

MINUTES OF THE CITIZENS CODE ENFORCEMENT BOARD
HEARING HELD AT 4:30 P.M.
SEPTEMBER 1ST, 2005
UTILITIES COMMISSION, 3RD FLOOR, DEBERRY ROOM, 200 CANAL STREET
NEW SMYRNA BEACH, FLORIDA

The Hearing of September 1st, 2005 was called to order at 4:32 p.m. Answering to roll call:

Maggie Hawk (Chairperson)
John Shelby (Vice Chairperson)
Jay Crocker
Elliott Hoffman
Susan Ellis

Board members absent were Carol Kerrigan and Michael Slayton. Also present were Code Enforcement Supervisor Lynne Kunkle, Code Enforcement Officer Barbara Bobelak, Patrol Commander William Drossman, City Attorney Frank Gummey, and Administrative Specialist Inga Campbell.

Regina Lynne Kunkle, Code Enforcement Supervisor, Barbara Jo Bobelak, Code Enforcement Officer and William Drossman, Patrol Commander were sworn for testimony.

NEW BUSINESS:

CASE NO: C2005-0652

Mark Dam
Beachside Tavern
690 3rd Avenue
New Smyrna Beach, FL 32169

Violation Location: Beachside Tavern
690 3rd Avenue
New Smyrna Beach, FL

- (A). Permitting or causing to be permitted the use of musical instruments, phonograph, tape or compact disc player, loudspeakers, amplifiers or other machine(s) or device(s) for the production of sound inside or outside a bar in such a manner that the sound produced by such a device is plainly audible

while standing within the boundary limits of an adjacent or neighboring property zoned for residential use in violation of §38-73. (12) of the City Code of Ordinances.

Attorney Ty Harris was present to represent Mark Dam and Beachside Tavern.

Mr. Harris presented Case No. 95-02905 Mark A. Sanders v. Lee County to City Attorney Mr. Gummey for his review. Mr. Harris stated based on this case he believes the City's noise ordinance is unconstitutional under Florida Law.

Mr. Gummey requested additional time to review this case.

Jay Crocker moved to continue this case until 4:00 pm Friday, September 2nd, 2005 to give Mr. Gummey additional time to review this case; seconded by Susan Ellis. Motion passed unanimously on roll call vote 5-0.

ADJOURNMENT:

There being no further business Susan Ellis made a motion to adjourn the meeting; seconded by Elliott Hoffman. All agreed and the board adjourned at 5:15 pm.

Pursuant to Florida statute 286.0105, if an individual decides to appeal any decision made by the Citizens Code Enforcement Board with respect to any matter considered at this hearing, a record of the proceedings will be required and the individual will need to ensure that a verbatim transcript of the proceedings is made, which record includes the testimony and evidence upon which the appeal is based. Such person must provide a method for recording the proceedings.

In accordance with the Americans with Disabilities Act (ADA), persons needing assistance to participate in any of these proceedings should contact the Administrative Specialist of the Citizens Code Enforcement Board listed below prior to the hearing:

Inga Campbell
Administrative Specialist
% City Hall
210 Sams Avenue
New Smyrna Beach, FL 32168-9985
Telephone: 386.424.2265
Fax: 386.424.2143

MINUTES OF THE CITIZENS CODE ENFORCEMENT BOARD
HEARING HELD AT 4:00 P.M.
SEPTEMBER 2ND, 2005
UTILITIES COMMISSION, 3RD FLOOR, DEBERRY ROOM, 200 CANAL STREET
NEW SMYRNA BEACH, FLORIDA

The Hearing of September 2nd, 2005 was called to order at 4:00 p.m. Answering to roll call:

Maggie Hawk (Chairperson)
John Shelby (Vice Chairperson)
Michael Slayton
Jay Crocker
Elliott Hoffman
Carol Kerrigan
Susan Ellis

Also present were Code Enforcement Supervisor Lynne Kunkle, Code Enforcement Officer Barbara Bobelak, Patrol Commander William Drossman, City Attorney Frank Gummey, and Administrative Specialist Inga Campbell.

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Mr. Gummey stated the City Staff is still sworn for testimony.

Attorney Ty Harris was present to represent Mark Dam and Beachside Tavern.

Chairperson Hawk stated this case was continued from September 1st, 2005 so Mr. Gummey could review the documents presented by Mr. Harris. Ms. Hawk recapped the previous meeting by stating Mr. Harris argued that based on the presented case he believes the City's noise ordinance is unconstitutional under Florida Law.

Chairperson Hawk asked Mr. Harris what he believed made the said ordinance unconstitutional.

