

Mailing Date: DEC 19 2007

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATIVE LAW JUDGE
FOR
PENNSYLVANIA LIQUOR CONTROL BOARD

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 06-2878C
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	Incident No. W01-340673
	:	
4333-35 SPRUCE INC.	:	
4333-35 SPRUCE ST.	:	LID - 42851
PHILADELPHIA PA 19104-4708	:	
	:	
	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-AP-SS-OPS-3391	:	

APPEARANCES:

FOR THE BUREAU OF ENFORCEMENT:

JAMES E. DAILEY, ESQ.

FOR THE LICENSEE:

JOHN J. McCREESH, III, ESQ.

BEFORE: JUDGE WRIGHT

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on December 19, 2006, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against 4333-35 Spruce, Inc., License Number R-AP-SS-OPS-3391 (hereinafter "Licensee").

An Administrative hearing was held on Tuesday, July 18, 2007, pursuant to requisite and appropriate hearing notice.

The citation contains four counts.

The first count charges Licensee with violation of Section 5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code Section 5.32(a), in that on October 4 and 28, 2006, Licensee, by its servants, agents or employees, used, or permitted to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

The second count charges Licensee with violation of Section 493(1) of the Liquor Code, 47 P.S. Section 4-493(1), in that on October 13, 2006, Licensee, by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated male patron.

The third count charges Licensee with violation of Section 493(1) of the Liquor Code, 47 P.S. Section 4-493(1), in that on October 18, 2006, Licensee, by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) male minor, nineteen (19) years of age.

The fourth count charges Licensee with violation of Section 471 of the Liquor Code, 47 P.S. Section 4-471, in that on September 2, 11, 24, 25, 26, 28, 29, October 2, 3, 4 and 20, 2006, and divers other occasions within the past year, the licensed establishment was not operated in a noisy and/or disorderly manner.

COUNT NOS. 1, 2, 3 AND 4

FINDINGS OF FACT:

1. The Bureau of Enforcement conducted an investigation of the licensed premises which began on September 28, 2006 and ended November 1, 2006. A notice of violation letter was sent to the licensed premises on November 27, 2006 by certified mail, return receipt requested. The mailing was signed as received on November 28, 2006. A citation was issued dated December 19, 2006 and was sent to the licensed premises by certified mail, return receipt requested. The citation was signed as received on December 21, 2006 (N.T. 32-24 and Exhibits B-1 and B-2).

2. Officer Gall is employed as an Enforcement officer for the Bureau and at the time of hearing had been so employed for approximately two and a half years. Officer Gall conducted an investigation of the licensed premises on October 4, 2006. Officer Gall arrived at the licensed premises at approximately 10:00 p.m. (N.T. 5-6).

3. When Officer Gall arrived at the premises, he parked on Spruce Street, approximately fifty to seventy-five feet away from the premises. The officer exited the vehicle and was joined by Officer Mullen, also from the Bureau. The two began walking towards the licensed premises. When they were approximately twenty feet away from the premises, on the corner of 33rd and Spruce, they heard music coming from the licensed premises (N.T. 7).

4. The officers did not observe any other licensed establishments in the area, which were open and operating. They noted that the area is 90% residential and approximately 10% commercial (N.T. 8).

5. When the officers approached, the licensed premises was open and operating. The music appeared to be playing from a touch tone music player on the side of the wall. It was electronically amplified through various speakers situated on the wall of the premises. The officer saw approximately two speakers, but believed that there were more (N.T. 8-9).

6. The officers described the touch tone music player and indicated the patrons can deposit coins or currency into it and select different artists and music (N.T. 9).

7. The officers noted that the same music that could be heard outside the premises was playing inside the premises (N.T. 10).

8. After exiting the premises, Officers Gall and Mullen walked west on Spruce Street back to where their vehicles were parked. Officer Gall then walked north on 43rd Street, approximately fifteen feet where he could still hear music coming from the licensed premises. He walked back to the corner of 43rd and Spruce, crossed the intersection and walked approximately thirty feet until he was no longer able to hear music emanating from the licensed premises. Upon returning to his vehicle, the officer then walked forty feet past the vehicle and still could hear music emanating from the licensed premises (N.T. 10-11).

