

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

April 13, 2009

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

VIA INTERAGENCY MAIL

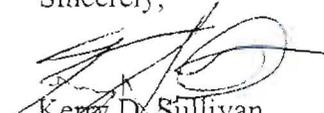
RE: SOAH Docket No. 458-08-3098; Texas Alcoholic Beverage Commission & William G. Boyd v Hog Creek Icehouse Club d/b/a Zach & Jim's Hog Creek Icehouse Club (TABC CASE NO. 574925)

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

Sincerely,


Kerry D. Sullivan
Administrative Law Judge

KDS/cm
Enclosure

xc Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA MAIL INTERAGENCY MAIL
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA INTERAGENCY MAIL (with TABC Exhibits Nos. 1-6 and Applicant Exhibits 1-4; 1hearing CDs)
John Malone, Applicant's Attorney, 1838 N. Valley Mills Drive, Waco, TX 76710 - VIA REGULAR MAIL
William W. Johnston, Attorney, Johnston & Johnston, 510 N. Valley Mills Drive, Suite 406, Waco, TX 76710 - VIA REGULAR MAIL

SOAH DOCKET NO. 458-08-3098

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
&	§	
WILLIAM G. BOYD,	§	
Protestant	§	
	§	OF
v	§	
	§	
HOG CREEK ICEHOUSE CLUB, D/B/A	§	
ZACH & JIM'S HOG CREEK	§	
ICEHOUSE CLUB, (TABC CASE NO.	§	
574925	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

William G. Boyd and other concerned individuals protested the renewal application filed by Hog Creek Icehouse Club, D/B/A Jim's Hog Creek Icehouse Club with the Texas Alcoholic Beverage Commission (TABC or Commission) on the basis that the Applicant maintains a noisy establishment in violation of Sections 11.61(b)(9) and 101.62 of the Texas Alcoholic Beverage Code. The Administrative Law Judge (ALJ) finds that the renewal application should be granted.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Applicant holds a Private Club Registration Permit and Beverage Cartage Permit for the premises at 170 Branson Trail, Waco, Texas. The hearing on the protest convened on August 8, 2008, in Waco, Texas before ALJ Kerry D. Sullivan. The Applicant was represented by John Malone, attorney. William Boyd appeared and was represented by William W. Johnston, attorney. TABC Staff Attorney Judith L. Kennison represented Staff, but Staff took no position on the protest. Following the presentation of the Protestants' case, the hearing was continued due to a scheduling conflict on behalf of the Protestants' counsel and in order to accommodate settlement negotiations. When settlement ultimately failed, the hearing reconvened and the record closed on

February 12, 2009. Notice and jurisdiction are addressed more completely in the Findings of Fact and Conclusions of Law.

II. DISCUSSION

A. Summary of Evidence

The Applicant operates a restaurant and bar that hosts live indoor concerts up to three nights a week and occasional large outdoor concerts. The Applicant has invested \$1.3 million in these facilities. The Icehouse is located west of the Waco city limits off Highway 6. The concerns raised about the operation of the facility at the hearing related almost exclusively to the nights on which there were outdoor concerts. The Applicant generally hosts five or six of these per year. These are large events, featuring performers such as Ted Nugent, Blue Oyster Cult, Foghat, and comedian and singer Rodney Carrington. Although these outdoor concerts are relatively infrequent, they are important to the Applicant's business because of the high volume of beverage sales that occur on these evenings.

Mr. Boyd 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. Many were also offended by the vulgarity of the Rodney Carrington concert, which occurred in 2007. Their uncontroverted testimony established that Mr. Carrington's sexually explicit routine was audible half a mile away and across Highway 6 on Dozier Lane, where approximately 25 people live.

Barbara Hughes, Margaret Hughes, Robert Cunningham, Lloyd Cunningham, Ruth Boyd, William Boyd, and James Harrelson all testified that they found the noise level objectionable on outdoor concert nights. Margaret Hughes lives a little over half a mile from the Icehouse across Highway 6 in what she described as a nice and quiet neighborhood. She said she believed the Applicant had lowered the bass level in response to a complaint she made. She has not had a lot of trouble since then with respect to the sound level. Before that, though, she sometimes slept with

commercial headphones to block noise from the Icehouse. Ms. Hughes said she could hear the curses and sexual remarks from the Carrington concert in her bedroom. She found them vulgar and offensive and thought it inappropriate that the little children who live on her street were subjected to them.

Barbara Hughes, who lives in the same neighborhood, testified similarly, although she did not speak of a recent reduction in the volume level. The loud bass sound and the vulgarity of the Rodney Carrington concert were her primary concerns.

