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**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. | ) |                  |
|                                       | ) |                  |

**APPELLANT'S SUPPLEMENTAL FILING PURSUANT TO BOARD ORDER**

Appellant, the Ward 5 Improvement Association, respectfully submits this supplemental filing pursuant to the order issued by the Board of Zoning Adjustment ("BZA" or "Board") on December 14, 2010. Appellant, the Ward 5 Improvement Association ("Association"), addresses the specific arguments raised during the Board's consideration of the above referenced matter at its December 14, 2010 hearing.

The Association appeals the grant of a non-sexually oriented business certificate of occupancy to Stadium Group LLC ("Stadium") on two independent grounds. First, the Association asserts that the strip club operated by Stadium is a Sexually Oriented Business Establishment ("SOBE") as defined by 11 DCMR § 199.1. Second, the Association asserts that the Zoning Administrator erred in granting a certificate of occupancy to Stadium because the Zoning Administrator did not conduct a reasonable investigation as required by statute. Additionally, the Association asserts that the existence of house "rules" for Stadium's strippers does not alter the fact that Stadium is a SOBE. Lastly, the Association asserts that reliance on the possibility of enforcement by the Department of Consumer and Regulatory Affairs ("DCRA") is an abdication of the BZA's regulatory responsibility.

The Association now addresses each of the foregoing in turn in light of the Board's discussion at the December 14, 2010 hearing.

**A. The Strip Club Operated by Stadium Is a SOBE as Defined by 11 DCMR § 199.1.**

The definition of a SOBE involves a two-prong test. To meet the first prong, "live performances" must involve nudity, which is defined as the exposure of "specified anatomical areas," which are described as:

- (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). *11 DCMR § 199.1*.

Here, this prong is not in dispute because all parties agree that the strippers at Stadium perform nude, thereby exposing the specified anatomical areas. Notably, an establishment does not need to satisfy both (a) and (b) above to meet the first prong of the SOBE definition. Indeed, (a) and (b) are mutually exclusive (e.g. “less than completely and opaquely covered” vs. “even if completely and opaquely covered”).

The second prong of the SOBE definition involves “specified sexual activities,” which are defined as including:

- (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. (24 DCR 5144). *11 DCMR § 199.1*.

Similar to the first prong, an establishment does not need to satisfy both (a) and (b) to meet the second prong of the SOBE definition. As the Board found in *In re California Steak House*, an establishment is a SOBE if it engages in any *one* activity on the list of “specified sexual activities,” once it has been found that there is nudity as defined in the first prong.

Indeed, the Board found that California Steak House was a SOBE because the establishment engaged in just *one* of the listed “specified sexual activities,” that of “sexual stimulation or arousal”:

There is no dispute from the record that the live performances presented included displays of “specified anatomical areas”....The issue before the Board is how to apply the term “sexual stimulation or arousal.” It is clear from the record that in the subject case there was no masturbation, sexual intercourse, sodomy, bestiality or fondling or other erotic touching....[However] the Board concludes that the type of activity observed occurring at the subject premises did constitute “sexual stimulation or arousal” and was therefore a “specified sexual activity” [because].... the 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.” The Board thus concludes that the...subject establishment is a “sexually oriented business 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 as BZA Exhibit 20: Appellant’s Brief, Attachment R.

Here, the Association entered substantial evidence into the record that the strippers at Stadium engage in several of the listed “specified sexual activities”: strippers touch and fondle themselves as a regular part of their routines; strippers and patrons touch each other during lap dances and table dances; *and* the strippers perform in a manner intended to stimulate and arouse customers. *BZA Exhibit 30: Appellant’s Closing Argument at 2-3; Attachment A: Declaration of James Williamson*. For example, the

strippers lie on the floor and assume poses in order to expose their genitals to customers. *Id.* Stadium owner James Redding testified that strippers in private rooms are rented to customers for \$600 per hour. *Transcript of October 26, 2010 hearing* 203: 7-14; 210: 9-21; 182: 18-20. The obvious purpose is sexual stimulation or arousal.

Since “sexual stimulation or arousal” of Stadium’s patrons takes place (or is intended to take place) in conjunction with nudity, Stadium is a SOBE based on the standard the Board created in *In re California Steak House*. Stadium is also a SOBE because the dancers fondle and touch themselves and patrons while naked as defined by 11 DCMR § 199.1.

This means that Stadium is a SOBE regardless of the type of investigation conducted by the Zoning Administrator.

At the hearing on December 14, 2010, a member of the Board implied otherwise: that the appeal was a matter of process. (“I’m uncomfortable with dictating the process for the Zoning Administrator” *Dec. Tr.* 26:22-27:2.) That is, that the question at hand is not the substance of whether Stadium is a SOBE, but merely whether the Zoning Administrator conducted a reasonable investigation prior to issuing the certificate of occupancy.

Appellant respectfully disagrees. If the Zoning Administrator conducts a reasonable investigation but comes up with the wrong conclusion, his decision is still subject to overturning by the Board.

The Board’s explicit powers in the District of Columbia Municipal Regulations say as much:

The Board, pursuant to the Zoning Act, shall also hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by any administrative officer or body, including the Mayor, in the administration or enforcement of the Zoning Regulations, Title 11 DCMR. *11 DCMR § 3100.2.*

There is substantial evidence in the record that Stadium meets the definition of a SOBE. Stadium *is* a SOBE. Stadium’s non-SOBE certificate of occupancy is error and must be revoked. It is within the Board’s explicit duties to correct administrative errors of substance, such as erroneous certificates of occupancy.

**B. The Zoning Administrator Erred In Granting a Certificate of Occupancy to Stadium without Conducting a Reasonable Investigation.**

The Zoning Administrator is required to conduct an investigation 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.<sup>1</sup> On both of Stadium's applications for certificates of occupancy, the sections called "C of O inspection" were left entirely blank by Mr. LeGrant. *BZA Exhibit 30: Appellant's Closing Argument at 5.*

Mr. LeGrant made fundamental errors that point to the perfunctory and insubstantial nature of his efforts: he wrote on Stadium's certificate of occupancy application #CO1001838 that there was no change in use, even though Stadium's owner stated on the same application that the use was changing from Warehouse to Nightclub/Restaurant. *Id.*

Mr. LeGrant was inexperienced: he conceded at the October 26, 2010 hearing that this was the first time he had applied the SOBE test when issuing a certificate of occupancy. *Transcript of October 26, 2010 hearing 248: 2-6; 271:21-272:18.*

Mr. LeGrant took ineffectual steps at investigating whether Stadium was a SOBE, confining himself to reviewing Stadium's building plans and soliciting a letter from the owner. *BZA Exhibit 30: Appellant's Closing Argument at 5.*

None of the steps taken by the Zoning Administrator threw any light on whether Stadium would meet the definition of a SOBE. Stadium's building plans say nothing about whether Stadium's strippers will engage in "specified sexual activities."<sup>2</sup> *Id.* The letter from Keith Forney, Stadium's owner, is silent on whether the strippers will engage in "specified sexual activities" such as fondling themselves or stimulating and arousing patrons.<sup>3</sup> *Id.* The Zoning Administrator also testified that he spoke in person with Stadium's owner, but he never testified that they discussed 11 DCMR § 199.1 or the behavior of Stadium's strippers relative to SOBE regulations.<sup>4</sup>

At the December 14, 2010 hearing, a member of the Board expressed concern that the Association seeks to have the Board specify how the Zoning Administrator should do his job. ("I'm uncomfortable with dictating the process for the Zoning Administrator." *Dec. Tr. 26:22-27:2.*) This concern is unnecessary. The Board can find that the Zoning Administrator did not conduct a reasonable investigation without specifying in detail what such an investigation should look like.

The Zoning Administrator erred because he did not conduct an investigation pursuant to 12A DCMR § 110.2.2 reasonably calculated to determine whether or not Stadium was a SOBE prior to issuing certificates of occupancy. The steps taken by the Zoning Administrator did not and could not shed light on whether the strippers would

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<sup>1</sup> The Zoning Administrator sought and received status as an "expert" on the District's zoning laws at the Board's October 26, 2010 hearing. The Zoning Administrator cannot, therefore, claim ignorance of his responsibility to investigate prior to issuing a certificate of occupancy.

<sup>2</sup> Indeed, a review of the plans should have heightened the Zoning Administrator's concern since the plans indicate that Stadium planned to build a dozen private back rooms so patrons could have one-on-one action with a stripper.

<sup>3</sup> Stadium's owner does promise that the dancers will, in essence, abide by DC Code § 25-372, which is part of the Alcoholic Beverage Control Board statutes and not relevant here.

<sup>4</sup> It is clear from the record that part of the problem is that the Zoning Administrator was unaware of the operation of 11 DCMR § 199.1 and, perhaps, of its very existence. Instead of applying 11 DCMR § 199.1, a zoning regulation, the Zoning Administrator sought to ensure that Stadium would comply with liquor licensure regulations regarding the height of the performance stage and the distance between strippers and customers. *See BZA Exhibit 26 at 10-13: emails between DCRA and Mr. Padou.*

engage in “specified sexual activities” as defined by 11 DCMR § 199.1. The result is that the Zoning Administrator erroneously granted a non-SOBE certificate of occupancy to Stadium. The Board should, therefore, revoke Stadium’s certificate of occupancy because it was granted without the statutorily required investigation.

