GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 17504 of JMM Corporation, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decisions of Administrative Law Judges, Department of Consumer and Regulatory Affairs ("DCRA"), sustaining two notices of civil infraction for operating in derogation of Certificate of Occupancy B176169 and revoking the aforementioned Certificate of Occupancy as well as a Mechanical Amusement License. The subject property is located in the DD/C-2-C District at premise 919 5th Street, N.W. (Square 516, Lot 825).

HEARING DATES: July 25, 2006, December 5, 2006, February 20, 2007
DECISION DATE: March 6, 2007

ORDER

PRELIMINARY MATTERS

On March 17, 2006, JMM Corporation ("Appellant" or "JMM") filed this consolidated appeal with the Board of Zoning Adjustment ("Board" or "BZA"), alleging error in the decisions of two DCRA Administrative Law Judges ("ALJ").[1] The first of these decisions was rendered by ALJ Lennox J. Simon on July 2, 2002 (herein referred to as the "NOI decision"). The NOI decision found the Appellant liable for two infractions of 11 DCMR § 3202, *to wit*, operating outside the scope of its Certificate of Occupancy ("C of O"). The specific allegation was that JMM was operating a sexually oriented business establishment while its C of O only permitted a non-sexually oriented use. ALJ Simon fined JMM $500 for each violation and an additional $1,000 because JMM was found liable for the same offense within the same three year period.

The second decision being appealed here was rendered by ALJ Henry W. McCoy on December 6, 2002 (herein referred to as the "C of O decision"). The C of O decision revoked the Appellant's C of O for the subject property and the Appellant's Mechanical Amusement License, also for the subject property. The C of O was revoked on the same grounds as the NOI – for operation outside its scope – and also because the C of O did not authorize the accessory mechanical amusement machine use that was occurring on the premises. ALJ McCoy revoked the Mechanical Amusement License pursuant to D.C. Official Code § 47-2844 (a) (2001) in the interest of public decency based on the content displayed on the mechanical amusement machines and its effect on the neighborhood.

Advisory Neighborhood Commission ("ANC") 6C, the ANC within which the subject property is located is automatically a party to this appeal by virtue of 11 DCMR § 3199.1, definition of

[1]The appeals of the two ALJ decisions were consolidated before this Board and treated as one appeal, No. 17504.

"Party," subsection (a). The ANC submitted two letters, dated July 17, 2006, and October 16, 2006, stating the ANC's continuing unanimous opposition to the appeal.

The appeals were originally filed in the wrong forum, which led to the District of Columbia Court of Appeals Memorandum Opinion and Judgment dated February 15, 2006, authorizing the filing of the appeals with this Board. As noted, this appeal was filed March 17, 2006 and a hearing was scheduled for July 25, 2006. The hearing was twice postponed at JMM's request and with the consent of DCRA. The first continuance was granted because no transcript or foreign language interpreter were available and the second continuance was granted due to the illness of JMM's owner, who wished to testify. On February 20, 2007, the Board conducted a limited hearing. At the decision meeting on March 6, 2007, the Board voted 3-0-2 to deny the appeal.

As it had done in the two proceedings below, the Appellant contended that the Zoning Regulations regulating the location of sexually-oriented business establishments ("SOBE") violate the Constitution of the United States both facially and as applied to businesses, like JMM, that sell sexually explicit material. In making this argument, JMM does not concede that it is a SOBE, but claims that the definition of the use is so vague that it and similar enterprises are unable to discern whether or not they fall within the definition's purview.

Like Administrative Law Judges Simon and McCoy, this Board concludes that it has no jurisdiction to decide questions of constitutionality, as its authority is limited to hearing appeals alleging error in the administration and enforcement of the Zoning Regulations. D.C. Official Code § 6-541.07(g)(1). Nor does the Board have the authority to amend any Zoning Regulation. *Id.* at § 6-641.07(e). *See also,* Board of Zoning Adjustment Order No. 13967, *Appeal of California Steak House, Inc.* (wherein the Board recognizes that it has no authority to declare unconstitutional any provisions of the Zoning Regulations.)

