

DOCKET NO. 597208

IN RE SPORTS @ THE B.U.S. LTD.	§	BEFORE THE
D/B/A THE B.U.S.	§	
PERMIT NOS. MB461962, LB461963,	§	
PE461964	§	TEXAS ALCOHOLIC
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-02-1278)	§	BEVERAGE COMMISSION

O R D E R

CAME ON FOR CONSIDERATION this 26th day of August 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Rex A. Shaver. The hearing convened on May 23, 2002 and adjourned on May 23, 2002. The record was held open through June 6, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on August 5, 2002. This Proposal For Decision (attached hereto as Exhibit "A"), 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, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. MB461962, LB461963 and PE461964 are hereby **SUSPENDED** for ten (10) days.

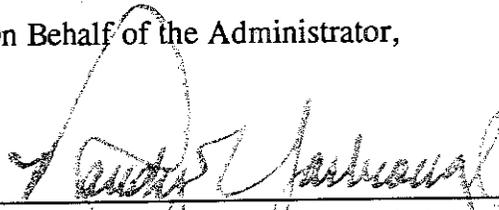
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$1,500.00 on or before the 16th day of October, 2002**, all rights and privileges under the above described permits will be **SUSPENDED** for a period of **ten (10) days days, beginning at 12:01 A.M. on the 23rd day of October, 2002.**

This Order will become final and enforceable on September 16, 2002, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile or through the U.S. Mail, as indicated below.

SIGNED this the 26th day of August, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

LT/bc

The Honorable Rex A. Shaver
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (713) 812-1001

SPORTS @ THE B.U.S. LTD.
D/B/A THE B.U.S.
RESPONDENT
942 Boros Dr.
Houston, TX 77024
CERTIFIED MAIL NO. 7001 2510 0000 7277 6364

Lindy To
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Houston District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 597208

REGISTER NUMBER:

NAME: SPORTS @ THE B.U.S. LTD.

TRADENAME: THE B.U.S.

ADDRESS: 1800 Texas Avenue, Suite 500, Houston, Texas 77003-3037

DATE DUE: October 16, 2002

PERMITS OR LICENSES: MB461962, LB461963 & PE461964

AMOUNT OF PENALTY: \$1,500.00

Amount remitted \$ _____ Date remitted _____

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 16H, DAY OF OCTOBER 2002, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address

P.O. Box No.

City

State

Zip Code

Area Code/Telephone No.

SOAH DOCKET NO. 458-02-1278

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
VS.	§	OF
	§	
SPORTS @ THE B.U.S. LTD	§	
D/B/A THE B.U.S.	§	
PERMIT NOS. MB461962, LB461963,	§	
PE 461964	§	
HARRIS COUNTY, TEXAS	§	
(TABC CASE NO. 597208)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (the Commission) brought this action against, Respondent, a permittee of the Commission, alleging that the permittee, its agent, servant, or employee permitted a person to take an alcoholic beverage purchased on the licensed premises from the premises where sold and thereby violated the TEX. ALCO. BEV. CODE ANN § 1.01 *et seq.* ("Code") and the Texas Alcoholic Beverage Commission Rules 16 TAC § 31.1 *et seq.* ("Rules") The Staff recommended that the Respondent's permit or license be suspended for 20 days and that for each day of suspension payment of \$150 be allowed in lieu of suspension. The ALJ found sufficient evidence that the Respondent permitted a person to take an alcoholic beverage purchased on the licensed premisses from the premises where sold. However; the ALJ recommends that the permits or licenses be suspended for 10 days and that for each day of suspension payment of \$150 in lieu of suspension be allowed.

I. Procedural History

By Notice of Hearing dated on the 10th of January 2002 the Staff of the Texas Alcoholic Beverage Commission (the Staff), notified Sports @ The B.U.S, Ltd. d/b/a The B.U.S.(Respondent) that the Staff would seek disciplinary action against the Respondent's permits or licenses because the Respondent its agent, servant or employee permitted a person to take an alcoholic beverage purchased on the licensed premisses from the premises where sold.

On the 23rd of May 2002, the hearing commenced, pursuant to the Notice of Hearing, in the offices of the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Harris County, Texas. The Staff was represented by Lindy To, of the TABC Legal Section. The Respondent, Sports @ The B.U.S, Ltd. d/b/a The B.U.S. was represented by Todd Dixon, the manager of its general partner, Downtown Sports, LLC. At the conclusion of the hearing the record was left open through the 6th of June 2002, for the filing of briefs, case law and additional documents.



II. Jurisdiction and Notice

Pursuant to TEX. GOV'T CODE ANN. Chapter 2001 *et seq.* and TEX. ALCO. BEV. CODE ANN. (The Code) § 6.01 and The Texas Alcoholic Beverage Commission has jurisdiction over this matter. Pursuant to TEX. GOV'T CODE ANN. CHAPTER 2003. 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

The Respondent is the holder of Mixed Beverage Permit, MB-461962, Mixed Beverage Late Hours Permit, LB-461963, and Beverage Cartage Permit PE-461964 and was the holder of such permits on the date of the alleged violation. Notice of this hearing was mailed to Respondent on the 10th day of January 2002.

