

CAUSE NO. _____

SPIRE RECEPTION HALL, LLC
D/B/A SPIRE

V.

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

_____ JUDICIAL DISTRICT

PETITION FOR REVIEW

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW PETITIONER, SPIRE RECEPTION HALL, LLC D/B/A SPIRE and, in accordance with Section 2001.171, *et seq.* of the Texas Government Code, files this petition for review, appealing a Decision and Order of The State Office of Administrative Hearings (“SOAH”) whereby Petitioner’s TABC permit was suspended for 60 days for allegedly failing to operate in compliance with the Texas Department of State Health Services GA-29 and GA-32 (“The Governor’s COVID Orders”). This Court should either vacate the underlying administrative orders or remand this case to SOAH with instructions to vacate the underlying administrative order because, as a matter of law, there was no continuing threat at the location on the date the initial administrative order of suspension was issued as required by Section 11.614 of the Texas Alcoholic Beverage Code.

A. Discovery Control Plan

1. This case is an appeal from an order of the State Office of Administrative Hearings and is therefore not governed by a discovery control plan.

B. Parties

2. Petitioner, Spire Reception Hall, LLC d/b/a Spire (“Spire”), is a Texas limited

liability company that conducts business in Harris County, Texas.

3. Respondent, the Texas Alcoholic Beverage Commission (“TABC”), is a governmental entity organized under the laws of the State of Texas. John Sedberry, Assistant General Counsel of the Texas Alcoholic Beverage Commission has agreed to accept service of this petition on the Commission’s behalf.

C. Jurisdiction

4. The Court has jurisdiction over this appeal pursuant to Section 11.67 of the Texas Alcoholic Beverage Code (“the Code”).¹

D. Venue

5. Venue is proper in Harris County, Texas because Petitioner’s principal place of business is located in Harris County, Texas. TEX. ALCO. BEV. CODE ANN. § 11.67(a).

E. Factual Background

6. Petitioner is the holder of a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, a Food and Beverage Certificate, and a Beverage Cartage Permit. These permits were issued by the Texas Alcoholic Beverage Commission.

7. Spire is a private event space located at 1720 Main Street, Houston, Texas 77002 made up of multiple lounges, a food service area, and a main event hall with a performance stage. Spire’s maximum occupancy rate prior to the novel coronavirus (COVID-19) pandemic was 1200 persons.

8. On March 13, 2020, Texas Governor Greg Abbott issued a disaster proclamation certifying that COVID-19 posed an imminent threat of disaster for all Texas

¹“An appeal from an order of the commission or administrator refusing, canceling, or suspending a permit or license may be taken to the district court of the county in which the applicant, licensee, or permittee resides or in which the owner of involved real or personal property resides.” TEX. ALCO. BEV. CODE ANN. § 11.67(a) (West 2020).

counties. On June 26, 2020, Governor Abbott issued Executive Order GA-28, which sets forth the requirements and minimum standards for safely operating businesses during the pandemic. On July 2, 2020, Governor Abbott issued Executive Order GA-29, which went into effect on July 3, 2020. GA-29 provides that the state wide face covering requirement “does not apply to the following...3. [A]ny person while the person is consuming food or drink, **or** is seated at a restaurant to eat or drink[.]”²

9. On October 7, 2020, Governor Abbott issued Executive Order GA-32, which went into effect on October 14, 2020. GA-32 provides new occupancy requirements and minimum standards for safely operating businesses which includes wearing face coverings.

10. Patrons reserved Spire’s event hall for a private birthday event for New Orleans event promoter Larry Morrow on January 17, 2021. See Decision and Order, attached as Exhibit C. Tickets were required to attend the event. *Id.*

11. In anticipation of this large gathering, Spire contacted the Harris County Sheriff’s Office and arranged to have fourteen (14) deputy sheriffs present at the event to provide security. *Id.* The day prior to the event, the Harris County Sheriff’s Office notified the Petitioner that no deputies would be available to provide security at Spire the next night. *Id.* Petitioner telephoned Houston Police Department and a Constable’s office in attempt to secure a police presence for the event, but the telephone calls were not returned. *Id.* Petitioner quickly hired private security for the event in order to help manage crowds and safety, but would have preferred uniformed officers. *Id.*

12. After midnight on January 17, 2021, party crashers who had not purchased tickets to the event breached Spire’s barricaded back door and began entering the

²See Governor Abbott’s GA-29.

premises in large numbers, due to no fault of Spire. *Id.* Many of those who came in without purchasing a ticket were not wearing protective masks properly. *Id.*

13. Due to the breach of Spire's back door, both Spire's management and members of the Houston Fire Marshall's Department determined it was in everyone's best interest to shut down the event, refund all the ticket purchases, and close down for the night. *Id.* After the decision was made to close and while patrons were being asked to exit, TABC auditors and agents entered Spire. *Id.* These agents and auditors reported that social distancing and face mask wearing requirements were not being enforced. *Id.*

14. On January 19, 2021, TABC issued a 90-day Emergency Order of Suspension³ of Spire's permits for Spire's failure to operate its business in accordance with the social distancing requirements and minimum standard health protocols recommended by the Texas Department of State Health Services, GA-29, and GA-32. *Id.*

15. On January 25, 2021, TABC issued a Notice of Hearing to Spire before the State Office of Administrative Hearings.⁴ On January 29, 2021 a hearing was held in front of Administrative Law Judge Steven Neinast.

16. Because Spire made reasonable efforts prior to the event to maintain crowd control, enforce social distancing, the withdrawal of the Harris County Sheriffs with little notice, and the backdoor breach, Judge Neinast ordered that the TABC's 90-day Emergency Order of Suspension is modified to reduce the suspension period to 60 days. See Decision and Order, attached as Exhibit C.