Mr. Harris stated the ordinance incorporates a term under the specific provision (12) that his client has been cited under which is the "plainly audible" standard. The standard states if the noise is "plainly audible" from a property line of a residential property or residentially zoned area then it is possible to be found in violation of the City's noise ordinance. Mr. Harris stated the case presented to Mr. Gummey yesterday was out of Lee County 1996 (Exhibit A) that looked at a similar ordinance finding most of the ordinance in accord with Florida law and the United States Constitution; however, it stated that the "plainly audible" provision was not constitutional. Mr. Harris submitted for Mr. Gummey's review another case Davis v. State 1998 (Exhibit B), which was a cocaine conviction from our district stating the "plainly audible" standard was a legal standard. Unfortunately, in this case there is not the depth of analysis of vagueness and analysis of the law as shown in the Lee County case. Mr. Harris stated, after speaking with Mr. Gummey, it casts enough doubt that he and Mr. Gummey believe the case could move forward today because there is a question. Mr. Harris stated from a legal standpoint there might be two district courts that have conflicting opinions, which could make this a Florida Supreme Court case.

Mr. Gummey stated the City Ordinance is cloaked with presumptive validity. The case cited from Lee County in 1996 certainly creates an arguable issue as to the validity of the City's Ordinance; however, it was not a case that construed the

New Smyrna Beach Ordinance. The 1998 case, Davis v. State, which found a provision using the term “plainly audible” found in the Florida Statutes the Uniform Traffic Code dealing with sounds emanating from vehicles found this term to be constitutionally valid; therefore, there is a conflict between these two decisions on face value. Us being in the 5th District Court of Appeals and that in the case of conflict we are guided by that and it being a more recently decided decision. There is also a case out of the state of Washington styled Holland v. City of Tacoma decided in 1998 (Exhibit B), where they distinguished the Tacoma Ordinance from the Lee County ordinance and found the Tacoma Ordinance valid. Mr. Gummey thinks one could argue similarly that the New Smyrna Beach Ordinance could be distinguished from the Lee County ordinance and on that basis, even under the Lee County decision standard, this could be found valid. However, Mr. Gummey does not believe that there is clear unchallenged precedent that would enable him to instruct the Board that the presumption of the validity of the New Smyrna Beach Ordinance had been overcome and thus being clearly unconstitutional. Certainly there is the opportunity, if this case is appealed and there is a determination of violation, that this could be argued and ultimately a court could decide that it is unconstitutional; however, he does not think the presumption has been overcome in this instance.

Mr. Gummey stated it was the Board’s choice to hear the case. Mr. Gummey stated he does not think if there was clear unchallenged precedent that he would be advising the Board to move forward. Mr. Gummey is not advising that the ordinance is unconstitutional on its face. Mr. Gummey further stated that there are two arguments with one being facial constitutionality and the second being constitutionality as applied, thus if there was a finding of violation upon appeal it would probably be challenged on both basis.

Unanimous consensus was to move forward and hear this case.

Mr. Harris stated the case out of Tacoma, Washington has absolutely no binding effect in any Florida court. The second case presented that has this noise provision discussed within is two years after the original case cited; however, the 5th District Court of Appeals case the first line begins “we have no Florida cases directly on point” which means someone missed the Lee County case or this ordinance is different than the Lee County case. Mr. Harris stated in his opinion for the record there is not enough information in the 5th District Court of Appeals case to make this determination; however, he respects the Board’s decision to move forward. Mr. Harris stated that he feels the one provision of the noise ordinance that the City brought this case under is unconstitutional. Mr. Harris stated “plainly audible” is the term he is focusing on and it is not defined in the City’s code and yet it is set as a standard for determining whether someone is in violation of the City’s noise ordinance.

Mr. Gummey stated words in every day usage do not have to be defined in a statute in order for them to have meaning and to be applied. In the State v. Davis case the statute in question does not contain a definition of the term “plainly audible” and the Davis case was decided despite the fact that no appearance was made on behalf of the State defending the statute. Mr. Gummey further stated that the present Lee County noise ordinance utilizes the term “plainly audible”.

Mr. Harris asked the Board if his client was now in compliance considering the citation was the 21st of August 2005 notice of violation. Mr. Harris stated the City code states that once the violation has been found a person can still be required to appear before the Code Board if it is a continuing violation or if it is a violation that cannot be corrected. Mr. Harris stated his question was if his client has not been cited since August 21st, 2005 is he in compliance.

Mr. Gummey stated he did not agree with Mr. Harris’ construction of this alleged violation because he does not believe this is a correctable violation. It is an uncorrectable violation if the sound exceeds the limits of the ordinance. In this situation each violation is a new violation. Mr. Gummey stated if this case is found in violation the Board can move forward with a repeat offense.

