

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

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

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**APPELLANT'S OPPOSITION TO INTERVENER'S MOTION TO DISMISS
AND MOTION TO AMEND APPEAL**

Appellant, the Ward Five Improvement Association, respectfully asks the Board of Zoning Adjustment ("BZA" or "Board") to deny Intervener's motion to dismiss this appeal for mootness. The DC Court of Appeals has consistently recognized that a case is not moot if the issue is "capable of repetition, yet evading review." This case falls squarely within that exception. Additionally, Appellant respectfully asks the Board to amend Appellant's appeal to include newly issued Certificate of Occupancy No. 1101152 because both the old and new Certificates of Occupancy are the same in all essentials relevant to this appeal and the issuance of the new Certificate of Occupancy in no way disposes of the grounds for appeal.

I. BACKGROUND

Before this Board is an appeal of the grant of non-sexually oriented business establishment ("SOBE") Certificates of Occupancy to Intervener, Stadium Group LLC ("Stadium"), to operate a strip club at 2127 Queens Chapel Road NE. *Intervener's Motion to Dismiss Appeal ("Mot. to Dismiss") at 1.* The Certificates that are the subject of this appeal are for occupancies of 396, with 349 interior seats. *BZA Exhibit 22: District of Columbia's Pre-Hearing Statement, Exhibits A and B.*

On June 24, 2011, a couple of weeks before the BZA was scheduled to rule on this matter, Stadium obtained a new non-SOBE Certificate of Occupancy. *Mot. to Dismiss at 1.* The new Certificate permits occupancy of 396, with 349 interior seats and a summer garden with 15 seats. *Mot. to Dismiss, Attachment: CO No. 1101152.*

Stadium, in its motion, provided no explanation for why it obtained a new Certificate of Occupancy aside from the slight change in occupancy. *Mot. to Dismiss.*

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Board of Zoning Adjustment
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II. ARGUMENT

A. Appellant's case is not moot because the issuance of a non-SOBE Certificate of Occupancy falls squarely within the "capable of repetition, yet evading review" exception to the mootness doctrine.

"A case is moot when the legal issues presented are no longer 'live' or when the parties lack a legally cognizable interest in the outcome." *Cropp v. Williams*, 841 A.2d 328, 330 (D.C. 2004).

The mootness doctrine "ensures that the requisite personal stake necessary at the outset of litigation continues through its course." *Mallof v. District of Columbia Bd. of Elections and Ethics*, 1 A.3d 383, 395 n.54 (D.C. 2010) (quoting *Natural Law Party v. Fed. Election Comm'n*, 111 F.Supp.2d 33, 40 (D.D.C. 2000)). However, there are exceptions: "the doctrine of mootness is subject to recognized exceptions that allow a court to proceed to judgment." *Id.*

The DC Court of Appeals has consistently recognized an exception to the mootness doctrine when an issue is "capable of repetition, yet evading review." That is, the DC Court of Appeals recognizes an exception to mootness when an action is likely to be brought again and again without ever having the opportunity to be adjudicated. See, e.g. *Smith v. U.S.*, 984 A.2d 196, 201 n.6 (D.C. 2009) (Declining government's mootness argument because sentencing error could reoccur and yet evade review); *Robinson v. Robinson*, 886 A.2d 78 (D.C. 2005) (Holding that the expiration of a Civil Protection Order (CPO) did not moot an appeal of the CPO because the short duration of CPOs meant that they were capable of repetition, yet evading review); *U.S. v. Edwards*, 430 A.2d 1321, 1324 n.2 (D.C. 1981) (Holding that challenge of pre-trial detention was not made moot by release of challenger because pre-trial detention was likely to occur again and be unreviewable because of the short period of detention).

In the context of administrative law, American Jurisprudence defines "capable of repetition, yet evading review" as:

The 'capable of repetition, yet evading review' doctrine is limited to the situation where two elements combine: (1) the challenged action is in duration too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. In determining whether to rely on this mitigating principle the court should consider a number of relevant factors including:

- (1) the public importance of the question presented;
- (2) the potential effect of the ruling on an ongoing program of the state's penal or civil system; and
- (3) the possibility of a similar effect on the plaintiff in the future. 2 *Am. Jur. 2d Administrative Law* § 487.

