presents a drain on local police resources and a danger to the local community. Staff contends that renewal of Respondent's permit will place the public safety at risk and may result in serious car accidents or other harm to property.

Therefore, Staff argues that the permit should not be renewed, asserting that the place or manner in which Respondent conducts its business warrants refusal of the permit based on the general welfare, peace, morals, and safety of the people and on the public sense of decency. Alternately, Staff contends that Respondent's business constitutes a public nuisance and, therefore, non-renewal is justified on that ground.

² The ALJ's discussion of the parties' arguments and evidence is very brief, as the parties themselves did not present extended arguments. Staff's closing arguments were only three pages long, and Respondent's closing arguments were even shorter, at just over two pages. Similarly, the evidence, though voluminous, is repetitious and represents only one thing: a volume of DWI arrests in which Respondent's business was mentioned by the arrested person.

2. Respondent's Evidence and Arguments

Respondent offered documents showing the training and information it provides to its employees, as well as the testimony of (1) Clifford Duron, Respondent's head of security; (2) Salvatore Giannino, Respondent's General Manager; and (3) Robert Marbach, Respondent's principal owner. These witnesses testified that they work with SAPD to minimize DWIs and to comply with existing laws. They testified that Respondent has a policy of calling taxicabs for intoxicated drivers, for limiting alcohol to patrons who appear intoxicated, and for training employees on recognizing intoxicated persons. Further, these witnesses testified that Respondent has appropriate training information from TABC posted on the premises, and that all of Respondent's employees are certified as receiving seller training by TABC.

Respondent points out that many of the arrest reports relied upon by Staff do not indicate whether the arrested drivers actually drank alcohol at Respondent's business. Further, Respondent points out that the record contains no evidence at all demonstrating that any of the arrested persons were actually served alcohol by an employee of Respondent. As Respondent posits in its written closing arguments, even if the arrested person consumed alcohol at Respondent's business, the following questions remain unanswered:

1. Did an employee of The Falls serve that person alcohol? Or was it furnished by a friend?
2. Even if an employee of The Falls served alcohol to the arrested person, did that person show signs of intoxication in the presence of the employee who provided the alcohol?
3. Did the arrested person [drink] alcohol after leaving The Falls—either at a different location, or in his/her vehicle?

Respondent contends that Staff's evidence proves nothing about what actually happened or did not happen at Respondent's place of business. Respondent further contends that SAPD and Staff have conducted undercover operations at Respondent's business, but none of those operations has ever demonstrated that Respondent's employees served an intoxicated person. In fact, Respondent argues, Staff cannot show that Respondent has ever served an intoxicated

person or done anything in violation of the law in regard to any of the DWI arrests relied on by Staff in this case.

In the absence of evidence showing wrongdoing by Respondent or proving that the persons arrested for DWI became intoxicated at its business, Respondent asserts there is no basis for denying its renewal permit or otherwise canceling its existing permit.

D. ALJ's Analysis

As Staff has noted, this case presents an issue of first impression: namely, whether the volume of DWI arrests associated with a particular licensed establishment can be a sufficient basis for canceling or not renewing a permit. While the ALJ agrees that a high volume of DWI arrests associated with a particular bar could serve as an appropriate basis for taking away that bar's permit, the evidence in this case does not establish the necessary basis for doing so. More specifically, to revoke or deny a permit solely on the volume of DWI arrests, the ALJ believes the evidence should sufficiently demonstrate that the persons arrested for DWI became intoxicated at the licensee's premises, and the number of DWI arrests associated with the bar is disproportionately high for a licensed establishment. In this case, the evidence shows neither of these.

There are two statutory grounds on which Staff relies for its proposed non-renewal of Respondent's permit. First, Staff cites Texas Alcoholic Beverage Code § 11.46(a)(8) and contends that the place or manner in which the Respondent may conduct its business warrants the refusal of a permit based on the general welfare, peace, morals, and safety of the people and on the public sense of decency. This provision requires some showing that either the "place" of the business or the "manner" in which it is conducted would warrant denial. Thus, either the location must be inappropriate, or the manner of operation must be inappropriate. There is no evidence that there is something uniquely inappropriate about the place of Respondent's business, so the ALJ focuses only on the manner in which Respondent conducts its business.

