



The matter is before the Administrator, Texas Alcoholic Beverage Commission for review, consideration and entry of the final agency decision.

**It is Ordered** that the Findings of Fact and Conclusions of Law made and entered into the Proposal for Decision by the Administrative Law Judge are adopted by the Administrator as the Findings of Fact and Conclusions of Law of the Texas Alcoholic Beverage Commission.

**IT IS THEREFORE ORDERED** that Respondent's renewal application is **GRANTED**.

This is a Final Order of the Commission. The terms of this Order will be enforced without further notice to the Respondent on August 6, 2010, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties in the manner indicated below.

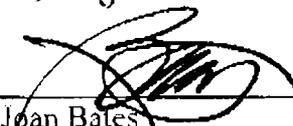
**SIGNED** this the 13 day of July,  
2010, at Austin, Texas.

On behalf of the Administrator,

Sherry K-Cook  
Sherry K-Cook, Assistant Administrator  
Texas Alcoholic Beverage Commission

**CERTIFICATE OF SERVICE**

I certify that each party or person with an interest in the above matter has been notified of the agency order in the manner indicated below on July 13, 2010.

  
\_\_\_\_\_  
Joan Bates  
Texas Alcoholic Beverage Commission  
Legal Services Division

State Office of Administrative Hearings  
Judge Roshunda Pringle  
**VIA FACSIMILE: (713) 812-1001**

6301 Broadway Inc.  
d/b/a Club 23  
**RESPONDENT**  
1309 23<sup>rd</sup> Street  
Galveston, Texas 77550  
**VIA U.S. FIRST CLASS MAIL**

Jim DeFoyd  
**ATTORNEY FOR RESPONDENT**  
**VIA FACSIMILE: (713) 672-7420**

Lt. D. J. Alvarez  
Galveston Police Department  
**PROTESTANT**  
601 54<sup>th</sup> Street  
Galveston, Texas 77552  
**VIA U.S. FIRST CLASS MAIL**

John Buck  
**PROTESTANT**  
2228 Seawall Blvd. # 403  
Galveston, Texas 77550  
**VIA U.S. FIRST CLASS MAIL**

Brenda Donaloio  
**PROTESTANT**  
2202 Avenue P  
Galveston, Texas 77550  
**VIA U.S. FIRST CLASS MAIL**

Walter Modzelewski  
**PROTESTANT**  
2228 Seawall Blvd., Apt. 412  
Galveston, Texas 77550  
**VIA U.S. FIRST CLASS MAIL**

Paul Flick  
**PROTESTANT**

3123 Shore Meadow  
League City, Texas 77575  
***VIA U.S. FIRST CLASS MAIL***

Ramona M. Perry  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division

Enforcement District Office

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

RECEIVED

JUN 9 2010

TABC HOUSTON  
LEGAL

June 4, 2010

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

VIA REGULAR MAIL

**RE: Docket No. 458-10-2175; Texas Alcoholic Beverage Commission v. 6301  
Broadway, Inc. d/b/a Club 23**

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, a SOAH rule which may be found at [www.soah.state.tx.us](http://www.soah.state.tx.us).

Sincerely,

A handwritten signature in cursive script, appearing to read "Roshunda Pringle".

Roshunda Pringle  
Administrative Law Judge

RP:rlm  
Enclosure

cc: Docket Clerk, State Office of Administrative Hearings- VIA REGULAR MAIL  
Ramona Perry, Texas Alcoholic Beverage Commission, 427 W 20<sup>th</sup> Street, Suite 600, Houston, TX 77008- VIA  
REGULAR MAIL (with exhibits and cd)  
Emily Helm, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX  
78731- VIA REGULAR MAIL  
Jim L. DeFoyd, 103 Eastway, Galena Park, TX 77547 -VIA REGULAR MAIL  
John Buck, 2228 Seawall Blvd., Apt. 403, Galveston, TX 77550 -VIA REGULAR MAIL



## **I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

No contested issues of notice, jurisdiction, or venue were raised in this proceeding. Therefore, these matters are set out in the findings of fact and conclusions of law without further discussion here.

