

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

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OFFICE OF ZONING

Appeal of Certificate of Occupancy)
Nos. 1001838 and 1002471)
Issued to Stadium Group LLC for)
2127 Queens Chapel Road NE)
Appealed by Ward 5 Improvement Assoc.)

Appeal No. 18114

APPELLANT'S CLOSING ARGUMENT

The Board has before it two related, but distinct, questions.

First, is the strip club operated by Stadium Group LLC a sexually oriented business establishment ("SOBE") as defined by 11 DCMR § 199.1? It is.

Second, did the Zoning Administrator comply with procedural requirements when he granted both a temporary and a permanent certificate of occupancy for a non-sexually oriented business to Stadium Group LLC? He did not.

The Zoning Administrator erred by issuing the Stadium Club LLC a non-SOBE certificate of occupancy.

I. THE STADIUM CLUB IS A SEXUALLY ORIENTED BUSINESS ESTABLISHMENT ("SOBE")

All parties agree that there are two elements to the definition of a SOBE provided in 11 DCMR § 199.1. Certain "specified anatomical areas" of the human body must be naked and certain "specified sexual activities" must take place.

Here, Appellant entered substantial evidence into the record to support a finding by the Board that both elements of the definition of a SOBE are met by the Stadium Club.

There is no dispute that the strippers at the Stadium Club ("Stadium") are nude. Benjamin Petok testified to this fact. Transcript of October 26, 2010 hearing (hereinafter "Tr.") 208: 3-8; Tr. 210: 18-20. Mr. Petok and Marshall Chriswell provided affidavits that attest to this fact. BZA Exhibit 26 at 82-87: Affidavits of Mr. Petok and Mr. Chriswell. James Redding, the majority owner of Stadium, testified to this fact. Tr. 172: 15-17; Tr. 175: 11-12. Keith Forney, the other owner of Stadium, confirmed this fact in a letter to Zoning Administrator Matthew LeGrant. BZA Exhibit 22 at 11: District's Pre-Hearing Statement. Mr. LeGrant testified that the owners of Stadium told him that the dancers at Stadium would perform nude. Tr. 236: 16-19; Tr. 253: 2-3; Tr. 277: 12-17.

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The first element of the SOBE definition is easily met: the strippers at the Stadium Club are nude, and therefore expose “specified anatomical areas.”

The second element of the SOBE definition relates to “specified sexual activities” that must occur. Examples of the “specified sexual activities” include “fondling or other erotic touching of human genitals, pubic region, buttock or breast,” and “sexual stimulation or arousal.”

Notably, the Board of Zoning Adjustment has found that “sexual stimulation or arousal” does not have to involve actual touching or direct physical stimulation, but is based on whether “[t]he positions assumed by the women and the manner in which the women display[] themselves are clearly designed to stimulate or arouse patrons of the establishment.” *In re California Steak House*, Board of Zoning Adjustment Appeal No. 13967, slip op. (Nov. 22, 1983) at 13. A copy of the Board’s opinion in *In re California Steak House* is included in BZA Exhibit 20: Appellant’s Brief, Attachment R.

At Stadium, both “fondling” and “sexual stimulation or arousal” take place.

Mr. Petok testified that he observed numerous nude dancers fondling and touching themselves as a regular part of their dance routines. Tr. 208: 3-8; Tr. 209:22 - 210:6; Tr. 224: 14-21. Mr. Petok testified that he received a lap dance in one of Stadium’s private rooms, which involved a nude dancer rubbing her naked buttocks against his groin. Tr. 210:12-21. Mr. Redding testified that lap dances take place in the “back rooms” at Stadium, but that he considered the number to be limited by their expense, testifying that at \$300 for half an hour, “how many lap dances can you have in a back room?” Tr. 197: 16-19. Mr. Petok testified that arousal was the purpose of the nude dances at Stadium. Tr. 222:18 - 223:1. Mr. Petok testified that he was aroused at Stadium. Tr. 223: 2-7.

Mr. Petok’s testimony regarding the “specified sexual activities” that take place at Stadium is echoed in his affidavit and confirmed by the affidavit of Mr. Chriswell. BZA Exhibit 26 at 82-87: Affidavits of Mr. Petok and Mr. Chriswell.

In his testimony, Mr. Redding said the strippers at Stadium do “floor work,” which is a type of dancing intended to stimulate or arouse patrons. Tr. 177: 16-18. “Floor work” is when a stripper lies on the floor and exposes her vagina or anus to customers. Tr. 174: 10-18; 175: 12-14; 179: 14-15. Mr. Petok also testified that the strippers incorporated “floor work” in their routines and posed in ways to expose their genitalia to customers. Tr. 208: 9-13; BZA Exhibit 26 at 82-83: Affidavit of Mr. Petok.

News articles also give accounts of the strippers’ actions to stimulate or arouse patrons. For example, a *Washington CityPaper* article included an eyewitness account by a reporter who described a stripper “strut down one of the bartops, pausing to put her backfield in motion right in a patron’s face.” BZA Exhibit 26 at 80: *Washington CityPaper* article.

The fact that Stadium charges \$600 per hour for customers to spend time alone with a stripper in a “back room” clearly indicates that sexual activities are taking place, and are indeed the purpose of the club. Tr. 203: 7-9. Mr. Redding even referred to the private rooms as “bedrooms” in testimony before the Alcoholic Beverage Control Board. Tr. 190: 6-21.

Mr. Redding’s testimony further confirmed that patrons are “stimulated or aroused” at Stadium: he testified that security is necessary because patrons lose control of themselves and try to touch the dancers. Tr. 195: 14-16.

The second element of the SOBE definition is clearly met: Stadium Club strippers engage in “specified sexual activities,” such as fondling and erotic touching (of themselves and patrons), and activities intended to stimulate or arouse the patrons.

In the face of this overwhelming evidence that Stadium is a SOBE, Stadium and the District were reduced to challenging the credibility of Appellant’s witness, Mr. Petok. They alleged that Mr. Petok’s testimony was biased because he was “paid” to go to Stadium. This allegation lacks merit because Mr. Petok was not “paid”: he was *partially reimbursed* for his expenses. Tr. 206:1-9; Tr. 223:8-15; Tr. 231: 9-14. In other words, Mr. Petok received no financial gain from going to Stadium and testifying about his experience there. *Id.*

By contrast, Appellee’s witnesses both have financial ties to Stadium: James Redding is the majority owner and Damian Gliatis is an employee who depends on his job at Stadium for most of his livelihood. Tr. 167: 18-20; Tr. 318: 17-19; Tr. 327: 2-6. Both Mr. Redding and Mr. Gliatis have a strong personal financial interest in Stadium which calls into question the reliability of their testimony.

Stadium attempted to claim that Mr. Petok was acting as an unlicensed “private investigator.” This allegation is without merit because Mr. Petok was not operating a business or acting in a professional capacity and because “private investigators” are not acknowledged as a profession by DCRA and do not require licensure in the District of Columbia (contrary to the misinformation put forward by Stadium’s counsel). See DC Code Title 47 Chapter 28; 16 DCMR § 3301; Tr. 233:18 - 234:6.¹

Finally, Mr. Petok’s testimony is corroborated in many particulars. Mr. Chriswell’s affidavit provides corroborating details, such as Mr. Chriswell’s observation that the dancers fondled or touched themselves as part of their routines. BZA Exhibit 26 at 86: Affidavit of Mr. Chriswell. The testimony of Mr. Gliatis, Stadium’s general manager and CFO, confirmed the names of several of the strippers cited by Mr. Petok. Tr. 329: 6-15; Tr. 318:17-19. Mr. Gliatis confirmed Mr. Petok’s account of the police incident on June 16, 2010. Tr. 324: 7-21. Mr. Gliatis also confirmed Mr. Petok’s testimony about acts

¹ “Private detectives” and “detective agencies” must be licensed in the District of Columbia by the Metropolitan Police Department. Private detectives and detective agencies are defined as operating a “business...for profit or gain” that relates to revealing criminal activity or discovering information about an individual, none of which applies here, and which no party has asserted applies here. DC Code § 47-2839.

performed by the strippers: Mr. Gliatis testified that he had fired dancers for engaging in activities described by Mr. Petok. Tr. 322: 2-15. Mr. Redding also testified that the strippers sometimes engaged in the “specified sexual activities” described by Mr. Petok. Tr. 195:9 - 196:22.

Importantly, Mr. Gliatis and Mr. Redding gave contradictory testimony, which further calls into question their reliability as witnesses. Mr. Gliatis testified that at least two dancers were fired for violating club rules. Tr. 322:21 - 323:10. Mr. Redding, on the other hand, testified that no dancers had ever been fired for violating club rules. Tr. 197: 9-11. Mr. Gliatis testified, improbably, that the dancers could not touch their breasts or buttocks because their hands and feet were gripping a pole at all times. Tr. 330: 8-16. This contradicts Mr. Redding’s characterization of the dancers as “ballerinas” who “swirl around,” and the description in *Washington CityPaper* of a dancer strutting down the bar and shaking her buttocks in the face of a patron. Tr. 179: 12-15; BZA Exhibit 26 at 80: *Washington CityPaper* article. Mr. Gliatis’ response also begs the question of what takes place in the private rooms, where there are no poles. Mr. Gliatis subsequently contradicted his own testimony by stating that the strippers perform at the edge of the stage to receive tips from customers. Tr. 331: 22-332: 4. This fact was confirmed by Mr. Petok, who said that dancers exposed and fondled their genitalia close to customers at the edge of the stage in order to receive tips. BZA Exhibit 26 at 82: Affidavit of Mr. Petok.

The very rules imposed by Stadium on the dancers make it clear that “specified sexual activities” occur, such as dancers intimately touching themselves, each other, and patrons. BZA Exhibit 25: Stadium Club Rules. Otherwise, the schedule of fines for engaging in these activities would not exist. *Id.*

Appellant has entered into the record substantial evidence supporting a finding that the dancers at Stadium’s strip club are both nude and engage in “specified sexual activities” as defined in 11 DCMR § 199.1. The Board, therefore, should find that Stadium is a SOBE and revoke the certificate of occupancy issued in error by the Zoning Administrator. Stadium should be required to obtain a certificate of occupancy for a SOBE if it wants to continue operating a strip club.

II. THE ZONING ADMINISTRATOR FAILED TO COMPLY WITH APPLICABLE REGULATIONS WHEN HE ISSUED A CERTIFICATE OF OCCUPANCY TO STADIUM

The record contains substantial evidence to support a finding that the Zoning Administrator did not comply with procedural requirements when he granted a non-SOBE certificate of occupancy to Stadium.

12A DCMR § 110.2.2 requires the Zoning Administrator to investigate before granting a certificate of occupancy. 12A DCMR § 110.2.2 provides:

Following the filing of a certificate of occupancy application,
except for a change in ownership pursuant to Section 110.1.2,

inspections shall be conducted to confirm compliance with the applicable Construction Codes and the Zoning Regulations.

Zoning Administrator Matthew LeGrant did not conduct a reasonable investigation. The inadequacy of Mr. LeGrant's investigation is demonstrated by key omissions on the certificate of occupancy applications submitted by Stadium. On application #CO1001525, the entire section called "C of O inspection" was left blank by Mr. LeGrant. BZA Exhibit 26 at 25: Certificate of Occupancy application #CO1001525. The same section is left entirely blank on application #CO1001838. BZA Exhibit 26 at 28: Certificate of Occupancy application #CO1001838. These sections are not optional: investigations are required by 12A DCMR § 110.2.2.

Furthermore, on application #CO1001838, Mr. LeGrant wrote that there was no change in use even though the applicant wrote on the same application that there was in fact a change in use from Warehouse to Nightclub/Restaurant. BZA Exhibit 26 at 27-28: Certificate of Occupancy application #CO1001838.

Mr. LeGrant's "investigation" was particularly inadequate given that the owners of Stadium told Mr. LeGrant that there would be nude dancing at the club. Tr. 236:16-19; Tr. 253:2-3; Tr. 277:12-17. Mr. LeGrant, in other words, was on notice that Stadium was likely to be a SOBE.

What investigatory steps did Mr. LeGrant take to assure himself that Stadium Club was not a SOBE?

According to Mr. LeGrant, he read Stadium's application; he reviewed Stadium's building plans; he talked to the owner; and he obtained a letter from the owner. Tr. 237:5-13; Tr. 238:11-239:4; Tr. 242:22 - 243:6; Tr. 252:5 - 253:13; Tr. 261:18 - 262:6; Tr. 280: 9-18; Tr. 287:21 - 288:4.

However, none of these actions was capable of establishing whether or not Stadium was a SOBE. Reviewing Stadium's building plans is unavailing: even Mr. LeGrant could not explain how a review of Stadium's building plans would provide evidence that Stadium was not a SOBE. Tr. 286:17 - 288:4. If anything, the building plans should have led Mr. LeGrant to investigate further because the plans show at least three dance stages and a series of private rooms. Mr. LeGrant's conversations with Stadium's owner, which culminated in a letter from Keith Forney to Mr. LeGrant on April 1, 2010, were equally unavailing. BZA Exhibit 22 at 11: District's Pre-Hearing Statement. Aside from being a biased source of information, Mr. Forney does not state in his letter that the strippers will not engage in "specified sexual activities" such as fondling themselves or stimulating and arousing patrons. Id.

In short, none of Mr. LeGrant's investigatory actions shed any light on Stadium's status as a SOBE.

What actions did Mr. LeGrant *not* take that should have been part of a reasonable investigation?

Mr. LeGrant did not visit Stadium even once to observe the activities of the strippers. Tr. 240:12-16; Tr. 243:14-19; Tr. 255:4-14. Mr. LeGrant did not take a look at Stadium's website. Tr. 262:7-8. Even just a glance at Stadium's website would have been illuminating: the website touts "special VIP rooms for private dance *experiences* with stadium girls." Emphasis added. BZA Exhibit 26 at 75: *Washington Post* article. Stadium's website clearly indicates a level of interaction between customers and strippers that should have raised a red flag for Mr. LeGrant. Mr. LeGrant did not review footage from the 36 security cameras installed at Stadium so he could see the types of dances and activities performed by the strippers. Tr. 321:17 - 322:1. Mr. LeGrant took no action even after it was brought to his attention by DCRA employees Linda Argo and Nicholas Majett that questions were being raised about Stadium's status as a SOBE prior to Mr. LeGrant's issuance of a permanent certificate of occupancy. BZA Exhibit 26 at 35-38: Emails from Ms. Argo and Mr. Majett. Mr. Padou even requested an investigation but Mr. LeGrant took no action. BZA Exhibit 26 at 37: Email from Mr. Padou.

In contrast to Mr. LeGrant's handling of Stadium's certificate of occupancy, DCRA is withholding a building permit from Club AKA 555, which is attempting to open a strip club at 2046 West Virginia Ave NE. In the zoning review, the zoning technician stated "The use of a Strip Bar will only be allowed with a variance from the Board of Zoning Adjustment (BZA)." BZA Exhibit 26 at 52: Zoning review of 2046 W. Virginia Ave NE.

The Zoning Administrator is properly accorded discretion in how to carry out his job, but this discretion is not unbounded. Here, Appellant entered substantial evidence into the record to demonstrate that the Zoning Administrator failed to comply with applicable regulations for conducting an investigation when he issued a certificate of occupancy to Stadium. The Board, therefore, should revoke Stadium's certificate of occupancy.

III. THE COUNTER-ARGUMENTS OF THE DISTRICT AND STADIUM ARE NOT PERSUASIVE

Appellant has placed into the record substantial evidence demonstrating that Stadium is a SOBE and that the Zoning Administrator failed to properly investigate before issuing the certificates of occupancy. Appellant has presented overwhelming testimony that has gone largely undisputed.

Instead of disputing Appellant's evidence, the District and Stadium have offered two counter-arguments. First, Stadium argues that the strip club does not fall within the definition of a SOBE because the strip club has rules against specified sexual activities. Second, both the District and Stadium attack the standing of the Ward 5 Improvement Association, but do not offer a whit of evidence to support such an attack.

A. The existence of “rules” at Stadium is irrelevant to determining whether Stadium is a SOBE.

Stadium argues that it is not a SOBE because it has a set of rules that prohibits behavior that would bring the club under the definition of a SOBE. Tr. 337: 6-17. This argument fails for two reasons.

