

Velva L. Price  
District Clerk  
Travis County  
D-1-GN-15-004139  
Jessica Arzola

CAUSE NO. D-1-GN-15-004139

EMCF PARTNERS, LLC.,	§	IN THE DISTRICT COURT
Plaintiff,	§	
	§	
V.	§	98 <sup>TH</sup> JUDICIAL DISTRICT
	§	
TRAVIS COUNTY; TEXAS,	§	
Defendant.	§	TRAVIS COUNTY, TEXAS

**TRAVIS COUNTY’S AMENDED MOTION IN OPPOSITION TO PLAINTIFF’S ORIGINAL PETITION FOR DECLARATORY JUDGMENT, APPLICATION FOR TEMPORARY RESTRAINING ORDER, AND REQUESTS FOR TEMPORARY AND PERMANENT INJUNCTIONS**

COMES NOW, Defendant Travis County, (“Defendant”) and files its Amended Motion in Opposition to Plaintiff’s Original Petition for Declaratory Judgment, Application for Temporary Restraining Order, and Requests for Temporary and Permanent Injunctions.

**I. BACKGROUND AND SUMMARY OF ARGUMENT**

Both the Texas Mass Gatherings Act and the Texas Occupations Code § 2104 authorize Texas Counties, either through the County Judge or the Commissioners Court, to set and enforce standards ensuring the health, safety and welfare of those affected by a Mass Gathering or an outdoor music festival. See Tex. Health and Safety Code § 751 and Tex. Occ. Code § 2104. Travis County Commissioners Court and the Travis County Judge have implemented a Major Event Permitting process to streamline permit applications for such events. (Ex. 1, Travis County Permitting Procedures for Major Events in Unincorporated Areas). Under either or both provisions, Travis County has authority to review facts and determine if amplified sound at certain times is contrary to the health, safety and welfare of the public and may use its discretion to grant or deny permits in accordance with that finding.

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Essentially, in an effort to give far more advanced notice than required under state law, this is a two-step process that is intended to give promoters notice of the factors to be considered by the County Judge and Commissioners Court during the permitting process laid out in the Texas Mass Gatherings Act (TMGA) and Chapter 2104 of the Texas Occupations Code (collectively hereafter, The Permitting Statutes), when appropriate. *See* Tex. Health and Safety Code § 751; Tex. Occ. Code § 2104. To ensure health, safety and welfare, every permit granted under this process is conditioned upon compliance with the applicable state and local laws, rules and orders, including Travis County's Permit Guidelines. However, the promotor can request a waiver of requirements in section 4 of the Major Event Permit Application. This allows for both the Commissioners Court and the County Judge to review the facts, and use their statutorily established discretion to make findings and to determine the conditions necessary to promote and protect the health, safety and welfare of all affected by the proposed event.

EMCF Partners, L.L.C. seeks an injunction solely under the Texas Mass Gatherings Act, which in this instance is the conditional permit granted within the purview of the County Judge's fact finding and discretionary authority. Specifically, EMCF is asking this Court to prohibit the enforcement of the conditional permit which limits the use of amplified sound after 11:00pm Sunday through Thursday and after 1:00am Friday and Saturday. Contrary to the allegations, the Conditional Permit does not limit the hours of operation but merely allows for the use of amplified sound at certain times.

Although the County Commissioners Court can exercise only the powers specifically conferred on it by the Texas Constitution or the statutes, it "has the implied authority to exercise a broad discretion to accomplish the purposes intended." *Anderson v. Wood*, 152 S.W.2d 1084, 1085 (1941). The purpose of The Permitting Statutes is to allow Counties to ensure the health,

safety, and welfare of those affected by the event including those attending an event or residing near an event and to minimize disruption to the community at large. Thus, the County has the implied authority to implement guidelines and limitations to mass gatherings and outdoor music festivals to that end.

The Plaintiff's request for injunction and declaration should be denied because the conditions of the permits are supported by substantial evidence that those conditions are necessary to promote the health, safety and welfare of those affected by the event when they considered the adequacy of the location, orderliness of the gatherings and the hours of the festival creating likely disruptions to the lawful activity on nearby premises.

## **II. STANDARD OF REVIEW**

### **A. Questions of Law Are subject to de novo review.**

A question of law or statutory construction is subject to *de novo* review. *Bragg v Edwards Aquifer Auth.*, 71 S.W.3d 729, 734 (Tex. 2002); *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003).

