

MINUTES OF THE CITIZENS CODE ENFORCEMENT BOARD
HEARING HELD AT 3:00 P.M.
NOVEMBER 21ST, 2005
UTILITIES COMMISSION, 3RD FLOOR, DEBERRY ROOM, 200 CANAL STREET
NEW SMYRNA BEACH, FLORIDA

Vice Chairperson, John Shelby, called the Hearing of November 21st, 2005 to order at 3:05 p.m. Answering to roll call:

Maggie Hawk, Chairperson (Arrived 3:06 p.m.)

John Shelby, Vice Chairperson

Michael E. Slayton

Jay Crocker

Elliott Hoffman

Susan Ellis

Carol Kerrigan

Also present were Code Enforcement Supervisor Lynne Kunkle, Code Enforcement Officer Barbara Bobelak, Police Officer Brian Page, Police Officer Chris Kirk, Police Officer Abraham Diffin, Police Commander Drossman, City Attorney Frank Gummey, and Administrative Specialist Inga Campbell.

Regina Lynne Kunkle, Code Enforcement Supervisor, Barbara Jo Bobelak, Code Enforcement Officer, Police Officer Brian Page, Police Officer Chris Kirk and Police Officer Abraham Diffin were sworn for testimony.

REPEAT BUSINESS:

CASE NO: C2005-0831

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

Violation Location: Beachside Tavern
690 3rd Avenue
New Smyrna Beach, FL 32169

On Sunday, October 23, 2005, at 02:55:49, Officer Page was dispatched to 690 3rd Avenue, in response to a noise complaint. When Officer Page arrived at 690 3rd

Avenue, the Officer, when on coming, was able to hear a radio inside the building, bongo drums, and people talking loudly. The noises stopped before contact, with a representative of Beachside Tavern, was made and the people that were talking loudly left before contact could be made with Code Enforcement. The incident was forwarded to Code Enforcement. (Event ID: 2005-0164432) In repeat violation of §38-73. (12) of the City Code of Ordinances.

On Saturday, October 29, 2005, at 23:46, Officer Kirk responded to 715 East 2nd Avenue in reference to a noise complaint. Officer Kirk clearly heard the music from the complainant's apartment located at 715 East 2nd Avenue. Officer Diffin assisted Officer Kirk and was also able to hear the music from this same apartment. The incident was documented and forwarded to Code Enforcement. (Case: 200510-0456) In repeat violation of §38-73. (12) of the City Code of Ordinances.

Mark Dam, owner of Beachside Tavern, was sworn for testimony.

Chairperson Hawk asked Mr. Dam if he agreed with the presented violations.

Mr. Dam testified he was contesting the violation.

Chairperson Hawk asked the City to present its case.

Ms. Kunkle presented copies of the Police Incident Reports for the Board's review (Exhibit A). Ms. Kunkle suggested the City begin with Officer Page, who responded to the first incident on October 23, 2005.

Officer Page testified he responded to 690 3rd Avenue, pulling up to 2nd Avenue and Horton Street. Officer Page walked to the outside of the complainants apartment where he could hear approximately 4-5 people in the rear of the business talking loudly, playing bongo drums and he could hear a radio. Officer Page stated he could hear a radio but could not confirm the radio was coming from inside or outside of the establishment. Officer Page testified he heard the noise for approximately a minute, went to call Code Enforcement when the noise ceased before contact could be made with the individuals.

Ms. Kunkle asked Officer Page if this was at 2:55 am and if the bar had already closed at 2:00 am.

Officer Page confirmed that was a true statement and that is why he believed it might have been the closing crew for the establishment.

Mr. Crocker asked Officer Page if the back door was open and if the noises were coming from inside or outside the establishment. Mr. Crocker asked Officer Page if the people making the noise were associated with the operation of the bar.

Officer Page testified from where he was standing he did not know if the back door was open or if the noises were coming from inside or outside of the establishment. Officer Page stated he did not know because the people were gone by the time he called Code Enforcement and he had no contact with those people. Officer Page confirmed for Ms. Kerrigan that he did in fact hear bongo drums being played.

Ms. Kunkle asked Officer Page if he pulled into the parking lot of the establishment.

Officer Page testified he was in the parking lot of the complainant's apartment complex on 2nd Avenue and Horton Street.

Mr. Slayton asked Officer Page if the noises he heard were from inside or outside of the complainant's apartment.

Officer Page testified he was outside the complainant's apartment approximately 50 feet away from the property line.

Ms. Kunkle asked for confirmation from Officer Page regarding his report that stated when he arrived at 690 3rd Avenue, that when on coming was able to hear a radio inside the building, bongo drums and people talking loudly.

Officer Page testified that must have been a typo because he is unsure of where the noise was coming from inside or outside of the building.

Mr. Gummey stated that Mr. Dam had the opportunity to question this witness.

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

Ms. Kunkle asked if anyone else within the audience would like to speak on behalf of the City.

Officer Kirk testified he responded to the 2nd Avenue and Horton Street address on October 29th, 2005. Officer Kirk stated when he arrived on scene with Officer Diffin they stood in the parking lot of the 2nd Avenue address to see if the violation could be observed. Officer Kirk stated that music could be heard but could be talked over in the parking lot. Officers Kirk and Diffin made contact with the complainant and entered her apartment where the music could clearly be heard from all rooms of her apartment. Officer Kirk testified he contacted his Sergeant on duty, who attempted to contact Code Enforcement by leaving voice mails. Officer Kirk stated he made contact with the owner of the establishment

stating to him that a report would be submitted to report the incident. Officer Kirk testified the incident had occurred at 23:46 being almost midnight and the establishment was still open for business.

Chairperson Hawk asked Officer Kirk if the words to the music could be heard within the complainant's apartment.

Officer Kirk testified the music could clearly be heard from within the apartment. Officer Kirk stated he was unsure if this was a live band but it was coming from the interior of the establishment.

Mr. Gummey asked Officer Kirk for clarification for the record, that he stated the owner had been contacted and wanted to know who the owner was.

Officer Kirk stated he did not remember the owner's name; however, he was sitting in the front row wearing a polo shirt with blue jeans.

Mr. Dam asked Officer Kirk about his report confirming that he used the words that the music could be "faintly" heard from where the Officer was standing.

Officer Kirk stated from the parking lot at the rear of the building separating the lot and Beachside Tavern the music could be heard but spoken over and once entering the complainant's apartment it could be "clearly" heard. Officer Kirk stated the music inside the apartment was louder than the north side of the building, with the building being between the establishment and the parking lot.

Mr. Dam asked Officer Kirk if he was 100% positive that there could be no other source noises from other apartments within the building.

Officer Kirk stated that was correct, the music was coming from Beachside Tavern.

Officer Diffin testified he was present at the complainant's address as a secondary Officer for back up. Officer Diffin stated when he arrived on scene he was parked on the North side of the apartments at 715 E 2nd Avenue. Officer Diffin stated on the North side of the apartments music could be heard coming from the direction of Beachside Tavern. Officer Diffin testified he went to the complainant's apartment on the second level of the building and once he entered the apartment, music from Beachside Tavern could clearly be heard. Officer Diffin stated he moved his car to the East side of the Beachside Tavern, entered the establishment where contact was made with Mr. Dam. Officer Diffin explained to Mr. Dam that the music was too loud and the incident would be documented and would contact Code Enforcement.

Mr. Dam asked Officer Diffin if the incident report was correct stating the music could be “faintly” heard.

Officer Diffin stated he had no way to measure the sound; however, the music could be clearly heard from 2nd Avenue coming from Beachside Tavern.

Mr. Dam asked Officer Diffin if he accompanied Officer Kirk inside the apartment.

Officer Diffin confirmed he had.

Mr. Dam presented copies of the Police Incident Report along with an additional paper for the Board’s review (Exhibit B). Mr. Dam testified the time on the October 23rd, 2005 incident was 3:00 am and the establishment had closed at 2:00 am and definitely the bands are finished playing at 1:00 am. Mr. Dam stated he was unable to reach all members of the band; however, the ones that were available all signed off stating the band was finished playing at 1:00 am and their equipment, including bongos and drums, had been packed up and locked in the band’s trailer and off the premises by 2:00 am. Mr. Dam stated that Beachside Tavern does not own any bongo drums so he is unsure the source of the bongos that were heard. Mr. Dam stated the radio belonging to Beachside Tavern is also shut off at 2:00 am and there are two witnesses present that can attest to this statement.

Jason Van Dine and Heather Dam were sworn for testimony.

Mr. Van Dine stated he was working the evening of October 23rd, 2005 and the band was finished playing at 1:00 am. Mr. Van Dine stated he witnessed the band packing all their equipment and it had been moved out of the building by 2:00 am and the music within the establishment had been turned off.

Ms. Dam stated she was not present the night in question; however, she knows the music is finished by 2:00 am.

Vice Chairperson Shelby asked for clarification from Mr. Van Dine as to which night he is referencing in this testimony.

Mr. Van Dine stated he was referring to the first incident of October 23rd, 2005 with the bongo drum violation.

Mr. Dam stated the Beachside Tavern was closed at the time of the first incident and ready to leave.

Chairperson Hawk asked Mr. Dam how late the cleaning crew stays at the establishment.

Mr. Dam testified the cleaning crew remains until the establishment is clean and usually that time is 3:00 am.

Mr. Dam stated that the back door remains shut all evening, every evening past 6:00 pm and no one is allowed out the back door unless it is an emergency.

Chairperson Hawk asked Mr. Dam if anyone would be going out the back door to take out trash.

Mr. Dam stated the trash is taken out of the front of the building not to use the back door.

Mr. Crocker asked Mr. Dam that it is his understanding that Mr. Dam's employees have been instructed not to use the back door; however, is it still used for purposes of bringing in product and taking out garbage or is it not used at all.

Mr. Van Dine stated that when ice and beer need to be replenished that back door is not used he must go around the bar to the rear of the establishment for that specific reason. Mr. Van Dine stated there were 2 doors located on the North side of the establishment and neither one are used. Mr. Van Dine testified the back door is never used during band time unless there is an emergency. Mr. Van Dine stated the back door is used for leaving the premises only after all the music has ceased.

Ms. Kerrigan asked for clarification on the ordinance as to how close the person has to be to the noise. Mr. Gummey read the ordinance, which confirmed the person must be standing within the boundary lines of an adjacent or neighboring property zoned for residential use and the noise must be "plainly audible".

Officer Page stated on October 23rd, 2005 he was at the property on 2nd Avenue and walked to the South side building of the address on 2nd Avenue being approximately 50 feet into the residential area, plainly hearing bongo drums and people talking.

Mr. Crocker asked Mr. Gummey that he believes the City is seeking to have this violation declared a repeat violation; however, there has been no evidence presented so far of a prior violation although the Board remembers this case being heard in September.

Mr. Gummey stated documentation would need to be submitted to the Board for evidence of any previous violations determination by this Board for the record.

Ms. Kunkle presented to the Board for their review the Board's Order dated September 2nd, 2005. Ms. Kunkle stated paragraph 11 states; "It is the further order of this Board that the above captioned individual shall pay a fine of \$500.00 per day for each and every day a repeated violation of §38-73 (12) of the City Code of Ordinances is found past the 2nd day of September 2005.

Chairperson Hawk asked Mr. Dam if he was aware of the strong recommendation of the Board from the previous meeting, stating that Mr. Dam, Mr. Harris, City Staff along with some type of sound proofing company all meet to try and prevent another occurrence. Chairperson Hawk asked if Mr. Dam had in fact done this.

Mr. Dam stated he was aware of this from Mr. Harris. Mr. Dam stated that he has contacted an acoustic company and Bob Howard, Architect and there are plans to enclose the patio area. Mr. Dam stated there is a meeting scheduled between Mr. Howard and Mr. Rakowski for December 2nd, 2005.