Mr. Harris stipulated an officer went to Beachside Tavern and found his client was in violation on the 21st of August 2005.

Mr. Crocker confirmed with Mr. Harris that he is conceding the fact that if this statute or ordinance is valid that Beachside Tavern was in violation on the 21st of August 2005.

Mr. Harris stipulated that a complaint was made and someone came to cite his client for violation under the City’s code.

Mr. Gummey asked Mr. Harris if he stipulated to the violation.

Mr. Harris stipulated to the fact that someone came out and issued a violation not that his client was guilty of a violation.

Ms. Kunkle stated she received a forwarded e-mail Monday, August 22nd, 2005 from Chief Pagano from the complainant regarding noise at Beachside Tavern. Ms. Kunkle introduced Commander Drossman who would inform the Board of the dates that officers have been called to the violation location as well as when Beachside Tavern was actually found in violation.

Commander Drossman stated there were 16 noise complaints regarding Beachside Tavern from April 5th, 2004 through December 31st, 2004. Also, from January 1st, 2005 to September 2nd, 2005 there have been 25 noise complaints regarding the same location. Commander Drossman stated there were no special permits issued for Beachside Tavern. Commander Drossman further stated the last complaint stated an officer was called to the violation location and documented the call. The Police Department Staff have been informed there is no enforcement action to be taken because the officer would then have to charge the alleged violator criminally versus the violator appearing before the Code Enforcement Board and the action taken. The City reached the decision that the Code Enforcement Board would address this issue rather than making it a criminal issue with the Police Department. In the past, there have been three Notices to Appear (NTA) issued to Beachside Tavern. The NTA's, which are all criminal in County Court, are as follows:

- May 8th, 2005 at 12:42 am for loud noise
- May 13th, 2005 at 11:34 pm for excessive noise
- July 29th, 2005 at 11:59 pm for excessive noise

Commander Drossman stated record shows that Mr. Dam paid for one NTA. Commander Drossman was informed by one of his officers, which is hearsay, that Mr. Dam stated the night he was issued an NTA that he could afford a \$50.00 fines infinitely. Commander Drossman further stated that he believed all City Ordinance violations came in at one price but a misdemeanor trial judge has the ability to fine up to \$500.00. Commander Drossman stated the last two complaints were August 26th, 2005 at 11:14 pm and August 27th at 11:26 pm. There was documentation of one call where Officer Jennifer Fike responded to a noise complaint on the 10th of May 2005 at 10:11 pm. Officer Fike stated she could not determine if there was a violation on that specific date; however, she made note that the doors were found open and Mr. Clark, the manager, closed the doors to the business prior to her departure. With the exception of Officer Fike, all other noise complaints officers responded to, warnings were issued to either turn the music down or completely shut the music off. Commander Drossman further stated as a representative of the Police Department that the officers have been told not to take any enforcement action because the Code Enforcement Board would handle this issue; therefore, there is no written police action as far as who was in violation. The City Ordinance requires all bars in the City to close at 2 am. There are some issues the Board may want to consider for record being our dispatch center is a consolidated dispatch center with Port Orange and Edgewater. There has been a recurring problem with the Regional Communication Center (RCC) personnel not always documenting the number of calls actually received. Some citizens have actually stated complaints were made

but there is not enough documentation for said calls. Commander Drossman stated this issue would be addressed with RCC.

Ms. Kunkle asked Commander Drossman about the evening the officer gave a verbal warning and two additional calls were received after that.

Commander Drossman stated that was the 21st of August 2005.

In cross-examination Mr. Harris asked Commander Drossman for a rough estimate of how many times in total have the police been called and gone to the violation location just on the noise violation.

Commander Drossman testified there were 16 visits in 2004 and year-to-date 25 visits in 2005.

Mr. Harris asked Commander Drossman of all 25 visits how many resulted in Notices to Appear.

Commander Drossman testified that three visits year to date resulted in Notices to Appear.

Mr. Harris asked if it was true that the City elects to remedy in any of these cases with a Notice to Appear or appear before the Code Enforcement Board but it cannot be both due to double jeopardy.

Commander Drossman agreed to this statement.

Mr. Harris asked Commander Drossman how many violations have actually been issued to this violation location that are not Notices to Appear.

Commander Drossman testified that other than the Notices to Appear verbal warnings have been issued on every other occasion with the exception of Officer Fike's report of the 10th of May 2005.

Mr. Harris asked Commander Drossman if there was any formal charging document issued for the other visits.

Commander Drossman testified that double jeopardy would attach if that were to occur; therefore, that has not occurred.