17. During the hearing, Spire argued that its day-to-day operations are not a

³See 90-day Emergency Order of Suspension, attached as Exhibit A.

⁴See Notice of Hearing, attached as Exhibit B.

continuing threat to the public welfare because this violation was an isolated event, not a daily breach of the social distancing requirements and minimum standard health protocols recommended by the Texas Department of State Health Services, GA-29, and GA-32. See Excerpts from Transcript, attached as Exhibit D. The TABC failed to prove why Spire's operations were a continuing threat to the public welfare.

F. Standard of Review

18. This appeal must be tried within twenty (20) days from the date this petition is filed. TEX. ALCO. BEV. CODE ANN. § 11.67(b)(2) (West 2020).

19. This appeal is governed by the substantial evidence rule. *Id.* at § 11.67(b).

20. The judicial review of the SOAH's Decision and Order by Section 2001.174 of Texas Government Code, entitled "Review Under Substantial Evidence Rule or Undefined Scope of Review." Section 2001.174 states:

"If the law authorizes review of a decision in a contested case under the substantial evidence rule or if the law does not define the scope of judicial review, a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but:

- (1) may affirm the agency decision in whole or in part; and
- (2) shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
 - (A) in violation of a constitutional or statutory provision;
 - (B) in excess of the agency's statutory authority;
 - (C) made through unlawful procedure;
 - (D) affected by other error of law;
 - (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the

record as a whole; or

- (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

TEX. GOV'T CODE ANN. § 2001.174.

G. Argument and Authorities

21. The TABC administered Spire's 90-day Emergency Suspension Order under §11.614 of the Texas Alcoholic Beverage Code. Section 11.614 states that if the TABC or its administrator determines that “the continued operation of a permitted or licensed business would constitute a continuing threat to the public welfare, the [TABC] or administrator may issue an emergency order, without a hearing, suspending the permit or license for not more than 90 days.” Tex. Alco. Bev. Code. § 11.614 (a).

The SOAH Decision and Order should be reversed because the Administrative Law Judge erred as a matter of law by stating that Spire did not contest whether there was reasonable cause for the issuance of the 90-day Emergency Order.

22. In his Decision and Order, the Administrative Law Judge stated “Respondent does not contest whether there was reasonable cause of the issuance of the Emergency order.” See Decision and Order, attached as Exhibit C. This is incorrect because throughout the SOAH hearing Spire did contest whether there was reasonable cause for the issuance of the 90-day Emergency Order by questioning the TABC's witnesses about Spire's alleged continued threat to the public welfare as required under §11.614 of the Texas Alcoholic Beverage Code. Because there was no continued threat to public welfare, reasonable cause did not exist for the issuance of the 90-day Emergency Order under §11.614 of the Texas Alcoholic Beverage Code.

23. No witness or evidence produced by the TABC proved there was a continued threat to the public welfare. Spire's counsel clearly contests the reasonable cause of the

Emergency Order, as evidenced below.

Mr. Van Huff (Spire Counsel to Janelle Berry, TABC Auditor) : “So, once the location closed and the customers left, at that point in time, what was the continuing threat to public welfare?”

Janelle Berry (TABC Auditor) : “I can’t attest to that, what the public –the continuing public threat would be at the time.”

See Hearing Transcript, attached as Exhibit D, Trial, p. 38, lines 20-24..

Mr. Van Huff (Spire Counsel to Kathy Anderson, TABC Auditor) : “Okay. So, you have no knowledge of what went on at the club after you left?”

Kathy Anderson(TABC Auditor) : “No.”

Id. at p. 54, line 25 through p. 55, lines 1-2.

Mr. Van Huff (Spire Counsel) : “Now, in order for this to be upheld, the court would need to rule that when the order was issued – in my opinion, the court would need to rule that when the order was issued, there were circumstances that constitut[ed] a continuing threat to public safety. Because of the isolated nature of the situation that occurred on the night in question, it’s my position that there was no continuing threat to public welfare. And that’s further backed up by Mr. Truesdale’s testimony that this was far from his normal course of operations at this location.”

Id. at p. 95, lines 7-18.

Mr. Van Huff (Spire Counsel) : “Or so you could set aside the emergency order because there’s no continuing threat, you could modify the emergency order to reduce the number of days of suspension is another option.”

Id. at p. 96, lines 3-6.

Mr. Van Huff (Spire Counsel): “I’d also like to note that the TABC who is the entity with the burden, none of its witnesses could testify to anything about a continuing threat. Two of the three had only been there one time and the other one had been there once before, but they couldn’t testify as to the normal manner of operations at the location which Mr. Truesdale did, so that’s uncontroverted, and Mr. Truesdale testified that this whole chaotic situation out there that night was an isolated incident and that it isn’t reflective of his standard business practices. So they have the burden to show that there was a continuing threat when the order was issued and I don’t – the think the evidence and the record is completely to the contrary and there was no evidence that it would be a continuing threat to allow him to reopen.

Id. at p. 98, lines 5-20.

24. Because Spire did contest whether there was reasonable cause for the issuance of the Emergency Order, this Court should either vacate the underlying administrative orders or remand this case to SOAH with instructions to vacate the underlying administrative order because, as a matter of law, there was no continuing threat at the location on the date of the initial administrative order of suspension was issued.

H. Prayer

25. Based upon the foregoing, Petitioner prays that the Decision and Order of the SOAH enforcing a 60 day suspension of Petitioner’s permits be reversed or remanded to SOAH with instructions to vacate the underlying TABC 90-Day Emergency Order of Suspension.

Respectfully submitted,

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