III. Evidence

From the Staff:

Documentary Evidence:

TABC Exhibit 1:

The affidavit of Licensing Department Director for the Texas Alcoholic Beverage Commission regarding the Mixed Beverage Permit, MB-461962, Mixed Beverage Late Hours Permit, LB-461963, and Beverage Cartage Permit PE-461964 issued to Respondent at 1800 Texas Ave. , Suite 500, Houston, Harris County, Texas including a violation history.

TABC Exhibit 2:

Basic Lease Provisions for the premises at Space No. 500 at 1800 Texas Ave., Houston, Texas permitting the use of that location by Respondent for a restaurant and bar.

TABC Exhibit 3:

A photocopy of a photograph of the exterior of premises at Space No. 500 at 1800 Texas Ave., Houston, Harris County, Texas.

TABC Exhibit 4:

Hand-drawn sketch of the placement of tables between the exterior front wall and the street curb of the subject on the date of the alleged violation. (Not to scale).

TABC Exhibit: 5-7

Photographs of the Texas Ave. front of the subject premises showing placement of railings and furniture.

TABC Exhibit 8:

Houston Code of Ordinances Chapter 40 Streets and Sidewalks, Article VII, Inspection Permit for Certain Structures in Public Right-of-Way.

TABC Exhibit 9:

A photocopy of Application for a Retailer's Permit or License by The B.U.S. signed the 7th of August 2000.

TABC Exhibit 10:

Photocopy, City of Houston, Location Inspection report for The B.U.S. located at 1800 Texas Ave., Suite 500, Houston Texas.

TABC Exhibit 11:

Photocopy City of Houston Multiple Permit inspection report B.U.S. Sports Bar 1800 Texas Ave, Suite 500, Houston, Texas.

TABC Exhibit 12:

Photocopy Request For Certification By The City Of Houston dated August 24, 2000.

TABC Exhibit 13:

Original Affidavit of Herbert Lee, Regulatory Supervisor, City of Houston Commercial Permitting and Enforcement Division.

TABC Exhibit 14 Harris County Deed Records Plat, Block 161.

Testimony:

1. Thomas B. Chadwick:

Thomas B. Chadwick testified that he is a licensed peace officer and an agent for TABC and in that capacity he responded to a report that patrons of The B.U.S. were consuming alcoholic beverages on the sidewalk in front of the premises. On September 24, 2001, he went to the licensed premises. He observed that persons were seated at tables on the sidewalk in front of The B.U.S. and had pitchers of beer on some of the tables. The tables and chairs were located in an area surrounded on three sides by wooden posts and railing configured as a "C" with one side running along the curb of the street and the top and bottom legs ending some 5 feet from the front wall of the premises.. This arrangement left a 4 to 5 foot wide gap between the wall and the railing allowing persons using the sidewalk to pass through the seating area.. Employees of the Respondent were behind the bar and had a clear view of the patrons leaving the bar a sitting in the fenced in area. Chadwick testified that they made no attempt to stop persons from leaving the premises. Chadwick then entered the premises and identified himself as an agent of the TABC. Mr. Todd Dixon identified himself as the manager and Chadwick then issued an Administrative Notice to Mr. Dixon. for permitting the removal of an alcoholic beverage from the premises.

The witness further testified that in some cases the TABC will issue a temporary permit for the use of an area such as a sidewalk or parking lot if it is shown that the permittee will exercise exclusive control of the area. In the case of public property the permittee will also need to get permission from the city as well.

On cross examination Chadwick stated that two Houston Police officers were on the sidewalk within about thirty feet of the fenced area but that neither was posted at an opening in the fenced area. He agreed that one of the officers could have been heard if he requested a person not to leave the fenced area with an alcoholic beverage. He also testified that he told Mr. Dixon that he would not activate the Administrative Notice until he had seen a copy of any sidewalk café permit issued by the City of Houston and completed some further investigation. He denied ever giving the permittee permission to use the sidewalk for the sale, service or consumption of alcoholic beverages. He stated that to his knowledge no one would be allowed to use a street as a part of the licensed premises without a temporary permit being issued.

From Respondent:

Respondent Exhibit 1:

City of Houston Permit For Use and Occupancy of a Portion of the City's Right of Way.
Dated 09/19/01 and accepted by Respondent on 09/26/01

Respondent Exhibit 2:

Administrative Notice from TABC agent Chadwick to the Respondent dated 9/24/01
alleging violation by permitting removal of an alcoholic beverage from the premises.

Respondent Exhibit 3:

City of Houston Department of Planning & Development Code Enforcement Receipt No.
2661324 dated 9/26/01.

Respondent Exhibit 4:

City of Houston Department of Planning & Development Code Enforcement Receipt No.
2661322 dated 9/26/01.

Respondent Exhibit 5:

Photocopy of a portion of survey for a portion of Texas Ave. and bearing a handwritten
notation indicating approval by Agent C. Nicholson and Sgt. Mike Barnett dated 10-08-01.

