

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF ST. PAUL

In the Matter of Adverse Action Against
All Licenses Held By Richard A. DeFoe
Enterprises, Inc., d/b/a Club Cancun
License ID #0096027

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge M. Kevin Snell (the ALJ) on May 7, 2009, at the Ramsey County Courthouse, 15 West Kellogg Boulevard, St. Paul, Minnesota. The OAH record closed on May 26, 2009, upon receipt of the Licensee's post-hearing reply brief to the City's post-hearing closing argument.

Rachel Tierney, Assistant St. Paul City Attorney, 15 West Kellogg Boulevard, Suite 400, St. Paul, Minnesota 55102, appeared at the hearing as attorney for the City of St. Paul (the City). Dennis B. Johnson, Esq., Chestnut & Cambrone, P.A., 204 North Star Bank, 4661 Highway 61, White Bear Lake, Minnesota 55110, represented Richard A. DeFoe Enterprises, Inc. (Licensee and/or Club Cancun) at the hearing.

STATEMENT OF THE ISSUES

1. Did the City prove by a preponderance of the evidence that, on February 14, 2009, Club Cancun violated condition number one of its license by failing to employ directional bass, sound absorption measures, and other noise controls to minimize the noise from inside the establishment from disturbing the neighborhood?

No, the ALJ finds that the City did not meet its burden of proof on this issue.

2. Did the City prove by a preponderance of the evidence that on February 14, 2009, Club Cancun violated the City's noise ordinance, St. Paul Legislative Code § 293.02?

No, the ALJ finds that the City did not meet its burden of proof on this issue.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Factual Background

1. Mr. Richard A. DeFoe is the owner of Richard A. DeFoe Enterprises, Inc., which is the current owner of and does business as “Club Cancun” at 1638 Rice Street in the City of St. Paul, Minnesota. Club Cancun is a restaurant and bar that holds restaurant, entertainment, gambling, and liquor licenses issued by the City.¹

2. The premises at 1638 Rice Street have been a bar and restaurant for over 40 years, with various names and owners. Mr. DeFoe first purchased Club Cancun in 1997. He sold it on a contract-for-deed in 2007. The owner defaulted and Mr. DeFoe reacquired Club Cancun in early 2008.² The area around Club Cancun is commercial, with some residential properties surrounding the commercial area.³

3. The entrance utilized when Club Cancun is open is the back, or east, entrance. That entrance opens out into a parking lot. Adjacent to the parking lot is an alley. Directly across the alley from Club Cancun to the east is McCarron’s Village, a large apartment complex that has scores of residents.⁴

4. The nearest residence to Club Cancun is a second floor apartment to the north that shares a common wall with Club Cancun. Across the alley from Club Cancun and running along the north side of Wheelock Parkway east of Rice Street are a group of townhouses located approximately 50 feet from the back of Club Cancun, then continuing east are a number of single family residences.⁵

5. Sometime in 2006 or 2007, Ms. Patricia Carlson and her family moved into the single-family residence at 174 Wheelock Parkway (the Carlson residence). The Carlson residence is located on the southwest corner of Wheelock Parkway and Albemarle Street, approximately one and one-half blocks southwest from Club Cancun. Directly between Club Cancun and the Carlson residence is a very busy SuperAmerica station-store that is located on the northwest corner of Rice Street and Wheelock Parkway.⁶

6. There is a lot of car and truck noise at the intersection where the SuperAmerica is located. Noise from automobile traffic getting gas at the SuperAmerica station is bothersome to Ms. Carlson.⁷

¹ Exhibits 2-3 and 13; Testimony of Christine Rozek, Deputy Director, St. Paul Department of Safety and Inspections (DSI).

² Test. of Richard DeFoe.

³ Test. of C. Rozek.

⁴ Ex. 9; test. of City Patrol Officer Tong Yang and R. DeFoe.

⁵ *Id.*

⁶ *Id.*, test. of Patricia Carlson.

⁷ Test. of P. Carlson.