On April 9, 2010, a public hearing was held before Roshunda Pringle, ALJ, at the State Office of Administrative Hearings, 2020 North Loop West, Ste. 111, Houston, Harris County, Texas. Staff was represented by Ramona Perry, attorney. Protestants were represented by John Buck. Respondent was represented by Jim L. DeFoyd, attorney. The record was closed on that date.

## **II. LEGAL STANDARDS AND APPLICABLE LAW**

The Commission may refuse to issue an original permit if it has reasonable grounds to believe that the place or manner in which Respondent may conduct its business warrants the refusal based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8).

## **III. EVIDENCE**

### **A. Staff and Protestant's Evidence and Contentions**

Staff offered Respondent's Licensing History for Club 23 into evidence, along with documents received from the public. The Commission did not offer any documents in support of the application's renewal. Documents in opposition included one complaint from the Galveston Police Department and 15 protest from residents opposing the renewal application. Protestants offered into evidence 2 photographs of Respondent's premises and the surrounding area.

#### **1. Testimony of Lieutenant D.J. Alvarez**

D.J. Alvarez is a lieutenant with the Galveston Police Department. Mr. Alvarez has 22 years of

experience as a police officer. Lieutenant Alvarez is familiar with Club 23. In the course of his duties, Lieutenant Alvarez prepared reports indicating incidents that were reported in a 24 hour time span in the area where Club 23 is located. His current duties include assigning officers to calls. Lieutenant Alvarez testified that he noticed an increase in calls to the surrounding area of Club 23. He stated that because of the increase in calls, the police department adopted a precinct concept to take back problem neighborhoods. The police department partnered with the residents in the communities to combat crime. Lieutenant Alvarez stated that the police department met with the residents and was informed of their chief concerns. The main concerns were public nuisance, prostitution, public intoxication, and drugs. Lieutenant Alvarez testified that most of the residents lived in the Edgewater Retirement Home, an assisted living facility across the street from Respondent's bar. Lieutenant Alvarez explained a five-year report that list a total of 476 calls for service in the immediate area. Over the five-year period, 197 calls for services were for incidents occurring in the vicinity of Club 23. Lieutenant Alvarez admitted that there were no calls for service directly against Club 23. Additional concerns of the residents were narcotic transactions occurring outside the establishment and people smoking drugs in the vacant adjacent building owned by Respondent. Lieutenant Alvarez stated that the police department made contact with Respondent's employee at the establishment in May of 2009 regarding the increased crime and the concerns. He observed career felons and two prostitutes in the establishment. Lieutenant Alvarez testified that he pointed the prostitutes out to the employee who then made the ladies leave. He then observed the women standing outside of the club. On cross-examination, Lieutenant Alvarez admitted that he never spoke directly with the bar owner Robert Walker regarding the complaints. He also admitted that he had no knowledge whether the Protestants ever spoke with Mr. Walker regarding the complaints. He admitted that most of the calls were received from residents for suspicious activity and suspicious persons in the immediate area and some calls were from the Respondent for service. In addition to the neighborhood complaints, Lieutenant Alvarez stated that Respondent was issued a citation from the Code Enforcement Department for the City of Galveston for a code violation. He further testified that records show that Respondent had corrected the violation and is in compliance. Lieutenant Alvarez believes that the manner in which Respondent operated the establishment was against the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

## **2. Testimony of John Buck**

John Buck resides in the apartment complex in the Edgewater Community across the street from Respondent's bar. Mr. Buck has lived in the neighborhood for five years. He did not believe that the bar was the problem, but the clientele that frequented the bar were. The clientele create an uncomfortable and unsafe atmosphere at the apartments because they sleep at the wheel chair ramp, congregate in the parking lot, and solicit the tenants for money. The clientele create an unsafe atmosphere in the neighborhood because of drug transactions by people parked in front of Respondent's bar. Mr. Buck observed people secure their bicycles at the apartment complex and then walk over to Respondent's bar. He was uncertain whether the persons who congregated in the parking lot of the apartment complex were clientele of Respondent's club. In Mr. Buck's opinion, granting Respondent's permit would greatly affect the general welfare, health, peace, morals, and safety of the people. He would feel more comfortable if Club 23 was not present in the neighborhood.