Robert Cunningham testified that he lives about a quarter mile down Speegle Road from Mr. Boyd. He grew up listening to Blue Oyster Cult and Fog Hart, but he said their music continued until 1:30 a.m. and kept him from sleeping. The bass and the crowd were his main problems. He likes to sleep with the windows open but cannot do so when there is a concert. When he was in his house with the windows closed, he did not notice the sound from these live concerts, although he said that his wife could. Robert Cunningham's father, Lloyd Cunningham, echoed his son's concerns.

James Harrelson, who lives half a mile down Speegle Road from the Boyds, also testified that the noise level is bothersome on outdoor concert nights. As with several witnesses, the bass level was his primary concern. He said it is sometimes so loud that it rattles his windows and keeps him from sleeping.

Mr. Boyd and his wife own 33 acres adjacent to Hog Creek. Their home on the property is located about 1,000 feet from the concert venue. Mr. and Ms. Boyd have lived at that location for 30 years. Mr. Boyd was the designated protesting party to this proceeding. He and his wife, Ruth, live as close to Hog Creek as anyone. The Boyds, like the other witnesses they called, deny that they want to close the Icehouse down. They simply want the noise level on outdoor concert nights reduced to an acceptable level.

The Boyds hired Jim Miller, an audio consultant, to check the decibel level of the sound reaching the Boyds' property and home during a live concert on April 26, 2008. In the field bordering the Icehouse, Mr. Miller measured the sound level at about 98 decibels when laughter and whistles from the crowd were at their peak. Moving into the Boyd's house, Mr. Miller measured the noise level from their open bedroom window, which fronts toward the Ice House. The decibel level registered in the 80s from this location, with a peak of 88 decibels. Mr. Miller purchased his sound measurement equipment from Radio Shack for \$69.95, and has had it for years. It is the same equipment he uses on other projects for his business.

The Applicant countered with the testimony of Charles French, president of a research and development company, and an experienced consultant pertaining to sound measurements. Mr. French conducted sound measurements around the Icehouse on August 3, 2008 and September 20, 2008, when outside bands were playing. Mr. French used more sophisticated and expensive equipment that had been calibrated and certified by an outside laboratory. He used this equipment to measure sound in terms of "dBa," which he said is a way of measuring decibels that adjusts and discounts the readings to reflect what the human ear actually hears. Mr. French, who was qualified to testify as an expert, stated that this is the standard and accepted approach to analyzing sound levels.

Mr. French testified that his measurements indicated that the sound level never exceeded 85 dBa off the Icehouse property, and that the level measured from the Icehouse side of the Boyd's home never exceeded 62 dBa on either night during his tests.

Jim Redding, one of the Owners and the Vice President of the Icehouse, also testified on the Applicant's behalf. In addition to the background information regarding the nature and location of the Icehouse, Mr. Redding testified that the Icehouse regularly hosts charitable events on behalf of entities such as the Susan G. Komen Breast Cancer Foundation, Boys and Girls Clubs, Project Angel Tree, and Goodfellows of Waco. Mr. Redding testified that the Icehouse 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 represented that the Icehouse will commit to monitor the sound level of future outdoor

concerts and will include contractual provisions requiring bands to keep noise levels below 85 decibels at the property line. Mr. Redding said the Icehouse would also be amenable to reasonable provisions relating to the volume of potentially offensive humor audible to neighboring residents.

Finally, the Applicant provided a petition in support of its application signed by approximately 360 customers of the Icehouse, and called two area residents, Wayne Morris and Donna Perrase, who testified that they did not find the sound level during live concerts to be excessive or disturbing.

B. The Legal Standard.

The sole potential basis raised for the denial of the Applicant's renewal application is the level of noise from the facility. The applicable noise provisions are Texas Alcoholic Beverage Code Sections 101.62 and 11.61(b)(9), respectively, which provide 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.¹

The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true: . . . (9) the permittee maintains a noisy, lewd, disorderly, or unsanitary establishment or has supplied impure or otherwise deleterious beverages. . . .²

A criminal provision that applies to everyone but is not specifically at issue in this administrative licensing hearing is Section 42.01 of the Penal Code pertaining to disorderly conduct. It provides in part:

¹ TEX. ALC. BEV. CODE § 101.62 (emphasis added).

² TEX. ALC. BEV. CODE § 11.61(b)(9) (emphasis added).

(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.

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. Taken literally, the sound level must be neither “loud” nor “noisy.” The caption of Section 101.62 indicates the context for assessing whether the sound leaving a facility is loud relates to its potential to be “offensive.” The 85 decibels criminal standard injects an objective benchmark into these considerations, but the criminal standard is distinct from the unquantified requirements of the Texas Alcoholic Beverage Code, quoted above.