7. Directly across Albemarle Street from the Carlson residence, on the southeast corner of Wheelock Parkway and Albemarle Street is an apartment complex.⁸

8. Across Albemarle Street and approximately one-half block north of the Carlson residence is the Lamplighter, another bar and restaurant. The Lamplighter is close to the same distance to the Carlson residence as Club Cancun. The Lamplighter and the Carlson residence appear to be in direct line of sight, without any intervening structures between them.⁹

9. Ms. Carlson and others had complained to the St. Paul Police Department many times about loud music coming from Club Cancun during the period in 2007 to early 2008 when the interim owner operated the establishment. Some complaints were confirmed by the police, some were determined by the police to be unfounded.¹⁰

10. On April 30, 2008, after a period of negotiations between Mr. DeFoe and the City that involved legal counsel for both parties, Mr. DeFoe agreed to three license conditions that would be put in place before he re-opened Club Cancun. Ms. Carlson was also involved in giving her input into the licensing conditions process. The relevant two conditions, numbers one and three state as follows:¹¹

1. Licensee will employ directional bass, sound absorption measures, and other noise controls to minimize the noise from inside the establishment from disturbing the neighborhood. This condition will be reviewed on or after June 30, 2008, and is subject to change if the measures employed by the licensee are not effective.

...

3. Prior to reopening of the establishment, the licensee will meet with DSI to review the license conditions.¹²

11. In accordance with condition number three, Mr. DeFoe met with DSI personnel on December 23, 2008.¹³ During the meeting Mr. DeFoe advised DSI that he had hired Robert Thao to promote his events to appeal to an older Asian clientele. DSI advised Mr. DeFoe that he must agree to eight additional conditions before he could reopen Club Cancun.¹⁴ In addition to the conditions, at the meeting DSI recommended to Mr. DeFoe that he talk to a noise specialist.¹⁵

⁸ Test. of Kurt Just, R. DeFoe and C. Rozek.

⁹ Ex. 9.

¹⁰ Test. of P. Carlson and Kerry Antrim, Ex. 2-1.

¹¹ Id., test. of R. DeFoe.

¹² Ex. 13.

¹³ Ex. 2-1.

¹⁴ Ex. 4; test. of C. Rozek.

¹⁵ Test. of C. Rozek.

12. Also at the December 23, 2008, meeting, DSI suggested that Mr. DeFoe meet with the District 6 Planning Council prior to reopening.¹⁶

13. District 6 Planning Council (Planning Council) is essentially a large “block club” covering the area of the City South of Larpenteur Avenue, east of Dale Street, west of Highway 35E, and north of the Burlington-Northern Railroad tracks that run adjacent to Pierce-Butler Route and Pennsylvania Avenue. The Planning Council has a formal relationship with the City.¹⁷

14. The Planning Council has a Board of Directors and a Land Use Task Force (LUTF). Ms. Carlson was a member of both the Board and LUTF prior to 2009. The Board meets on the first Tuesday of each month and the LUTF meets on the fourth Tuesday of each month.¹⁸

Implementation of Directional Bass and Sound Absorption Measures

15. In order to comply with condition number one, prior to reopening Club Cancun Mr. DeFoe took the following steps, sound absorption measures and noise controls:

- a. Hired the sound mitigation expert Don Rice (who “does sound” for Lifetime Fitness and churches and nightclubs all around the Twin Cities area) and followed all of his recommendations; and
- b. Removed the four large, freestanding bass speakers that had been in the four corners of the room that encompasses the dance floor area; and
- c. Replaced the four large speakers with two smaller speakers that are approximately one-half the size of the removed speakers; and
- d. Built the two small bass speakers into the stage, facing east towards the back of Club Cancun; and
- e. Filled in the entire stage behind the two bass speakers with sand; and
- f. Moved the two hanging upper and mid-range speakers from the west corners of the establishment approximately 20 feet east and lower, closer to the dance floor with reduction of the power to those speakers; and
- g. Operated all sound at lower power levels than the previous owner; and
- h. Allowed no bands or musicians to utilize drums when performing; and
- i. Had Gillund Construction rebuild the South wall of Club Cancun with soundproof channels; and

¹⁶ *Id.*, test. of R. DeFoe.

¹⁷ Test. of Kerry Antrim.