Nevertheless, the Board was advised by the Office of the Attorney General for the District of Columbia that it must afford the Appellant an opportunity to make a record with respect to its "as applied" constitutional claim for the purposes of a subsequent appeal. The Board afforded the Appellant this opportunity and will not further address the contention.

The portion of its appeal that is within this Board's jurisdiction to decide is whether Appellant's mechanical amusement machines, which Appellant concedes depict "very explicit sexually activity", and the various "sex toys" and other "adult" materials it sells represent such a substantial portion of its stock and trade so as to fall within the definition of a sexually-oriented business establishment. Appellant contends that these machines and materials are not a "substantial" portion of the business. Because the Board concludes otherwise, and for the reasons stated below, the appeal is denied.

The Board's scope of review differs as to the two decisions before it. Because the NOI decision stemmed from a hearing conducted in accordance with § 203 of the Department of Consumer

and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1985 (D.C. Law 6-42; D.C. Official Code § 2-1803.03 (2001)) ("Civil Infraction Act"), the Board's review is limited to "the record established before the administrative law judge." Civil Infraction Act § 303, D.C. Official Code § 2-1803.03. Pursuant to § 303, the Board must "set aside any administrative law judge or attorney examiner order that is without observance of procedure required by law or regulations ... or any administrative law judge or attorney examiner order that is unsupported by a preponderance of the evidence on the record." *Id.*

In contrast, there is no similar restriction on the Board's review of the C of O decision. The Building Code provides that

> Any person aggrieved by the action of the [DCRA] Director ...revoking a Certificate of Occupancy may appeal the action to the Board of Zoning Adjustment, pursuant to D.C. Official Code Sec. 6-641.09 (2001), and the District of Columbia Zoning Regulations.

12A DCMR § 110.6.[2]

Notwithstanding this provision, DCRA provided the Appellant with a full hearing on the proposed revocation before Administrative Law Judge McCoy. Nonetheless this Board undertook a *de novo* review of the facts upon which the revocation was based, because an appeal of a certificate of occupancy revocation is subject to different appellate procedures than those governing the review of an ALJ's order affirming a civil infraction fine. *See, Kuri Bros., Inc. v. District of Columbia Bd. of Zoning Adjustment*, 891 A.2d 241, 247 (D.C. 2006). Accordingly, pursuant to its authority under Section 8 of the Zoning Act of 1938 D.C. Official Code § 6-641.07(f) and 11 DCMR § 3100.2 to hear appeals based in whole or part on any Zoning Regulations or Zoning Map, the Board applied the hearing procedures set forth in the Zoning Regulations at 11 DCMR §§ 3117 and 3119 for its review of the revocation decision.

At the hearing, Appellant, for the most part, chose to rely on the record created by ALJ McCoy in the C of O decision. However, because no transcript could be made of that proceeding, the parties stipulated that the facts adduced in the NOI proceeding were the same as those adduced in the C of O proceeding, BZA Hearing Transcript at 181, lines 12-22, and 182, lines 1-4. In addition, Appellant was permitted to ask questions it claimed were asked and answered (but not transcribed) during the C of O proceeding, and to ask questions it claimed were relevant to its constitutional claims. The Appellant also reiterated several times that Fun Fair Video is being operated in the same manner in 2007 as it was operated at the time of the C of O and NOI proceedings.

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[2]This and all other Building Code provisions cited in herein were codified in Chapter 16 of DCMR Title 12A when the notices were issued and the decisions rendered. These subsections were later re-codified, without change, to Chapter 10 of that same DCMR title by virtue of a Notice of Final Rulemaking published in *the D.C. Register* on January 8, 2004 at 51 DCR 368.

Although the Findings of Fact that follow are primarily intended to support the Board's legal conclusions reached as part of its *de novo* review of the C of O decision, the findings that do not refer to observations made in 2006 also reflect the preponderance of evidence in the record that supported ALJ Simon's legal conclusions in the NOI decision, for which this Board undertook a record review.

FINDINGS OF FACT

The subject property and Certificate of Occupancy.

1. JMM Corporation operates a retail business known as "Fun Fair Video" at address 919 5th Street, N.W. ("the subject property").
2. The subject property is located in a DD/C-2-C[3] zone district in Square 516, Lot 825.
3. JMM Corporation is owned by Jose Montiel, who also operates Fun Fair Video.
4. On November 19, 1996, the Appellant was issued C of O No. B176169, permitting it to operate a video membership store. The C of O specifically noted that the store was "not sexually oriented" and did not authorize mechanical amusement machines as an accessory use.
5. JMM concedes that "not sexually oriented" signified that JMM had no authority to operate a sexually-oriented business establishment, or "SOBE," as that term is defined at 11 DCMR 199.1. BZA hearing Transcript at 147, line 22 through 148, line 6.

The first Notice of Infraction

6. On April 7, 2000, DCRA issued to the Appellant Notice of Infraction ("NOI") No. 42251, in the amount of $500.00.
7. A hearing was held on NOI No. 42251, and on June 20, 2000, a Decision and Order was issued by a DCRA ALJ finding the Appellant liable for operating Fun Fair Video in a manner that did not conform to its C of O No. B176169. Specifically, Appellant was found liable for operating a sexually-oriented business in violation of its C of O.
8. As a result of the June 20, 2000 Decision and Order, Appellant was ordered to pay a fine of $540.00.

Events leading to the issuance of the Notice of Infraction decision

9. At some point in late August/early September, 2001, DCRA again determined that a significant portion of Appellant's stock in trade was sexually-oriented (*See*, 11 DCMR §

[3]The subject property is mapped within the Downtown Development Overlay District ("DD"), but this fact has no bearing on, or particular relevance to, this appeal. Therefore, hereinafter, the "DD" designation has been dropped in references to the Appellant's zone district.

199.1, definition of SOBE) and that C of O No. B176169 did not permit the operation of the mechanical amusement machines observed on the premises.

10. On September 9, 2001, DCRA issued NOI No. 028120 to Appellant for operating its business in a manner that did not conform to its C of O.

11. On September 13, 2001, DCRA issued another NOI, No. 035446 to the Appellant for operating its business in a manner that did not conform to its C of O.

12. ALJ Lennox J. Simon held hearings on March 5th and 8th, 2002, on the two NOIs, and on July 2, 2002 issued the NOI decision upholding them.

13. The NOI decision ordered the Appellant to pay a $500.00 fine for each of the NOIs and also assessed another $1,000.00 fine because Appellant was found to be a recidivist.

Events leading to the issuance of the C of O decision

14. On February 27, 2002, DCRA served the Appellant with a Notice of Intent to Revoke its C of O and a Notice of Intent to Revoke its Mechanical Amusement License.

15. DCRA held hearings before the agency's Office of Adjudications on both the C of O revocation notice[4] *and* the notice to revoke its Mechanical Amusement License on July 29th and 30th, 2002, resulting in the December 6, 2002 C of O decision.

16. The C of O decision revoked the C of O and revoked Appellant's Mechanical Amusement License No. 31005263.

The Court of Appeals decision

17. The NOI decision indicated that general appeals of ALJ decisions must be filed with the Board of Appeals and Review ("BAR"), although if the matter concerned "a violation of the Zoning Regulations," it should be appealed to the Board of Zoning Adjustment.

18. The C of O decision stated that JMM only had a right of appeal to the BAR.

19. JMM appealed both decisions to the BAR.

20. The BAR dismissed both appeals for lack of jurisdiction over errors alleged in the enforcement of the Zoning Regulations.

21. The District of Columbia Court of Appeals ("DCCA"), through a Memorandum Order and Judgment dated February 15, 2006, affirmed both dismissals without prejudice to the Appellant filing an appeal before this Board.

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[4] "Neither the zoning statute nor the regulations governing C of O revocations expressly entitled [Appellant] to a hearing before the DCRA on the revocation of its C of O.". *Kuri, supra,* 891 A.2d at 245 (DC 2006). The Kuri opinion surmised that DCRA offered this type of hearing opportunity "to comply with the requirements of due process". *Id.*

22. This Appeal was filed on March 17, 2006.

Appellant's sexually explicit entertainment and materials

23. Appellant concedes that Fun Fair Video/JMM "sell[s] erotic entertainment, including videos that show very explicit sexual activity." BZA Hearing Transcript at 148, lines 9-12.

24. The Appellant did not dispute that Fun Fair Video displayed and sold sex toys and accessories, such as dildos depicting the human penis, vibrators, body oils, personal lubricants, and condoms, as found by both the NOI and C of O decisions. *See,* Exhibit No. 4, Finding of Fact No. 1, and Exhibit No. 5, and Finding of Fact No. 5. *See also,* Exhibit No. 5, at 10.

25. Appellant's witness, William Vain, photographed the interior of Fun Fair Video.

26. One photograph (No. FF1-14) depicts a sign that appears to be posted next to the door of one of the booths. The sign reads: "8 Different Video Selections of Continuous Adult Entertainment." Exhibit No. 33A.

27. Another of Mr. Vain's photographs (No. FF1-8) shows a sign on a closed door within Fun Fair Video that reads: "X-Rated Videos in this Room." Exhibit No. 33A.

28. Sergeant Mark A. Gilky, Metropolitan Police Department, Detective Grade 1, Supervisor, Prostitution Enforcement Unit, testified that

> he had been inside the subject premises, saw the 'pornographic' tapes for sale and rental, saw the sex toys on display for sale, observed the video booths and noticed activity in the booths, observed what appeared to be semen on the floor of one of the booths, and observed condom wrappers on the floors of the booths and in the aisle outside the booths ... [and] ... he did observe a male individual masturbating in one of the booths.

Exhibit No. 5, at 11. *See also* Exhibit No. 4, Finding of Fact No. 5.

29. There were 10 video booths in the rear area accessible via a door fitted with an electronic lock controlled by one of Appellant's employees. These video booths contained monitors showing adult/sexually-explicit videos for a fee of $1.00 for each five minutes of playing time. Exhibit No. 4 (NOI decision), Finding of Fact No. 1, and Exhibit No. 5 (C of O decision), Findings of Fact Nos. 4 & 12.

30. The existence of the monitors in the video booths and their showing of sexually-explicit content were stipulated to by Appellant's attorney. *See,* BZA Hearing Transcript at 276, line 22, and 277, lines 1-2.

31. On August 22, 2001, DCRA's Office of Compliance conducted an on-site investigation of Fun Fair Video and the DCRA inspector observed 153 sexual accessories for sale and 10 video booths with monitors showing adult/sexually-explicit content.

32. On September 1, 2001, a DCRA inspector conducted a second unannounced inspection of the Appellant's business premise and observed patrons seeking booth rentals or proceeding directly to an adult movie and "sex toy" section at the rear of the premise.

33. As of September 21, 2001, the Appellant had 1,966 general viewing VHS/DVDs and 544 adult/sexually-oriented VHS/DVDs in its inventory and available for rental or sale. *See,* Exhibit No. 4, Finding of Fact No. 4, and Exhibit No. 5, at 8.

34. On December 14, 2001, an officer of the D.C. Metropolitan Police Department observed a male patron inside Fun Fair Video watching an adult/sexually explicit video in one of the Appellant's video booths. As the door was partially open, the police officer observed that the male patron was masturbating.

35. The operation of Fun Fair Video has not substantially changed between 2001 and the date of the haring. *See, e.g.,* BZA Hearing Transcript at 193, lines 1-2.

36. In November, 2006, an officer of the Metropolitan Police Department visited Fun Fair Video and observed, in the "back" of the store, but in an area accessible to customers, different types of personal lubrication for sale, sex toys, adult videos, condoms, used and unused, and drug paraphernalia. *See,* BZA Hearing Transcript at 318, lines 16-21; 320, line 22; and 321, lines 1-4.