Mr. Harris stated he had no further questions for this witness.

Ms. Kunkle stated when Mr. Dam was in her office earlier in the week, he had a Notice to Appear that had been issued but did not get the date from the NTA by Officer Freeman that was \$50.00. There was not a mandatory appearance it was basically just a \$50.00 ticket that he was required to pay. Ms. Kunkle brought to the Board's attention that Mr. Dam has only owned the business since April 2005 and was under different ownership in 2004. Ms. Kunkle stated she issued the Notice of Violation.

Mr. Harris stated he had no questions for Ms. Kunkle.

Matt Lloyd and Julie Capelle were sworn for testimony.

Mr. Lloyd testified he believed the case presented today was based on the complaint from his fiancée Julie Capelle from the 20th of August 2005. Mr. Lloyd stated with all the windows and doors shut it is so loud in their apartment they are unable to hear the television and have difficulty sleeping because all that can be heard was the bass guitar and the drums with the "boom, boom, boom" noise. Mr. Lloyd testified on some occasions words to songs can be heard. Mr. Lloyd stated their apartment is located in Callalisa Condos positioned directly behind the Beachside Tavern on the second floor. Mr. Lloyd stated this occurs basically every Friday and Saturday evenings from 11 pm until 2 am and it is difficult to catch the alleged violation because the band will play for a 30 minute set then they take a break. The band, in some cases, may be taking a break once the officer arrives which means the violation is not occurring when the officer is present and nothing can be done. Once the officer leaves, the band begins playing again and it has become a frustrating process for he and his fiancée. Mr. Lloyd further stated that the violation location has been given countless number of warnings and he was under the impression that the warnings were up. Mr. Lloyd testified that he is unable to tell when the doors to the building are open or closed related to the noise.

In cross-examination Mr. Harris asked Mr. Lloyd if the weather makes a difference as to whether noise is heard or not. For example, the wind coming from a specific direction, if it is a cool night or if it is a muggy night because he has heard that all these things plays a part as to how far sound travels.

Mr. Lloyd testified he did not believe the weather necessarily makes a difference.

Mr. Harris stated he had no further questions for this witness.

Ms. Capelle stated she has lived in this location for 1½ years. Relating to the door opening and closing, if it is loud in the house when the tavern door opens as employees come out to get ice, they can be heard scooping ice and when the

door closes it gets a little more quiet. However, it is still loud enough to hear the bass from the guitar, sometimes the microphone can be heard and sometimes singing along with the song is possible. It can be heard over the television and it absolutely keeps us awake. Ms. Capelle testified she has tried putting towels over the bedroom window, shutting all the internal doors to the apartment, put pillows in the window frame and nothing helps because it just continues to bounce through the apartment. The officers will come to the violation location and it will stop for a few minutes or she has seen officers leave and there was no change. Ms. Capelle has spoken with the officers on several occasions, which are always very helpful and concerned, but they state they do not know what to do, there is only so much they can do and she should contact the City Commission. Ms. Capelle stated officers have come inside the apartment, parked on the rear of the property, come to the front door and walked along Horton Street to observe the noise. Ms. Capelle testified her apartment complex is less than 25 feet from the property line. Ms. Capelle stated there are palm trees and a 6-foot fence between the two properties; however, it does not reduce the level of noise.

In cross-examination Mr. Harris presented Ms. Capelle with a City zoning map from the Property Appraiser's website where the Beachside Tavern was identified by a yellow dot. Mr. Harris asked Ms. Capelle to use a blue line to identify where her apartment is located in relation to the Beachside Tavern. Mr. Harris presented to City Staff and the Board the City zoning map (Exhibit C) for their review.

Mr. Harris stated he had no further questions for this witness.

Thomas Diggins was sworn for testimony.

Mr. Diggins testified he is the Home Owner Association President for this condo association for 5½ years and has lived at this location for 6½ years. Mr. Diggins stated to the Board that from where the Board was sitting the windows in the back of the chambers is how close the apartment complex is to Ms. Capelle's apartment. Mr. Diggins testified that he works nights so he does not have that much noise; however, on occasion there have been dishes dancing on the counter. Mr. Diggins stated that the shrubbery and the fence do not help with the noise. Mr. Diggins stated the rear bay door, which he does not believe has been soundproofed but has been sealed, is where the bands are located. Mr. Diggins testified that anytime you want to talk on the telephone, read, or watching television it is difficult to pay attention because all you can hear is "bam, bam bam" music.

In cross-examination Mr. Harris asked Mr. Diggins what was in that location before the Beachside Tavern moved in and what kind of condition was the building in at the end of its life.