Staff has presented no evidence of specific wrongdoing by Respondent in regard to the service of alcohol. There are no cited violations by Respondent for serving alcohol to intoxicated persons, and no evidence presented in this case that Respondent specifically did so in regard to any of the DWI arrests. There is no testimony of any arrested persons that they became intoxicated at Respondent's premises, nor testimony of any witnesses who observed any of the arrested persons become intoxicated at Respondent's premises. Rather, Staff wants an inference to be drawn that the number of DWI arrests where the arrested person identified being at Respondent's business must indicate wrongdoing by Respondent. But, the ALJ is unwilling to make such an inference on the evidence before him.

The evidence establishes that Respondent's licensed premises has a capacity for 650 patrons at one time, and has 10,000-15,000 customers per month. This translates to more than 100,000 visits by customers annually, or more than 200,000 customers in the period for which the DWI arrests were compiled. An occurrence of 70 DWI arrests over a period of two years may or may not be high for this volume of customers. Without evidence showing that such a level of arrests is high in proportion to the number of customers served, or even high in general, the ALJ cannot infer some wrongdoing in the manner Respondent conducts its business. In order to draw any inference from the number of DWI arrests, these arrests must be shown to be statistically significant in some meaningful way.³ But, there is no evidence to inform the ALJ whether 70 DWI arrests is a high number in general, or whether it is higher than would be expected for a business that serves the number of customers Respondent does. Without this context, the ALJ cannot say the manner in which Respondent conducts its business is contrary to the general welfare, peace, morals, and safety of the people or to the public sense of decency.

Moreover, even if the number of DWI arrests was disproportionately high, the evidence does not sufficiently establish that the arrested persons were intoxicated from drinking alcohol at Respondent's business. Consider, for example, the following arrest reports contained in the first part (*i.e.*, first notebook) of Staff's Exhibit 1:

³ In a sense, it is similar to the oft-quoted statement that a high percentage of car accidents occur within a few miles of a person's home. One could argue this shows some inherent danger in driving close to home, but in reality this statement just reflects the fact that a person does a disproportionately higher amount of driving close to home.

- Bates Stamp 0001: Arrested Person (AP) was found in possession of an alcoholic beverage container in his vehicle and admitted to drinking it prior to going to Respondent's business (thus, the evidence raises some question as to whether AP was intoxicated from drinking his own alcohol, and not that served by Respondent);
- Bates Stamp 00007: AP stated he was coming from his girlfriend's house; AP was in possession of Vicodin and marijuana (thus, the evidence raises some question as to whether AP was intoxicated not from alcohol served by Respondent, but rather by alcohol consumed at his girlfriend's house or by the use of legal or illegal drugs);
- Bates Stamp 00017: AP stated that he had been drinking at "The Bitter End" and at Respondent's bar (thus, the evidence raises some question as to whether AP was intoxicated from alcohol served by Respondent or from another licensed premises);
- Bates Stamp 00018: Witnesses identified the AP as a possible intoxicated driver "attempting to leave Roberto's Restaurant;" When stopped, the AP admitted to taking "Norco" and "Valium" (thus, the evidence raises some question as to whether AP was intoxicated from alcohol served by Respondent, or by alcohol served elsewhere—such as Roberto's Restaurant—or by the use of prescription drugs); and
- Bates Stamp 00020: AP and passenger stated they were coming from Coco Beach (a bar), and that they were at The Falls previously that night (thus, the evidence raises some question as to whether AP was intoxicated from alcohol served by Respondent or by alcohol obtained at Coco Beach).⁴

The five arrest reports listed above demonstrate the difficulty with associating Staff's evidence of DWI arrests with Respondent. Five of the 23 reports (*i.e.*, 22% of the reports) in the first notebook of Staff Ex. 1 reflect a complete inability to prove that the driver's impairment was from alcohol served by Respondent, as the arrested persons admitted to drinking alcoholic beverages at locations other than Respondent's bar, or admitted to using drugs. So, even assuming the arrested persons' hearsay statements of being at Respondent's bar are admissible for their truth, they often still do not establish any obvious wrongdoing by Respondent. Thus, the ALJ cannot say that the mere number of DWI arrests offered by Staff somehow shows anything improper about the manner in which Respondent conducts its business.