37. The Zoning Administrator ("ZA") visited Fun Fair Video on December 3, 2006, and personally observed Fun Fair Video's 10 video monitors. Such monitors were "show[ing] acts of human masturbation, sexual intercourse, sexual stimulation and arousal" as well as "fondling," "other erotic touching of human genitalia and so forth...." *See,* BZA Hearing Transcript at 245, lines 19-22, and 246, line 1.

38. On December 6, 2006, an undercover DCRA inspector visited Fun Fair Video and observed, in the "back" of the store, but in an area accessible to customers, "hundreds" of videos of a sexual nature available for rental or sale. *See,* BZA Hearing Transcript at 296, lines 6-10.

Appellant's floor areas devoted to the sale and viewing of sexually explicit entertainment and materials

39. The approximate total floor area of Fun Fair Video is 1,522.5 square feet. *See*, Exhibit No. 33, statement #4, and Exhibit No. 33C.

40. The adult video section occupied approximately 100 square feet. The rear area devoted to the adult video booths, including all the area between an attendant-controlled locked access door and the front wall of the management office, situated at the very back of the premises, was approximately 488.25 square feet. Therefore, a total of approximately 588.25 square feet was devoted to adult-only areas. *See,* Exhibit No. 33, statement #4, and Exhibit No. 33C.

41. The approximate total floor area of Fun Fair Video devoted too "General Video/All Ages," including the area occupied by the Customer Service Desk, was 533.22 square feet. *See,* Exhibit No. 33, statement #4, and Exhibit No. 33C.

42. The rest of the floor area of Fun Fair Video, approximately 400 square feet, all located at the rear of the premise, was taken up by a video control and storage room, a management office, a custodial closet, a restroom, and an open area leading to a rear emergency exit. *See,* Exhibit No. 33, statement #4, and Exhibit No. 33C.

Absence of Accessory Use Authorization on C of O

43. On April 28, 1999, the Appellant obtained from DCRA Mechanical Amusement License No. 31005263, permitting it to operate video booths at the subject property. The license was subsequently renewed, and would have expired on May 31, 2003.

44. C of O No. B176169 was never amended to add "mechanical amusement machine" as an accessory use. *See,* Exhibit No. 5, at 8 & 10, and Exhibit No. 4, at 3 (Summary of the Evidence).

CONCLUSIONS OF LAW

As noted immediately prior to the Findings of Fact, this consolidated proceeding involves two appeals with two different standards of review. The first appeal is of an ALJ's order sustaining two Notices of Infraction for the same offense committed on two different dates. The NOIs were issued pursuant to the Civil Infraction Act. The second is an ALJ decision revoking Appellant's Certificate of Occupancy.

As to the NOI decision, the Board may only "set aside any administrative law judge or attorney examiner order that is without observance of procedure required by law or regulations ... or any administrative law judge or attorney examiner order that is unsupported by a preponderance of the evidence on the record." Civil Infraction Act § 303, D.C. Official Code § 2-1803.03. In contrast, because the Board's review of the C of O decision is de *novo,* it is not bound to accept any of the evidentiary conclusions reached by ALJ McCoy.

As to what facts the Board may consider, § 303 of the Civil Infraction act limits the Board's purview of the NOI decision issued by ALJ Simon to "the record established before the administrative law judge". Similarly, the Board generally does not consider facts that were not known to the District official (in this case ALJ McCoy) whose decision is undergoing a *de novo* review, but has done so in the past where, as here, the evidence was proffered by the Appellant and "proves useful in 'confirming our view as to the proper disposition of this case,' *George Washington University v. D. C. Board of Zoning Adjustment,* 83 1 A.2d 921,945 n22 (2003)." *Appeal No. 16998 of Advisory Neighborhood Commission 5B* ((March 31, 2004). *Affirmed, Bannum, Inc. v. District of Columbia Bd. of Zoning Adjustment,* 894 A.2d 423 (D.C. 2006).