First, there is evidence in the record that Stadium’s strippers break the rules and engage in behavior that meets the definition of a SOBE. See, e.g., BZA Exhibit 26 at 82-87: Affidavits of Mr. Petok and Mr. Chriswell; Tr. 322: 2-15; Tr. 195:9 - 196:22. The extent to which the rules are broken is evidenced by the schedule of fines in the strippers’ rules and the need for numerous managers and security guards like Mr. Gliatis to constantly patrol the club in an attempt to “keep everything under control.” See, e.g., BZA Exhibit 25: Stadium Club Rules; Tr. 318:22 - 319: 1; Tr. 198: 1-2.

Second, even if the strippers obeyed Stadium’s rules at all times, the club would still be a SOBE because (1) the strippers are nude and therefore expose “specified anatomical areas,” and (2) the strippers engage in activities intended to stimulate and arouse the patrons, which meets the regulatory definition of a “specified sexual activity.” See, e.g., BZA Exhibit 26 at 82-87: Affidavits of Mr. Petok and Mr. Chriswell.

The quandary faced by Stadium is insoluble. The point of a strip club is to sexually arouse or stimulate the customers, which means strip clubs are SOBE’s by nature. No amount of rules or enforcement can alter that fact. The BZA found that to be the case in *In re California*. As Appellant noted in its brief, every court or administrative agency that has looked at this issue has found that strip clubs are SOBE’s. See also BZA Exhibit 20: Appellant’s Brief, Attachments Q-S: *Upper Georgia Ave. Planning Cmte v. Alcoholic Beverage Control Board*, 500 A.2d 987 (D.C. 1985); *President and Directors of Georgetown College for Georgetown Univ. v. Diavatis*, 470 A.2d 1248 (D.C. 1983); *In re Jefferson Grill, Inc.*, ABC Board Order No. 2005-1, Jan. 5, 2005, 52 D.C. Reg. 743 (Jan. 28, 2005).

B. The Association has both associational standing and standing in its own right.

The District and Stadium cannot prevail on the merits. Stadium is plainly a SOBE and the Zoning Administrator did not conduct an investigation as required before granting a certificate of occupancy. The District and Stadium are, therefore, reduced to attacking the standing of the Ward 5 Improvement Association (“Association”). The attack is unpersuasive.

The Association has entered substantial evidence into the record to support its contention that it has both associational standing (i.e. standing to assert the rights of its members) and standing in its own right. The District and Stadium have entered no evidence into the record that the Association does not have standing.

1. Associational Standing

The Supreme Court and the DC Court of Appeals have both adopted the same three prong test to determine when an unincorporated association has standing. Appellant's Opposition to District of Columbia's and Prospective Intervener's Motions to Dismiss for Lack of Standing (hereafter "Appellant's Opp.") at 4-6. As Appellant explained, an unincorporated association has standing when at least one of its members would have standing on its own; when the purpose of the organization is germane to the alleged wrong; and when the participation of an individual member is not required by either the cause of action or by the relief sought.

The Association's standing has not been attacked on the last two prongs. The purpose of the Association is to improve the quality of life in Ward 5, which is germane to preventing strip clubs from operating in Ward 5 without first obtaining proper certificates of occupancy. Courts have found that the last prong of the test (the participation prong) is only implicated if money damages are sought. Appellant's Opp. at 7. Here, the Association seeks no money damages, but only the enforcement of the District's regulations regarding SOBE's.

The District and Stadium have attacked the Association's standing on the first prong. Neither, however, has offered a single piece of evidence to support the attack. The Association, on the other hand, has entered into the record substantial evidence demonstrating that at least one of its members has standing in its own right. Specifically, the Association has identified three of its members who would have standing in their own right: First Christ Apostolic Church which abuts Stadium's property and Camilla and Herbert Faulkner, who live down the street from Stadium. Appellant's Opp. at 12-13; Declaration of Abigail Padou.

Rather than enter evidence into the record, the District and Stadium have loudly and repeatedly stated that they do not accept the Association's evidence. Repetition and volume are not substitutes for evidence. The District and Stadium have had ample opportunity to submit their own evidence to oppose the Association's evidence on standing: they had *five months* between the date the appeal was filed and the date of the hearing to submit evidence opposing the Association's standing, *and* they could have called Don Padou, the Association's President, or Abigail Padou, the Association's Secretary, to the stand at the hearing before the Board to question them about the Association and its members.