¹⁸ *Id.*

- j. Had Gillund Construction rebuild the west wall of Club Cancun with soundproof channels.¹⁹

16. Mr. DeFoe called Kerry Antrim, Executive Director and Community Organizer for the Planning Council, and was invited to attend the Board meeting on January 5, 2009.²⁰ Mr. DeFoe attended the Planning Council Board meeting on the 5th, announced his intention to reopen Club Cancun soon and invited all in attendance to visit Club Cancun.²¹ Neither Ms. Antrim nor Ms. Carlson has been to Club Cancun since its reopening.²²

17. Mr. DeFoe invited DSI licensing personnel to come visit Club Cancun. As of the date of the hearing, no one from DSI has visited Club Cancun for any purpose.²³

18. At the Planning Council Board meeting on January 5, 2009, Mr. DeFoe and Ms. Carlson exchanged cell phone numbers and agreed to keep in close touch regarding any noise issues with Club Cancun.²⁴ Mr. DeFoe is sincere about addressing any noise issues concerning Club Cancun and being a good neighbor to the surrounding neighborhood.²⁵

19. On or about January 16 or 17, 2009, Mr. DeFoe reopened Club Cancun.²⁶

20. City police officers routinely conduct walk-throughs of Club Cancun and did so on: January 17, 18, 24, and 25, 2009; February 1, 6, 7, 8, and 22, 2009; March 1, 6, and 8, 2009; April 4, and 17, 2009. Officer Yang conducted some or all of the walk-throughs and was instructed by Sergeant Campbell to keep a close eye on Club Cancun.²⁷

21. On January 26, 2009, Ms. Antrim had e-mail communications with Jami Olson, the manager of McCarron's Village Apartments, and asked her whether or not the noise from Club Cancun had improved. She said it had not.²⁸

22. At some time before February 14, 2009, Ms. Antrim had a conversation with a Debra Staydohar about whether the noise from Club Cancun had improved. She said it had not. She did not communicate this complaint to Mr. DeFoe or anyone at Club Cancun.²⁹

¹⁹ Exs. 10, 11, 12; test. of R. DeFoe and Kurt Just.

²⁰ *Id.*, test. of R. DeFoe.

²¹ *Id.*

²² Test. of Kerry Antrim and P Carlson.

²³ Test. of R. DeFoe and C. Rozek.

²⁴ Test. of P. Carlson and R. DeFoe.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Ex. 8, test. of T. Yang.

²⁸ Test. of K. Antrim.

²⁹ *Id.*

23. The only complaint about Club Cancun that Ms. Antrim received regarding February 14, 2009, (other than from Ms. Carlson), was from Ms. Olson, who stated that there were so many cars trying to park in the parking lot that it looked like a parade, and that bottles had been dumped at different times. Ms. Olson did not complaint about any noise from Club Cancun.³⁰

24. In the City, from the hours of 7 a.m. - 10 p.m. any sound level cannot exceed 65 decibels at 100 feet from the sound's source, which is comparable to sound in a business office. From the hours of 10 p.m. - 7 a.m. the sound level cannot exceed 55 decibels at 100 feet, which is comparable to conversational speech.³¹

Carlson Complaints Regarding Bass Attributed to Club Cancun

25. Before and during sound checks at Club Cancun, Mr. DeFoe would call or text Ms. Carlson. Mr. DeFoe seemed genuinely concerned about sound mitigation at Club Cancun.³²

26. Ms. Carlson called or texted Mr. DeFoe many times between the reopening of Club Cancun and January 24, 2009, to complain about bass.³³ She told him not to listen just outside in the Club Cancun parking lot because the bass was louder at her house than it was immediately outside the club.³⁴

27. Mr. DeFoe was unable to verify Ms. Carlson's complaints. He also sat in a City police cruiser in front of the Carlson residence, with a police officer unsuccessfully trying to get any sound to register on a decibel meter.³⁵

28. After Ms. Carlson's repeated complaints to Mr. DeFoe, Club Cancun removed the two smaller bass speakers that had been installed into the stage and replaced them with even smaller speakers.³⁶

29. In addition to the sound mitigation measures outlined above, in response to Ms. Carlson's complaints, Mr. DeFoe:

- a. Filled all basement and the south first floor windows with soundproof insulation; and

³⁰ *Id.*

³¹ City website:

http://74.125.95.132/search?q=cache:0O_gmqgsD5cJ:www.ci.stpaul.mn.us/index.asp%3FNID%3D2000+293+st.+paul+legislative+code&cd=2&hl=en&ct=clnk&gl=us

³² Test. of P. Carlson.

³³ *Id.*

³⁴ Test. of R. DeFoe

³⁵ *Id.*

³⁶ Test. of K. Just and R. DeFoe.

- b. Terminated ingress and egress access to Club Cancun from the front (west) door so that no noise would escape to the west and covered that door with sound insulation.³⁷

30. After looking for and plugging every possible gap and hole that could be located at Club Cancun, Mr. DeFoe asked the sound expert Don Rice if there was anything more that could be done to further mitigate the music at Club Cancun. Mr. Rice told him nothing more could be done to fix the problem.³⁸

31. All of the sound mitigation measures taken at Club Cancun have resulted in expenditures in excess of \$10,000.00.³⁹

32. After all sound mitigation measures had been taken, the Asian musicians accused Mr. DeFoe of being racist and that he did not like their music.⁴⁰

33. On February 6, 2009, Mr. DeFoe signed his agreement to abide by the eight new conditions and his attorney e-mailed the document to DSI and the City Attorney.⁴¹

34. Mr. DeFoe has asked every residential neighbor that has come to Club Cancun if they were could hear or were ever bothered by any music or noise coming from Club Cancun. They all stated that they have heard nothing, including the neighbor to the north that shares a common wall, residents of McCarron's Village, and the residents of the new townhouses immediately Southeast across the alley from the club.⁴²

35. Although Mr. DeFoe has been extremely responsive to her, Ms. Carlson believes the bass music at Club Cancun is exactly the same after the reopening as it was during the tenure of the prior owner.⁴³

36. DSI has had no telephone conversations, written correspondence or any other communication with Mr. DeFoe or Club Cancun since it reopened in January 2009.⁴⁴

37. Since reopening, Mr. DeFoe has directed the Club Cancun Security Manager, Mr. Kurt Just, to walk around the neighborhood three times every night to check whether any excessive noise or music can be heard from Club Cancun.⁴⁵ The only loud music and heavy bass he has heard was from cars at the SuperAmerica station with loud bass stereo systems and from loud parties every weekend at the

³⁷ *Id.*

³⁸ Test. of R. DeFoe.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Ex. 3.

⁴² *Id.*

⁴³ Test. of P. Carlson.

⁴⁴ Test. of C. Rozek.

⁴⁵ Test. of R. DeFoe and K. Just.

apartment complex directly across the street from the Carlson residence that is located on the southeast corner of Wheelock Parkway and Albemarle Street.⁴⁶

38. Every night that Club Cancun is open there is a uniformed City police officer stationed at the SuperAmerica. Mr. DeFoe and Mr. Just have asked her many times whether or not she could hear any loud music coming from Club Cancun. She stated that she could not hear anything coming from Club Cancun.⁴⁷

39. On Saturday night, January 24, 2009, Ms. Carlson texted Mr. DeFoe about loud music.⁴⁸ Mr. DeFoe dispatched Mr. Kurt Just, Security Manager for Club Cancun, to walk down to the Carlson residence to determine if music from the club could be heard at her residence.⁴⁹

40. Mr. Just walked down to the Carlson residence and stood in her front yard and listened for loud music. The only music that could be heard at that time was from a loud party in progress at the apartment complex directly across the street from the Carlson residence on Albemarle Street. Mr. Just spoke to Ms. Carlson and told her that the music was coming from the apartment party. Ms. Carlson was convinced that loud bass was coming from Club Cancun.⁵⁰

41. A few days prior to February 14, 2009, police officers had responded to noise complaints from Ms. Carlson about Club Cancun. Those complaints were unfounded.⁵¹

42. At 11:39 p.m. on February 13, 2009, after Ms. Carlson's complaint about noise coming from Club Cancun, the police came to her home and the officer was unable to hear any noise.⁵² The police officer logged the complaint as unfounded.⁵³

43. Approximately an hour and a half later, at 1:00 a.m. on February 14, 2009, Officer Yang investigated a noise complaint from Ms. Carlson regarding Club Cancun. The complaint was unfounded.⁵⁴

44. At 8:38 p.m. on February 14, 2009, Officer Yang investigated a noise complaint from Ms. Carlson regarding Club Cancun. The complaint was unfounded.⁵⁵

45. At 11:46 p.m. on February 14, 2009, Officer Yang was dispatched to investigate a noise complaint from Ms. Carlson regarding Club Cancun. Upon arriving in the east parking lot of Club Cancun, near the rear door, Officer Yang could hear loud

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Test. of P. Carlson and R. DeFoe.

⁴⁹ Test. of R. DeFoe and K. Just.

⁵⁰ Test. of K. Just and P. Carlson.

⁵¹ Test. of T. Yang.

⁵² Test. of P. Carlson, Ex. 8.

⁵³ Ex. 8.

⁵⁴ *Id.*

⁵⁵ *Id.*

music and bass coming from inside Club Cancun. The police radio dispatcher told Officer Yang to immediately go talk to Ms. Carlson before investigating any further.⁵⁶

46. Officer Yang went to the Carlson residence and spoke to Ms. Carlson. She told him that she was unable to sleep because she could hear bass music inside her house and out in her driveway. She invited him into the home and he went in. Ms. Carlson shut all of the windows and doors and asked Officer Yang if he could hear the music. Officer Yang told her that he could.⁵⁷

47. While in the house, Officer Yang was unable to determine from which direction music was coming. It was as likely to have been coming from the Lamplighter as it was to have been coming from Club Cancun.⁵⁸

48. Officer Yang did not go to the Lamplighter, the SuperAmerica, or any other location to rule them out as the alleged source of the bass complained of by Ms. Carlson.⁵⁹ Ms. Carlson has not walked to the Lamplighter to determine if any bass music comes from that establishment.⁶⁰

49. Ms. Carlson asked Officer Yang to return to Club Cancun and speak with Mr. DeFoe. Officer Yang returned to Club Cancun and advised Mr. DeFoe about Ms. Carlson's complaint. Mr. DeFoe stated that he was aware of the situation with Ms. Carlson and would address the problem.⁶¹

50. Officer Yang, in a conversation with Mr. Just, lowered and shook his head and stated, "She's nuts. We're sick of going over there and I'll talk to my Sergeant about not writing up a report."⁶²

51. Officer Yang was ordered to write up a report by Sergeant Campbell.⁶³

52. In a later conversation between Officer Yang and Mr. Just, Officer Yang told him that the police were tired of dealing with Ms. Carlson and going over to her house.⁶⁴

53. In March 2009, Ms. Antrim received a noise complaint about Club Cancun from Raymond Davis, 100 California Avenue. She did not communicate this complaint to Mr. DeFoe or anyone at Club Cancun.⁶⁵

⁵⁶ Test. of T. Yang.

⁵⁷ *Id.*; Ex. 1-4; test. of P. Carlson

⁵⁸ Test. of T. Yang.

⁵⁹ Test. of T. Yang.

⁶⁰ Test. of P. Carlson.

⁶¹ *Id.*, Ex. 1-3, test. of R. DeFoe.

⁶² Test. of K. Just.

⁶³ Test. of T. Yang.

⁶⁴ Test. of K. Just.

⁶⁵ Test. of K. Antrim.

Procedural Findings

54. In determining that the music from Club Cancun was too loud on February 14, 2009, DSI considered the fact that the complaint occurred after 10:00 p.m., that the music was alleged to be relatively constant, that Club Cancun is approximately 500 feet from the Carlson residence, and that there are other residential properties near Club Cancun.⁶⁶

55. In making its determination of a noise violation by Club Cancun, DSI did not give consideration to the fact that Club Cancun and its immediate surrounding area is a high traffic commercial area with many automobiles containing extraordinarily loud bass in their stereo systems. It did not consider the number of people actually affected by the music from Club Cancun. DSI did not test or consider the sound peak pressure level of the alleged noise, in comparison to the level of ambient noise.⁶⁷

56. DSI rarely takes adverse action based on a single complaint. In this case, DSI chose to take action based on the complaint of Ms. Carlson. The only noise complaint about Club Cancun is from Ms. Carlson.⁶⁸

57. Christine Rozek, the Deputy Director of DSI, routinely reviews police reports for licensing implications. Ms. Rozek reviewed the report submitted by Officer Yang concerning his visit to the Carlson residence on February 14, 2009.⁶⁹

58. After reviewing the police report and consulting with the City Attorney, Ms. Rozek recommended a fine of \$1,000.00.⁷⁰

59. On February 24, 2008, the City of St. Paul sent a Notice of Violation letter to Licensee, alleging a violation of license condition one and a violation of St. Paul Legislative Code § 293.02.⁷¹

60. On March 24, 2009, Licensee, through its attorney, requested a hearing in connection with the alleged February 14, 200, violations.⁷²

61. On April 1, 2009, the City issued a Notice of Administrative Hearing to the Licensee to be held on May 7, 2009, for the alleged licensing violations.⁷³

Based on these Findings of Fact, the Administrative Law Judge makes the following:

⁶⁶ Test. of C. Rozek.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*, Exs. 2-1, 5-1.