Appellant's post 2002 evidence, which concerned aspects of the Appellant's business observed in the months leading to the hearing on this appeal, does indeed confirm our view that Judge Simon correctly described Fun Fair Video as a "quintessential sexual oriented business."

Nevertheless, the facts adduced in his NOI decision, which have been stipulated to be the same as were adduced in the C of O decision, suffice to sustain both decisions and the Notices that the decisions upheld.

Validity of Notices based upon operating outside the scope of C of O

Subsection 3202.1 of the Zoning Regulations provides that

> no person shall use any structure, land, or part of any structure or land for any purpose other than a one-family dwelling until a certificate of occupancy has been issued to that person stating that the use complies with the provisions of this title and the D.C. Construction Code, Title 12 DCMR.

The Director of DCRA is authorized to revoke a certificate of occupancy "if the actual occupancy does not conform with that permitted." 12A DCMR 110.5.1. Subsection 3312 of Title 15 DCMR sets forth the Civil Infraction Act fines for violating the Zoning Regulations. Subsection 3202.1 provides in part:

> 3202.1 Violation of any of the following provisions shall be a Class 1 infraction:
>
> (a) 11 DCMR § 3203 (failure to obtain a certificate of occupancy or use beyond scope of certificate of occupancy); …

The definition of sexually-oriented business establishment is as follows:

> An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals, films, materials, and articles, or an establishment that presents as a substantial or significant portion of its activity, live performances, films, or other materials, that are distinguished or characterized by their emphasis on matters depicting, describing, or related to *specified sexual activities* and *specified anatomical areas*.
>
> These establishments may include, but are not limited to, bookstores, newsstands, theaters, and amusement enterprises. If an establishment is a sexually-oriented business establishment as defined here, it shall not be deemed to constitute any other use permitted under the authority of this title. (Emphasis added.)

11 DCMR § 199.1, definition of "Sexually-oriented business establishment." The Zoning Regulations go on to separately define the two phrases italicized above – "specified sexual activities," and "specified anatomical areas." These separate definitions help to bring greater specificity to the overall definition of SOBE, and are as follows:

> Specified anatomical areas – parts of the human body as follows:

(a) Less than completely and opaquely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and

(b) Human genitals in a discernibly turgid state, even if completely and opaquely covered.

Specified sexual activities – the following activities:

(a) Acts of human masturbation, sexual intercourse, sexual stimulation or arousal, sodomy, or bestiality; and

(b) Fondling or other erotic touching of human genitals, pubic region, buttock, or breast.

11 DCMR § 199.1, definitions of "Specified anatomical areas," and "Specified sexual activities."

It follows, therefore, that if Appellant's Fun Fair Video establishment had "as a substantial or significant portion of its stock in trade, ... periodicals, films, [or] materials, ... that are ... characterized by their emphasis on matters depicting, describing, or related to specified sexual activities and specified anatomical areas," then it is a SOBE.

The Appellant concedes that it sells erotic entertainment and has on its premises video monitor booths showing explicit sexual activity. The videos shown by these monitors depict "specified sexual activities" and "specified anatomical areas" as defined at 11 DCMR § 199.1. Moreover, the Findings of Fact recited above that describe JMM's operations preceding the issuances of the NOI and C of O decisions provide abundant proof that part of its stock and trade consisted of materials that fall within the SOBE definitions.

The only inquiry is whether that portion of Fun Fair Video's stock in trade which emphasizes depictions of specified anatomical areas and specified sexual activities constitutes a "substantial" or "significant" portion of its overall stock in trade. Neither "stock in trade," nor "substantial," nor "significant" are defined in the Zoning Regulations, but they are all defined in *Webster's Dictionary*. *See*, 11 DCMR § 199.2(g) *Webster's Dictionary* defines "stock in trade" as follows:

> the equipment necessary to or used in the conduct of a trade or business:
>
> as (**a**): the goods kept for sale by a shopkeeper (**b**): the fittings and appliances of a workman (**c**): the aggregate of things necessary to carry on a business.