Neither party took advantage of these obvious opportunities. The Board can infer why. The District and Stadium know that the Association springs from the efforts of more than 60 residents to stop the creation of a "red light district" in Ward 5. The District and Stadium, in other words, know that the answers to any

question they might ask will only serve to bolster the standing of the Association. Therefore, the District and Stadium have relied solely on vague assertions, trying to create doubt and mystery where none exists.

The Association has entered substantial evidence into the record demonstrating that Appellant has associational standing. The District and Stadium have entered no evidence into the record contradicting the Association's claim even though they had the opportunity.

2. Standing in Its Own Right

An Association has standing in its own right if the right it seeks to vindicate is in the "zone of interest" that the applicable regulation or statute seeks to protect. See, e.g. *Brentwood Liquors v. DC ABC Board*, 661 A.2d 652 (D.C. 1995).

Here, the applicable regulations (11 DCMR §§ 199.1, 801.2 and 12A DCMR § 110.2.2) seek to limit sexually oriented businesses to certain zoning districts and require the Zoning Administrator to undertake an investigation to ensure that there is no violation of the zoning regulations prior to issuing a certificate of occupancy.

The District has long recognized the negative impact of strip clubs (a type of sexually oriented business) and has sought to strictly regulate these establishments. See, e.g. DC Code § 25-374 (strictly limiting where existing strip clubs may relocate); 11 DCMR §§ 199.1 and 801.2 (imposing special and strict zoning requirements on strip clubs); 10 DCMR § A312 Policy LU-2.4.9 (policy limiting the proliferation of strip clubs); and 10 DCMR § B5002 (prohibiting the use of the District's borrowing authority on behalf of SOBE's).

The District, in other words, has long recognized that strip clubs have a negative impact on the quality of life of those living and working nearby.

The purpose of the Ward 5 Improvement Association is to improve the quality of life in Ward 5. Appellant's purpose is, in other words, the same as the zone of interest created by 11 DCMR §§ 199.1 and 801.2. Similarly, Appellant's purpose includes ensuring that District regulations are not violated when certificates of occupancy are issued in Ward 5; therefore, Appellant falls within the zone of interest created by 12A DCMR § 110.2.2.

The Board has implicitly recognized that associations similar to the Ward 5 Improvement Association in other parts of the District have standing to challenge actions of the Zoning Administrator before the Board, so the Board should not treat the Ward 5 Improvement Association any differently.

The Ward 5 Improvement Association has standing in its own right to challenge the erroneous issuance of a non-SOBE certificate of occupancy to a strip club in Ward 5.

3. Supplementation of the Record

The Association has not supplemented the record with regard to standing. There are two reasons for this.

First, Mr. O'Brien, counsel for Stadium, said he would demand "another round of hearings" when the Association supplemented the record on standing. Tr. 343: 3-7. By insisting on more hearings when there has already been ample time and opportunity to address the issue of standing, Stadium is trying to needlessly prolong this process. Such delay helps Stadium and hurts the Association and its members. The longer this process is prolonged, the longer the Association and its members have to put up with a strip club that should not be operating in their neighborhood with an erroneous certificate of occupancy. Furthermore, while Stadium and the District have the resources to pursue long and complex litigation, the Association does not. Given the statements and tactics of the District and Stadium, the Association believes that there is no supplemental evidence that would satisfy the other parties; that submission of further evidence will be used as an excuse for more hearings and further delay; and, therefore, that the Association's interests and the interests of its members will not be served by further submission.

Second, subsequent to the October 26, 2010 hearing, the Association has reviewed the transcript and the record and is confident that it has met its burden to demonstrate standing. Once a party has made its prima facie case for standing, the burden shifts to the other parties if they wish to challenge it. It is now the District and Stadium who bear the burden, but they have entered no evidence disputing Appellant's evidence on standing. The District and Stadium have, instead, howled that they do not find Appellant's evidence sufficient. Such howls are merely an attempt to create an issue where none exists and are no substitute for evidence.

The Association entered substantial evidence into the record to support findings that it has both associational standing and standing in its own right.

IV. VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS

The tactics of the District and Stadium highlight this point: the rules used by the Board to govern appeals violate the due process rights of appellants. The District and Stadium could never have submitted eleventh-hour motions attacking the Appellant without the imbalanced rules of the Board.

Procedural due process requires fairness. *Kent v. US*, 383 U.S. 541, 553-555 (1966). Fairness is based on a sufficient degree of regularity. *Id.* A basic tenet of fairness is that rules need to apply evenly to all parties before an adjudicatory body like the Board.

BZA's rules do not apply evenly. The appellant must disclose all documents to the Board, the District, and any other parties at least two weeks before the hearing date. 11 DCMR § 3112.10. The District and applicant-interveners, however, are not bound by this rule or any other rule regarding disclosures. The District and applicant-interveners do not have to make any disclosures.

This imbalance allows the District and an applicant-intervener to prepare their case with full knowledge of the appellant's case, while the appellant cannot learn of the opposition's case until the day of the hearing.

This imbalance is not tolerated by any other adjudicatory board or court in the District. The Court of Appeals requires that all filings be served on all parties well before oral argument. The Superior Court has extensive rules providing for broad and deep discovery and full disclosure of all materials well before trial. See, e.g. Super.Ct.Civ.R. 26 et seq. The Alcoholic Beverage Control Board requires all parties to file and serve a Protest Information Form (PIF) disclosing all documents and a witness list at least seven days before a protest hearing. Failure to comply leads to dismissal. Similar procedures are used for special education hearings and hearings before DOES.

The disadvantage suffered by appellants under such an imbalanced rule is compounded by the lack of a discovery process in appeals before the Board. The District does not have a burden of production even though it holds almost all relevant records.

Here, the District and Stadium waited until mere days before the hearing to attack the Association's standing. When the Association responded with strong briefs on very short notice, the ambush tactics of the District and Stadium backfired. The District and Stadium were reduced to loud howls that the proof offered by the Association was insufficient and pledges to stretch out the process with demands for more hearings if the Association provided more evidence.

In preparation for the hearing, Appellant attempted to rectify the lack of discovery by requesting relevant documents from DCRA using the Freedom of Information Act. DCRA refused to comply with FOIA or to produce the documents even after receiving an order from the Office of the General Counsel to do so. BZA Exhibit 26 at 54-68: Declaration of Abigail Padou and correspondence regarding FOIA request. To this day, DCRA has refused to produce records of Matthew LeGrant's correspondence with the Alcoholic Beverage Regulation Administration about the Stadium Club. These records would show that District agencies broke their own regulations to ensure that Stadium Club could open for business in Ward 5, and that the Zoning Administrator was applying alcohol licensing regulations to Stadium instead of zoning regulations.

This case illustrates why procedural due process is important and why procedural due process is protected by the Constitution. The imbalanced rules of the Board governing appeals led to the violation of Appellant's due process rights.

V. THE ASSOCIATION TIMELY FILED ITS APPEAL

The District argued that Appellant did not timely file the present appeal. Tr. 265: 8-9. The District raised this argument for the first time in an oral motion during the October 26th hearing. The District's position is without merit.

11 DCMR § 3112.2(c) provides:

Notwithstanding paragraphs (a) and (b) of this subsection, for purposes of establishing the timeliness of an appeal under this subsection, an appellant shall have a minimum of sixty (60) days from the date of the administrative decision complained of in which to file an appeal.

The Zoning Administrator granted Stadium certificate of occupancy #CO1001838 on April 21, 2010. Appellant filed its appeal on June 11, 2010, well within the minimum 60 day time period for filing an appeal pursuant to 11 DCMR § 3112.2(c). The Zoning Administrator granted Stadium a permanent certificate of occupancy on June 22, 2010 and Appellant amended its appeal to include the permanent certificate of occupancy on June 27, 2010. BZA Exhibit 11. Appellant timely filed and amended its appeal.

VI. PUBLIC POLICY CONSIDERATIONS:

A FINDING FOR STADIUM SETS A PRECEDENT FOR ALLOWING STRIP CLUBS TO LOCATE IN COMMERCIAL AREAS AS A MATTER OF RIGHT

Currently, SOBE's cannot operate in C-1, C-2 and CM zoned districts. 11 DCMR §§ 701, 721, 801.2. SOBE's can operate in C-3 and C-4 zoned districts if they get a special exception from BZA. 11 DCMR §§ 744, 754. Even with a special exception, SOBE's cannot operate within 600 feet of residence districts, special purpose districts, churches, schools, libraries, playgrounds, and areas under the jurisdiction of the Commission of Fine Arts. *Id.* SOBE's cannot locate within 300 feet of each other, and cannot advertise their offerings with exterior displays. *Id.*

If the Board finds that strip clubs like Stadium are not SOBE's, it will be overturning its own precedent and that of the D.C. Court of Appeals that strip clubs are SOBE's and are subject to the regulations above.² The Board will open up large swaths of the District to strip clubs locating as a matter of right because strip clubs will be classified no differently from, say, restaurants.

² See, e.g., BZA Exhibit 20: Appellant's Brief, Attachments Q-S: *Upper Georgia Ave. Planning Cmte v. Alcoholic Beverage Control Board*, 500 A.2d 987 (D.C. 1985); *In re California Steak House*, Board of Zoning Adjustment Appeal No. 13967, slip op. (Nov. 22, 1983); *President and Directors of Georgetown College for Georgetown Univ. v. Diavatis*, 470 A.2d 1248 (D.C. 1983); *In re Jefferson Grill, Inc.*, ABC Board Order No. 2005-1, Jan. 5, 2005, 52 D.C. Reg. 743 (Jan. 28, 2005).

A finding by the Board that strip clubs like Stadium can operate as a matter of right in CM-zones also means that strip clubs will be able to operate *as a matter of right* in C-1 and C-2 Districts (Neighborhood Shopping Districts and Community Business Center Districts). 11 DCMR §§ 701, 721. Strip clubs will no longer require a special exception from BZA to operate in C-3 and C-4 zones. 11 DCMR §§ 744, 754. Strip clubs will be able to locate *as a matter of right* in commercial areas within 600 feet of residence districts, special purpose districts, churches, schools, libraries, playgrounds, and areas under the jurisdiction of the Commission of Fine Arts. *Id.* Strip clubs will be able to locate within 300 feet of each other, and will be able to advertise their offerings with exterior displays. *Id.*

The ability of strip clubs to locate as a matter of right in all commercially zoned districts overturns the District's zoning and planning goals, stated in the Comprehensive Plan and elsewhere, to strictly limit where strip clubs and other "high impact commercial uses" may locate. 10 DCMR § A312 Policy LU-2.4.9. Such an outcome is hardly conducive to revitalizing neighborhood commercial corridors around the city.

VII. CONCLUSION

It is undisputed that the dancers at Stadium's strip club meet the first element of the definition of a SOBE because they perform nude. The Association has offered substantial evidence that the strippers engage in "specified sexual activities" as part of their performances, and that the purpose of their performances is to "stimulate or arouse."

The Association has also entered substantial evidence into the record to support a finding that the Zoning Administrator did not comply with procedural requirements before issuing certificates of occupancy to Stadium. Most importantly, the Zoning Administrator did not conduct a reasonable investigation as required by 12A DCMR § 110.2.2.

The Association has made a prima facie case for associational standing and standing in its own right. The District and Stadium have not offered any evidence to the contrary.

For the foregoing reasons, Appellant respectfully asks the Board to revoke Stadium's non-SOBE certificate of occupancy and require Stadium to obtain a SOBE certificate of occupancy if it wishes to operate a strip club at 2127 Queens Chapel Road NE.

Respectfully submitted,



Don Padou
President, Ward 5 Improvement Association

11/30/10

Date

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

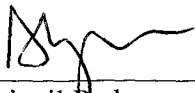
Appeal of Certificate of Occupancy	)	
Nos. 1001838 and 1002471	)	
Issued to Stadium Group LLC for	)	Appeal No. 18114
2127 Queens Chapel Road NE	)	
	)	
Appealed by Ward 5 Improvement Assoc.	)	
	)	

CERTIFICATE OF SERVICE

I, Abigail Padou, mailed this closing statement by first class mail on December 1, 2010 to:

Stadium Group LLC
Attn: Steve O'Brien
Mallios & O'Brien
2600 Virginia Ave NW, Suite 1112
Washington DC 20037

Jay Surabian
DCRA Office of the General Counsel
1100 4th Street SW, 5th Floor
Washington DC 20024



Abigail Padou
Secretary, Ward 5 Improvement Association