

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

10/27/2010
DISTRICT OF COLUMBIA
2010-070-1 PM 2:08

APPEAL OF WARD 5 : No. 18114
IMPROVEMENT ASSOCIATION :

THE STADIUM GROUP, LLC'S CLOSING STATEMENT

At the conclusion of the October 26, 2010, public hearing on this case, the Board directed that the parties' closing arguments be presented in writing. This pleading constitutes the closing statement of The Stadium Group, LLC ("Stadium").¹

Standing

Prior to the public hearing, Stadium filed a motion to dismiss this appeal on the ground that the unincorporated appellant "Ward 5 Improvement Association" was nothing more than a fiction created by Don Padou and Abigail Padou (husband and wife). Because the Padous reside more than one mile from the subject property, Stadium asserted that their moral objections to nude dancing are not "significantly, distinctly or uniquely affected in character or kind... than those of other persons in the general public." 11 DCMR §3106.2. An unincorporated association cannot have standing if its members do not. D.C. Code 29-971.07. Accordingly, and notwithstanding the subterfuge of labeling themselves the "Ward 5 Improvement Association," Stadium asserted that the Padous lacked standing to prosecute this appeal.

At the public hearing, the Board heard oral argument on the standing issue, but took the matter under advisement and proceeded with the hearing (Tr. 151). However, at the conclusion of the hearing, the Board, sua sponte, invited the appellant to supplement the record with respect to the

¹ The Stadium Group, LLC is lessee of the subject real property and holder of the Certificate of Occupancy at issue in this appeal. It was granted party status at the commencement of the public hearing. Tr. 137.

issue of standing. Mr. Padou explicitly accepted that invitation.² Although granted until November 12, 2010 to so supplement, appellant has filed nothing at all to buttress its opposition to the motion to dismiss for lack of standing.

Thus, the Board is left where it was at the commencement of the public hearing: The Articles of Association accompanying the June 11, 2010 appeal filing recited that appellant was formed on that very date by “Member 1 – Abigail Padou” and “Member 2 – Don Padou.” There was no mention in those Articles of the existence of a Member 3, a Member 4 or any other Member of the Ward 5 Improvement Association. Likewise a document also dated June 11, 2010, purporting to “unanimously” authorize Don Padou to file this appeal in the name of the Ward 5 Improvement Association, is signed only by Don Padou and Abigail Padou.

Stadium is mindful of the October 26, 2010 (the morning of the public hearing) Declaration of Abigail Padou, claiming that a church “is” a member of the appellee and that Camila and Herbert Falkner “are” members. But this present tense recitation is precisely what Stadium challenged at the public hearing.

MR. O'BRIEN: Madam Chair, I really see a problem emerging with this submitting additional information on standing. And I'll tell you exactly what I foresee coming, and it's going to require another round of hearings, I'm afraid. Mr. Padou is going to submit evidence that certain other people than he and his spouse are members of this group. It's not going to address when they became members, or more pointedly, which we did not hear today, whether they were members of this group when this appeal was filed.

Tr. 343.³ The failure of appellant, notwithstanding explicit invitation, to provide any evidence that, at the time of filing this appeal, the Ward 5 Improvement Association consisted of anybody other

² Tr. 340-342.

³ Stadium made the same point in opening argument: “[t]he question is not whether since the filing of this appeal they’ve managed to recruit new members...”. Tr. 144.

than the standing-challenged Mr. and Mrs. Padou sitting in their living room, far removed from the subject property, defeats the appellant's claim of standing.⁴

Motion in Limine

Prior to the public hearing, Stadium moved the Board to exclude any evidence not available to the Zoning Administrator at the time he decided to issue the subject Certificates of Occupancy on a "not sexually oriented" basis.⁵ The Board explicitly recognized that the conduct of the subject business subsequent to issuance of the last of the Certificates of Occupancy is an enforcement issue and not properly before the Board in this appeal. Tr. 161-162. See Appeal No. 16404 of the Capitol Hill Restoration Society (March 8, 2000).