## **3. Testimony of Walter B. Modzelewski**

Walter B. Modzelewski resides in the apartment complex in the Edgewater Community across the street from Respondent's bar. Mr. Modzelewski has lived in the neighborhood for eleven years. Mr. Modzelewski complained of traffic in and out of the club in the early mornings, a huge truck parked outside of the club, and questionable activities in front of the club. Mr. Modzelewski stated that the club's presence did not create an unsafe environment for him. He admitted that he never called the police or spoke with the owner regarding his complaints.

## **4. Testimony of Paul E. Flick**

Paul E. Flick is the owner of an apartment complex immediately to the west of Respondent's club. Mr. Flick has owned the apartments for 43 years. He resides in League City and travels to Galveston twice a month to monitor the operation of the complex. Mr. Flick testified that he has patronized the club in times past. In his opinion, the appearance and clientele of the club has changed

over the years. The building has deteriorated and the clientele has evolved to undesirable people. Mr. Flick believes that the operation of Respondent's club has affected the value of his complex. Mr. Flick complained about fighting, loud noises, public intoxication, and prostitution. He said that Respondent's clientele constantly disturb his residents, litter in the area, and urinate in the alley near his complex. Mr. Flick admitted that some of his observations were over two years old. On cross-examination, Mr. Flick admitted to having problems with some of the tenant in his complex regarding drugs and would not be surprised if his tenants were responsible for littering the area.

## **B. Respondent's Evidence and Contentions**

### **1. Testimony of Robert Walker**

Robert Walker is the owner of Club 23. He testified that Club 23 has been in existence since 1987. Mr. Walker owns other bars in Galveston. He testified that he has not had an administrative case filed against him for the operation of Club 23 or any of his bars by TABC, the Galveston Police Department, nor any other police agency. He further stated that neither he nor any of his employees have ever been charged with a criminal violation. Mr. Walker stated that Club 23 is a small establishment with a diminished clientele. He estimated that the bar serves five to six persons in the day and maybe a few more at night. When questioned about the homeless population surrounding his establishment, Mr. Walker stated that his bar is right on the Seawall and there are people walking up and down the Seawall at all times of the day and night. Mr. Walker testified that if there are any problems in the bar his staff has been advised to immediately call the police. Mr. Walker is familiar with the apartment complex located behind his establishment and owned by Mr. Flick. He stated that he has had problems with the tenants who reside in the apartment complex. The tenants litter on a weekly basis and there is a strong unpleasant odor coming from the apartment complex. Mr. Walker stated that he has never been contacted by the police department or the Protestants regarding the complaints. Mr. Walker admitted being cited by the Code Enforcement Department of the City of Galveston. Mr. Walker was ordered to clean the yard in back of his establishment and he complied. He is willing to cooperate with the police and the residents in the neighborhood. Currently, he is making every effort

to keep drugs and prostitution out of his club. On cross-examination, Mr. Walker was asked about several calls regarding incidents at Club 23. Mr. Walker explained that the calls were made by the employees of the club for police service as advised by the Commission.

## 2. Testimony of Connie Dotson

Connie Dotson has been employed by Respondent as a bookkeeper for 27 years. Ms. Dotson testified that the club is doing poorly financially and with clientele due to the constant harassment by the residents and the police department. Ms. Dotson testified that the club grosses \$3,000.00 a month. She stated that there is minimal traffic inside and outside the bar. Ms. Dotson advised that the employees are required to call the police if there is a problem inside the club. In her opinion, it is impossible to physically check everyone who enters the club or watch them in the restrooms. Ms. Dotson said that she is aware of tenants in the apartment complex behind the club who are drug users. She testified that the club, Mr. Flick complex, and other building in the area are old and in poor condition.