Webster's Third International Dictionary (Unabridged) (1986). The phrase "stock-in-trade" broadly encompasses the aggregate of all things necessary to conduct a business, including mechanical equipment, as well as inventory. Based on the evidence presented in this appeal, the Board interprets the phrase to include all income-producing assets of Fun Fair Video, including its entire VHS/DVD inventory, its inventory of sex accessories and sex toys, and its video monitor booths.

The relevant portions of the definitions of "substantial" and "significant" from *Webster's Dictionary* are as follow: "substantial" – "considerable in amount, value, or worth; of or relating to the main part of something," and "significant" – "having or likely to have influence or effect: deserving to be considered: important, weighty, notable." *Id.*

The sale or rental of VHS/DVDs emphasizing specified anatomical areas and specified sexual activities, as well as the sale of time to watch such VHS/DVDs on the video monitors in the 10 booths, constituted an important part of Appellant's business, and, indeed, appeared to be the main part of that business. Fun Fair Video had an inventory of both sexually-oriented and non-sexually-oriented VHS/DVDs, but the 10 video booth monitors show only the former.

The Board credits the DCRA's inspector, who concluded that at the time relevant here, sexually-oriented VHS/DVDs comprised between one-quarter and one-third of the total VHS/DVD inventory. Appellant's witness counted the total inventory several months later and claimed that the sexually-oriented VHS/DVDs comprised between one-eighth and one-ninth of the total inventory. Even if the numbers claimed by Appellant's witness are correct, that percentage of sexually-oriented inventory, particularly coupled with the presence of the exclusively sexually-oriented video monitor booths and the sale of sex toys and accessories, is sufficient to convince the Board that material emphasizing specified anatomical areas and specified sexual activities constituted a substantial part of Appellant's stock in trade.

The Board's conclusion that Fun Fair Video was an SOBE is also based in part on the allocation of floor space within the premise of Fun Fair Video. *See,* Exhibit No. 33C. Because Appellant did not provide all of the necessary numbers the calculations are approximate. Of a total of approximately 1,5211.5 square feet, approximately 588.25 square feet or one-third of the floor space is devoted to adult-only areas, the majority of which are located behind the attendant-controlled locked access door. These 588.25 square feet contain the sexually-oriented video inventory and the 10 video booths and areas necessary and accessory to these booths, such as the aisle way between the booths. An area of approximately 50 square feet less – 533.22 square feet – contains general viewing videos and is accessible to all customers. The rest of the total of 1,521.5 square feet – approximately 400 square feet -- is devoted to managerial, custodial, and storage uses, as well as an open area leading to a rear emergency exit and a restroom. From these numbers, it is clear that a considerable portion of floor area within Fun Fair Video is given over to sexually-oriented inventory and video booths, or space accessory to these sexually-oriented uses.

Finally, Appellant's argument suggests that DCRA should have followed the criteria discussed in an eight-page opinion issued in 1998 by then-Acting Zoning Administrator Gladys Hicks attempting to further clarify the definition of a SOBE. Hicks and/or her staff performed some research into what attributes of a business lead to its being found to be a SOBE in other jurisdictions and determined certain numerical standards to guide DCRA, and presumably others, in determining whether a business was or was not a SOBE. These "standards" were only guides

and interpretations and could not legally bind DCRA, the public or future Zoning Administrators.

Only the Zoning Commission has the authority to set such binding standards. Section 492 (a) of the District Charter amended § 1 of the Zoning Act of 1920 to provide that "The Zoning Commission shall exercise all the powers and perform all the duties with respect to zoning in the District as provided by law." D.C. Official Code § 6-621.01 (e). "Thus, the Home Rule Act explicitly provides that the Zoning Commission is the exclusive agency vested with power to enact zoning regulations for the District of Columbia." *Tenley & Cleveland Park Emergency Committee v. District of Columbia Bd. of Zoning Adjustment,* 550 A.2d 331, 340 (D.C.1988), *cert. denied*, 489 U.S. 1082 (1989). That means that only the Zoning Commission may amend a Zoning Regulation, including the definitions contained therein. As the Court of Appeals has repeatedly stated,

> even if an agency charged with implementing a regulation - which in this case, we note, is *not* the agency that wrote it - perceives it to be deficient or imperfect, it is not the agency's (or this court's) prerogative "to rewrite the statute [or regulation]...." *Moore v. Gaither, 767 A.2d 278, 285 (D.C. 2001)* (internal punctuation omitted)

Chagnon v. D.C. Bd. of Zoning Adjustment, 844 A.2d 345, 348-349 (D.C. 2004)

In short, the Hicks Opinion has no bearing on this appeal.