The Board did rule that it would receive evidence regarding operation of the business prior to issuance of the final Certificate of Occupancy on June 22, 2010, to the extent that such evidence was available to the Zoning Administrator prior to such issuance. Tr. 161-162. Appellant then presented the testimony of his "classmate and friend," Benjamin Petok.⁶ Mr. Petok, who was compensated by Mr. Padou for his efforts,⁷ testified as to his visit to the business on June 16, 2010. But Mr. Petok did not communicate his observations to the Zoning Administrator or to any other employee of the

⁴ We observe that Abigail Padou declined to testify at the public hearing. Tr. 145 ("I'm just here to assist."). Thus, she could not be cross-examined on the question whether, at the time of filing this appeal, there were any Ward 5 Improvement Association members other than the Padous. The Administrative Procedure Act requires that parties in a contested case be afforded the opportunity to "conduct such cross-examination as may be required for a full and true disclosure of the facts." D.C. Code §2-509(b). C.f. Villacres v. United States, 357 A.2d 423 (D.C. 1976) (statements of counsel are not evidence). For that reason, her Declaration does not constitute evidence.

⁵ Temporary Certificates of Occupancy were issued on April 2 and April 21, 2010. The permanent Certificate of Occupancy was issued on June 22, 2010. Tr. 250-251. However, the uncontradicted evidence is that the Zoning Administrator made his determination that this business is not sexually oriented in conjunction with issuance of the April 2, 2010 Certificate. Tr. 251.

⁶ Tr. 205.

⁷ Tr. 205-206, 213.

Department of Consumer and Regulatory Affairs at any time prior to the June 22, 2010 issuance of the full Certificate of Occupancy. Tr. 220, 249.⁸ Appellant has not claimed otherwise.

Accordingly, Stadium renews its Motion in Limine and asks that the testimony of Benjamin Petok be stricken. Mr. Petok's observations were not made available to the Zoning Administrator until after issuance of the final June 22, 2010 Certificate of Occupancy and, thus, could not have been factored into the decision to issue that Certificate.⁹

As a Substantive Matter, the Zoning Administrator's Decision to Issue
the Certificates of Occupancy was Correct as a Matter of Law.

The instant appeal was predicated upon Mr. Padou's erroneous assumption that presentation of nude dancing necessarily renders a business sexually-oriented.¹⁰ The learned Zoning Administrator did not make the same mistake. However, he did go to extraordinary lengths before concluding, on the evidence available to him, that the subject nude dancing business would not be sexually oriented within the meaning of the District's Zoning Regulations.

As all understand,¹¹ mere nude dancing does not render a business sexually oriented. Rather, in order to be deemed sexually oriented, a business featuring nudity also must present "specified sexual activities." 11 DCMR §199; see Appeal No. 13967 of the California Steak House, Inc. Because he was aware that nude dancing would be offered at The Stadium Club, the Zoning Administrator went to great lengths to confirm that the nudity would not be accompanied by specified sexual activities.

⁸ It was not until July 12, 2010 that Mr. Petok drafted his Affidavit (Record, Exhibit 13) detailing his June 16, 2010 visit to the premises.

⁹ The Affidavit of Marshall Criswell (Record, Exhibit 14) must be stricken for the same reason. Moreover, Mr. Criswell did not testify and, thus, was not subject to cross examination. See n.4, supra.

¹⁰ Memorandum of Points and Authorities in Support of Appellant's Appeal at 3, Argument III.A.

¹¹ Including, now, appellant.

Although his office processes approximately 200 Certificate of Occupancy applications per month, the Zoning Administrator is involved personally in only 5 or 6 of those applications. Of those 5 or 6, he personally interviews the applicant at his office perhaps two or three times per month.¹² Because he was particularly sensitive to the possibility of sexual orientation implications, he afforded this particular application “extraordinary” attention.¹³ After interviewing applicant’s principal, Keith Forney, in his office, the Zoning Administrator concluded, prior to issuance of the first temporary Certificate of Occupancy on April 2, 2010, that this business would not be sexually oriented.¹⁴