9. Officer Gall returned to the premises on October 13, 2006 at approximately 10:15 p.m. When he entered the premises, it was open and operating. He then saw the touch tone music player being operated on the licensed premises and amplified through speakers. There were approximately twenty patrons on the premises (N.T. 11-12).

10. The officer noted that there was one bartender on duty. The officer noted one patron directly in front of him at a distance of approximately three to four feet. The female was wearing a blue jean jacket, with a white long sleeve shirt underneath, and a pair of jeans. She was in her forties with blond hair. In front of her was a male who was very loud. The officer also noted that the male had slurred speech. The officer could see that the patron's eyes were half shut and a little bloodshot. The male was wearing a yellow shirt with white stripes on it. The officer also noted the shirt had a patch on it indicating "Izod." The officer indicated that he was able to see well in the lighting conditions and there were no obstructions to his vision (N.T. 12-13).

11. The officers sat from five to seven feet from the patrons. They waited approximately twenty minutes before they made an alcoholic beverage purchase. During these twenty minutes, the male was very loud while having a conversation with the female. During that time, the officer noted his speech was slurred and that he swayed back and forth. At one point when music was playing, he tried to dance with a female while she was seated. He kept stumbling. He had to be held up at some point when he was trying to dance (N.T. 13-14).

12. Based upon his experience and training, the officer concluded that the male patron, more so than the female patron, was visibly intoxicated (N.T. 14).

13. The male patron was holding a sixteen ounce glass of beer. There were two shot glasses on the table in front of him and an empty wine glass. The male patron stumbled to the bar straight ahead of him and waited for a few minutes while the bartender finished his order. He had a short conversation with the bartender and was served a sixteen ounce glass of beer. Alcohol was then poured into the two shot glasses and the wine glass was also filled with an unidentified beverage (N.T. 15).

14. The individual had a short conversation with the bartender and returned to the area where the female was still sitting. He began drinking again. He also noted that his voice was still slurred. The female seemed to be distressed with regard to her conversation with the other patron (N.T. 15).

15. The officer continued to observe the patron for ten to fifteen minutes. Once he had quickly emptied his glass, he walked back to the bar, swaying and staggering as he went. At this time, the patron's eyes were half closed and bloodshot. He began walking towards the bar and received another beer, two shots of liquor and a glass of wine (N.T. 15-16).

16. The patron carried the sixteen ounce bottle of beer and a glass of wine and staggered back to the bar and carried the two shots. However, the officer did not see him spill any of the drinks (N.T. 39-40).

17. On the first occasion, the officer did not see what kind of payment was made. When the second round of drinks was requested, the officer was able to hear that the individual was putting the drinks on a tab (N.T. 16).

18. There were approximately twenty patrons in the bar (N.T. 17).

19. The officer departed the premises at approximately 11:20 p.m. (N.T. 17).

20. On October 18, 2006, the officer again visited the licensed premises. On this occasion, he was there to complete an age compliance check. One of the undercover officers entered the premises in order to make sure that the environment was safe before sending the underage buyer in (N.T. 17-18).

21. The officer arrived at the premises at approximately 8:40 p.m. The other officers and Underage Buyer No. 81 were outside. At 8:40 p.m. when the officer entered the premises, it was open and operating with approximately fifteen patrons inside (N.T. 18-19).

22. The officer sat at a table. At that time, Underage Buyer No. 81 entered the premises. When Officer Gall entered the premises, he ordered a bottle of Miller Lite beer and was carded. When Underage Buyer No. 81 came in, he walked up front and sat at the bar for a few moments before the bartender came over. The bartender did not ask Underage Buyer No. 81 for identification (N.T. 19-20).

23. Underage Buyer No. 81 was served a twelve ounce bottle of Miller Lite beer (N.T. 21).

24. Underage Buyer No. 81 departed the premises with the beer in his hand and it was turned over to another officer (N.T. 21).