⁷¹ Ex. 5.

⁷² Ex. 6.

⁷³ Ex. 6.

CONCLUSIONS

1. This matter is properly before the City and the ALJ pursuant to St. Paul Legislative Code §§ 310.05, 310.06 and 324.11.

2. The City complied with all requirements of regulation and gave proper and timely notice to the Licensee.

3. The City has not proven by a preponderance of the evidence that Club Cancun violated condition number one of its liquor license.

4. The relevant portions of Chapter 293 of the St. Paul Legislative Code provide as follows:

Sec. 293.01. Definitions.

As used in this chapter, the following terms shall have the meanings ascribed to them in this section.

(1) PCA definitions adopted. Pursuant to Minnesota Statutes, Section 471.62, the definitions contained in the Minnesota Pollution Control Agency Air Quality Division Noise Pollution Control Rules, Section 7030.0020, are hereby adopted by reference.

...

(4) Department. The city department of safety and inspections.

...

(6) Sound level (or noise level). The A-weighted sound pressure level, expressed in dBA, obtained by the use of a sound level meter having characteristics as specified in the ANSI Standard S1.4-1983.

Sec. 293.02. Noise as a public nuisance.

(a) Generally.

(1) It shall be unlawful for any person to make, continue, permit or cause to be made, continued or permitted within the city, any loud, disturbing or excessive noise which would be likely to cause significant discomfort or annoyance to a reasonable person of ordinary sensitivities in the area.

(2) The characteristics and conditions which shall be considered in determining whether a noise is loud, disturbing or excessive for the purposes of paragraph (a) of this section, shall include, without limitation, the following:

- a. The time of day or night when the noise occurs.
- b. The duration of the noise.
- c. The proximity of the noise to a sleeping facility and/or a residential area.
- d. The land use, nature and zoning of the area from which the noise emanates and the area where it is perceived.
- e. The number of people and their activities that are affected or are likely to be affected by the noise.
- f. The sound peak pressure level of the noise, in comparison to the level of ambient noise.

...

(d) Amplified sound. It shall be a violation of this section to play, operate or permit the playing, use or operation of any radio, tape player, disc player, loud speaker or other electronic device used for the amplification of sound, unless otherwise permitted by law, located inside or outside, the sound of which carries to points of habitation or adjacent properties, and is audible above the level of conversational speech at a distance of fifty (50) feet or more from the point of origin of the amplified sound.

(f) Penalties.

(1) A violation of any section of this chapter is a misdemeanor, and a sentence of not more than ninety (90) days in jail, or a fine of not more than one thousand dollars (\$1,000.00), or both, may be imposed.

- a. Each day a violation of this ordinance is committed or permitted to continue shall constitute a separate offense and may be punished separately.

...

Sec. 293.07. Noise source limitations.

(a) No person shall operate or cause to be operated on any property or properties any source of noise or sound in such manner as to create a sound level outdoors which exceeds the limits set forth for the receiving land use classification in Table 1 below when measured at the point of human activity which is nearest the noise source.

Table 1. Sound Level Restrictions for Receiving Land Use Classifications As Determined by the Location of the Receiver

TABLE INSET:

Noise Receptor	Land Use Classification	Time	Sound Level Limit (One hour L10 dBA)
Class I	I-1, I-2 and I-3	At all times	80 dBA
Class II	R-1 through R-4, RT-1, RT-2	7:00 a.m. to 10:00 p.m.	65 dBA
	RM-1 through RM-3, P-1 and PD	10:00 p.m. to 7:00 a.m.	55 dBA
Class III	B-1 through B-5, B-2C and OS-1	At all times	70 DBA

...

Sec. 293.08. Administration.

(a) Responsibility of enforcement. The primary responsibility of enforcing the provisions of sections 293.02 through 293.08 shall be with the police department. The primary responsibility of enforcing the provisions of section 293.09 shall be with the department.