## IV. ANALYSIS AND RECOMMENDATION

The Commission and Protestants challenged Respondent's renewal application arguing that it should be denied on the basis of the general welfare, health, peace, morals, safety of the people, and the public sense of decency. TEX. ALCO. BEV. CODE ANN. § 11.46(a)(6). To deny a permit on such basis "some unusual conditions or situations must be shown so as to justify a finding that the place or manner in which the applicant may conduct his business warrants a refusal of a permit." Dienst v. Texas Alcoholic Beverage Commission, 536 S.W.2d 667, 669 (Tex.Civ.App. — Corpus Christi 1976, no writ). *See also*: Texas Alcoholic Beverage Commission v. Jack E. Mikulenska d/b/a Frigate Club, 510 S.W.2d 616, 619 (Tex.App. — San Antonio 1974, no writ); 650 S.W.2d 208; Kermit Concerned Citizens Committee v. Colonial Food Stores, Inc., 650 S.W.2d 208, 210 (Tex. App.—El Paso 1983, no writ). The success or failure of Applicant's request for renewal turns on whether or not Protestants have shown by a preponderance of the evidence that some unusual condition or situation exists in light of the place or manner in which Applicant conducts its business that warrants a refusal of the requested

renewal based on an adverse impact on the general welfare, health, peace, morals, and safety of the people in the neighborhood in which Respondent operates.

In the instant case, Protestants complained about increased criminal activity such as public intoxication and narcotic transactions, loud noises, increased littering, and undesirable clientele such as homeless individuals, drug users, drug dealers, and prostitutes congregating in the parking lot of the apartment complex and in front of the club. Protestants have also complained that the Club is a nuisance, negatively affecting the neighborhood and property values.

Relevant case law has set out some examples of “unusual conditions” such as traffic hazards and congestions, negative impact on the nature of the neighborhood, noise, and increased criminal activity. Dienst v. Texas Alcoholic Beverage Commission, 536 S.W. 2d 667 (Tex. Civ. App. – Corpus Christi 1976, no writ); Helms d/b/a The Thirsty Turtle v. Texas Alcoholic Beverage Commission, 700 S.W. 2d 607 (Tex. App. – Corpus Christi 1985, no writ); Bavarian Properties, Inc. v. Texas Alcoholic Beverage Commission, 870 S.W. 2d 686 (Tex. App.-Fort Worth 1994, writ denied).

The evidence in the instant case fails to show that granting Respondent’s renewal will result in an increase in criminal activity or that the recent increase was a result of the manner in which Respondent operated. The evidence shows that the Galveston Police Department only received 197 calls for service over a five-year period for incidents that occurred in the immediate area of Club 23. There were no calls for service complaining of the place or manner in which Respondent operated. This ALJ believes that calls made by Respondent for police intervention and service do not reflect negatively on Respondent, but show Respondent’s efforts to operate in a peaceable and safe manner. Several of the Protestants who are also residents of the apartment complex expressed concerns regarding criminal and suspicious activities of Respondent’s clientele taking place in front of the establishment. In addition, Protestants expressed a concern regarding the increase of homeless individuals in the area and Respondent’s undesirable clientele. It is clear from the evidence that criminal and suspicious activities were also observed in the parking lot of the apartment complex, around the apartments owned by Mr. Flick, and on the walkway utilized by persons walking the Galveston sea wall. Observations of

criminal and suspicious activities was not limited to the immediate area of Club 23, but appeared to be a significant part of the neighborhood. The ALJ is cognizant of the concerns of the Protestants; however, no evidence was offered to show that Respondent operated its business in a manner that resulted in Protestant's concerns. Based on the evidence in the record, Protestant's concerns and complaints appear to be more a result of a changing neighborhood that was once thriving.