25. Officers Donati and Burns entered the premises and spoke with the bartender (N.T. 22).

26. According to the J-Net, Underage Buyer No. 81 was born January 31, 1987 and was under the age of twenty-one at the time of the purchase of alcoholic beverages (N.T. 23 and Exhibit B-3).

27. Officer Gall had worked with Underage Buyer No. 81 on at least twenty prior occasions and was able to identify him from the J-Net picture as the one who had purchased alcoholic beverages (N.T. 23-24 and Exhibit B-3).

28. Gerald Donati from the Bureau of Enforcement was part of the age compliance program on October 18, 2006 along with Underage Buyer No. 81. Officer Donati entered the premises and advised the Licensee of the violation (N.T. 42).

29. Julian Alkon lives approximately seventy five feet from and across the street from the licensed premises. He has resided at that location for approximately twenty-three years. He was living at the location prior to the bar opening in its current name (N.T. 43-45).

30. Mr. Alkon contacted the Bureau of Enforcement with a complaint of noise and disturbance from that location and documented disturbances from September, 2006 through October, 2006 (N.T.45).

31. Mr. Alkon indicated that he hears music playing from the licensed premises with a repetitive beat. He can hear patrons talking at the bar, especially late in the evening. He also sees people standing outside the bar. He indicates that the bar has a habit of leaving their door tied open with a rope (N.T. 45).

32. Approximately a year ago, the complainant indicated that the bar had two windows cut into the side and that they would keep them open and he could hear noise coming from that side. He could hear noise in his own window in the nature of music, shouting, talking and people raising their voices (N.T.45-46).

33. Mr. Alkon indicated that at the time he would tend to go to sleep, he would find that the bar would get louder. He could hear people talking and shouting (N.T. 46).

34. Mr. Alkon indicated that the music was highly amplified and extremely loud. He stated that the premises has some very large speakers. He has at times heard people singing up until 2:00 a.m. (N.T. 47).

35. Mr. Alkon began keeping a log in August of 2006, and noted times that he called the Philadelphia Police (N.T. 47-48).

36. According to the Licensee's log on September 1, 2006, he indicated that the windows of the licensed premises were open and there was loud music and raised voices. These conditions also existed on September 3, 4, 5, 12, 13, 14 and 15, 2006. On September 21, 2006, the doors and windows were open and again he could hear loud music. There was loud music on September 24, 2006. On September 25, 2006, he indicated there were people standing on the sidewalk outside the bar drinking beer and shouting until 12:30 or 1:00 a.m. On September 26, 2006, the doors were open and people were standing outside drinking and shouting until 11:30 p.m. On September 27, 2006, Licensee indicated that patrons were standing outside and sitting at a table drinking. At 11:15 p.m., the doors and windows were open and there was loud music coming from the bar. The Licensee indicated that he heard loud music and people shouting on September 28, 29, October 2 and 3, 2006. Beginning at about 11:00 p.m. on October 3, 2006, patrons were sitting outside and talking loudly. This continued until after 1:00 a.m., at which time the complainant called the police. On October 6, 2006, live music was playing, which could be heard up and down the street. The complainant phoned the Licensee and got an operator and then called the police. The doors and/or windows were open and loud music and voices could be heard. On October 7, 2006, the door was open and very loud music was playing. Licensee also noted noise and loud music on October 8, 10, 12, 17, 18, 20 and 28, 2006 (N.T. 48-64 and Exhibit B-4).

37. Mr. Alkon indicated that he never approached the owners with regard to the loud music (N.T. 64-65).

38. Mr. Alkon has never heard or seen a fight at the licensed premises. Mr. Alkon does indicate that people sit and drink at the table outside the premises (N.T.73-74).

39. Colin Earl lives on the third floor above the licensed premises. He patronizes the bar on occasion. He indicates that he is a data based design and web developer and also teaches yoga. He has never been disturbed by music from the licensed premises. He has noticed the windows open on occasion and he has noticed the doors open on occasion (N.T. 85).

