

RECEIVED
DISTRICT OF COLUMBIA
2011 OCT 28 AM 11:54

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Re: Appeal of Certificate of Occupancy Nos. 1001838 and 1002471 issued to Stadium Group LLC for 2127 Queens Chapel Road NE.

BZA Appeal No. 18114

**APPELLANT'S OPPOSITION TO PROSPECTIVE INTERVENER'S
MOTION *IN LIMINE***

Appellant, The Ward 5 Improvement Association ("Association") respectfully asks the Board of Zoning Adjustment ("Board") to deny the motion *in limine* filed by the Prospective Intervener, Stadium Group LLC ("Stadium").

As laid out more fully in the attached Memorandum of Points and Authorities, Stadium's motion *in limine* should be denied because:

1. A motion *in limine* is inappropriate in this circumstance (i.e. not a jury trial).
2. Stadium's motion is predicated on a factual error and a misapprehension of the law.
3. The affidavits Stadium seeks to preclude are relevant.
4. Preclusion of the affidavits would be contrary to the binding precedent of the Court of Appeals.

For the foregoing reasons, the Association respectfully asks the Board to deny Stadium's motion *in limine*.


Don Padou, President
Ward 5 Improvement Association
1335 Lawrence Street NE
Washington, D.C. 20017
(202) 832-4038

10/26/10

Date

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18114
EXHIBIT NO. 27

Board of Zoning Adjustment
District of Columbia
CASE NO.18114
EXHIBIT NO.27

MEMORANDUM OF POINTS AND AUTHORITIES

FACTUAL AND PROCEDURAL BACKGROUND

On April 21, 2010, the Zoning Administrator granted a temporary Certificate of Occupancy (C of O) to Stadium Group LLC ("Stadium") to operate a strip club at 2127 Queens Chapel Road NE. Appellant's Brief for the Appeal of the Issuance of Certificates of Occupancy (hereafter "App. Brf.") Disclosure B.¹ The C of O was for a non-sexually oriented business establishment. App. Brf. Disclosure B.

On June 11, 2010, the Ward 5 Improvement Association ("Association") filed an appeal with the Board of Zoning Adjustment ("Board"), arguing that the strip club operated by Stadium was a sexually oriented business establishment ("SOBE") as defined by 11 DCMR § 199.1 and that, therefore, the Zoning Administrator erred in granting Stadium a non-SOBE Certificate of Occupancy. Appeal of the Issuance of a Certificate of Occupancy (hereafter "Appeal") at 1.

In May and June 2010, Mr. Padou sent numerous emails to DCRA protesting the issuance of a non-SOBE Certificate of Occupancy to a strip club. App. Brf. Disclosure E.

On June 22, 2010, the Zoning Administrator granted a permanent non-SOBE Certificate of Occupancy to Stadium to operate a strip club. App. Brf. Disclosure D. The Association amended its appeal to cover the issuance of the permanent C of O. DCR vol 57/34, August 20, 2010.

¹ To avoid confusion, the Attachments to Appellant's Brief for the Appeal of the Issuance of Certificates of Occupancy will be called "Disclosures" in this document.

The Association served copies of its appeal on the affected ANC (ANC 5B); on the owner of 2127 Queens Chapel Road NE (RF Holdings LLC); on Stadium, the tenant; and on Matthew LeGrant, the DC Zoning Administrator. Appeal at 5-6.

The Association is an unincorporated association formed pursuant to DC Code § 29-971. App. Brf. Disclosure O. The purpose of the Association is to improve the quality of life for residents and businesses in Ward 5. Id. Members of the Association have been actively protesting the creation of a red light district in Ward 5. See protest groups before Alcoholic Beverage Control Board against strip club liquor licenses for Stadium Group LLC and AKA, Inc, July and August 2010. See also Abigail Padou Decl. ¶ 6.

