OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS
Appeals Division

9 Bond Street, 6th Floor
Brooklyn, NY 11201
Tel: (212) 436-0624

Appeal No. 2300403 Dietmar Detering (CC) v. Jackson Hole July 27, 2023

APPEAL DECISION

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

Petitioner appeals from a recommended hearing decision by Judicial Hearing Officer (JHO) J. Silverman, dated March 15, 2023, dismissing a charge under § 24-244(b) of the Administrative Code of the City of New York (Code) for creating unreasonable noise from a sound reproduction device for commercial or business advertising purposes. Having fully reviewed the record, the Board affirms the dismissal of the summons and finds as follows:

Summons	Law Charged	Hearing Determination	Appeal Determination	Penalty
216397610	Code § 24-244(b)	Dismissed	Affirmed – Dismissed	$0

In the summons, Petitioner affirmed that on October 19, 2022, at 6935 Astoria Blvd. in Queens, he "personally observed at least two speakers, facing the street/the sidewalk, mounted on the bars of the cellar windows, playing music in order to attract attention to this business. No one was using the outdoor seating."

At the telephonic hearing, held on February 27, 2023, Petitioner testified as follows. The two speakers playing music were mounted to the exterior of basement windows facing a gated outdoor dining area abutting the sidewalk. He heard the music coming from the speakers, which was loud enough to be heard while passing by. No one was eating outside at the time. The music volume was the same near the door. Respondent's manager testified in defense as follows. He was not aware that the very low music was coming from the tiny speakers in the video. He was not sure those were speakers, and if they were, he did not think they were working. There are usually guests eating outside depending on the weather. They play music inside to create an old vibe ambience and for customer comfort. They do not play the music for advertising purposes. The music heard in the video was typical of what is played inside the restaurant. One can hear music when the doors open and close, but one cannot tell from the video if a door was being kept open.

In her decision, the JHO dismissed the summons, finding that the music was not coming out from the speakers, which were not working; and that any music was ambient for outdoor diners, not for business or commercial advertising purposes.

On appeal, Petitioner repeats and elaborates his hearing assertions and arguments. He further argues as follows. He established a prima facie case which Respondent failed to refute and to which it failed to establish a defense. The loud music was coming from the exterior speakers, which are clearly for a commercial or business advertising purpose. *See NYC v. East End Essemble, Inc.*, Appeal No. 41190 (September 16, 2003). Respondent's manager was uncertain if the speakers were not working, and he produced no evidence to substantiate that claim. That was inadequate to refute Petitioner's video evidence that shows no one eating in the outdoor area, and only one person leaving the restaurant with a paper bag as takeout or delivery.

Therefore, the JHO's findings are against the weight of the evidence. Respondent did not answer the appeal.

The Board affirms the JHO's decision.

On this record, the Board finds that Petitioner failed to establish a violation of Code § 24-244(b). Code § 24-244(b), in relevant part, prohibits anyone from operating a sound reproduction 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 . . . (i) outside or in front of any building, place or premises." Petitioner's video showed that the music volume increased when Petitioner was near the speakers visible on the outside of the basement windows of Respondent's diner and diminished when he traveled between them. Therefore, contrary to the JHO's determination, the Board finds that the speakers were emitting music.