Mr. Crocker asked Mr. Dam if he agreed that he was found to be in violation previously by the Code Enforcement Board.

Mr. Dam stated he agreed.

Mr. Hoffman asked Mr. Dam what the hours of operation were and what the hours the bands played at the establishment.

Mr. Dam stated Beachside Tavern is open from 12:00 pm until 2:00 am during the week and 12:30 pm until 2:00 am during the weekend. Mr. Dam stated the music begins at 9:00 pm until 1:00 am. Mr. Dam stated there has been no complaints received Sunday through Thursday and he had documentation to support that statement.

Ms. Kunkle stated a copy of the previous Board's Order would be made a part of the record for this case (Exhibit C).

Mr. Dam presented to the Board copies Page 2 of the second Police Incident Report Case 200510-0456 for their review (Exhibit D). Mr. Dam stated the report was written that the music was "faintly heard".

Ms. Kerrigan stated this is a preventable violation and she can appreciate the fact that Mr. Dam has tried to deal with the acoustic companies and architects; however, the property was purchased that it used to be a gas station with a minimal amount of noise that probably was not built to accommodate loud bands. Ms. Kerrigan further stated it was incumbent upon Mr. Dam to try to find a way to ensure that the apartment building that has been behind his establishment for

many years was not impacted. Ms. Kerrigan stated until Mr. Dam fixes the problem, it would seem the music would need to be kept down.

Mr. Dam stated he agreed and there has been a 62% reduction in complaints from 75 days prior to September 2nd, 2005 to date. Mr. Dam realizes the goal would be zero complaints, which is what he is striving for and he will get there. Mr. Dam believes this reduction shows that an effort is being made on their part in respect of the Board's previous Order.

Ms. Kerrigan stated the neighbors were before the Board previously and are present today. Ms. Kerrigan asked Ms. Kunkle if she had spoken with the neighbors and if the problem was getting better.

Ms. Kunkle testified she had not spoken with the neighbors regarding this issue.

Thomas Diggins was sworn for testimony.

Mr. Diggins testified that Mr. Harris, who is Mr. Dam's attorney, had approached him to set up a meeting with the neighbors and at that time it was not convenient for the neighbors to meet. Mr. Diggins stated that double paned windows were offered to two condominium apartments and the condominium association states that all windows have to be the same within the complex. Mr. Diggins stated the music comes right from the back door that Mr. Dam states is bolted. Mr. Diggins states he is unsure if the door is insulated but if the noise continues the neighbors will continue to complain. Mr. Diggins testified that Friday and Saturday nights are the problem nights. Mr. Diggins stated the condominium association meetings are held annually in February.

Carol Kerrigan made a motion on the case involving the noise violation on October 23rd, 2005 regarding Beachside Tavern at 690 3rd Avenue finding the property in violation of a repeat violation for noise and levy fine of \$500.00; seconded by Elliott Hoffman.

Mr. Shelby stated the Officer's testified they did not see whom the people were making the noise nor did they see the establishment to determine where the music was originating and asked Mr. Gummey if this was still considered a violation under §38-73 (12) City Code of Ordinances.

Mr. Gummey stated the question the Board must face is was there sufficient evidence presented identifying the originator of the sound that was determined to be excessive to sustain the charge.

Motion failed on roll call vote 2-5 with John Shelby, Michael Slayton, Jay Crocker, Susan Ellis and Maggie Hawk as the dissenting votes.

Jay Crocker made a motion to find this property in violation with regard to the incident occurring on Saturday, October 29th, 2005 at 11:46 pm and that a fine of \$500.00 be imposed; seconded by John Shelby. Motion passed unanimously on roll call vote 7-0.

DISCUSSION:

Mr. Crocker asked Mr. Gummey if the Board was able to legally impose a fine of \$1,000.00 considering there were two incidents listed under one case number.

Mr. Gummey stated it is not required to have a separate case number for each incident in order to impose the maximum fine.

ADJOURNMENT:

Jay Crocker made a motion to adjourn; seconded by Michael Slayton. All agreed and the Board adjourned at 4:05 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