The Board finds that there was a preponderance of evidence in the record to support ALJ Simon's conclusion and a preponderance of evidence in this Board's record to support its conclusion that Appellant's Fun Fair Video establishment falls within the plain meaning of "sexually-oriented business establishment" as set forth in 11 DCMR § 199.1. It has, as a substantial or significant portion of its stock in trade, films and materials that emphasize depictions of, and/or are related to, specified sexual activities and specified anatomical areas. Since it falls within the definition of a SOBE, it is a SOBE, and cannot be deemed to constitute any other use permitted by the Zoning Regulations. 11 DCMR § 199.1, definition of "Sexually-oriented business establishment," last sentence.

Because Appellant's C of O limits its use to one that is not sexually oriented, the Applicant was operating outside of its scope as of the date that the Notices of Infraction and Intent to Revoke were issued. Both notices, and the two decisions that sustained them, are affirmed, and the appeal is denied on this ground.

Revocation of C of O due to lack of endorsement for accessory use

Although Appellant does not challenge this portion of the C of O decision, the Board nevertheless notes that § 722.1 of the Zoning Regulations (Title 11 DCMR) provides that a

"mechanical amusement machine shall be permitted in a C-2 District as an accessory use incidental to the uses permitted" as a matter of right and certain special exceptions. Pursuant to 11 DCMR 3202.1, Appellant could not lawfully engage in this accessory use unless it was stated on its C of O. Since it was not so stated, this use was beyond the scope of the C of O and therefore revocation of the C of O and the issuance of the NOI were lawful and are upheld on this ground as well.

Revocation of Mechanical Amusement License[5]

D.C. Official Code § 47-2844 (a) authorizes the Mayor to "revoke any license issued hereunder when, in his judgment, such is deemed desirable in the interest of public decency or the protection of lives, limbs, health, comfort, and quiet of the citizens of the District of Columbia, or for any other reason he may deem sufficient." Based upon the record before him, ALJ McCoy concluded that this standard had been met. The Board agrees with ALJ McCoy that that the evidence before him "demonstrated that public decency was compromised by the activity in and around Fun Fair Video and that revocation of [JMM's] business license for the video booths would serve to protect the comfort and quiet of those neighboring District citizens who call that general vicinity home." C of O decision at 13.

As to Appellant's claim that the ALJ had no authority to revoke the license, the Mayor's authority to revoke was delegated to DCRA and by offering JMM an opportunity for a hearing before revoking the license, DCRA had designated ALJ McCoy as the DCRA official with the responsibility to take the final action.

CONCLUSION

For the reasons stated above, the Board concludes that the Appellant did not meet its burden of demonstrating that DCRA erred in revoking Appellant's C of O or Mechanical Amusement License. Nor did Appellant prove that ALJ Simon's order was deficient in any of the ways that would have required this Board to set it aside.

Therefore, it is hereby **ORDERED** that this appeal be **DENIED.**

VOTE: **3-0-2** (Geoffrey H. Griffis, Ruthanne G. Miller, and Curtis L. Etherly, Jr., to deny. No fourth member and no Zoning Commission member participating or voting.)

A majority of the Board has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

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[5] While this aspect of the Appeal does not allege an error made in the enforcement of the Zoning Regulations., the Board considered the issue as requested by the District of Columbia Court of Appeals.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: OCT 01 2007

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPLICATION NO. 17504

As Director of the Office of Zoning, I hereby certify and attest that on OCT 01 2007, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY: _____
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Director, Office of Zoning