

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT 2011 JUL 11 PM 2:05

APPEAL OF WARD 5 : No. 18114
IMPROVEMENT ASSOCIATION :

INTERVENOR'S REPLY TO APPELLANT'S
OPPOSITION TO MOTION TO DISMISS

Only a few of the arguments made by appellant in its Opposition to our Motion to Dismiss necessitate rejoinder:

1. Appellant contends that intervenor's procurement of the superseding Certificate of Occupancy was a mere device to deprive the Board of an opportunity to decide this case. But the purpose of intervenor's summer garden is to provide an outdoor area in which intervenor's patrons may smoke. Provision of such area is intended to avoid congregation on the public sidewalk in front of the subject premises. Thus, there was a legitimate business purpose served by acquisition of the new Certificate of Occupancy.

2. Appellant continues to misunderstand the issue before the Board. The question is not whether the Stadium Club presently is operating as a sexually oriented business establishment. The Board previously acknowledged that such is an enforcement issue and is not before the Board for adjudication. Rather the sole issue on appeal is:

...whether or not the ZA erred in issuing the [June, 2010] C of O...
whether or not the ZA erred in reviewing or not reviewing
the operation of the facility [prior to issuance of the previous Certificate].

Tr. October 26, 2010 at 161-162. Such was the only "live" controversy in this case, and that controversy is "dead" due to issuance of the superseding Certificate of Occupancy.

The District's response to the instant Motion makes clear that the Zoning Administrator issued the new, superseding Certificate of Occupancy "only after a new investigation of the Stadium Club's operations." Such new investigation included undercover inspection. How could the Board rule on a 2010 hearing record that such 2011 investigation was inadequate as a matter of law? Obviously, the Board cannot.

3. The only relief the Board could grant appellant in this case would be an order revoking the June 2010 Certificate of Occupancy. But that 2010 Certificate is not longer in use, so such revocation would be meaningless. The Stadium Club would continue to operate under its 2011 Certificate of Occupancy.

The inability of the Board to grant appellant any meaningful relief is why the appeal at bar is moot.

4. What appellant really is complaining about here is operation of a nude dancing club.¹ But that is not the issue before the Board, as mere nude dancing is permissible. Appellant's speculative and paranoiac visions of a proliferation of such businesses and issuance of more Certificates of Occupancy for the Stadium Club do not give rise to a "live" controversy sufficient to avoid dismissal of this particular case on mootness grounds.²

¹ Appellant prefers the pejorative "strip club" characterization.

² Hand in hand with such wild speculation is the reckless accusation of "collusion" on the part of the Zoning Administrator. The Zoning Administrator could not have refused to consider Stadium Club's application for a new Certificate of Occupancy. Rather, he could only review that application so as to satisfy himself that Stadium Club's operation did not constitute a sexually oriented use. The District's response to this Motion establishes he indeed did so.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition to Motion to Dismiss have been served electronically and by first class mail, postage prepaid, upon:

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Jay A. Surabian
Assistant Attorney General
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this 11th day of July, 2011.



Stephen J. O'Brien