

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

2011 JUL 25 PM 3:09
D.C. OFFICE OF ZONING

APPEAL OF WARD 5 : No. 18114
IMPROVEMENT ASSOCIATION :

THE STADIUM GROUP, LLC'S POST HEARING BRIEF

The hearing on this appeal was conducted on October 26, 2010. On December 14, 2010, the Board announced that it was not able to render a decision because of a lack of unanimity among the Members who had heard the evidence. On that latter date, the Board reopened the record for additional submissions to January 25, 2011. This constitutes intervenor The Stadium Group, LLC's additional post hearing submission.¹

Intervenor respectfully submits that some Members of the Board misapprehended the hearing record as follows:

Standing – This appeal was filed by the “Ward 5 Improvement Association” on June 11, 2010. Documents submitted by that appellant demonstrate that the Association was formed on that very day, without any regulatory filings, by Mr. and Mrs. Padou, who were referred to in the appellant's organizational documents as “Member 1” and “Member 2.” These organizational documents make no mention of the existence of any other “Members.” (See Exhibit A.) It is undisputed that Mr. and Mrs. Padou, as individuals, do not have standing to prosecute this appeal.

The Zoning Administrator's and Intervenor's prehearing submissions challenged the Padous', and thus the Association's, obvious lack of standing. In response, on the morning of the

¹ The Board will find that this submission reads like a typical motion for reconsideration. Of course, as the Board has not rendered a decision, there is no order to reconsider in a formal sense. But this submission is intended to refute inferences and factual determinations with respect to which we believe board Members erred on December 13, 2010.

hearing Mrs. Padou filed a Declaration which, for the first time, contended that a church (First Christ Apostolic Church) located contiguous to the subject property was a member of the Association. Mrs. Padou's Declaration pointedly did not recite *when* the church had joined the Association, or more importantly, whether the church had been a member of the Association when this appeal was filed. At the conclusion of the public hearing, the Board afforded appellant the opportunity to supplement the record as to its claim of standing to prosecute this appeal. At that time, Intervenor stressed that the real issue was *when* the church had become a member of the Association.²

Notwithstanding the Board's explicit invitation, the Padous filed absolutely nothing post hearing on the standing question. To date, the Board and parties have not seen a single scrap of paper from the church confirming that it is a member of the Association and, more importantly, whether the governing body of the church authorized the filing of this appeal on June 11, 2010.

At the December 14, 2010 "non-decision" session, the voting Members of the Board concurred that the Association had standing because of the membership of the church. The Chair while acknowledging that an Association cannot have standing unless at least one of its members does, remarked that the Zoning Administrator and the Intervenor had failed to demonstrate that the Church was not a Member of the Association when this appeal was filed.³ But it always is the burden of a party to establish its standing to prosecute litigation. Apart from imposing upon the opposing parties the obviously impossible burden of proving a negative (that the church was not a member when the appeal was filed), the sitting Members of the Board overlooked the

² Tr. October 26, 2010 at 343.

³ Tr. December 14, 2010 at 7.

documentary evidence of record that the Association when organized on June 11, 2010 consisted only of "Member 1" and "Member 2;" that is, Mr. and Mrs. Padou.

Intervenor infers that the Board may have bypassed the standing issue in a desire to reach the merits of this case. But intervenor asks that the Board consider the ramifications of overlooking the standing deficiency should this position be perpetuated in the ultimate decision in this case. 11 DCMR § 3106.2 requires that an appellant's interests be "significantly, distinctly or uniquely affected in character or kind...than those of other persons in the general public." The Board's inclination in this case, would viciate the requirement that appellants demonstrate standing.

Instead, the position expressed to date by some Members of the Board, if adopted, will constitute a road map for individuals who obviously have no standing to easily circumvent the requirement of standing. Simply put, in the future any two "standing challenged" individuals need only say that they are an association, without even filing with any governmental agency. Then, after the same-day filing of an appeal to this Board (in order to satisfy time deadlines), those individuals need only make the undocumented claim that at some future time they have recruited a party with standing to join their private association. Those future appellants need not: (1) produce any documentation showing that the purported member with standing indeed considers itself a member; (2) claim that the new member was a member when the appeal was filed; or, (3) demonstrate that the purported member with standing authorized or joined in the decision to appeal. In short, in future cases the requirement that a party demonstrate standing will easily be

circumvented and this Board will be presented with numerous appeals lodged by “pop up associations.”

At the October 26, 2010 public hearing, the Chair acknowledged that post hearing submissions by appellant on the standing issue might require that additional evidentiary hearings on that issue be scheduled.⁴ If the sitting Members of the Board are not now persuaded that the appellant lacks standing, Intervenor requests that the evidentiary hearing be reconvened in order to take evidence on the standing issue. At such hearing, the appellant should be required to demonstrate by objective documentary evidence, or by testimony by a representative of the church, that the church:

- (1) Joined the Ward 5 Improvement Association on June 11, 2010 pursuant to authority duly granted by its governing body; and,
- (2) Authorized the filing of the instant appeal.

As this case is in “limbo” pending nomination and confirmation of a least one new Board Member (and maybe two members if the first new Member concludes that the appeal should be denied), a reopened hearing will not delay ultimate decision of this case. On the other hand, such an evidentiary hearing may result in agreement of the sitting Members that this appeal must be dismissed on standing grounds.

The Adequacy of the Zoning Administrator’s Performance. There seems to exist no disagreement between sitting Members of the Board or the parties that in order to be deemed a “sexually oriented business establishment” (SOBE), a business must present both nudity (“specified

⁴ Tr. October 26, 2010 at 344-347.

anatomical areas”) *and* “specified sexual activities.” 11 DCMR 199.1; *see Appeal No. 13967 of the California Steak House, Inc.*

It always has been understood by all, including the Zoning Administrator, that the Stadium Club would present nude dancing. After interviewing a principal of the business, the Zoning Administrator, before issuance of the first of the three Certificates of Occupancy at issue here, concluded that the business would not present “specified sexual activities. No one has argued that the Zoning Administrator misunderstood or misinterpreted the SOBE definition.

Rather, at the December 14, 2010 session, the sitting Members engaged in an extensive dialogue regarding the extent to which the Board should be critiquing the Zoning Administrator’s discharge of his duties.⁵ Two sitting Members opined that the Zoning Administrator had not done enough in this case to confirm that the subject nightclub was not a SOBE before issuing the last of the three Certificates of Occupancy, while another Member expressed his belief that the Board should not be dictating “process” to the Zoning Administrator and that enforcement matters should be left to the latter. The question of the appropriate scope of the Board’s supervision of the manner in which the Zoning Administrator goes about his work (as opposed to the more narrow issue of whether he has correctly interpreted the Zoning Regulations) is of potentially greater significance than the merits of this case. But the Board need not here resolve that larger question, because close examination of the record in this instance demonstrates that the Zoning Administrator’s performance in granting the Certificates of Occupancy is not subject to fair challenge.

⁵ Tr. December 14, 2010 at 9-28.

The Zoning Administrator was not asleep at the switch here. He recognized the SOBE issue and conducted special review of the first Certificate of Occupancy application, including an interview with the applicant's principal. Even a sitting Member who found fault with the Zoning Administrator's performance nonetheless characterized his review of this matter as "above and beyond."⁶ The Members who would have granted the appeal seemingly found no fault with issuance of the first and second Certificates (April 2, 2010 and April 21, 2010).⁷ Instead, the latter Members opined that information presented to the Zoning Administrator prior to issuance of the third Certificate of Occupancy on June 22, 2010, should have caused the Zoning Administrator to conduct a physical inspection of the business, in order to determine whether "specified sexual activities" were underway, before approving that final Certificate. But here is where we submit, respectfully, that some Board Members have misapprehended the hearing record.

Specifically, sitting Members of the Board observed that prior to the June 22, 2010 issuance of the final Certificate of Occupancy, the Zoning Administrator received complaints that specified sexual activities were transpiring at the business.⁸ However, the hearing record is devoid of factual support for that assertion. While the Zoning Administrator was aware that Mr. Padou was disturbed by the opening of a nude dancing club, the only relevant evidence of record is that on June 7, 2010, Mr. Padou emailed Linda Argo⁹ claiming that "the Stadium Club offers nude dancing and is, therefore, a sexually oriented business." (Emphasis added.) That email (Exhibit B) was forwarded to the Zoning Administrator on that date.

⁶ Tr. December 14, 2010 at 12.

⁷ Tr. December 14, 2010 at 15.

⁸ Tr. December 14, 2010 at 16.

⁹ Then-Director of the Department of Consumer and Regulatory Affairs.

But that email did not contend that “specified sexual activities” were occurring at the Stadium Club. Instead, it stated only Mr. Padou’s then-belief that mere nude dancing rendered the business sexually oriented. The Zoning Administrator already knew that, so Mr. Padou’s June 7, 2010 email could not reasonably have constituted motivation for the Zoning Administrator to visit the business.

Two Board Members noted that the Zoning Administrator had knowledge of Mr. Padou’s filing of this appeal prior to issuing the final Certificate of Occupancy, and opined that such knowledge should have occasioned an inspection of the premises. However, review of Mr. Padou’s appeal submission demonstrates that he merely was reiterating his erroneous assertion that “nude dancing is a sexually oriented business under 11 DCMR § 199.1.”¹⁰ Nowhere in his initial appeal filing did Mr. Padou assert that “specified sexual activities” were transpiring at The Stadium Club.¹¹ Accordingly, the filing of this appeal did not supply the Zoning Administrator with reason to investigate further.

The bottom line is that Mr. Padou never claimed to the Zoning Administrator, prior to June 22, 2010, that “specified sexual activities” were transpiring at the Stadium Club. Thus, there was zero reason presented to the Zoning Administrator to investigate further before authorizing the June 22, 2010 Certificate. In light of that undisputed factual record, intervenor respectfully submits that the decision of the Zoning Administrator to approve issuance of the June 22, 2010 Certificate of Occupancy should not be second-guessed.

¹⁰ Appeal of Issuance of a Certificate of Occupancy, III. Argument, Section A.

¹¹ It was only after being disabused of that notion during the course of this appeal that Mr. Padou switched horses to his present “specified sexual activities” claim.

Respectfully submitted,



Stephen J. O'Brien
Mallios & O'Brien
2600 Virginia Avenue, NW
Suite 1112
Washington, DC 20037
(202) 675-7700
sobrien@malliosobrien.com
Attorney for the Stadium Group, LLC

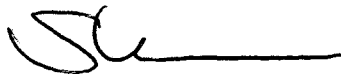
CERTIFICATE OF SERVICE

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

Ward 5 Department Association
c/o Don Padou
1335 Lawrence Street, NE
Washington, DC 20017

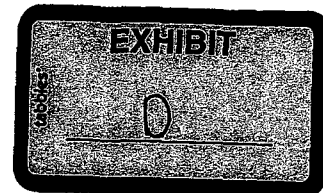
Jay A. Surabian
Assistant Attorney General
Department of Consumer and Regulatory Affairs
Office of the General Counsel
1100 4th Street, S.W., 5th Floor
Washington, DC 20024

this 25th day of January, 2011.



Stephen J. O'Brien

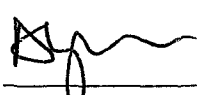
WARD 5 IMPROVEMENT ASSOCIATION



Articles of Association

1. The Ward 5 Improvement Association is an Unincorporated Nonprofit Association pursuant to DC Code § 29-971.
2. The purpose of the Ward 5 Improvement Association is to engage in civic activities intended to improve the quality of life of Ward 5 residents and business owners. The Ward 5 Improvement Association has no real property and will not engage in any real property transactions.
3. Membership: Membership is open to any resident or business owner of Ward 5 upon a majority vote by existing members.
4. Income and Dues: None.
5. Mailing address: 1335 Lawrence St NE, Washington DC 20017.
6. Meetings: Meetings of the association shall be governed by Roberts Rules of Order (10th Edition).
7. These articles may be amended upon majority vote of existing members.

Member 1:

 6/11/10

Abigail Padou
1335 Lawrence St NE
Washington DC 20017
(202) 832-4038

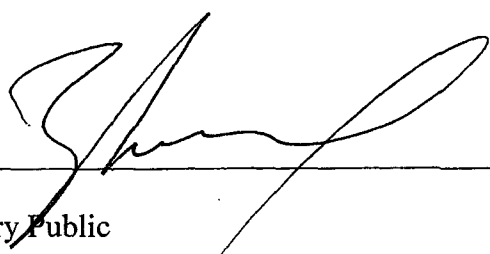
Date

Member 2:

 6/11/10

Don Padou
1335 Lawrence St NE
Washington DC 20017
(202) 832-4038

Date

 06/11/10

Notary Public

Date

JUDE U. NKPADO
NOTARY PUBLIC
DISTRICT OF COLUMBIA
MY COMMISSION EXPIRES
JULY 31, 2010



Kuralt, Hamilton (DCRA)

From: Argo, Linda (DCRA) [Linda.Argo@dc.gov]
Sent: Monday, June 07, 2010 1:37 PM
To: Majett, Nicholas (DCRA)
Cc: Argo, Linda (DCRA); LeGrant, Matt (DCRA); Byrd, Jill (DCRA); Bolling, Melinda (DCRA); Dickey, LaShawn (DCRA)
Subject: RE: Stadium Group Certificate of Occupancy

Nick:

Please handle response.

Thanks.

Jill Byrd
Staff Assistant
Office of the Director
Department of Consumer and Regulatory Affairs
Dept. of Consumer and Regulatory Affairs
1100 4th Street, SW
5th Floor
Washington, DC 20024
Office: (202) 442-7898
jill.byrd@dc.gov
www.dcrd.dc.gov

Have you heard the knock at your door?

U.S. Census workers are here to assist you with filling out the **2010 Census Form**.
www.census.dc.gov

From: Don Padou [mailto:don.padou@yahoo.com]
Sent: Monday, June 07, 2010 9:19 AM
To: Argo, Linda (DCRA)
Cc: Majett, Nicholas (DCRA)
Subject: Stadium Group Certificate of Occupancy

Dear Ms. Argo,

I am writing to follow up on a complaint I filed a couple of weeks ago regarding the Stadium Club located at 2127 Queens Chapel Rd NE.

The club is currently operating under a temporary Certificate of Occupancy that expires on June 21, 2010. The Certificate is for a "restaurant, non-sexually oriented business."

As I explained in my complaint, the Stadium Club offers nude dancing and is, therefore, a sexually oriented business.

Can you tell me the status of DCRA's investigation?

10/4/2010