When the legislature enacts a statute, it is presumed that a just and reasonable result is intended and that the public interest is favored over any private interest. Tex. Gov't Code § 311.021. When interpreting statutes, words must be given their plain and common meaning, the statute must be read as a whole, and the statutes history and purpose must be considered, as well as the consequences of alternate constructions. *See* Tex. Gov't Code § 311.023; *Texas Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004); *Texas Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004).

Legislative intent should be determined and a liberal construction be given to achieve a purpose and promote justice. Tex. Gov't Code § 312.005, 312.006. Further, the Texas Supreme

Court has held that the words “or” and “and” in a statute can be interchanged when it is necessary to effectuate the legislature’s intent, where to do so would not render the statute meaningless, and where not to do so would result in an absurdity. *Robinson v. Reliable Life Ins. Co.*, 569 S.W.2d 28 (Tex. 1978); *Bayou Pipeline Corp. v. Railroad Comm’n*, 568 S.W.2d 122 (Tex. 1978).

B. *Questions of fact are subject to the Substantial Evidence Review and must be presumed to be supported by the substantial evidence.*

The standards of review under the substantial evidence rule are now reasonably well established in Texas:

1. The findings, inferences, conclusions, and decisions of an agency are presumed to be supported by substantial evidence, and the burden is on the party contesting the order to prove otherwise.
2. In applying the substantial evidence test, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence of questions committed to agency discretion.
3. Substantial evidence is more than a scintilla, but the evidence in the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence.
4. The true test is not whether the agency reached the correct conclusion, but whether some reasonable basis exists in the record for the action taken by the agency.
5. The agency’s action will be sustained if the evidence is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action.

*Texas Health Facilities Commission v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446, 452-53 (Tex. 1984).

The court must uphold the agency decision if reasonable minds could have reached the conclusion of the agency. *Id.* at 453. Agency decisions that are not supported by substantial evidence are arbitrary and capricious. *Id.* at 454. The motives a county commissioner may have in taking a lawful action are “wholly immaterial.” *Live Oak County v. Lower Nueces River*

*Water Supply Dist.*, 446 S.W.2d 14, 26 (Tex.Civ.App.--Beaumont 1969, writ ref'd n.r.e.). Evidence relating to the "mentations" of a commissioners court "is legally ineffective as a matter of substantive law to impeach or abrogate an order of a Commissioners' [sic] Court." *Glimpse v. Bexar County*, 160 S.W.2d 996, 999 (Tex.Civ.App.--San Antonio 1942, writ ref'd). So long as an act of a commissioners court is reasonable, it cannot be arbitrary and capricious. *Randall County Comm'rs Court v. Sherrod*, 854 S.W.2d 914 (Tex. App. Amarillo 1993, no writ).

In this instance, Travis County (through the Travis County Judge and the Commissioners Court) reviewed and considered various recommendations, standards, laws and communications, including live testimony. Based on this information, Travis County determined that in order to promote health, safety and welfare of all those affected by the proposed mass gathering, a conditional permit was granted. The findings are that if the terms of the conditional permit are met, the health, safety and welfare of all those affected will be preserved.

### **III. EVIDENCE**

Travis County incorporates by reference the following evidence:

- Ex. 1: Travis County Permitting Procedures for Major Events in Unincorporated Areas
- Ex. 2: Euphoria Festival 2016 Application
- Ex. 3: Travis County Major Event Permitting Guidelines and Application
- Ex. 4: Order Granting Conditional Major Event Permit for Euphoria Festival 2016
- Ex. 5: Order Granting Conditional Mass Gatherings Act Permit for Euphoria Festival 2016
- Ex. 6: Joint Stipulated Facts<sup>1</sup>

### **IV. ARGUMENT AND AUTHORITIES**

Plaintiff's Petition for declaratory judgment and permanent injunction should be denied because Travis County has the authority to enforce the conditions of the Mass Gathering and Major Event Permits as issued to EMCF Partners, LLC in order to ensure the health, safety and

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<sup>1</sup> Travis County anticipates filing joint stipulated facts for the Court's consideration.

welfare of those affected by Euphoria Festival 2016. The Major Event Permitting Guidelines merely provide notice of the factors to be considered by Travis County. In this instance, granting the conditional permit is not only within Travis County authority, it is also supported by substantial evidence. As such, Travis County is authorized to enforce the conditional permits.

A. Travis County has authority and responsibility to preserve the health, safety and welfare of those affected by an event.

The Texas legislature has vested authority in Counties to regulate Mass Gatherings<sup>2</sup> and Outdoor Music Festivals<sup>3</sup> that occur outside the boundaries of a municipality. The county can exercise only powers specifically conferred on it by the Constitution and statutes. *Canales v. Laughlin*, 147 Tex. 169, 214 S.W.2d 451, 453 (1948). However, it “has implied authority to exercise a broad discretion to accomplish the purposes intended.” *Anderson v. Wood*, 137 Tex. 201, 152 S.W.2d 1084, 1085 (1941).

Here, TMGA specifically allows consideration and enforcement based on 1) the minimum standards for health as prescribed by state and local laws, rules and orders, and 2) order as prescribed by state and local laws, rules and orders.

**1. Travis County can set and enforce standards for health, including noise.**

The County Judge can deny permits and require compliance with minimum standards prescribed by state and local laws, rules and orders, including Travis County’s Event Permit Guidelines. *See* Tex. Health and Safety Code §§ 751.007(b)(6), 751.012(a),(c).

The construction of a statute by an agency charged with its execution is entitled to serious consideration unless the agency’s construction is unreasonable and clearly inconsistent with the legislative intent. *Texas Water Comm’n. v. Brushy Creek MUD*, 917 S.W.2d 19, 21 (Tex. 1996);

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<sup>2</sup> For a complete definition of “Mass Gathering” see Tex. Health and Safety Code § 751.002.

<sup>3</sup> For a complete definition of “Outdoor Music Festival” see Tex. Occ. Code § 2401.001.

*Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993). Greater deference is given to an agency interpretation that is long-standing. *Texas Citrus Exchange v. Sharp*, 955 S.W.2d 164, 170 (Tex. App.—Austin 1997, no writ).

Here, the State Health Department was directed to implement rules for minimum standards for health for mass gatherings. Tex. Health and Safety Code § 751.010. In adopting its rules on mass gatherings in the 1970's, the State Health Department construed the term "health" to include health impacts from sound. 25 Tex. Admin. Code § 265.3(f)<sup>4</sup>. Hence, the state agency delegated the responsibility for writing rules construed the TMGA to allow regulation of sound from a mass gathering. This indicates that excessive noise can be a health hazard and this Court should defer to the agency's judgment on the issue of sound as a health hazard.

Plaintiff argues that the TMGA limits the County's authority to the 70 decibel "minimum standards" as defined by Department of State Health Services<sup>5</sup> [sic]. (Pl. Orig. Pet. ¶34). First, taken in plain language, a minimum standard is just that, the minimum, not the only guideline or the maximum standard. Additionally, the TMGA does not confine the local health official or County Judge to considering only the Department of State Health Services' minimums but explicitly allows enforcement of "minimum standards of health/public safety and order . . . prescribed by state and **local laws, rules, and orders . . .**" Tex. Health and Safety Code § 751.012(a),(c) (emphasis added).

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<sup>4</sup> (f) Noise control. Amplifying equipment used shall be designed to control the noise level at the perimeter of the site on which the gathering shall take place and be so operated that at no time more than 70 decibels is registered on the 'A' scale at slow response of a standard sound level meter which meets the specifications of the American National Standards Institute.

<sup>5</sup> S.B.219, 84<sup>th</sup> Legislature, Regular Session requires the executive commissioner of the Commission for Health and Human Services to adopt rules relating to minimum standards for health and sanitation at mass gatherings.

Furthermore, the TMGA provides that the County Judge may conduct any additional investigation that the County Judge considers necessary and to consider testimony from any person for or against the granting of the permit. Tex. Health & Safety Code § 751.006(c). Such testimony would not be necessary if it were only the State's minimum standards that could be considered in the permitting process.

The Travis County Commissioners Court entered a local order specifying guidelines on hours of amplified sound in its Major Event Permitting Guidelines. (Ex. 3, Travis County Maj. Event Permitting Guidelines). The guidelines were entered after public hearings and with substantial evidence supporting them. Here, the County Judge considered industry standards, live testimony for and against the permit, reports from county officials, the location of the event in question and determined that amplified noise after 11pm on school nights and after 1am on Friday and Saturday was not conducive to the health, safety and welfare of those affected by the event and did not comply with the minimum standards as prescribed by local rule or order. She then entered an order consistent with those findings and granted the permit conditioned upon the promotor meeting the minimum standards contained therein. Thus, Travis County can now enforce on-going compliance with the conditions of the permits, including limiting amplified sound after 11pm Sunday through Thursday and 1am on Friday and Saturday.