Members of the Association include the First Christ Apostolic Church located at 2130 24th Place NE, a property abutting Stadium at the rear. See official zoning map and atlas of the District of Columbia. See also Abigail Padou Decl. ¶ 3. The Association also includes two members, Camilla and Herbert Faulkner, who live approximately 1,000 feet from the strip club. Abigail Padou Decl. ¶ 4.

The Board of Zoning Adjustment published a notice in the District of Columbia Register advertising the Association's appeal of Certificate of Occupancy Nos. 1001838 and 1002471 granted to Stadium to operate a strip club at 2127 Queens Chapel Road NE. DCR vol 57/34, August 20, 2010.

On June 16, 2010, Ben Petok, Marshall Chriswell and Joe Karlya visited Stadium's strip club. Petok Aff. ¶ 2; Chriswell Aff. ¶ 2. Mr. Petok and Mr. Chriswell swore affidavits describing what they saw during their visit. Affidavits of Marshall Chriswell and Ben Petok. The affidavits are based on personal knowledge. Id.

DISCUSSION

A. Stadium offers its motion *in limine* for an inappropriate purpose and the Board should reject the motion on that basis alone.

The authors of American Jurisprudence, a legal database, advise caution in granting motions *in limine*, explaining:

While the ability to restrict interrogation at trial makes the *in limine* order a powerful weapon, such power also makes it a potentially dangerous one. *Lockett v. Bi-State Transit Authority*, 94 Ill. 2d 66, 67 Ill. Dec. 830, 445 N.E.2d 310 (1983). Consequently, before granting a motion *in limine*, the courts must be certain that such action will not unduly restrict the opposing party's presentation of its case. *Burris v. Madison County*, 154 Ill. App. 3d 1064, 107 Ill. Dec. 898, 507 N.E.2d 1267 (5th Dist. 1987); *Whittle v. City of Meridian*, 530 So. 2d 1341 (Miss. 1988).... [A motion *in limine*] should not ordinarily be employed to choke off an entire claim or defense. *Associates v. Bass*, 158 Ill. App. 3d 526, 110 Ill. Dec. 513, 511 N.E.2d 690 (1st Dist. 1987).... It is clearly improper for the court to allow a motion *in limine* which limits or refuses the introduction of relevant admissible evidence. *Mack v. First Sec. Bank of Chicago*, 158 Ill. App. 3d 497, 110 Ill. Dec. 537, 511 N.E.2d 714 (1st Dist. 1987).... Since the motion prevents a party from presenting his or her evidence in the usual way, it should only be granted sparingly. *Bellardini v. Krikorian*, 222 N.J. Super. 457, 537 A.2d 700 (App. Div. 1988). Am. Jur. § 44, *Limitations on use of Motions In Limine*.

Motions *in limine* are an expensive tactic that some have recognized as favoring wealthy parties over poor parties. See, e.g. *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 739 (3d.Cir 1994). Perhaps for this reason, courts—particularly Federal courts—look with disfavor on many motions *in limine* and prefer to decide the issue at trial. See, e.g. *U.S. v. Barletta*, 644 F.2d 50, 57 (1st Cir 1981); see, also *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir 1975) (orders *in limine* which exclude broad categories of evidence should rarely be employed; the better practice is to deal with questions of admissibility as they arise); *Scarboro v. Travelers Insurance Co.*, 91 F.R.D.

21 (D.Tenn.1981) (in Sixth Circuit, motions *in limine* are disfavored; the better practice is to deal with questions of admissibility as they arise during the course of the trial).

Here, Stadium seeks to do exactly what the courts cited by American Jurisprudence condemn: preclude the introduction of relevant evidence. The relevant evidence in question is two affidavits that demonstrate that Stadium is a sexually oriented business establishment (SOBE) and that, therefore, the Zoning Administrator erred in granting Stadium a Certificate of Occupancy.

Stadium's improper use of a motion *in limine* is highlighted when the Board considers the purpose of such a motion. The purpose of a motion *in limine* is to protect a jury from exposure to irrelevant and prejudicial evidence. *BHG, Inc. v. F.A.F., Inc.*, 784 A.2d 884 (R.I. 2001). ("A motion *in limine* is not meant to be a dispositive motion, but, rather, a way to prevent a party from displaying potentially prejudicial information to the jury."); *State v. Martinez*, 824 A.2d 443 (R.I. 2003) ("A motion *in limine* is a salutary device to avoid the impact of unfairly prejudicial evidence upon the jury and to save a significant amount of time at the trial").

The classic example of the proper use of a motion *in limine* is to prevent a gruesome photograph of a murder victim from being presented to a jury. The photograph is relevant because it is evidence demonstrating that a murder – a particularly bloody killing – has taken place. The photo, however, is unduly prejudicial because it will inflame the jury against the defendant. What is more, once the jury sees the photo, the prejudicial damage is done and cannot be undone. *Edwards v. Centex Real Estate Corp.*, 61 Cal.Rptr.2d 518, 524, 53 Cal.App.4th 15 Cal.App. 1 Dist. 1997. The probative value of the photograph is outweighed by the unduly prejudicial nature of the gruesome image.

Here, there is no jury to protect. The Court of Appeals has held that administrative boards do not need protection because “individual agency members are presumed capable of properly assessing the reliability and weight of evidence.”

Washington Post v. District of Columbia Dept. of Employment Services, 675 A.2d 37, 43-44 (D.C.1996) (citing *Kopff v. District of Columbia Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1385 (D.C.1977)).

Indeed, the Board cannot be protected because it needs to examine the very evidence that Stadium seeks to exclude to make a ruling on Stadium’s motion. Stadium’s motion, in other words, protects nobody from prejudicial evidence. Stadium’s motion is not really designed to prevent undue prejudice, but is really a motion seeking a final determination that the evidence is inadmissible, a purpose that the courts have rejected. *Schaefer v. State*, 750 N.E.2d 787 (Ind. Ct. App. 2001); *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002).

An argument that the affidavits are inadmissible hearsay is also unavailing. The Court of Appeals has repeatedly held that hearsay evidence is admissible at administrative hearings. *Washington Post v. District of Columbia Dept. of Employment Services*, 675 A.2d 37, 43-44 (D.C.1996); *James v. District of Columbia Dep’t of Employment Servs.*, 632 A.2d 395, 398 (D.C.1993).

The Board should deny Stadium’s motion *in limine* because it is offered for an inappropriate purpose, a purpose for which motions *in limine* are not intended.

B. Stadium’s motion *in limine* is based on errors of law and fact and should, therefore, be denied.

1. Error of Law

Stadium's motion asks the Board to limit the evidence the Board will hear to that evidence "reviewed by and relied upon by the Zoning Administrator in approving the subject Certificate of Occupancy." Stadium Mot. in Limine at 1.

Stadium cites Appeal No. 16404A, Capital Hill Restoration Society (CHRS), but that appeal does not support Stadium's proposition that the Board can only review evidence considered by the Zoning Administrator. In that case, CHRS appealed the grant of a home residency permit to a contract buyer. Appeal No. 16404A at 1-2. CHRS was concerned that the contract buyer was not really planning to use the building as a residency, but as an office. *Id.* The contract buyer filed a motion *in limine* which argued that CHRS should be prevented from entering facts into evidence that CHRS learned after the Zoning Administrator made her decision. *Id.* The buyer made the same argument made here by Stadium. *Id.* at 6. However, the Board in that case did *not* rule that the evidence in question was inadmissible because it had not been before the Zoning Administrator. *Id.* The Board granted the motion *in limine* because it found the evidence in question to be "not germane." *Id.*

In short, the Board did not agree with the buyer's argument in that case and should not accept the same argument from Stadium in this case. There are several additional reasons for this.

The Court of Appeals has repeatedly – and with some exasperation – held that "the Board, not the Zoning Administrator...has final administrative responsibility to interpret the zoning regulations." *Bannum, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 894 A.2d 423, 432 (D.C.2006) (quoting *Murray v. District of Columbia Board of Zoning Adjustment*, 572 A.2d 1055, 1058 (D.C.1990); see, also D.C. Code § 6-

641.07(g)(4) (2001) (empowering the BZA to “reverse or affirm, wholly or partly, or...modify” any order or decision appealed from, or to “make such order as may be necessary to carry out its decision”).

Stadium’s invitation to the Board to limit its role is an attempt to analogize the Board’s role to that of the Court of Appeals. Normally, the Court of Appeals does limit its review of a lower court decision to the record generated by that court. The difference between that practice and the Board’s review of a Zoning Administrator’s decision is obvious on its face. The Appeals Court reviews records generated through the adversarial process, a process where each side has an opportunity to place all relevant evidence into the record. The Zoning Administrator’s decision to grant a Certificate of Occupancy, on the other hand, does not arise from an adversarial process. There was no opportunity for parties who opposed the issuance of the Certificate of Occupancy to place evidence supporting their case into the record.

If the Board limits the evidence it considers only to the evidence considered by the Zoning Administrator, the Board will be making the Zoning Administrator the ultimate arbiter of zoning questions. The Zoning Administrator will be able to justify all of his or her decisions by selectively limiting the information he or she considers, and hence what evidence can be considered by the Board. Such a situation clearly is not compatible with the Board’s statutory role as having.

The Board’s job is to review the Zoning Administrator’s decision to ensure that he or she made the right decision based on law. Such a review is not limited only to the materials that the Zoning Administrator chose to use, particularly when relevant material may have been omitted.

Stadium's invitation to the Board to limit its role should be rejected and the Board should consider all relevant evidence.

2. Error of Fact

Regardless of the foregoing, Stadium's motion rests on an error of fact, an error that is fatal to Stadium's motion.

The Association's initial appeal, filed June 11, 2010, was of the Zoning Administrator's grant of temporary Certificate of Occupancy No. 1001838. As soon as the Zoning Administrator issued a permanent Certificate of Occupancy on June 22, 2010, the Association sought permission from the Board to amend its appeal to include permanent Certificate of Occupancy No. 1002471. The Association's amendment was acknowledged by the Board, which published a revised public hearing notice in the DC Register on August 20, 2010, which identified the appeal as pertaining to both the temporary and permanent Certificates of Occupancy. DCR vol 57/34, August 20, 2010.

Stadium contends that the Association is appealing only the temporary Certificate of Occupancy and, therefore, cannot introduce into evidence events that occurred after the temporary Certificate of Occupancy was issued. Stadium Mot. in Limine at 1.

Stadium is in error. The Association is appealing both the temporary and permanent Certificates of Occupancy. The affidavits describe events that occurred *before* the issuance of the permanent Certificate of Occupancy and, therefore, should be considered by the Board—even using Stadium's own logic.

Stadium's motion to exclude relevant evidence should be denied because it is based on an error of fact.

C. The Petok and Chriswell affidavits (Affidavits) are relevant to the issue before the Board.

Relevance, with regard to evidence, is defined as evidence having any tendency to prove or disprove a material fact. See, e.g. *Townsend v. Donaldson*, 933 A.2d 282 (D.C.2007) (citing *Plough, Inc. v. Nat'l Acad. of Sciences*, 530 A.2d 1152, 1158 (D.C.1987)); see, also Fed.R.Evid. 401; Calif. Evid. Code § 210.²

Here, the “material fact” the Board must decide is whether or not the Stadium strip club is a sexually oriented business establishment as defined by 11 DCMR § 199.1.

11 DCMR § 199.1 defines a sexually oriented business establishment as:

Sexually-oriented business establishment - 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. (24 DCR 5144)

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. (24 DCR 5144)

Specified sexual activities - the following activities:

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

² The text of Federal Rule of Evidence 401 is: “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

- (b) Fondling or other erotic touching of human genitals, pubic region, buttock, or breast. (24 DCR 5144)

As the District explained in its motion to dismiss, a finding that a business is sexually oriented depends on two elements: whether certain parts of the body are nude (e.g. nipples, genitals, buttocks) and whether certain sexual activities take place (e.g. fondling, masturbation, simulated sex, intent to arouse observers, etc.). See District's Mot. to Dismiss at 5.

The Affidavits demonstrate that Stadium meets the first half of the definition of a sexually oriented business establishment because the strippers appear completely nude, thereby exposing "specified anatomical areas." Petok Aff. ¶ 5-9, 12, 15, 17; Chriswell Aff. ¶ 4.

The Affidavits also demonstrate that Stadium meets the second half of the definition because the strippers fondle themselves, touch patrons and perform in a sexually provocative manner. *Id.* The Board found similar conduct to meet the definition of "specified sexual activities" in In re California Steak House, BZA Appeal No. 13967, slip op. (Nov. 22, 1983). In that case, the Board found that "[t]he positions assumed by the women and the manner in which the women displayed themselves are clearly designed to stimulate or arouse patrons of the establishment, and in and of themselves do constitute a 'specified sexual activity.'"³

The Affidavits are relevant and admissible because they demonstrate a material fact at issue: the fact that Stadium is a sexually oriented business establishment.

The Affidavits do even more than demonstrate that the Stadium strip club was a sexually oriented business establishment on June 16, 2010: they *tend to* prove that the

³ For example, the women exposed their vaginas and buttocks to customers; sashayed; and engaged in nude dancing near customers. In re California Steak House, at 7-8.

Stadium strip club is fundamentally and always a sexually oriented business establishment. Since the Affidavits *tend to* prove that Stadium is fundamentally and always a sexually oriented business establishment, the Affidavits are relevant and admissible to this appeal on that basis as well.

The Affidavits are relevant and should not be excluded.

D. Preclusion of the affidavits of Ben Petok and Marshall Chriswell would be contrary to Court of Appeals binding precedent.

The Court of Appeals has long recognized that the evidentiary standards used in administrative hearings are less rigorous than those used in a court. *Washington Post v. District of Columbia Dept. of Employment Services*, 675 A.2d 37, 43 (D.C.1996). Indeed, the Court has recognized that administrative boards should accept hearsay evidence, with hearsay going to weight and not admissibility in an administrative hearing. *Id.* The court has explained that many evidentiary rules exist to protect a jury from exposure to prejudicial and irrelevant evidence, but that administrative boards have sufficient experience and knowledge to make such protection unnecessary. *Id.* at 43-44 (citing *Kopf v. District of Columbia Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1385 (D.C. 1977)).

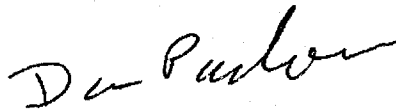
Based on the foregoing, the Court of Appeals has repeatedly held that an administrative board's ruling can be reversed if the board “fails to apply generous principles of admissibility” and if prejudice is shown. *Washington Post*, 675 A.2d at 44. In *Washington Post*, the court remanded the case because the administrative hearing officer “applied legal principles substantially more restrictive than those outlined [by the court].” *Id.*

Here, the Affidavits describe events during a visit to the strip club operated by Stadium. The Affidavits contain relevant facts because the Affidavits describe a strip club that easily falls within the definition of a "sexually oriented business establishment," which is the primary issue to be decided by the Board.

The Affidavits plainly contain information relevant to the Board's determination. Preclusion of the Affidavits would violate binding Court of Appeals precedent.

CONCLUSION

For the foregoing reasons, Appellant respectfully asks the Board to deny Stadium's motion *in limine* to exclude the Petok and Chriswell affidavits.



Don Padou
President
Ward 5 Improvement Association
1335 Lawrence Street NE
Washington, D.C. 20017

10/26/10

Date

CERTIFICATE OF SERVICE

I emailed a copy of this Brief to Jay Surabian, counsel for the District of Columbia. I also emailed a copy of this Brief to Stephen O'Brian, counsel to Stadium Group LLC.



Don Padou

10/26/10

Date