



**OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**  
Appeals Division

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

Appeal No. 2400020

DOB v. OWNERS GC NY

March 28, 2024

**APPEAL DECISION**

The appeal of Respondent, general contractor, is **denied**.

Respondent appeals from a recommended decision by Judicial Hearing Officer (JHO) A. Lees, dated October 30, 2023, sustaining a Class 2 violation of § 28-105.1 of the Administrative Code of the City of New York (Code) for performing work without a permit. Having fully reviewed the record, the Board finds that the JHO’s decision is supported by the law and a preponderance of the evidence. Therefore, the Board finds as follows:

Summons	Law Charged	Hearing Determination	Appeal Determination	Penalty
35578618K	Code § 28-105.1	In Violation	Affirmed – In Violation	\$625

**BACKGROUND**

In the summons, the issuing officer (IO) affirmed on July 17, 2022, at 295 Himrod Street, Brooklyn, as follows:

Work after hours without a variance permit contrary to 28-105.12.5. At time of inspection, observed work in progress on Sunday 07/17/22 with approx[] 4 workers present installing floor tiles in the basement[.] No work permit was posted at the site or presented when I requested, for work was done under the Permit # B00628735-11-GC-CX and B00628735-11-S1-PL.

At the telephone hearing, held on October 23, 2023, the IO testified as follows. He observed workers putting down floor tiles and concrete in the basement. A work permit is not specifically required for the installation of floor tiles, but it is a different issue when the tiles are embedded in concrete. In support, the attorney for Petitioner, Department of Buildings (DOB), submitted photographs taken by the IO at the time of his inspection. Petitioner’s attorney also submitted the Property Profile Overview, which states that the premises are a three-storied walk-up apartment building in general residential district R6. Respondent’s attorney argued as follows. The installation of floor tiles requires neither a work permit nor an after-hours variance permit because it is a minor alteration. Respondent had no notice of the alleged concrete work. The alleged violation is not an immediate hazard as there is no evidence that the installation of floor tiles caused noise. The IO originally charged a Class 1 violation of Code § 28-105.1, but at the hearing, Petitioner’s attorney moved to amend to a Class 2 violation of Code § 28-105.1 upon Respondent’s attorney’s class challenge, which motion was granted by the JHO without any objection by Respondent’s attorney.

In the decision sustaining the summons, the JHO credited the summons, found that Respondent did not refute the allegations as set forth in the summons, and imposed the mitigated penalty based on proof of correction before the first scheduled hearing date.

On appeal, Respondent argues as follows: Respondent was not on notice of the alleged concrete work; the installation of floor tiles does not require a permit; and Petitioner did not prove the

severity of the charge to support the amended Class 2 designation. Respondent may not raise a class challenge for the first time on appeal. Respondent's attorney never challenged the amended Class 2 designation at the hearing and is therefore precluded from doing so for the first time on appeal. See *DOB v. Max N. Almonor Jr.*, Appeal No. 1900711 (July 11, 2019).

Petitioner did not answer the appeal.

### **ISSUE ON APPEAL**

The issue on appeal is whether Petitioner provided adequate notice to Respondent and thereafter established a Class 2 violation of Code § 28-105.1.

### **APPLICABLE LAW**

Code § 28-105.1 provides:

It shall be unlawful to construct, enlarge, alter, repair, move, demolish, remove or change the use or occupancy of any building or structure in the city, to change the use or occupancy of an open lot or portion thereof, or to erect, install, alter, repair, or use or operate any sign or service equipment in or in connection therewith, or to erect, install, alter, repair, remove, convert or replace any gas, mechanical, plumbing, fire suppression or fire protection system in or in connection therewith or to cause any such work to be done unless and until a written permit therefor shall have been issued by the commissioner in accordance with the requirements of this code, subject to such exceptions and exemptions as may be provided in section 28-105.4.

Code § 28-105.12.5 requires that all work be performed in compliance with the Noise Control Code and provides that failing to comply with Code §§ 24-222 and 24-223 shall be a violation of this code.

Code § 24-203(21) defines "construction work" as "any or all activity necessary or incidental to the erection, demolition, assembling, altering, installing or equipping of buildings . . . ."

Code § 24-222 provides:

Except as otherwise provided in this subchapter, it shall be unlawful to engage in or to cause or permit any person to engage in construction work other than on weekdays between the hours of 7 a.m. and 6 p.m. A person may however perform construction work in connection with the alteration or repair of an existing one or two family owner-occupied dwelling classified in occupancy group J-3 or a convent or rectory on Saturdays and Sundays between the hours of 10 a.m. and 4 p.m. provided that such dwelling is located more than 300 feet from a house of worship.

Code § 24-223(e) limits authorization for after-hours construction work to: (1) emergency work, (2) where there are public safety concerns, (3) City construction projects, (4) construction activities with minimal noise impact, and (5) cases where there is undue hardship.

### ANALYSIS

For the following reasons, the Board affirms the JHO's decision.

Per § 6-12(b) of Title 48 of the Rules of the City of New York (RCNY), a summons affirmed under penalty of perjury is prima facie evidence of the facts stated therein. The IO was permitted to supplement the description of the violating condition on the summons and did so through his testimony. *See NYC v. Nisim Khaimov*, Appeal No 1700775 (September 21, 2017). Although Respondent's attorney asserted surprise regarding the concrete work alleged at the hearing, he made no request for an adjournment at the hearing to allow Respondent to prepare a defense.

On this record, the Board finds that Petitioner established a violation of Code § 28-105.1. Code § 28-105.12.5 requires that all work be performed in compliance with the Noise Control Code and provides that failing to comply with Code §§ 24-222 and 24-223 shall be a violation. Code § 24-222 prohibits engaging in any construction work other than on weekdays between the hours of 7:00 a.m. and 6:00 p.m., unless otherwise authorized by Code § 24-223. Code § 24-203(21) defines "construction work" as "any or all activity necessary or incidental to the erection, demolition, assembling, altering, installing or equipping of buildings." Here, the IO's credited and undisputed testimony established that Respondent was installing floor tiles after hours. Since Respondent did not have an after-hours variance permit, the work performed by Respondent's employees on a Sunday was in violation of Code § 24-222. It is irrelevant that Respondent might not have needed a DOB permit to install the floor tiles. *See NYC v. Triple 8 Construction, Inc.* (Appeal No. 1301076, January 30, 2014). Per 1 RCNY § 101-14(c), construction work exempt from requiring a DOB permit must still comply with Noise Control Code provisions. *See NYC v. Titan Construction Services*, Appeal No. 1600283 (June 30, 2016). Code § 28-105.12.5 requires that "all work," i.e., whether performed pursuant to a work permit or exempt from the permit requirements, comply with Code § 24-222. *See NYC v. Hill International, Inc.*, Appeal No. 1100761 (December 15, 2011). Therefore, that the cited work might not have required a DOB permit does not lead to the conclusion that after-hours work is allowed. Respondent was required to comply with the restrictions in Code § 24-222 and is in violation of that statute for performing the work on a Sunday without an after-hours variance permit and without falling within the exception as provided in Code § 24-222. Working on a prohibited day and time is a violation of Code § 24-222 regardless of whether it caused noise. *See NYC v. Adel Sarhan*, Appeal No. 1701394 (March 8, 2018).

Accordingly, the Board affirms the JHO's decision sustaining a Class 2 violation of Code § 28-105.1 and imposing a mitigated civil penalty of \$625.

*By: OATH Appeals Division*