40. Ernest Holley lives right above the bar in an apartment and pays rent to live there. He has lived there approximately two and half to three years. He indicates that music from the bar does not disturb him. He can hear it as background noise, but is not disturbed by the music. He does frequent the bar (N.T. 86-87).

41. Mr. Holley indicated that the doors are open once in a while on hot days, but that they are not open all the time (N.T. 88).

42. Walter Harrar lives about a block from the bar. He patronizes the bar. The owner sponsors his softball team. He does not find the bar to be noisy or unruly (N.T. 89-90).

43. Kenneth Gritter, a teacher, also patronizes the bar. He finds it to be pleasant. He is sixty-two years old and generally goes there in the afternoon or after work and occasionally late at night. He never heard a band playing on the premises and the music has never been loud enough to drive him out (N.T. 91-92).

44. Joseph Connor has been in the restaurant business for almost thirty years. He purchased the bar approximately nine years ago. He has never met Dr. Alkon (N.T. 93-94).

45. Mr. Connor indicates that his tenants have never complained about the noise (N.T. 95).

46. Across the street from the premises is an apartment building. The owner has no complaints with regard to the noise from the bar (N.T. 96-97).

47. From Mr. Connor's estimate, Dr. Alkon is approximately 120 feet from the licensed premises (N.T. 97).

48. Mr. Connor admits to having live music on the premises in the nature of an acoustic guitar player, but denies that the music was amplified through speakers (N.T. 97-98).

49. A table, chairs and ashtray were put outside because of the smoking ban (N.T. 98-99).

50. There are two to three universities in the area, and the medium age of the patronage is thirty years old (N.T. 100).

51. Mr. Connor stated that the last time he had live acoustic music in the licensed premises was in April, 2006 (N.T. 100-102).

CONCLUSIONS OF LAW:

All statutory prerequisites for notice to the Licensee were satisfied.

Count No. 1 - On October 4 and 28, 2006, Licensee, by its servants, agents or employes, used, or permitted to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside, in violation of Section 5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code Section 5.32(a).

Count No. 2 - On October 13, 2006, Licensee, by its servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated male patron, in violation of Section 493(1) of the Liquor Code, 47 P.S. Section 4-493(1).

Count No. 3 - On October 18, 2006, Licensee, by its servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) male minor, nineteen (19) years of age, in violation of Section 493(1) of the Liquor Code, 47 P.S. Section 4-493(1).

Count No. 4 - There is insufficient evidence to conclude that on September 2, 11, 24, 25, 26, 28, 29, October 2, 3, 4 and 20, 2006, and divers other occasions within the past year, the licensed establishment was not operated in a noisy and/or disorderly manner, in violation of Section 471 of the Liquor Code, 47 P.S. Section 4-471.

PRIOR RECORD:

Licensee has been licensed since November 18, 1998, and has a record of prior violations as follows:

Citation No. 00-1869. \$1,000.00 fine.

1. Sales to minors.
October 13, 2000.
2. Minors frequenting. (Dismissed by ALJ)
October 13, 2000.

Citation No. 05-2480. \$600.00 fine.

1. Purchased malt or brewed beverages from other than Pennsylvania manufacturers or importing distributors.
November 23, 2004.
2. Failed to maintain complete and truthful records covering the operation of the licensed business for a period of 2 years immediately preceding January 25, 2005.

Citation No. 06-0329. \$400.00 fine.

1. Refilled liquor bottles.
December 18, 2005.

Citation No. 06-2002. \$1,250.00 fine.

1. Sales to a minor.
July 13, 2006.

DISCUSSION:

Sufficiency of Notice

On November 27, 2006, the Bureau sent Licensee a notice of violation letter. It was signed as received on November 28, 2006. The Bureau of Enforcement submitted an amended letter to the Licensee dated December 1, 2006 by certified mail, return receipt requested, which was signed as received at the licensed premises on December 4, 2006. The amended letter indicated the dates of October 4, 2006 and October 28, 2006, as well as divers other occasions when the Licensee used or permitted to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, could be heard. The original letter indicated the date of October 28, 2006 and then indicated divers other occasions. Likewise with regard to noisy and disorderly operations, the original letter indicated solely the date of October 20, 2006 but indicated divers other occasions within the past year. The amended letter indicated September 2, 11, 24, 25, 26, 28, 29 and October 2, 3 4, 20, 2006 and divers other occasions within the past year. Both letters were sent within the thirty day period. The November 27, 2006 letter was sufficient to indicate notice of the pending charges. The December 1, 2006 letter merely provided the Licensee with more specificity. At any rate, Licensee was provided with statutory notice.

While the Court did not find that the premises operates in a noisy or disorderly operation, the Court finds that there is a neighbor who is disturbed by the sound of music and entertainment coming from the premises. In addition, the outside area which is supposedly used for smoking is apparently creating a pocket of noise. In addition, the Licensee indicates that the windows are occasionally open. On these occasions, it is clear that music is escaping from the premises as well as the noise from the crowd. While Licensee had several people testify that they were not disturbed by the music, some were Licensee's tenants. Dr. Alkon testified credibly that he was disturbed by the music. There is no known basis for Dr. Alkon having any motivation to complain other than to get a good night's sleep.

Under the circumstances, a monetary penalty shall be imposed and Licensee is warned that they need to take measures to insure that the music played inside the premises is contained inside the premises and that patrons are not permitted to gather outside, further increasing the tendency for there to be noise in the neighborhood at late hours.

Licensee was R.A.M.P. certified on February 12, 2007. Licensee must remain in compliance with its R.A.M.P. Certification for a period of at least one year from the date of this Order.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. Section 4-471, prescribes a penalty of suspension or revocation of license or imposition of a fine of not less than \$50.00 or more than \$1,000.00, or both, for violations of the type found in Count Nos. 1 and 4 of this case.

Section 471 of the Liquor Code, 47 P.S. Section 4-471, prescribes a penalty of suspension or revocation of license or imposition of a fine of not less than \$1,000.00 or more than \$5,000.00, or both, for violations of the type found in Count Nos. 2 and 3 of this case.

Therefore, penalties shall be assessed as follows:

- Count No. 1 - \$500.00.
- Count No. 2 - \$1,000.00.
- Count No. 3 - \$1,250.00.
- Count No. 4 - DISMISSED.

Accordingly, we issue the following

ORDER:

THEREFORE, it is hereby Ordered that Licensee, 4333-35 Spruce, Inc., License Number R-AP-SS-OPS-3391, pay a fine of Two Thousand Seven Hundred Fifty Dollars (\$2,750.00) within twenty (20) days of the mailing date of this Order. In the event the aforementioned fine is not paid within twenty (20) days from the mailing date of this Order, licensee's license shall be suspended or revoked.

IT IS FURTHER ORDERED that Licensee shall remain in compliance with the requirements set forth in Liquor Code Section 471.1, pertaining to Responsible Alcohol Management for a period of one year from the mailing date of this Order.

Failure to comply with this Order will be grounds for modification of penalty in this case. Failure to comply may also constitute grounds for issuance of a new citation as authorized by Section 471(d) of the Liquor Code, 47 P.S. Section 4-471(d).

In order to insure compliance with this Order, jurisdiction of this matter is retained.

Dated this 17th day of December, 2007.

Tania E. Wright, J.

4333-35 Spruce, Inc.
Citation No. 06-2878C

NOTE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER TO THE OFFICE OF ADMINISTRATIVE LAW JUDGE AND REQUIRE A \$25.00 FILING FEE. A WRITTEN REQUEST FOR RECONSIDERATION MUST BE SUBMITTED WITH THE FILING FEE.

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Detach Here and Return Stub with Payment

The fine must be paid by Treasurer's Check, Cashier's Check, Certified Check or Money Order. **Personal Checks, which include business-use personal checks, are not acceptable.** Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail, along with any required documentation, to:

PLCB - Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg, PA 17110-9661

Citation No. 06-2878C