The evidence in the instant case failed to show that a nuisance exist on the premises. Protestants expressed a concern regarding noise, litter, and a vacant adjacent building. The evidence did not show that Respondent's premises generated an unacceptable amount of noise. Accordingly, there were no noise complaints or complaints regarding alleged activity in the vacant building made by Protestants or any of the surrounding residents against Respondent's establishment. There was no evidence to show that Respondent tolerated, allowed, or had knowledge of Protestant's concerns. It is clear from the evidence that Respondent was cited by the City of Galveston Code Enforcement Department for litter in the yard behind his establishment. Respondent cleaned the area and came into compliance of the city code. There was conflicting evidence whether the litter generated from the club clientele or the apartment residents. Based on the evidence, Respondent has only received one citation from the City of Galveston and has never received an administrative violation from TABC or any other policing agency in its 23 years of operation.

After reviewing all the evidence, the ALJ finds insufficient evidence that the general welfare, peace, and safety of the surrounding residents warrants the refusal of the renewal of the permit, and further, that no unusual condition or situation prohibits the permit's renewal. There is also insufficient evidence that the permit's renewal should be denied based on a nuisance, the health or morals of the people, or the public sense of decency.

## **VI. FINDINGS OF FACT**

1. 6301 Broadway Inc. d/b/a Club 23 (Respondent) filed a renewal application with the Texas Alcoholic Beverage Commission (Commission) for a Mixed Beverage Permit, Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit for the premises known as Club 23 located at

2009 Tremont, Galveston, Galveston County, Texas. The mailing address for Respondent is 1309 23<sup>rd</sup> Street, Galveston, Texas 77550.

2. A protest to Respondent's application was filed by Commission, the Galveston Police Department, and individual residents of the neighborhood of Respondent's premises. The protest was based on the general welfare, health, peace, morals, and safety of the people, and on the public sense of decency and nuisance.
3. The Commission received one complaint form from the Galveston Police Department and 15 protest forms filed by individuals in opposition of Respondent's application being granted.
4. A Notice of Hearing dated January 22, 2010, was issued by the Commission's Staff notifying Respondent of the protest and informing the parties of the nature of the hearing, the statutes and rules involved, and the legal authorities under which the hearing was to be held.
5. By Order dated February 16, 2010, the hearing was continued to April 9, 2010.
6. On April 9, 2010, a public hearing was held before Roshunda Pringle, ALJ, at the State Office of Administrative Hearings, 2020 North Loop West, Ste. 111, Houston, Texas. Staff was represented by Ramona Perry, attorney. Protestants were represented by John Buck, non-attorney. Respondent was represented by Jim L. DeFoyd, attorney. The record was closed on that date.
7. Respondent has been operating the premises as Club 23 for approximately 23 years in the Edgewater Community.
8. No disturbances have occurred at the location and no 911 calls have been received by the Galveston Police Department regarding complaints against Respondent.
9. Respondent was cited one time by the City of Galveston for a code violation. Respondent removed the debris from the property and came into compliance.
10. The evidence fails to demonstrate that the existence of Respondent's business tends to increase the general level of suspicious, criminal or loitering activities in the area.
11. The evidence fails to demonstrate that the existence of Respondent's business caused traffic hazards or unreasonable traffic congestion on roadways in the area.
12. The evidence fails to demonstrate that the existence of Respondent's business generated an unacceptable amount of noise and litter.
13. The evidence fails to demonstrate that Respondent's business is a public nuisance.
14. No unusual condition or situation exists to warrant refusing Respondent's request for renewal of

the permits.

15. The evidence fails to show that Respondent operated the business in a manner detrimental to the general welfare, peace, morals, health, safety, and public sense of decency.

## VII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, §§ 6.01 and 11.46(a)(8).
2. The State Office of Administrative Hearings has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003. Proper and timely notice of the hearing was effected on all parties pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE §155.55.
3. Granting Respondent's requests for a Mixed Beverage Permit, Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit will not adversely affect the general welfare, health, peace, morals, safety of the people, and the public sense of decency. TEX. ALCO. BEV. CODE ANN. §11.46(a)(8).
4. Respondent's application for a Mixed Beverage Permit, Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit for Club 23 should be granted.

**SIGNED June 4, 2010.**

  
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**ROSHUNDA PRINGLE**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**