



OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS
Appeals Division

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Appeal No. 2300986

Eric Eisenberg, CC v. Jasper's

October 26, 2023

APPEAL DECISION

The appeal of Respondent, restaurant owner, is granted. Respondent appeals from a recommended decision by Judicial Hearing Officer (JHO) D. Vazquez-Diaz, dated June 20, 2023, sustaining 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. After a full review of the record, the Board finds as follows:

Table with 5 columns: Summons, Law Charged, Hearing Determination, Appeal Determination, Penalty. Row 1: 216391818, Code § 24-244(b), In Violation, Reversed - Dismissed, \$0

In the summons, a citizen complainant (CC) affirmed observing on August 18, 2022, at 11:16 a.m., at 761 9th Avenue, Manhattan, sound playing from speakers outside a business and audible on the sidewalk.

After a hearing held on June 14, 2023, the JHO affirmed the violation finding that the cited sound, music, served as advertisement to passersby. For the following reasons, the Board reverses the JHO's decision. Code § 24-244(b) 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," inter alia. Here, the CC's video showed a restaurant playing music to outdoor dining tables. Respondent's representative stated at the hearing that the music was intended to create an ambience for the outdoor dining space, not for advertising, which the Board credits. As the Board held in Dietmar Detering v. Jackson Hole, Appeal No. 2300403 (July 27, 2023), 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. Consequently, here, an advertising purpose has not been shown where music was provided to be heard by customers using an outdoor dining area, and was only incidentally audible by passersby.

Accordingly, the Board reverses the JHO's decision and dismisses the summons.

By: OATH Appeals Division

1 While Petitioner asserts that Respondent did not properly serve a copy of the appeal on him, the Board notes that Petitioner was afforded the opportunity to submit a response to the appeal, which he did. As such, the Board finds any asserted deficiencies in service of the appeal to be harmless.