(b) Noise impact statements. Any city department or agency may require a noise impact statement in association with any change in zoning classification, in planning of a structure, or in any operation, process, installation or alteration which may be considered as a potential noise source, or in reviewing a request for a variance under this chapter.

(c) Performances of department. The department shall also perform the following:

(1) Prepare for city council approval and keep on file guidelines establishing the test procedures and instrumentation to be utilized.

(2) Conduct inspections as required to determine whether violations exist.

(3) Review all variance requests and make recommendations to the city council. There is hereby established within the department a dedicated activity to which all receipts and disbursements for noise level variance requests will be recorded.

(4) Issue orders for abatement of noises which constitute a violation.

(5) Conduct such research, monitoring and other studies related to sound as are necessary or useful in enforcing this chapter.

5. In making its determination of a noise violation by Club Cancun, DSI did not give consideration to the land use, nature and zoning of the immediate area around Club Cancun. It did not consider the number of people actually affected by the music from Club Cancun. DSI did not test or consider the sound peak pressure level of the alleged noise, in comparison to the level of ambient noise.

6. In making its determination of a noise violation by Club Cancun, DSI did not prove by a preponderance of the evidence that, on February 13 or 14, 2009, Club Cancun made, continued, permitted or caused to be made, continued or permitted within the city, any loud, disturbing or excessive noise which would be likely to cause significant discomfort or annoyance to a reasonable person of ordinary sensitivities in the area.

7. The City has not proven by a preponderance of the evidence that Club Cancun violated any portion of Chapter 293 of the St. Paul Legislative Code.

8. The ALJ adopts as Conclusions any Findings that are more appropriately described as Conclusions, and as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge respectfully recommends that the St. Paul City Council:

1) DISMISS the allegation that the Licensee violated condition number one of the Licensee's licenses; and

2) DISMISS the allegation that the Licensee violated Chapter 293 of the St. Paul Legislative Code.

Dated: June 22, 2009

s/M. Kevin Snell

M. Kevin Snell

Administrative Law Judge

Reported: Digitally Recorded

NOTICE

This report is a recommendation, not a final decision. The St. Paul City Council will make the final decision after reviewing the record and may adopt, reject or modify the Findings of Fact, Conclusions and Recommendation contained herein. Pursuant to Section 310.05 of the St. Paul Legislative Code, the City Council's final decision shall not be made until this Report has been made available to the parties to the proceeding and the Licensee has been provided an opportunity to present oral or written arguments alleging error on the part of the Administrative Law Judge in the application of the law or the interpretation of the facts and an opportunity to present argument relating to any recommended adverse action. The Licensee and any interested parties should contact Shari Moore, Saint Paul City Clerk, 290 City Hall, 15 West Kellogg Boulevard, St. Paul, MN 55102, to ascertain the procedure for presenting argument.

MEMORANDUM

Condition Number One of Licensee's Licenses

There is no reliable evidence in the record to provide a basis to conclude that Club Cancun violated condition number one of its liquor license. Condition number one provides specifically:

Licensee will employ directional bass, sound absorption measures, and other noise controls to minimize the noise from inside the establishment from disturbing the neighborhood. This condition will be reviewed on or after June 30, 2008, and is subject to change if the measures employed by the licensee are not effective.⁷⁴

The Administrative Law Judge notes that this condition, by its terms, does not require those measures and sound controls to eliminate all noise or be completely successful. It requires these efforts to "minimize the noise from inside the establishment from disturbing the neighborhood." The weight of the evidence suggests that the "neighborhood" has not been disturbed by noise from Club Cancun. Further noted is the fact that the City, prior to the hearing, had no idea what steps, if any, the Licensee has taken to comply with this condition. Finally, no review has been done by the City to determine whether or not the measures taken by the Licensee have been effective. The evidence in the record suggests that those measures have been effective in minimizing the bass and music from inside Club Cancun.