Staff also relies on Texas Alcoholic Beverage Code § 81.004 as a basis for non-renewal of Respondent's permit. That statute provides that TABC may choose to not renew a permit if a common nuisance existed at the premises at any time in the 12 months preceding the permit

⁴ Staff Ex. 1, Part 1.

application. As noted previously, a common nuisance exists (1) when someone maintains a place to which persons habitually go to engage in any of a number of criminal activities, including various offenses involving drugs, gambling, prostitution, firearms, and engaging in organized criminal activity; or (2) at a place where alcoholic beverages are sold, bartered, manufactured, stored, possessed, or consumed in violation of the Texas Alcoholic Beverage Code or under circumstances contrary to the purposes of the Texas Alcoholic Beverage Code. There is no requirement of wrongdoing by the licensee for revocation or non-renewal under Texas Alcoholic Beverage Code § 81.004. Rather, others' wrongdoing can be a sufficient basis.

However, the ALJ finds that the requirements for a common nuisance do not exist in this case. The definition of a common nuisance under Texas Civil Practice and Remedies Code § 125.0015 requires that one of the listed types of criminal wrongdoing be committed at the premises. Public intoxication and DWI are not among the listed offenses. Rather, the criminal offenses listed in the statute focus on matters such as prostitution, gambling, assault, pornography, and illegal drugs, among others. There is no evidence in this case that any of the listed criminal offenses have occurred at Respondent's business. Therefore, Staff has not shown that a common nuisance exists under Texas Civil Practice and Remedies Code § 125.0015.

The definition of common nuisance under Texas Alcoholic Beverage Code § 101.70 is broader, and encompasses any place where alcoholic beverages are sold, bartered, manufactured, stored, possessed, or consumed in violation of or contrary to the purposes of the Alcoholic Beverage Code. If the evidence sufficiently established that Respondent's business is where a disproportionately high number of persons arrested for DWI had become intoxicated, then Staff might be able to show that Respondent's business is a common nuisance under this definition. But, the evidence does not show this. As noted above, the evidence does not sufficiently establish that the persons arrested for DWI became intoxicated at Respondent's premises as a result of alcohol served by Respondent. The arrested persons' hearsay admissions that they were at Respondent's business are of dubious reliability. But, even accepting them at face value, they are still inadequate for two reasons: (1) many of them also indicate consumption of alcoholic beverages or drugs elsewhere; and (2) the volume of them has not been shown to be so disproportionately great as to constitute a nuisance.

Without such evidence, and in the absence of *any* specific evidence of wrongdoing by Respondent in the sale, storage, or consumption of alcohol, the ALJ cannot say that Respondent's premises is a place where alcoholic beverages are sold, bartered, manufactured, stored, possessed, or consumed in violation of the Alcoholic Beverage Code or contrary to the purposes of the Alcoholic Beverage Code.

Therefore, under the circumstances, the ALJ finds that Staff has not shown an adequate ground for denying a permit to Respondent. Because there is not a sufficient basis for TABC to deny renewal of the permit, the ALJ recommends that the application be granted and the requested permit be issued. In support of this recommendation, the ALJ makes the following findings of fact and conclusions of law.