Mr. Diggins stated it was previously a garage and it was rotten inside the building.

Mr. Harris stated he had no further questions for this witness.

Mr. Crocker asked Chairperson Hawk for a 5 minutes recess at 5:07 pm.

The meeting reconvened at 5:12 pm.

June Whaley was sworn for testimony.

Ms. Whaley testified that she looked up the word audible in Webster's Dictionary and it states "capable of being heard" and what she is being subjected to is definitely capable of being heard. Ms. Whaley stated has lived in the apartment just below Ms. Capelle for 10 years and she also receives a large amount of noise. Ms. Whaley stated it is loud, she cannot sleep and she feels they should not be allowed to make that much noise. Ms. Whaley stated she feels the problem is not corrected when they call and there should be some type of penalty for when the City's noise ordinance is violated. Ms. Whaley testified she feels her feelings along with the other witnesses should be taken into consideration. Ms. Whaley testified that the fence and shrubbery have not affected the noise levels.

Mr. Harris stated he had no questions for this witness.

Ms. Kunkle stated the City had completed presenting its case.

Mr. Harris stated his evidence to present was the charging document (Exhibit D). Mr. Harris stated that no one has heard testimony from the person who issued the charging document as to finding a violation nor has he had an opportunity to cross-examine that person.

Mr. Gummey stated that Ms. Kunkle was the person who issued the charging document and stated that Mr. Harris was afforded the opportunity to cross-examine the witness.

In cross-examination Mr. Harris asked Ms. Kunkle if she observed the noise at the violation location on the 21st of August 2005 at 11:00 pm. Mr. Harris asked how the charging document was in her name if she was not a witness to the alleged

violation. Mr. Harris asked if the officer that the City based the information on for the charging document here today.

Ms. Kunkle testified that she was not present and did not observe the noise at the violation location the evening of August 21st, 2005. Ms. Kunkle stated only the Code Enforcement Officer or the Code Enforcement Supervisor can bring a case before this Board and she asked for witnesses to be present. Ms. Kunkle stated the charging document was based on the e-mail from Julie Capelle and the officer who observed the noise is not present today.

Mr. Harris stated he had no further questions for this witness.

Mr. Harris stated if the Board looks at the zoning map that he circulated where Julie Capelle noted where she lived in respect to the violation location the problem can be seen. If the Board looks at the definition of the B2 Zoning District code (Exhibit E), there are 38 uses and only one of those is a residential use. Mr. Harris stated that 10 of these uses are business activities that could be expected to go on after "normal" business hours that are allowed by the City Code for this district. No one caused this conflict in the code; however, it is a problem. These witnesses have a right to peace and enjoyment with a right to live in their building and his client also has a right to conduct a business and have a tavern in his location. There must be a solution but that will not be at the Code Board or a court of law; therefore, these parties must get together to resolve this issue and find a long-term solution. New Smyrna Beach has 30 zoning districts with 2 of those allowed to have taverns. Mr. Dam is currently working on soundproofing his business and Mr. Harris believes the Code Board cannot find his client not in compliance based on the fact the person from the City who observed the violation in the charging document is not present. Mr. Harris asked the Board to find his client in compliance or to continue this case so the involved parties can work toward resolution. Mr. Harris stated that his client would be willing to work with the City and the community to resolve this issue.

Mr. Gummey stated he was not troubled by the charging document being issued by the Code Enforcement Supervisor. However, he is troubled by the charging document not giving notice to the respondent of what facts constitute the violation of the ordinance and things like time are material as to when the violation occurred. Mr. Gummey further stated this description of the violation is of the provisions of the code not of the facts that occurred at the Beachside Tavern.

Ms. Kunkle stated that the charging document has never stated a specific time or date and this is the first time this has been an issue and it is based on the complaint of the 20th of August 2005 and Chairperson Hawk agreed.

Mr. Gummey reminded the Board that they had heard testimony of the sound being “plainly audible” from the other property by the resident witnesses.

Ms. Kunkle stated the City’s recommendation would be that the Beachside Tavern is currently in compliance and that it has been in violation and set a repeat offense fine of \$500.00 per day.

There was discussion among Board members.

John Shelby made a motion finding Beachside Tavern in violation of the section 12 ordinance as stated on the 20th of August 2005 and is currently in compliance with no action needed and to set up as a repeat violator with a fine of \$500.00 for each and every day they remain in violation as stated in the ordinance; seconded by Michael Slayton. Motion passed unanimously on roll call vote 7-0.

Being no further business John Shelby made a motion to adjourn; seconded by Jay Crocker. All agreed and the meeting adjourned at 6:00 pm.