Respondent Exhibit 6:

Photocopy of a portion of survey for a portion of Texas Ave. and bearing a handwritten
notation indicating approval by Agent C. Nicholson dated 10-08-01.

Respondent Exhibit 7:

Photocopy of a one page letter from TABC to the Respondent dated 10/31/01.

Respondent Exhibit 8:

Photocopy of a letter from Respondent to TABC totaling 8 pages undated.

Respondent Exhibit 9:

Photocopy of a one page letter from TABC to Respondent dated 03/29/02.

Respondent Exhibit 10:

Photocopy of Street Right-of-Way Occupancy Permit No. 2002 04 01776.

Testimony:

No Testimony was presented by the Respondent.

IV. Statutory Criteria

1. Section 6.01 (b) of the Code states;

A license or permit issued under this code is a purely personal privilege and is subject to revocation or suspension if the holder is found to have violated a provision of this code or a rule of the commission.

2. Section 28.10 (b) the Code states in relevant part:

A mixed beverage permittee may not permit any person to take any alcoholic beverage purchased on the licensed premises from the premises where sold.

V. Reason for Decision

That Respondent had permitted persons to buy alcoholic beverages and then take them to an enclosure on the side walk was not disputed. The dispute was whether or not the enclosure on the sidewalk constituted a part of the licensed premises. That Respondent was aware that the sidewalk was the city's right of way can be seen from Respondent's Permit For Use of a Portion of the City's Right of Way introduced by the Respondent. In the application for a Retailer's Permit, which bears the acknowledgment of Todd Dixon, there appears on the same page as his acknowledgment the black bordered, bold-faced notice that "Each permittee or licensee shall have exclusive occupancy and control of the entire licensed location." Respondent should have known that the sidewalk enclosure was not a part of the original license and could not be made a part of the premises without some action by TABC. The question of whether or not a City of Houston Sidewalk Café Permit was in effect on the 24th of September is not relevant because that city permit cannot enlarge the premises

set out in the TABC application and subsequent licenses or permits. Licensing and permitting are TABC matter while obstruction of a right of way is a city matter.

VI. Recommendation

The Staff has requested a 20-day suspension or payment of fine in lieu of suspension. The ALJ believes that attention should be given to the fact that Mr. Todd Dixon, acting on behalf of the Respondent, made good faith efforts he believed would allow him to expand Respondents licensed location. Respondent made no attempt to hide the enclosure which he erected on a main thorough fare directly across from a major league ball park. The ALJ believes that these facts should act in mitigation and recommends a 10-day suspension or payment of a fine of \$150 for each day of suspension

Based upon the Findings of Fact and Conclusions of Law, the Administrative Law Judge recommends that Respondent's permits and licenses be suspended for 10 days and that consideration be given to allowing the payment of a penalty of \$150 per day in lieu of suspension.

PROPOSED FINDINGS OF FACT

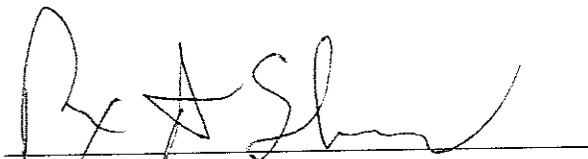
1. The Respondent, Sports @ The B.U.S. Ltd., d/b/a The B.U.S. is the holder of Mixed Beverage Permit, MB-461962, Mixed Beverage Late Hours Permit, LB-461963 and Beverage Cartage Permit, PE-461964.
2. The Respondent had placed a wooden enclosure around three sides of an area on the sidewalk in front of The B.U.S.
3. The Respondent had placed furniture within that enclosure for use of Respondent's customers.
4. Respondent's employees had an unobstructed view of the sidewalk seating area.
5. On September 24, 2001, Agent T. Chadwick observed persons with pitchers of beer drinking beer in the enclosure on the side walk.
6. On September 24, 2001, the sidewalk in front of the Respondent's location was a City of Houston sidewalk right of way.
7. Respondent did not have exclusive control in the sidewalk enclosure.
8. Respondent's application for a Retailer's Permit did not request that any portion of the sidewalk be included as premises in the permit.

9. On the 24th of September, 2001 the permits and licenses issued to Respondent did not include as premises the sidewalk right of way in front of 1800 Texas Ave., Houston, Texas.
10. On the 24th of September, 2001 the respondent permitted a person to take an alcoholic beverage purchased on the licensed premises from the premises where sold.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Sections 28.10(b) of the TEX. ALCO. BEV. CODE ANN.
2. The State Office of Administrative Hearings has jurisdiction in matters related to the hearing in this proceeding, including the authority to issue a proposal for decision proposed findings of fact and conclusions of law pursuant to TEX. GOV'T. CODE ANN. Chapter 2003.
3. Service of proper and timely notice of the hearing was given to the Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T. CODE ANN, Chapter 2001 and 1 TEX. ADMIN. CODE, Chapter 155.
4. On the 24th of September, 2001 the respondent permitted a person to take an alcoholic beverage purchased on the licensed premises from the premises where sold, in violation of Section 28.10(b) of the Texas Alcoholic Beverage Code.

SIGNED this 5th day of August, 2002.



Rex A. Shaver
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS