



OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS
Appeals Division

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Appeal No. 2300078

Dietmar Detering, CC v. Café Ole

April 27, 2023

APPEAL DECISION

The appeal of Petitioner, citizen complainant (CC), is **granted**.

Petitioner appeals from a recommended decision by Hearing Officer S. Chetrit, dated December 20, 2022, dismissing a violation of § 24-244(b) of the Administrative Code of the City of New York (Code), for noise emitted from a sound reproduction device used for commercial or business advertising purposes and heard on a public street. Having fully reviewed the record, the Board finds that the hearing officer’s decision is not supported by the law and a preponderance of the evidence. Therefore, the Board finds as follows:

Summons	Law Charged	Hearing Determination	Appeal Determination	Penalty
213498102	Code § 24-244(b)	Dismissed	Reversed – In Violation	\$440

In the summons, the CC affirmed that on September 16, 2022, at 11:38 a.m., at 38-09 36th Avenue, Queens, he “personally observed a speaker, mounted on the outside of this bar or restaurant, playing music, directed at the sidewalk and the empty outdoor tables of this [establishment].”

At the telephonic hearing, held on December 7, 2022, the CC testified that in passing the front of Respondent’s business, he heard music. He observed a mounted speaker playing music onto the sidewalk with an outdoor dining shed adjacent. No one was sitting in the dining shed. He submitted a video and a photograph of the place of occurrence. Respondent’s representative, the owner’s daughter, testified that it was a single speaker, which was softly playing music. She argued that it was quieter than 42 decibels, which she contended is the legally allowed limit, and that they are allowed to play music outside of the citywide quiet hours of 10:00 p.m to 7:00 a.m. CC countered that Code § 24-244(b) does not have an allowable decibel limit or timeframe. In a decision dismissing the violation, the hearing officer found that CC failed to establish that the music was being used for “commercial or business advertising purpose or for the purpose of attracting attention to any performance, show, sale or display of merchandise.”

On appeal, the CC reiterates his hearing assertions. He also argues that the music was clearly being used for a commercial purpose of bringing in customers and cites to *NYC v. East End Essemble, Inc.*, Appeal No. 41190 (September 16, 2003), in support. Respondent did not answer the appeal.

The Board reverses the hearing officer’s decision. Code § 24-244(b), in relevant part, prohibits anyone from operating a sound device “for commercial or business advertising purposes or for the purpose of attracting attention to any performance, show, sale or display of merchandise, in connection with any commercial or business enterprise outside or in front of any building, place or premises.” CC’s video showed a speaker mounted to the exterior wall of a restaurant, playing music to the public sidewalk and an empty dining shed. As noted in *NYC v. East End Ensemble Inc.*, there is a reasonable inference that when music is played audibly to the outside of an establishment, it serves a purpose of attracting passersby, “which is, in fact, the definition of advertising.” Particularly on this record, where the outdoor dining shed was empty and the time was 11:38 a.m., the music is not there to entertain any diners, but to draw attention and inform

passersby that the café is open. As to Respondent's argument at the hearing that the sound did not exceed 42 decibels, the Board notes that only applies to a charge of Code § 24-231.¹

Accordingly, the Board reverses the hearing officer's decision, sustains a violation of Code § 24-244(b), and imposes a civil penalty of \$440.

By: OATH Appeals Division

¹ Additionally, under Department of Transportation's Open Restaurants Program, which allows restaurants to use the sidewalk and roadway adjacent to the restaurant, amplified sound systems are prohibited.