III. FINDINGS OF FACT

1. The Texas Alcoholic Beverage Commission (TABC) issued Permit Number MB712131 to Universal Entertainment, Inc. d/b/a The Falls (Respondent) for the premises known as The Falls, located at 226 Bitters Road, Suite 120, in San Antonio, Texas.
2. Respondent applied for renewal of Permit No. MB712131.
3. Protests to the renewal application were filed by the San Antonio Police Department (SAPD) and TABC Staff (Staff).
4. On October 31, 2012, this case was referred to the State Office of Administrative Hearings (SOAH) for assignment to an Administrative Law Judge (ALJ) for hearing.
5. On November 19, 2012, Staff issued a notice of hearing informing the parties of the time, date, and location of the hearing on the application; the applicable rules and statutes involved; and a short, plain statement of the matters asserted.
6. The parties requested that the matter be referred to mediation and the hearing be continued until after mediation was conducted.
7. The parties participated in mediation, which was unsuccessful in resolving the dispute.
8. On March 10, 2014, Staff issued a first amended notice of hearing informing the parties of the time, date, and location of the hearing on the application; the applicable rules and statutes involved; and a short, plain statement of the matters asserted.

9. On August 19, 2014, a public hearing was convened in this matter in San Antonio, Texas, before ALJ Craig R. Bennett. Respondent was represented by attorney Don Walden. Staff was represented by John Sedberry, staff attorney. SAPD did not appear formally as a party, although numerous SAPD officers appeared and testified at the hearing as witnesses for Staff. The hearing concluded that same day.
10. The record closed on September 22, 2014, after additional evidence and closing arguments were filed.
11. Between January 21, 2011, and November 28, 2012, at least 70 individuals who were arrested for driving while intoxicated (DWI) in San Antonio, Texas, stated that they had been at Respondent's premises prior to being arrested.
12. The record does not show any specific violations by Respondent in regard to serving alcohol to those 70 individuals arrested for DWI identified in the preceding finding of fact.
13. Numerous of the 70 individuals arrested for DWI identified in the preceding findings of fact also admitted to drinking alcoholic beverages at locations other than Respondent's premises and/or to using drugs prior to being arrested.
14. Respondent serves between 10,000 and 15,000 patrons per month at its premises, and has a capacity of 650 persons at any one time at its licensed premises.
15. Staff has not identified any known criminal offenses or violations of the Texas Alcoholic Beverage Code committed by Respondent's owners, managers, or employees, in regard to any of the DWI arrests identified by Staff.
16. An occurrence of 70 DWI arrests over a period of two years has not been shown to be disproportionately high for the number of customers served by Respondent, or even high in general for a licensed premises.
17. The 70 DWI arrests cited by Staff have not been shown to be statistically significant in any meaningful way.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Texas Alcoholic Beverage Code Chapters 1 and 5 and §§ 6.01, 11.41, and 11.46.
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 Texas Government Code chapter 2003 and Texas Alcoholic Beverage Code §§ 5.43 and 11.015.

3. Notice of the hearing was provided as required by the Administrative Procedure Act, Texas Government Code §§ 2001.051 and 2001.052.
4. A preponderance of the evidence does not show that the place or manner in which Respondent conducts or may conduct its business warrants the refusal to renew the permit under Texas Alcoholic Beverage Code § 11.46(a)(8).
5. A preponderance of the evidence does not show that, at any time during the 12 months preceding the permit or license application by Respondent, a common nuisance existed on the premises for which the permit or license is sought.
6. A preponderance of the evidence does not show that Respondent has maintained a place to which persons habitually go to engage in any of a number of criminal activities, including various offenses involving drugs, gambling, prostitution, firearms, and engaging in organized criminal activity.
7. A preponderance of the evidence does not show that Respondent's premises is a place where alcoholic beverages are sold, bartered, manufactured, stored, possessed, or consumed in violation of the Texas Alcoholic Beverage Code or under circumstances contrary to the purposes of the Texas Alcoholic Beverage Code.
8. Based on the foregoing findings and conclusions, Respondent's Permit No. MB 712131 should be renewed.

SIGNED October 1, 2014.



CRAIG R. BENNETT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS