

Mailing Date: MAR 15 2011

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-2699
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W01-396609
	:	
v.	:	LID - 47478
	:	
BIJOU LLC	:	
927-939 N DELAWARE AVE	:	
PHILADELPHIA PA 19123-3110	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-AP-SS-EHF-15561	:	

JUDGE SHENKLE
BLCE COUNSEL: Erik S. Shmukler, Esq.
LICENSEE COUNSEL: Edward B. McHugh, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on November 24, 2009. The citation alleges that Licensee violated §5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code §5.32(a), on May 15, 22, 24, 29, 30, 31, June 5, 7, 12, 14, July 19, 25, 26, 31, August 1, 8, 16, 20, 22, 23, 28, 29, 30, September 4, 12, 17, 18, 19, 20, 23, 24, 25, October 4 and 5, 2009, by permitting the use on the inside of the licensed premises of a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

A hearing was held on Tuesday, January 25, 2011, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. Liquor enforcement officers arrived at the licensed premises at 12:05 a.m. on Sunday, August 16, 2009. They parked at the corner of N. Delaware and Frankford Avenues, about 450 feet from the licensed premises. They heard music at that location, coming from the direction of the

licensed premises. The officers paid a cover charge and entered the premises, where they found that the source of the music was several loudspeakers in a large open air venue (N.T. 6-8).

2. The area surrounding the licensed premises is composed largely of industrial buildings, but between the premises and the Delaware River there are three high-rise residential buildings, and one of them contains the home of a person who complained to the Bureau about noise coming from the licensed premises (N.T. 8).

3. The officers left the premises and drove to the parking lot of the apartment buildings, to the point they judged farthest from the licensed premises. The music could still be heard at that location, about 300 feet away (N.T. 9).

4. On August 30, 2009, an officer arrived at the licensed premises at 1:10 a.m. and parked at the same spot, 450 feet distant, where he again heard music, the same as before (N.T. 10-11).

5. On Saturday, September 19, 2009, a liquor enforcement officer visited the residence of the person who complained at approximately 10:00 p.m. From that 11th floor balcony the officer heard the music and disk jockey talk coming from the licensed premises. Inside, with the doors and windows closed, the bass tones could still be heard (N.T. 11-12).

6. The dates of violation listed in this citation were the three dates officers visited the premises plus the dates listed in logs maintained by the two residents of the apartment buildings who complained (N.T. 13-14).

7. The resident who testified maintained a log which showed the dates and times he perceived noise or music coming from the licensed premises. The dates involved were May 15, 22, 24, 29, 30, 31, June 5, 7, 12, 14, July 19, 25, 26, 31, August 1, 8, 20, 22, 23, 28, 29, September 4, 12, 18, 19, 20, 23 and 25, 2009 (N.T. 40-78, Exhibit B-3).

CONCLUSIONS OF LAW:

Licensee violated §5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code §5.32(a), on May 15, 22, 24, 29, 30, 31, June 5, 7, 12, 14, July 19, 25, 26, 31, August 1, 8, 16, 20, 22, 23, 28, 29, September 4, 12, 18, 19, 20, 23 and 25, 2009, by permitting the use on the inside of the licensed premises of a loudspeaker whereby music and other entertainment could be heard outside.

DISCUSSION:

In cross examination, counsel for Licensee made every effort to suggest that the source of the sound complained of was some other venue. The weight of the evidence nevertheless favored a conclusion that Licensee violated the regulation on the dates for which evidence was presented.

Counsel also made the point, as a matter of mitigation, that his client ran the establishment the same way for years without complaint. There were, of course, no residents in the area during those years, so the absence of complaint is understandable. The implication is that Licensee acquired some sort of right – as if by adverse possession – to let the sound made by its loudspeakers escape into this formerly industrial neighborhood.

Along comes a developer with plans for three waterfront condominium towers and suddenly the neighborhood has changed. Is there something unfair in this?

I think not. The Board's regulation enjoins all licensees, at all times and all places* to confine the output of their loudspeakers to the four walls of the establishment. When one finds credible evidence that loudspeakers could be heard six hundred feet from a licensed premises one is not confronted with a close case.

Counsel also argued that there was not direct evidence, on every occasion, that the sound escaping the premises was produced "by a loudspeaker or similar device." I am satisfied that the circumstantial evidence favors a conclusion that loudspeakers were involved, and this is sufficient.

PRIOR RECORD:

Licensee has been licensed since December 20, 2001, and has had three prior violations:

Citation No. 04-2031. \$500.00 fine.

1. Loudspeakers could be heard outside. August 30, 2004.
2. Improper liquor license display. October 22, 2004.

Citation No. 05-2500. \$600.00 fine.

1. Loudspeakers could be heard outside. July 2 and August 21, 2005.

Citation No. 08-2533. \$700.00 fine.

1. Loudspeakers. On 21 dates between June 21 and August, 2008.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine in the \$50.00 to \$1,000.00 range, or both, for violations of this type.

* With one exception. See 47 P.S. §4-493.1(d). This statute has one beneficiary, Conroy Catering at Glen Foerd, Inc., License No. R-AP-SS-7915, LID 38571. Bijou and Conroy have this in common: they are primarily outdoor facilities in nonresidential neighborhoods near the Delaware River. They differ in that the building used by Conroy is owned by the city of Philadelphia, on the National Register of Historic Places, and is more than 100 years old. They differ also in that the sound in Conroy's cases could be heard at a distance exceeding 6,000 feet, in New Jersey, and the sound in this case was heard at most 600 feet from the premises, entirely in Pennsylvania.

This is not to excuse Licensee's conduct. Absent legislative change the Board's regulation remains a blunt instrument, allowing for no degrees of violation or exceptions.

I will note, though, that Conroy's efforts to contain the sound (before enactment of the legislated exception) were more substantial than Bijou's have been so far, in that they involved erection of an expensive tent-like structure which had a beneficial effect.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, Bijou, LLC, License No. R-AP-SSEHF-15561, shall pay a fine of nine hundred dollars (\$900.00) within 20 days of the mailing date of this order. In the event the fine is not paid within 20 days, Licensee's license will be suspended or revoked. Jurisdiction is retained.

Dated this 28TH day of February, 2011.



David L. Shenle, J.

jb

NOTICE: MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A \$25.00 FILING FEE.

Detach Here and Return Stub with Payment

The fine must be paid by cashier's check, certified check or money order. Personal and business checks are not acceptable unless bank certified. Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail to:

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

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