Nevertheless, the Board also finds that the music therefrom was intended to create an ambience for the outdoor dining space, not for advertising. It notes that two recent decisions cite *East End Essemble*, 41190, as does Petitioner, in stating that that there is a reasonable inference that when music is projected audibly to the outside of an establishment, it has an advertising purpose. *See Dietmar Detering, CC v. El Gran Coffee Shop*, Appeal No. 2300079 (April 27, 2023), and *Dietmar Detering, CC v. Café Ole*, Appeal No. 2300078 (April 27, 2023). *East End Essemble*, however, is to the contrary. In that case the Board stated that it was upon its review of the "totality of the evidence" that it determined that there was an advertising purpose, finding that the respondent intended live music being played in its club to be heard on the street outside so as to attract passersby's attention to the club and the band performing there. Similarly, in *NYC v. 177 Christie Inc. dba Esperanto*, Appeal No. 40526 (February 28, 2008), the Board rejected the petitioner's argument that Code § 24-244(b) contains a "presumption" that music emanating from a commercial premises is being played for an advertising purpose; instead, in finding the violation it relied on additional facts established by the petitioner, including the issuing officer's credited testimony that the five-piece band playing in the respondent's club could be heard through a "wide open" door from up to thirty feet away and that he saw that people were dancing on the sidewalk in front of the club.[1] Finally, in dismissing the charge in *NYC v. Dawn Swaby Brooklyn Jerk Center*, Appeal No. 1000431 (October 28, 2010), the Board cited both the respondent's credible explanation that music audible through its restaurant's open door was for the enjoyment of the patrons within and the petitioner's failure to present additional facts supporting an inference of an advertising purpose.[2]

---

[1] The Board's decision was affirmed by the Supreme Court, New York County, in *177 Christie, Inc. v. Environmental Control Bd.*, 2010 NY Slip Op 30009U; 2010 N.Y. Misc. LEXIS 1195. On further appeal, the lower court's decision was unanimously affirmed by the Appellate Division, *177Christie, Inc. v Environmental Control Bd.*, 83 A.D.3d 561 (1st Dep't 2011).

[2] Since *Dawn Swaby Brooklyn Jerk Center*, 1000431, there have been only two other Board decisions on Code § 24-244(b) charges brought by the Department of Environmental Protection, both of which the Board dismissed upon a similar examination of additional facts in the record. *See NYC v. 165-24 Jamaica Ave. Corp.*, Appeal No. 1100373 (June 23, 2011) (no advertising purpose found based on size and location of speakers playing music in respondent's store); *see also NYC v. Church of Scientology New York*, Appeal No. 1200229 (June 28, 2012) (no advertising purpose found based on non-commercial content of message).

From the foregoing, the Board concludes that in considering the totality of the evidence: (1) where music is directed to the public in general from a performance venue where the music is the "product" on offer, an advertising purpose may be inferred; (2) where music contributes to the atmosphere of a dining establishment or of a store and is directed to the patrons or shoppers therein, even though it may also be incidentally heard by passersby, an advertising purpose may not be established;[3] and consequently (3) an advertising purpose has not been shown where music is provided to be heard by customers using an outdoor dining area, and is only incidentally audible by passersby.

Accordingly, consistent with the above, the Board assesses the totality of the evidence in the instant appeal in determining whether there was an advertising purpose. It notes that Petitioner's video shows that: Respondent's diner offers an outdoor dining area to its patron, with the cited music emanating directly thereto; the dining area is on a patio-like surface, adjacent to the parking lot, and elevated above and separated from the public way by a wrought iron fence; and no passersby are visible and the sound of automobile traffic on Astoria Boulevard is pronounced and constant. It finds therefore that the record contains no evidence in addition to the music itself to support an inference of an advertising purpose; to the contrary, the record establishes Respondent's legitimate non-advertising intention.

Finally, the Board finds that in *El Gran Coffee Shop*, 2300079, and *Café Ole*, 2300078, music played for the patrons of two outdoor dining sheds was found to establish an advertising purpose without the presence in the record of any additional facts to support an inference and despite a credible alternative explanation provided by the respondents. Therefore, it overrules these decisions as inconsistent with precedent and the analysis set forth above.[4]

Accordingly, the Board affirms the JHO's dismissal.

---

[3] The Board further finds that whether there are patrons or shoppers currently in a dining establishment or store is not a material fact as such dining establishment or store is not expected to turn on and off music being provided for ambience as customers enter and leave.

[4] The Board notes that its determination is limited to finding that a violation of Code § 24-244(b) did not exist under the facts presented. It does not extend to the question of whether one or more other provisions of law may prohibit conditions as cited in the instant case, as well as *El Gran Coffee Shop*, 2300079, and *Café Ole*, 2300078.