

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

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OFFICE OF THE
BOARD OF ZONING ADJUSTMENT

Appeal of Ward 5 Improvement Association

Appeal No. 18114

DISTRICT OF COLUMBIA'S POST-HEARING BRIEF

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("Appellee" or "DCRA"), by and through undersigned counsel, hereby submits its post-hearing brief as permitted by the Board at their December 14, 2010 public meeting. At that meeting, the Board deliberated the merits of this case, but was unable to reach a consensus to either deny or grant the appeal. Consequently, the Board left the record open for the parties to file additional briefs. DCRA files this brief to restate its position and address points raised by the Board during deliberations.

BACKGROUND

This case began as a challenge by the Appellant to the April 21, 2010 certificate of occupancy ("the April 21st CO") issued to the Stadium Group, LLC by DCRA for the operation of a "restaurant with nightclub" at 2127 Queens Chapel Road, NE ("the Property") known as the Stadium Club.¹ The April 21st CO was issued with a condition requiring the filing of a covenant. After the Stadium Club complied with that condition, DCRA issued a permanent CO for a "restaurant with nightclub" on June 22, 2010 ("the June 22nd CO").

¹ Before issuing the April 21st CO, DCRA issued Stadium Group, LLC a CO on April 2, 2010 for the same use ("the April 2nd CO").

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The sole issue raised by Appellant in the appeal, filed on June 11, was an argument that the Property was operating as a sexually-oriented business establishment ("SOBE") because nude dancing entertainment was provided on site. Before filing this appeal, the Appellant's President, Mr. Padou, contacted DCRA via email explaining his view that the Stadium Club was a SOBE. He stated, "the Stadium Club offers nude dancing and is, therefore, a sexually oriented business." See Padou's email of June 7.

As DCRA has previously explained, Padou's contention that nude dancing is sexually oriented is plainly wrong. The language of the Zoning Regulations and the relevant case law, support the Zoning Administrator's ("ZA") interpretation that an establishment that provides nude dancing entertainment is not a SOBE. During deliberations, the Board seemed to agree with the ZA on this point.

At the hearing, the Board offered its own theory of the case, that it could find that the ZA erred if it was established that after DCRA issued the April 21st CO, it had information that the Stadium Club was operating outside of the of the law, but issued the June 22nd CO anyway. As explained in DCRA's Closing Statement, there is nothing in the record to indicate that anyone at DCRA had any information that Stadium Club might be operating beyond the scope of its CO. Neither Appellant's appeal nor Padou's email make any allegation as to the conduct of the dancers at the Stadium Club, but rather he insists that nude dancing in and of itself is sexually-oriented. The affidavits from Petok and Chriswell were created after the June 22nd CO was issued. Accordingly, it is clear that the DCRA did not have any information on June 22, which could have lead it to conclude that the Stadium Club was a SOBE.

During the Board's December 14th deliberations, the Board deliberated and ultimately reached an impasse on another question. That question is whether the ZA erred by failing to

conduct an appropriate inquiry as to whether the Stadium Club was a SOBE. As to this question, DCRA believes strongly that the ZA did not err, but also that this question really is one of enforcement and is most appropriately addressed by DCRA and the Office of the Attorney General.

DISCUSSION

First, it is important to clarify the issues in this case. The COs that DCRA issued to Stadium Group, LLC approve the use of the Property as a "restaurant with nightclub." That use is a permitted on the Property as a matter of right. Thus, if the Board is looking at whether the COs were issued in error, it must find that they were not. If the use of the Property does not conform with the use approved by the CO, then it may be revoked by DCRA; however, the Board cannot invalidate a CO on that ground. *See Appeal No. 17439 of Advisory Neighborhood Commission 6A* (June 6, 2006) at p. 6.

The Board's jurisdiction also extends to "decisions" and "determinations" concerning the Zoning Regulations. Here, the ZA made a decision concerning nude dancing. He knew that there would be nude dancing at the Stadium Club and determined that it did not need to obtain a variance because nude dancing was not a "specified sexual activity" under the Zoning Regulations. This decision was made before issuing the April 2nd CO. In this case, it was the decision that was appealed by the Appellant. Appellant believed that a club providing nude dancing entertainment is a SOBE. The record is clear, however, that the ZA did not err in making this decision. No other "decisions" or "determinations" of the ZA concerning the Property have been appealed to the Board.

The Board has raised the issue as to whether the ZA failed to conduct a sufficient inquiry into the Stadium Club's operations after it opened. Specifically, the Board focused on the fact

that the ZA did not personally visit the Stadium Club before issuing the June 22nd CO. While this is a critique of the process of how the June 22nd CO was issued or of the ZA's enforcement of the Zoning Regulations, it does not constitute an error with the respect to the Zoning Regulations and does not render the Property's CO invalid.

Enforcement Is Within DCRA's Discretion

When hearing an appeal of the issuance of a CO, the Board analyzes whether, based on the information before the ZA at the time of application, the ZA erred with respect to the Zoning Regulations in issuing the CO. *See e.g. Appeal No. 17439 of Advisory Neighborhood Commission 6A* (June 6, 2006) at p. 6. If after issuance, the holder of the CO violates the Zoning Regulations, then that is an enforcement matter to be handled by DCRA and the Office of the Attorney General. Decisions concerning enforcement are within the discretion of DCRA. *See Appeal No. 16950 of the West End Citizens Association* (March 4, 2003) at p.10 (stating that the Board normally gives "absolute discretion" to enforcement decisions). For example, in *Appeal No. 17439*, the appellant alleged that DCRA erred in issuing a CO for a restaurant to Cluck-U-Chicken, because Appellant believed it was operating as a fast-food establishment. *See Appeal No. 17439 of Advisory Neighborhood Commission 6A* at p. 6. There, the Board stated:

Almost all of the ANC's assertions concern how Cluck U is now operating, which is not the focus of an appeal. The issue before this Board is whether the facts known to the Acting Zoning Administrator at the time the Certificate of Occupancy was issued could have reasonably led him to believe that the proposed use was to be a restaurant, and not a fast food restaurant. The Appellant has not offered persuasive evidence that the decision to issue the certificate of occupancy was erroneous based upon the facts known at the time of the application.

...

Appellant's contention that the business is actually being operated as a fast food restaurant does not prove that the issuance of the certificate of occupancy was in error. Although a lawfully issued certificate of occupancy may be revoked by DCRA and enjoined by the Superior Court if "the actual occupancy does not

conform with that permitted," 12A DCMR § 110.5.1, this Board cannot invalidate a valid certificate of occupancy on that ground.

See id.

However, while deliberating this case, the Board did not focus on the question of whether the ZA knew that the Stadium Club was a SOBE when he issued the June 22nd CO. Instead, the Board questioned whether he could have or should have known more about the operation of the Stadium Club before the issuing the June 22nd CO. This question is problematic for several reasons.

First, at the hearing the ZA testified that before issuing the April 2nd CO he took extraordinary steps in scrutinizing the application. As the ZA testified, before he issued the April 2nd CO, he discussed the proposed use of the Property with the owner and determined that it would not fall within the definition of SOBE in 11 DCMR § 199.1. *See Transcript of October 26, 2010 at p. 238-9.*

Accordingly, when the Stadium Club satisfied the condition on the April 21st CO, there was no reason for DCRA to not issue a new CO. DCRA received no information that the dancers were engaging in any prohibited conduct at the club. For that reason, Appellant's appeal and Padou's email gave DCRA no reason to immediately investigate the Stadium Club's operations.

Even if an allegation was made to DCRA, that alone would not serve as a basis for DCRA to refuse to issue the June 22nd CO. An allegation may serve as the basis to begin an investigation; however, DCRA would not shut down an existing business based on an uncorroborated allegation. DCRA must take time to conduct an appropriate investigation. Further, even if DCRA concluded that the Stadium Club had violated the Zoning Regulations, taking action against a CO is only one enforcement tool DCRA can use. It can also issue fines,

and refer the matter to the Office of the Attorney General for criminal prosecution or injunctive relief. See 11 DCMR §§ 3201.1-2; 16 DCMR § 3312.1. In some instances, an action with such finality like revoking a CO, is not the enforcement path DCRA wants to pursue.

DCRA also works with its sister agencies, like the Alcohol Beverage Regulation Administration (ABRA), in enforcing the law. Here, inspectors with ABRA have visited the Property on many occasions. The results of some of those inspections are detailed in the Affidavit of Jabriel Shakoor attached hereto as Exhibit A. The results of those inspections have not provided evidence that the Stadium Club is a SOBE.

For the Board to find error in the how DCRA approaches investigation or as to which enforcement tool it decides to use, inappropriately encroaches on DCRA's discretion and undermines the District's ability to make strategic and policy decisions in enforcing the law.

The Board Must Avoid Questions of Process

It is also not prudent for the Board to wade into the process of how a CO was issued, when the CO is not inconsistent with the Zoning Regulations. In approving the CO, DCRA permitted the Stadium Club to operate as a restaurant and nightclub that provides nude dancing entertainment. All of those uses are consistent with the Zoning Regulations. While it is true, that the ZA did not visit the Stadium Club prior to June 22, his failure to do so did not result in any violation of the Zoning Regulations.

The Zoning Regulations do not command that the ZA conduct such an inspection. Similarly, DCRA is not aware of a prior case where the Board revoked a CO based merely on a finding that the ZA's investigation of a CO application was insufficient. Thus, it is troubling that the Board would now find the ZA was so derelict in approving the June 22nd CO so as to constitute an error.

The ZA testified that his office reviews approximately 200 CO applications per month and does not do "spot checks" unless he receives a complaint. See Transcript of October 26, 2010 at p. 309-10. As there is no guidance in the Zoning Regulations or case law as to what steps the ZA must take before issuing a CO, for the Board to find that the ZA should have done a "spot check" in this case puts the Board at risk of adjudicating this case based on an unknowable and unarticulated standard. The effect of that decision would also unnecessarily put many other COs for matter of right uses in jeopardy.

DCRA understands the SOBE regulations and regularly enforces them

While the issue of whether a business is a SOBE does not often come before the Board, it is a question that DCRA has extensively dealt with. In that past few years, the ZA has worked with several businesses to ensure compliance with the regulations concerning SOBEs. Many of these businesses would not necessarily raise any red flags in the application stage. For example, newsstands may sell adult magazines and literature as a matter of right, but that newsstand will become a SOBE when the percentage of sales of those items become "substantial." See 11 DCMR § 199.1 (definition of SOBE). Likewise, a video store may rent and sell adult videos as a matter of right, but must similarly limit its inventory of those items. There have also been instances where stores primarily selling women's lingerie become SOBEs when they begin to sell sex toys and other adult novelties. The Zoning Regulations do not treat the Stadium Club any differently. It may continue to have nude dancing entertainment, but must operate within the boundaries of the law. Similarly, it may be subject to enforcement action by DCRA and its sister agencies if it violates the law.

Accordingly, DCRA asks the Board to deny this appeal.

Respectfully Submitted,

IRVIN B. NATHAN
Acting Attorney General

MELINDA M. BOLLING
General Counsel

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JAY A. SURABIAN (DC Bar # 977657)
Assistant Attorney General
Department Of Consumer And
Regulatory Affairs
Office of the General Counsel
1100 4th Street, SW, 5th Floor
Washington, DC 20024
(202) 442-8403 (office)
(202) 442-9447 (fax)
jay.surabian@dc.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing was served by first class mail, this 25th day of January 2011, to the following:

Stephen J. O'Brien, Esq.
Mallios & O'Brien
2600 Virginia Ave., NW, Suite 1112
Washington, DC 20037
sobrien@malliosobrien.com

Ward 5 Improvement Association
c/o Don Padou
1335 Lawrence St., NE
Washington, DC 20017
Don.padou@yahoo.com

ANC 5B
2100 New York Ave., NE
Washington, DC 20002


Jay Surabian

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AFFIDAVIT OF INVESTIGATOR JABRIEL SHAKOOR

I, Jabriel Shakoor, being duly sworn on oath, depose and state that the following is true to the best of my information, knowledge and belief:

1. I am over the age of eighteen and make this statement of my own personal knowledge.
2. I am an Investigator with the Alcoholic Beverage Regulation Administration and my business address is 1250 U Street N.W., 2nd Floor, Washington, D.C.
3. In June 2010, I was assigned the protest investigation of a Retailer's Class CN (Nightclub) license renewal application for The Stadium Group, LLC t/a Stadium, located at 2127 Queens Chapel Road, N.E., Washington, D.C.
4. For purposes of my investigation, I visited Stadium on the following dates: July 15, 2010, July 16, 2010, July 17, 2010, July 21, 2010, July 22, 2010, July 23, 2010 and July 24, 2010. The licensed establishment was open during these monitoring periods.
5. While inside the establishment during these seven monitoring periods, I observed female dancers performing nude. I observed female dancers who were off-stage, dressed in gowns and dresses. I did not observe any dancers either on or off stage interacting with patrons in an inappropriate manner.
6. Specifically, during my seven monitoring periods, I did not observe any acts of human masturbation, sexual intercourse, sexual stimulation or arousal, sodomy or bestiality. I also did not observe any dancer engaging in any fondling or other erotic touching of a patron's or her own genitals, pubic region, buttocks or breasts.

I declare under penalties of perjury of the laws of the District of Columbia that the foregoing
is true to the best of my knowledge, information, and belief.

Jabriel Shakoor
Printed Name


Signature

Subscribed and sworn to before me, this 20th day of January, 2011.


Printed Name
NOTARY PUBLIC

My commission expires: _____, 20____

LECHE M. LEE
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires December 14, 2014