



Appeal No. 2500988 DOB v. 104-10 Roosevelt Avenue LLC September 25, 2025

APPEAL DECISION

The appeal of Respondent, premises owner, is **granted**.

Respondent appeals from a recommended decision by Judicial Hearing Officer (JHO) J. DiPerna, dated July 7, 2025, sustaining a Class 1 violation of § 28-105.1 of the Administrative Code of the City of New York (Code) for work without a permit. Having fully reviewed the record, the Board finds that the JHO’s decision is not supported by the law and a preponderance of the evidence. Therefore, the Board finds as follows:

Summons	Law Charged	Hearing Determination	Appeal Determination	Penalty
35680795M	Code § 28-105.1	In Violation	Reversed – Dismissed	\$0

BACKGROUND

In the summons, the issuing officer (IO) affirmed on August 23, 2024, at 104-10 Roosevelt Avenue, Queens, as follows:

At time of inspection observed wood structure with no structural stability attested for with electrical components at ceiling at exp #1 front of the building[.] No permits found in D.O.B. records[.]

At the telephonic hearing held on June 30, 2025, the attorney for Petitioner, the Department of Buildings (DOB), relied on the IO’s affirmed statements on the summons and submitted photographs of the cited structure. Respondent’s attorney asserted as follows. The outdoor seating enclosure was erected during the COVID-19 pandemic pursuant to Emergency Executive Order 126 and approved by the Open Restaurants program. Therefore, a DOB permit was not required, as reflected in DOB’s Operational Buildings Bulletin 2025-004, issued on April 25, 2025. Additionally, the Department of Transportation (DOT) granted Respondent a revocable consent to continue its outdoor seating enclosure, as required by § 5-13(b) of Title 34 of the Rules of the City of New York (RCNY). In support, Respondent’s attorney submitted Operational Buildings Bulletin 2025-004; an email from DOT dated September 29, 2020, authorizing Respondent to add outdoor seating as part of the Open Restaurants program; and screenshot of a map of establishments in the Open Restaurants program purported to show that DOT had granted Respondent a revocable consent to continue its outdoor seating enclosure. Petitioner’s attorney noted that the Operational Buildings Bulletin was issued after the date of violation. She asserted that the screenshot submitted by Respondent did not show that it was granted a revocable consent by DOT to operate the outdoor seating structure.

In his decision sustaining the charge, the JHO credited Respondent’s evidence but found that Respondent had not complied with the rules for outdoor dining structures, which changed as of April 2024.¹

¹ Chapter 5 of 34 RCNY was enacted, effective March 3, 2024, to implement DOT’s permanent outdoor dining program (Dining Out NYC), which was created after the Open Restaurants program “quickly evolved from a response to the COVID-19 pandemic to a reimagination of the City’s streetscape to support small businesses, while creating vibrant public spaces that improve quality of life for all New Yorkers.” See Statement of Basis and Purpose in City Record February 2, 2024.

On appeal, Respondent's attorney argues that no law exists requiring a DOB permit for the outdoor dining structure erected during the COVID-19 pandemic. Respondent's attorney notes that the only legal requirement contained in Operational Buildings Bulletin 2025-004 is to obtain a revocable consent from DOT.

Petitioner did not answer the appeal.

ISSUE ON APPEAL

The issue on appeal is whether Respondent was required to obtain a permit for its outdoor seating structure constructed during the COVID-19 pandemic.

APPLICABLE LAW

Code § 28-105.1 provides, in pertinent part:

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, . . . 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.

Operational Buildings Bulletin 2025-004 provides, in pertinent part:

V. TEMPORARY OUTDOOR DINING STRUCTURES CONSTRUCTED DURING COVID PURSUANT TO EMERGENCY EXECUTIVE ORDER 126 (March 17, 2020 – March 2, 2024)

The temporary Open Restaurants program was established pursuant to an emergency executive order in response to the COVID-19 pandemic and permitted temporary outdoor dining structures to be constructed. Such temporary outdoor dining structures were permitted to be constructed without construction permits from DOB, or Department of Consumer and Worker Protection licenses, and were not subject to zoning requirements. As of March 3, 2024, these structures are subject to DOT rule including subdivision (b) of Section §5-13 that states in relevant parts:

“A restaurant operating a temporary outdoor dining setup that does not submit a petition for a revocable consent pursuant this chapter within five (5) months of the effective date of these rules shall immediately remove such temporary outdoor dining setup. Any temporary outdoor dining setup that is not removed shall be subject to penalties for the operation of a sidewalk cafe or roadway cafe without a license and revocable consent and may be removed in accordance with paragraph (1) of subdivision (d) of Section 5-12 of these rules.”

Therefore, unless an application to DOT has been submitted, such a structure may be subject to removal. Refer to **DOT Rule** Section §5-13 Temporary Outdoor Dining Structures for more information.

ANALYSIS

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

On this record, the Board finds that Respondent was not required to obtain a permit for its outdoor seating structure constructed during the COVID-19 pandemic. Respondent's evidence shows that it was authorized under the Open Restaurants program to construct the cited outdoor dining structure, which per Operational Buildings Bulletin 2025-004 was exempt from construction permits. *See also DOB v. First Street Development LLC*, Appeal No. 2101632 (Buildings Bulletin 2020-017 exempts from permitting requirements "tents or other shelters that are on the sidewalk and/or roadway where the restaurants or bars have obtained approval through NYC Open Restaurant Program and are less than 400 SF each in area"). Per Code § 28-102.4, "[t]he lawful use or occupancy of any existing building or structure, including the use of any service equipment therein, may be continued unless a retroactive change is specifically required by the provisions of this code or other applicable laws or rules." As noted by Respondent's attorney on appeal, no law or rule exists that retroactively requires a permit for outdoor dining structures legally constructed under the Open Restaurants program.

Accordingly, the Board affirms the JHO's decision sustaining a Class 1 violation of Code § 28-118.3.2 and imposing a civil penalty of \$2,500.

By: OATH Appeals Division