

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington D.C. 20001**

2010/10/29 AM 11:32

Appeal of Ward 5 Improvement Association

Appeal No. 18114

DISTRICT OF COLUMBIA'S CLOSING STATMENT

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("Appellee" or "DCRA"), by and through undersigned counsel, hereby submits its written closing statement as requested by the Board at the October 26, 2010 hearing. DCRA reaffirms its position that this appeal must be dismissed because 1) the Appellant lacks standing, 2) the appeal is untimely, and 3) DCRA did not err.

Lack of Standing

This appeal must be dismissed as the Appellant does not have standing under 11 DCMR § 3112.2. As discussed in the District's Pre-Hearing Statement, the Appellant can only have standing if one of its members has standing. Both Don and Abigail Padou live approximately 1.5 miles from the Stadium Club (or "the Property") and cannot demonstrate any interest in the Property distinct from that of the general public. At the hearing Appellant did not argue or submit any evidence that either Mr. or Mrs. Padou have been affected in anyway by DCRA's decision to issue Stadium Group, LLC a certificate of occupancy ("CO"). Additionally, no other members of the Ward 5 Citizens Association appeared or testified at the hearing.

After receiving motions from DCRA and Stadium Group to dismiss based on the lack of standing, Mr. Padou filed an affidavit with the Board signed on October 26, 2010 (the date of the

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18114
EXHIBIT NO. 28

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District of Columbia
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hearing) by his wife. See Appellant's Opposition to District of Columbia's and Prospective Intervener's Motions to Dismiss For Lack of Standing. This affidavit indicated that the Ward 5 Citizens Association has other members: The First Christ Apostolic Church, and Camilla and Herbert Faulkner. This affidavit is insufficient for the Board to find that Appellant has standing. First, as Mrs. Padou did not testify at the hearing the parties were not able to cross examine her as to the content of the affidavit. Second, the record still remains devoid of a statement by a person, other than Don or Abigail Padou, that Ward 5 Citizens Association has more than two members. Thirdly, the affidavit does not indicate how the interests of the new, alleged members of the Ward 5 Citizens Association are uniquely or distinctly impacted.

Accordingly, the appeal must be dismissed.

Untimeliness

Under 11 DCMR § 3112.2(a), an appeal must be filed within sixty days from the date the person "reasonably should have had notice or knowledge of the decision complained of." At the hearing, it was Appellant's burden to establish that the appeal was filed timely. It did not. This appeal was filed on June 11, 2010. DCRA issued the first CO to Stadium Group, LLC on April 2, 2010. See DCRA's Supplemental Exhibits filed 10/22/10 at Exhibit A. As Appellant did not file this appeal within sixty days of the date of the Zoning Administrator's decision to issue the CO, it must be dismissed.

The evidence presented at the hearing reveals that Appellant was aware that there would be nude dancing entertainment provided at the Stadium Club in March 2010. Appellant's President, Mr. Padou, stated that he was aware of the Stadium Club in early March. See Transcript ("Tr.") at p. 147. The newspaper articles Appellant submitted are dated March 22 and 25, 2010. See Appellant's Exhibits compilation at Exhibits 12 and 13. Both articles indicate that

there will be nude dancing at the Stadium Club. *Id.* The Complaint Mr. and Mrs. Padou filed with DC Superior Court against the District states that he was aware of the Stadium Club obtaining a liquor license on March 25, 2010. *See DCRA's Supplemental Exhibits* filed 10/22/10 at ¶ 37 of Exhibit C. The Complaint also indicates the Appellant was aware of the zoning for the Stadium Club, as the Property's zoning was part of the issue about which he was complaining. *Id.* at ¶ 16, 17, 39, and 51(h) of Exhibit C. The Complaint, while dated April 22, 2010, contains a very in depth factual history of the ABRA licensing history for this Property and the Stadium Group's interactions with various DC government agencies from 2006 to present. *See id.* at Exhibit C. The April 20, 2010 letter of ABRA's general counsel to Mr. Padou references Mr. Padou's letter of April 12, 2010 and further discusses the Property's zoning. *See id.* at Exhibit B. The letter also indicates that a CO had been issued for the Stadium Club (the April 2 CO). *Id.*

It is clear that Mr. Padou was aware that the Stadium Club was going to provide nude dancing entertainment at 2127 Queens Chapel Rd, NE before April 11, 2010. Accordingly, he could have reasonably made an inquiry of DCRA to determine whether or not a CO had been issued for the Property. The record contains no evidence as to whether Mr. Padou or any member of the Ward 5 Improvement Association ever made such an inquiry. Given Mr. Padou's level of involvement in this matter and the depth of his understanding of the law, if he did not make this inquiry of DCRA, it was to his detriment. By Mr. Padou's own admission, he was aware in early March 2010 that the Stadium Club would be opening; however, at the hearing, he failed to put forth any facts that could lead the Board to conclude that he either did not know that DCRA had issued the April 2 CO or that he could not have reasonably know that. Therefore, this Board is compelled to dismiss the appeal as untimely.

DCRA Did Not Err

The plain language of the Zoning Regulations and the relevant case law, support the Zoning Administrator's interpretation that an establishment that provides nude dancing entertainment is not a sexually-oriented business establishment ("SOBE"). Further, there is nothing in the Zoning Commission orders that created the sexually-oriented business regulations that could lead the Board to conclude that it was the intention of the Zoning Commission to include nude dancing in the definition of "specified sexual activities." *See Zoning Commission Order nos. 161, 180, and 188.* Accordingly, the COs issued by DCRA do not violate any provision of the Zoning Regulations and must be upheld by the Board. If it is true that the Stadium Club is operating beyond the scope of its CO, then that is a matter for the appropriate District government agencies to investigate and take enforcement action.

At the hearing, the Board proffered an alternative theory of the case, in which it could find that DCRA erred if it was established that DCRA had information that the Stadium Club was operating outside of the law, but issued a CO anyway. Even under this theory, DCRA did not err. It is clear that the DCRA did not have any information concerning the allegations made by Appellant about the dancers' conduct. While Mr. Padou complained to DCRA that the Stadium Club was a SOBE, his complaint was based on his misunderstanding of the law that nude dancing by itself made the club a SOBE. *See Appellant's Exhibits compilation at Exhibit 5.* When he made this complaint to DCRA, Mr. Padou did not have personal knowledge about the dancers' conduct. The sole basis of his knowledge concerning the club's operations comes from the accounts of the individuals he paid to go to the club on June 16, 2010. Those accounts are found in the affidavits of Benjamin Petok and Marshall Chriswell, which are dated July 12, 2010. *See Appellant's Exhibits compilation at Exhibit 15.* Neither Mr. Padou nor the

individuals who went to the club on June 16 reported their findings to DCRA before the June 22 CO was issued. *See* Tr. at p. 220. Accordingly, it is clear from the record that DCRA did not have any information on June 22 that could have led the Zoning Administrator to conclude that the Stadium Club was operating outside the scope of its CO.

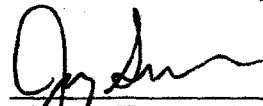
Accordingly, DCRA did not err in issuing the April 2nd, 21st or June 22nd COs and this appeal must be dismissed.

Respectfully Submitted,

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November 19, 2010



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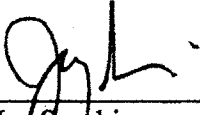
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing was served by first class mail, this 29th
day of November 2010, to the following:

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