Here, this case falls squarely within the “capable of repetition, yet evading review” exception to mootness because this case meets the two elements above. First, Stadium, through its own actions, shortened the duration of its Certificate of Occupancy, thereby attempting to prevent review of the grant of that Certificate of Occupancy.¹

Second, there is a reasonable probability that Appellant will be subjected to the same action again because the Zoning Administrator will continue to grant non-SOBE Certificates of Occupancy to strip clubs. The Zoning Administrator, for example, testified before the Board that he intended to grant a non-SOBE Certificate of Occupancy to Club AKA 555, located at 2046 West Virginia Ave NE, a few blocks from Stadium.² *Transcript of October 26, 2010 hearing (hereinafter “Tr.”) 308:9-16.*

Appellant will appeal the grant of non-SOBE Certificates of Occupancy to these strip clubs, but the strip clubs, like Stadium, will evade review by making small changes to their Certificates of Occupancy every time the Board gets close to a decision.³

The three *factors* described by American Jurisprudence also tip in favor of Appellant:

Public Importance: This case is of great public importance because it will impact where strip clubs can locate in the District. For example, if Appellant’s interpretation of 11 DCMR § 199.1 (definition of sexually oriented business establishment) is correct, then the number of properties at which strip clubs can locate is limited because SOBEs are not allowed to locate in properties zoned CM. *11 DCMR § 801.2.* If, on the other hand, the Zoning Administrator is correct, then the number of properties at which strip clubs can locate is quite large because strip clubs will be allowed to locate *as a matter of right* at CM-zoned properties.

¹ Stadium changed its Certificate of Occupancy to add 15 outdoor seats. The BZA should view with skepticism Stadium’s interest in having a summer garden. The Board can take judicial notice of the fact that Stadium is located across the street from a trash transfer station. The odor from the trash makes sitting outdoors in the summer virtually impossible. Further, the point of a strip club is to watch strippers, so the Board should view with skepticism Stadium’s desire to have outdoor seating.

² There is also a third strip club, Club Rendezvous, located on West Virginia Ave NE, that has not yet filed for a building permit or Certificate of Occupancy.

³ Appellant is not surprised that Intervener is trying this transparent ploy to evade review by the BZA. Appellant, however, is surprised that the Zoning Administrator, a government employee with a duty to the public, would lend his office to such shenanigans. The Zoning Administrator’s grant of this most recent non-SOBE Certificate of Occupancy amounts to collusion with Intervener to prevent the BZA from reviewing the Zoning Administrator’s action. The Zoning Administrator’s collusion also makes a mockery of his argument before the BZA that he was unaware of credible allegations of lap dances at Stadium and, therefore, should not have been required to take those allegations into account when issuing the Certificate of Occupancy. *Tr. 246:15-247:4.* The Zoning Administrator certainly knew of the credible allegations when he issued this most recent Certificate of Occupancy, yet he issued the Certificate anyway.

Effect on the District's Civil System: The District has a system in place to limit where strip clubs can locate. *See, e.g. DC Code § 25-374; 10 DCMR § A312 Policy LU-2.4.9.* The District's system is built on the fact that strip clubs are sexually oriented businesses. The Council explicitly relied on the fact that strip clubs are sexually oriented businesses when it amended D.C. Code § 25-374. *D.C. Council Committee on Public Works and the Environment, Committee Report, May 8, 2007, Subject: Bill 17-109, the "The One-Time Relocation of Licensees Displaced by the Ballpark and Skyland Development Project Amendment Act of 2007" at page 3.*

For example, the Council explicitly stated that nude dancing establishments cannot relocate to CR zones because "sexually oriented businesses are prohibited in CR zones." *Id.* The Council relied on the fact that strip clubs are sexually oriented businesses when it made the following statement about "licensees...that permit nude dancing" when it amended D.C. Code § 25-374:

It is important to note that this legislation ONLY changes ABC law, not zoning law. Under zoning law, sexually oriented businesses are only allowed as a "special exception" in a CM zone or an M zone, and are therefore subject to approval by the Board of Zoning Adjustment.... (Italics and other emphasis in original). Id.

The Council unequivocally treats strip clubs as falling within the definition of SOBE and has acted on that belief. The Zoning Administrator has unilaterally changed the interpretation of 11 DCMR § 199.1 to exclude strip clubs from the sexually oriented business definition. If the BZA fails to rule on the Zoning Administrator's actions then the entire system in place to limit strip clubs is imperiled. For this reason alone, the BZA should reach the merits of this case.

Possibility of Similar Effect on Appellant: The possibility that Appellant will suffer similar effects is very high. If the Board grants Stadium's motion then Appellant will be forced to seek review of the new Certificate of Occupancy. The Board will have to hold another hearing on the same issue – the application of the definition of SOBE – and, after much delay, we will all be exactly where we are today. Intervener will, of course, obtain yet another new Certificate of Occupancy by slightly changing occupancy loading and the whole process will begin again. By obtaining new, slightly different Certificates, Stadium will be able to evade review.

This case falls squarely within an exception to the mootness doctrine and, therefore, the BZA should reach the merits of this case. That is, the BZA should rule on both grounds for appeal raised by Appellant:

1. Whether or not the Zoning Administrator used the proper procedures when he granted a non-sexually oriented business establishment Certificate of Occupancy to Intervener; *and*

2. Regardless of the procedures used by the Zoning Administrator, whether he erred in granting a non-sexually oriented business establishment Certificate of Occupancy to Stadium because Stadium is a SOBE.

B. Even if the Board does not agree that this case falls within an exception to the mootness doctrine, the BZA should, nonetheless, hear this case on its merits because the BZA should amend Appellant's appeal to include newly issued Certificate of Occupancy No. 1101152.

Stadium cites BZA *Appeal No. 17980 of William T. Reaves* (April 13, 2010) in support of its motion. That case is inapposite because it involved the suppression of a building permit by a new building permit that completely removed the grounds for appeal.

In that case, the appellee originally wanted to build a detached single-family house right on the lot line. *Id. at 2*. The next-door neighbor filed an appeal based solely on the building being on the lot line. *Id.* Subsequently, the appellee filed for a new building permit in which the proposed house would not be built on the lot line. *Id.* The new building permit was granted, superseding the original building permit. *Id.*

The issue in that case was whether there should be a side yard or not. The issue disappeared with the granting of the new permit. Not so here, where the issues are whether or not a strip club is a SOBE and whether or not the Zoning Administrator followed the proper procedures in granting a non-SOBE Certificate of Occupancy to a strip club. Neither of these issues has changed in the slightest because a new Certificate was issued that slightly changed the occupancy of the strip club.

Appellant initially appealed the issuance of temporary Certificate of Occupancy No. 1001838, issued April 21, 2010. The Zoning Administrator issued permanent Certificate of Occupancy No. 1002471 on June 22, 2010. There were no differences relevant to the issues on appeal between the temporary and permanent Certificates of Occupancy. The Board allowed Appellant to amend its appeal to include the permanent Certificate of Occupancy. The Board should do the same here. The old and new Certificates are the same in all essentials relevant to this appeal.

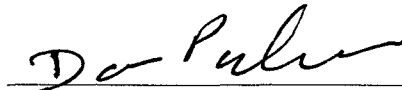
Allowing parties to moot long and expensive appeals simply by making slight and irrelevant changes sets a bad precedent. Such practices will lead to the waste of Board resources as parties game the system to delay decisions.

The Board should amend Appellant's appeal to include Certificate of Occupancy No. 1101152.

III. CONCLUSION

For the foregoing reasons, Appellant respectfully asks the Board to deny Intervener's motion to dismiss and to rule on both grounds for appeal raised by Appellant.

Respectfully submitted on behalf of the Ward Five Improvement Association,



Don Padou, President

7/1/11

Date

CERTIFICATE OF SERVICE

I caused a copy of this response to be emailed and mailed via first class mail, postage pre-paid, to Stephen O'Brien, counsel for Intervener, and to Jay Surabian, counsel for the Zoning Administrator at the following addresses.

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