The Trial Court may not substitute its judgment for that of the fact finding body but rather must defer to the fact finding unless it is arbitrary and capricious. If there is even a mere scintilla of support in the record for its findings, the Court must uphold the conditional permit.

**2. Travis County can ensure the event is conducted in a safe and orderly manner.**

Also, Travis County can deny permits and require compliance with minimum standards prescribed by state and local laws, rules and orders to ensure the event is conducted in a safe and



orderly manner. Tex. Health and Safety Code §§ 751.007(b)(6), 751.012(a),(c). Noise is an element of orderly conduct as demonstrated by the Texas Penal Code, Title 9, Offenses Against Public Order and Decency<sup>6</sup>.

In this instance, not only do the Major Event Permitting Guidelines, Order Granting the Conditional Major Event Conditional Permit, and the Order Granting the Conditional Mass Gatherings Permit establish enforceable minimum standards for ensuring public order as it relates to noise, but the Texas Penal Code also provides that intentionally making unreasonable noise near a private residence is disorderly conduct. Tex. Pen. Code § 42.01(5). Under the circumstances, the intentional amplification of sound and bass thumping throughout the night and into the wee hours of the morning such that it disrupts residents of a nearby home could be considered disorderly conduct and would be violating the permitting orders. The TMGA allows for enforcement of violations of minimum standards as prescribed by state and local law, rules or order. Thus, the limitations on amplified sound are enforceable.

B. Travis County can establish Music Festival Permitting Guidelines and deny permits that do not comply.

The Travis County Major Event Permit contemplates the TMGA and the Outdoor Music Festival permitting statutes. The Texas Legislature conveyed authority over permitting for outdoor music to a county commissioners court. Tex. Occ. Code § 2104. After a hearing at which any person may appear and give testimony for or against the permit, the Commissioners shall grant the permit, unless they find, by a majority vote, by a preponderance of the evidence that one or more of the enumerated basis for denial are present. Tex. Occ. Code §§ 2104.103-04. Notably, under the statute, a promoter is required to register with the county clerk and have a

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<sup>6</sup> “A person commits an offense if he intentionally or knowingly makes unreasonable noise . . . in or near a private residence that he has no right to occupy.” Tex. Penal Code § 42.01(5).

permit in hand prior to promoting his or her event. *Id.* at 2104.151. Furthermore, it explicitly requires consideration of the times and location of the event. Tex. Occ. Code §§ 2104.051, 2104.101(6), 2104.104(5).

Relevant to this case, the court may deny the permit if they find 1) the preparations described in the application are insufficient to protect the community from health dangers, or 2) times of the festival or the festival location create a substantial danger of disruption of other lawful activities in the immediate vicinity of the festival. Tex. Occ. Code § 2104.104. Here, the Court considered the location and testimony from EMC Partners, LLC, local officials and concerned residents living near the proposed location. Rather than denying the permit outright, the Court voted to grant the permit but conditioned the permit's approval on limiting the hours of amplified sound to ensure the health of the nearby residents and to minimize the danger of disrupting other lawful activities, such as sleeping.

The Court's decision to condition the permit was not arbitrary or capricious and does not violate the Plaintiff's rights in that the limitation is a content neutral time, place and manner limitation. Thus, the Court acted within its authority to condition the permit on compliance with local orders, including those limiting amplified sound late at night and early in the morning.

## **V. CONCLUSION**

Plaintiff's Injunction and Declaratory Judgment should be denied because Travis County has the authority to enforce violations of the minimum standards for health and order as prescribed by state and local laws, rules and orders. Here, Travis County has considered the times of the festival, location, testimony from local officials and citizens residing in the immediate vicinity of the festival's proposed location. The County Court and County Judge

entered orders that establish narrow limitations on amplified sound for legitimate purposes and by virtue of their explicit and implied authority as conferred by The Permitting Statutes.

WHEREFORE, PREMISES CONSIDERED, Travis County prays that Plaintiff take nothing by reason of its suit and that County recover its expenses, with all costs of court, and any other and further relief to which it may show itself justly entitled.

Respectfully submitted,

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