The reliable evidence in the record of this case establishes by clear and convincing evidence that the Licensee took extensive, expensive measures to: implement directional bass; implement sound absorption measures throughout the establishment, including the rebuilding of the South and West interior walls, closing off and insulating the West door that faces Rice Street; covering virtually all of the establishment's windows with soundproofing insulation; not allow any band or musician

⁷⁴ Factual Finding 7.

to utilize drums; and implement significantly lower amplification of the music. The last item was done to the extent that the Asian musicians performing at Club Cancun accused Mr. DeFoe of being a racist. Finally, after considering all of the measures taken by the Licensee, the sound expert concluded that there is nothing more that the Licensee can do to further minimize the sound level of the music at Club Cancun unless there is none.

Allegations of Excessive Bass Emanating from Club Cancun

The police department and Department of Safety and Inspections failed to follow the minimum requirements of section 293.02 (a)(2) of the St. Paul Legislative Code containing the factors that are required to be considered in determining whether or not a noise violation has been established. Neither the police department nor DSI utilized the provisions of sections 293.01 and 293.07, which provisions contain objective, scientific procedures to determine whether or not a noise source is excessive. The City did not introduce any evidence to establish that music emanating from Club Cancun was above 55 decibels, the level of conversational speech, beyond fifty feet from Club Cancun pursuant to section 293.02 (d) of the City noise regulation.

DSI relied entirely on the subjective terms of section 293.02 (a)(1) to establish a noise ordinance violation:

It shall be unlawful for any person to make, continue, permit or cause to be made, continued or permitted within the city, any loud, disturbing or excessive noise which would be likely to cause significant discomfort or annoyance to a reasonable person of ordinary sensitivities in the area.

The evidence in this case establishes that DSI relied entirely on the complaint of a single individual. In addition, there is little persuasive or reliable evidence to indicate that other potential sources of the offending bass noise were ruled out.

All of the sound mitigation measures employed by Club Cancun directed all music to the East, directly towards the alley and the adjacent apartments, away from 174 Wheelock Parkway.

Officer Yang testified that he could hear music coming from Club Cancun when he arrived at the east door to the establishment. However, there is no evidence in the record to establish whether or not the driver's window or door to his police vehicle were open or shut. There is no evidence in the record to establish whether or not the door to Club Cancun was closed or was opened when Officer Yang was present in the parking lot. There is no reliable evidence in the record to establish whether or not the music Officer Yang heard could be heard above normal conversation. It is reasonable to assume that some music will be heard at the entrance to any establishment that provides music. The fact that some music can be heard immediately outside of the entrance to Club Cancun is insufficient to establish either that it is disturbing the neighborhood or can be heard above normal conversation.

Officer Yang's testimony was equivocal. In his testimony he was able to remember his conversations with Ms. Carlson on February 14, 2009, yet could not "recall" his later conversations with Mr. Just and Mr. DeFoe on the same date. He could not recall whether or not he was the police officer who responded to the earlier, unfounded complaints by Ms. Carlson. Furthermore, he did not deny the statements attributed to him by Mr. Just and Mr. DeFoe – statements that tend to contradict the testimony he gave at the hearing. Finally, although the music allegedly heard was as likely to have been coming from the SuperAmerica or the Lamplighter as Club Cancun, Officer Yang did not go to the Lamplighter to rule it out as a source.

On balance, the testimony of Mr. DeFoe and Mr. Just is more credible and reliable than the testimony of Officer Yang. Viewed in the light of all of the other evidence in the record of this matter, it is more likely than not that Officer Yang was being candid and truthful in his statements to Mr. Just, and his true view is that Ms. Carlson's latest noise complaint was unfounded, as were her previous complaints. The only reason he wrote up a report was because he was ordered to do so by his superior officer.

In addition, it would be reasonably expected that, if excessive noise was emanating from Club Cancun, there would be some verified complaints from neighbors other than Ms. Carlson, particularly from someone living close to the establishment. There were none at all. The fact that the earlier complaint from her on the night of February 14, 2009, and one from the previous night, were investigated by the police and determined to be unfounded, persuasively suggests that the bass she hears either did not emanate from Club Cancun or was of such a modest level that a reasonable person of ordinary sensibilities would not be disturbed.

For the foregoing reasons, the ALJ finds that there is insufficient evidence to conclude that Club Cancun violated Chapter 293 of the St. Paul Legislative Code.

Conclusion

Because the City failed to prove by a preponderance of the evidence that Licensee violated either condition number one of its licenses or the Chapter 293 noise regulations, the Administrative Law Judge recommends that the City dismiss both alleged violations.

M. K. S.