The Zoning Administrator did not receive any contradictory information between his April 2, 2010 approval of the first temporary Certificate of Occupancy and issuance of the June 22, 2010 unconditional Certificate.¹⁵ Again, Mr. Petok’s allegations were not presented to the Zoning Administrator prior to issuance of the latter Certificate.¹⁶ Moreover, we have scoured the voluminous Applicant’s Exhibits package (core dumped on the Board and parties at the public hearing) for even a hint that the Zoning Administrator had reason to suspect prior to June 22, 2010, that Stadium’s assurances to him regarding the absence of specified sexual activities might be false. The closest we could come was an email chain initiated by Mr. Padou on June 7, 2010 (Appellant’s Exhibit 8). That chain reflects that Mr. Padou inquired of Linda Argo,¹⁷ that Ms. Argo referred the inquiry to her subordinate Nicholas Majett and that the latter, in turn, forwarded it on that date to the Zoning Administrator. Mr. Padou’s June 7, 2010 email to Ms. Argo recited that “the Stadium Club offers nude dancing and, is, therefore, a sexually oriented business.” But that proposition was obviously incorrect as a matter of law. The Zoning

¹² Tr. 247-248.

¹³ Tr. 248-249.

¹⁴ Tr. 250-251. The Zoning Administrator also received, and relied upon in part, an April 1, 2010 confirmatory letter from Mr. Forney (Exhibit C to District of Columbia’s Pre-Hearing Statement). Tr. 261-262.

¹⁵ Tr. 249-250, 254.

¹⁶ Tr. 220, 249.

¹⁷ Ms. Argo is Director of the Department of Consumer and Regulatory Affairs.

Administrator had known since at least early April that Stadium presented nude dancing. Tr. 277.

Mr. Padou's June 7, 2010 email did not contend that specified sexual activities accompanied nude dancing at Stadium and, thus, the Zoning Administrator had no cause for concern upon receiving a copy of that email.¹⁸

What the Board is left with then is the potential proposition that, notwithstanding the absence of any reason to reconsider his April 2, 2010 determination that Stadium was not a sexually oriented business, the Zoning Administrator nevertheless should have investigated the business before approval of the final, June 22, 2010 Certificate of Occupancy.¹⁹ The short answer to that proposition, should it be made, is that there exists no reason for the Zoning Administrator to seek prove a negative. Absent reason to suspect that something may be amiss, the Zoning Administrator does not sua sponte go out to check on holders of Certificates of Occupancy. Tr. 309-310.

So the bottom line is that at no time prior to June 22, 2010 (the date of issuance of the final Certificate of Occupancy) did Mr. Padou or anyone else suggest to the Zoning Administrator that specified sexual activities might be occurring at The Stadium Club. Approval of a Certificate of Occupancy on that date, after "extraordinary" measures on the part of the Zoning Administrator to assure himself that the business was not sexually oriented within the meaning of the Zoning Regulations, was correct as a matter of law. This appeal must be denied.

Postscript

In establishing that Benjamin Petok's observations were not known to the Zoning Administrator at any relevant time and, accordingly, must be stricken, we do not want to leave the wrong impression. Mr. Petok's claims were contradicted by the testimony of Damien Gliatis. Tr. 318-325. As the Board has

¹⁸ Appellant's Exhibit 5 is a copy of a May 10, 2010 letter from Mr. Padou to Nicholas Majett. There is no indication in the record that the Zoning Administrator received a copy of that letter. Regardless, the letter merely repeated Mr. Padou's patently mistaken contention that "nude dancing is a 'sexually oriented business,'" and, accordingly, would not have raised any alarm.

¹⁹ The issuance of two temporary Certificates of Occupancy was for building code compliance reasons and not related to the Zoning Administrator's determination that the business would not be sexually oriented. Tr. 277-278. Again, that latter determination was made on or before April 2, 2010. Tr. 250-251.

ruled, the conduct of the business after issuance of a Certificate of Occupancy in reliance on Stadium's representations is an enforcement matter not before the Board in this appeal. Tr. 161. Mr Gliatis testified that Stadium knows that it is under constant scrutiny. Tr. 337. See Appeal No. 13967 of California Steak House, Inc., supra.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Closing Statement have been served by first class mail, postage prepaid, upon:

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Jay A. Surabian
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this 1st day of December, 2010.



Stephen J. O'Brien