**C. The Existence of House “Rules” for Stadium’s Strippers Does Not Alter the Fact That Stadium Is a SOBE.**

Even if the strippers precisely followed all of Stadium’s “rules,” the establishment would still be a SOBE. This is because it is impossible to have a rule against stimulating or arousing patrons: it is the purpose of strip clubs and it is the reason that strip clubs are SOBEs. Furthermore, there is nothing in Stadium’s “rules” that prevents the strippers from “erotically touching” their breasts or buttocks, which also causes the establishment to meet the SOBE definition. *BZA Exhibit 25: Stadium Club rules.*

It is impossible to require patrons not to be sexually aroused by strippers at a strip club. As laid out in *In re California Steak House*, the definition of “specified sexual activities”—and hence SOBE—is met if strippers stimulate or arouse patrons even without touching them. *In re California Steak House* at 13. That is why every court or administrative agency that has looked at this issue—including the BZA—has found that strip clubs are SOBEs.<sup>5</sup> It is also why it is impossible for DCRA to “police” Stadium into conforming with a non-SOBE certificate of occupancy.

At the December 14, 2010 hearing, a Board member suggested that Stadium is trying to run its business “right up to the line” that divides SOBEs from non-SOBEs. *Dec. Tr. 19: 1-6.* This is incorrect. As noted above, Stadium is well over the line of the SOBE definition and as long as the establishment has strippers, Stadium will always be a SOBE, no matter what house “rules” are in place.

**D. Reliance on the Possibility of DCRA Enforcement Is an Abdication of the BZA’s Responsibility.**

This matter is not an enforcement issue for DCRA or the Zoning Administrator. The Board has a regulatory responsibility to correct errors. *11 DCMR § 3100.2.* The Board shirks its responsibility if it says, in essence, “if the Zoning Administrator erred in granting a non-SOBE certificate of occupancy to Stadium, it is up to the Zoning Administrator to correct the error.” Aside from being contrary to 11 DCMR § 3100.2, the problem with this approach is highlighted by the fact that the Zoning Administrator has had credible evidence for more than six months that Stadium is a SOBE but has conducted no investigations and taken no enforcement action. Indeed, Stadium is still operating as a SOBE because it is a SOBE. *Attachment A: Declaration of James Williamson.*

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<sup>5</sup> See, e.g. *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).

## CONCLUSION

For the foregoing reasons, the Ward 5 Improvement Association respectfully requests the Board of Zoning Adjustment to revoke Stadium Club LLC's current 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

1/25/11  
Date

## CERTIFICATE OF SERVICE

I mailed a copy of this filing via U.S. Postal Service, first class prepaid, on January 25, 2011 to:

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

Stadium Group LLC  
c/o Stephen O'Brien  
Mallios & O'Brien  
2600 Virginia Ave NW, Suite 1112  
Washington DC 20037



Abigail Padou

1/25/11  
Date

# **ATTACHMENT A**

## DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

APPEAL NO. 18114  
In re Stadium Group LLC  
2127 Queens Chapel Road NE

### DECLARATION OF JAMES WILLIAMSON

I declare, under penalty of perjury, that the following is true and accurate to the best of my belief.

I am a resident of Washington, DC and I am over 21 years old.

Don Padou is a classmate of mine. Mr. Padou asked me to visit The Stadium Club and note what I saw. Mr. Padou offered to reimburse me for my expenses.

Mr. Padou explained that he and others in Ward Five were trying to stop a number of Strip clubs from opening in Ward Five. Mr. Padou explained that there was an appeal pending before the Board of Zoning Adjustment. Mr. Padou explained that the issue before the Board was whether or not Stadium Club was a sexually oriented business as defined in 11 DCMR 199.1.

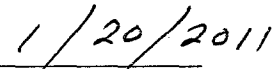
I visited Stadium Club on January 4, 2011. I was accompanied Irvin Cannaday IV. We arrived at approximately 9:35 pm. We left at approximately 12:10am.

While at the Stadium Club I saw:

- Nude dancers perform on stages and table tops.
- One dancer in particular Jayla slap her buttocks and fondle her breasts as a part of her routine.
- Dancers lie on the floor and expose their vagina or anus to customers.
- I saw one of the dancers performing pull-ups on a horizontal bar with fully unclothed with her legs spread.
- Customers tipping dancers when dancers acted in a sexually provocative manner.
- I saw some of the dancers performing dances for the patrons sitting in the V.I.P. section after they had completed their routines.
- I asked one of the servers about lap getting a lap dance and was told that there would be a wait because of there were only a few dancers working that night.

- I saw one of the dancers walk to the left of the DJ booth (facing the stage) and escort one gentleman to the other side of the club past the bathroom area, presumably to get a lap dance. When they got to the steps, they spoke for a few seconds, and then the man went back to the area that he where he was sitting.

  
Signed \_\_\_\_\_

  
Date \_\_\_\_\_