While the ALJ acknowledges the very real irritation the occasional outdoor performances at the Icehouse cause some of the neighboring residents, the ALJ does not believe the situation rises to a level that warrants denial of the renewal application. Plainly, the Rodney Carrington concert was perceived as vulgar by many area residents who were involuntarily subjected to it. With its graphic sexual depictions and recurrent profanity, the ALJ accepts that this concert was “vulgar” within the community of its involuntary audience and within the context of Alcoholic Beverage Code, as quoted above.

But, at least as reflected in the record of this case, this vulgarity was a one-time incident, and the Applicant has agreed to avoid repeat incidents of this nature. The ALJ accepts this. Because the Applicant has no other enforcement issues of this type, the ALJ does not believe its renewal permit

should be denied based on one entertainer who carried his act beyond the community's standards. This is especially true in light of the fact that the Applicant has expressed a willingness to take reasonable steps to ensure that unwilling persons are not subjected to vulgar performances in the future. Finally, in this respect, the ALJ observes that even the protesting witnesses assert that their goal is to bring the Applicant into compliance with community standards rather than to close it down.

The ALJ comes to the same conclusion with respect to the more persistent sound level consideration. The outdoor concerts provide a public entertainment forum that is both popular in the area and profitable to the Applicant. They occur only five or six nights per year and receive mixed reviews, even in the immediate neighborhood. Plainly, it would be hard for most people in the vicinity to sleep with their windows open while an outdoor concert was playing, 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. French's experience was more extensive and his equipment more sophisticated. The ALJ accepts his testimony that the accepted standard for measuring compliance with sound standards is the one he applied, which adjusts for the way in which sound is heard by the human ear. Based on Mr. French's readings, the level of sound off the Applicant's property has consistently been below the 85 decibel level, and the sound level near the Boyd's home was considerably below that standard, registering around the 60 decibel level.

Finally, the ALJ observes that this sort of problem between neighbors acting in good faith is one that calls for ongoing cooperation and effective communication. 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. At least one resident testified that this level improved after she complained - and that is a good result. Through experimentation and effective communication, the parties could potentially achieve a compromise that everyone could live with. In the mean time, and as a starting point, the ALJ recommends a finding that the music from the licensed premises should

be monitored on outdoor concert nights and limited to 85 decibels at the property line in order to comply with the statutory requirements prohibiting loud and noisy establishments. Furthermore, and in compliance with the existing standard set out in Section 101.62 of the Texas Alcoholic Beverage Code, the Applicant should be ordered not to allow vulgar performances in its outdoor venue. With these limitations, the ALJ recommends that the renewal application be granted.

IV. FINDINGS OF FACT

1. William G. Boyd and other concerned individuals protested the renewal application filed by Hog Creek Icehouse Club, D/B/A Jim's Hog Creek Icehouse Club, with the Texas Alcoholic Beverage Commission (TABC or Commission).
2. TABC's staff sent notice of hearing concerning the protest to the Applicant and Protestant on May 22, 2008. 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 August 8, 2008, and February 12, 2009, in Waco, Texas. The Applicant, Protestant, and Staff were represented at the hearing.
4. The Applicant operates restaurant and bar that hosts live indoor concerts up to three nights a week and occasional large outdoor concerts. The Applicant has invested \$1.3 million in these facilities. The Icehouse is located west of the Waco city limits off Highway 6.
5. The applicant hosts outdoor concerts approximately on approximately five or six weekend nights each year.
6. The sound from the outdoor concerts is often audible and irritating to some area residents. The level of the bass music is the most consistent source of irritation.
7. The applicant has not been cited for any noise violations.
8. The level of sound beyond the licensed premises has been below 85 decibels even on outdoor concert nights.
9. One performer who gave an outdoor concert in 2007 used graphic sexual depictions and recurrent profanity during his act, which were clearly audible in the neighboring community.
10. Numerous members of the neighboring community were reasonably offended at being involuntarily subjected to the performance described in Finding of Fact 9.

11. The Applicant has agreed to monitor the decibel level of the music during each live performance.
12. The Applicant will include provisions in contracts involving outdoor performers requiring that the sound level **not exceed** 85 decibels at the property line of the licensed premises.
13. In order to comply with the statutory requirements prohibiting loud and noisy establishments, music from the licensed premises should be limited to 85 decibels at the property line of the licensed premises.

V. 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 Applicant operates the licensed premises was not shown to warrant denial of the application.
5. The Applicant may not allow vulgar performances during outdoor concerts. TEX. ALCO. BEV. CODE §101.62.
6. The Applicant's licenses should be renewed.

VI. PROPOSED ORDERING PROVISIONS

1. The Applicant shall monitor the decibel level of the music during each live outdoor performance.
2. The Applicant may not allow vulgar performances during outdoor concerts.

SIGNED April 13, 2009.



KERRY D. SULLIVAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS