GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF JMM CORP.
J.M.M. CORPORATION

Appellant

BZA Appeal No. 17504
(Hearing: 7/25/06)

SUPPLEMENTAL ARGUMENTS OF APPELLANT JMM CORP.

A. NATURE OF THE CASE

Appellant JMM Corporation's two consolidated appeals challenge enforcement actions against Appellant JMM Corporation that arose in the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), pursuant to the DCRA's efforts to enforce its regulations governing sexually oriented business establishments (SOBE's) and its efforts to revoke Appellant's certificate of occupancy and mechanical amusement license.

Appellant operates a retail store in zone C-2-C., at 919 5th St., NW, Washington, DC 20001, which is the subject of this appeal.

B. COURSE OF THE PROCEEDINGS

On July 2, 2002, as a result of a contested hearing at which undersigned counsel defended Appellant, DCRA Administrative Law Judge Lennox J. Simon ruled as follows below in Appel. No. 04-AA-000104: (1) ruled that Appellant was in violation of two notices of infraction alleging that Appellant was operating a SOBE without having a SOBE certificate of occupancy, and (2) ruled that the Office of Enforcement issue a cease and desist order for Appellant to cease all business at its location until obtaining "the required Certificate of Occupancy for his business." App. 44-50.

Appellant filed a timely notice of appeal therefrom with the District of Columbia Board of Appeals and Review; the Board of Appeals then assigned BAR Docket No. CI5875-02.

On December 6, 2002, DCRA Administrative Law Judge Henry McCoy ruled as follows below in Appel. No. 04-AA-000149: (1) revoke Appellant's certificate of occupancy issued in 1996, and (2) revoke Appellant's mechanical booth license renewed on June 1, 2001.

Appellant filed a timely notice of appeal therefrom with the District of Columbia Board of Appeals and Review, the Board of Appeals assigned BAR Docket No. CI5958-03.

After directing Appellant to provide lengthy (and expensive) transcripts from the DCRA Office of Administrative Hearings[1], and after Appellant submitted an in-depth, formal brief to the Board of Appeals and Review, pursuant to the Board of Appeals' imposed deadline (filed on November 20, 2003), by certificate of service dated January 30, 2004, the Board of Appeals *sua sponte* dismissed both appeals below -- which had been consolidated by the Board of Appeals -- for alleged want of jurisdiction, without reaching any merits of either appeal.

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[1] While Appellant was able to provide the Board of Appeals a complete transcript of the two-day March 2002 hearing before ALJ Lennox Simon, the DCRA provided Appellant with an entirely inaudible set of audiocasettes from the July 29-30, 2002, hearing before ALJ Henry McCoy. App. 53-59.purportedly of

STATEMENT OF MATERIAL FACTS

Except where otherwise noted in this brief, Appellant relies on the following material facts.

The case before DCRA ALJ Lennox Simon

Since 1996, Respondent J.M.M. Corporation (Respondent), trading as Fun Fair Video, has been operating at 919 5th Street, NW, except for being closed part of 2000-2001, and reopening in 2001. J.M.M.'s Certificate of Occupancy ("COO") includes the phrase "not sexually oriented." No businesses in the District of Columbia have a COO for a SOBE. Testimony of then-Acting Zoning Administrator Toye Bello (March 8, 2002) (T2-70).[1] Unless a business has a SOBE COO, the COO automatically says not sexually oriented. 11 DCMR §§ 744 and 754.

Respondent is located in zoning district C-2-C. T1-338. The District of Columbia's (the District's) Municipal Regulations only speak of permitting SOBE's in zoning districts C-3-C and C-4, 11 DCMR §§ 744 and 754, but only if permitted by the Board of Zoning Adjustment after a finding the that the business meets the stringent requirements set forth in said regulatory provisions. Consequently, numerous retail businesses in the District sell sexually explicit material without having SOBE COO's. T2-69.

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the July 29-30, 2002, hearing before ALJ McCoy -- that was subsequently provided to undersigned counsel by the DCRA's Office of Adjudication had no sound whatsoever, when carefully checked by undersigned counsel and the owner of Bradford & Associates court reporters in Arlington, Va. Undersigned counsel plans to see right away if even the master recording was audible.

The NOI's against Appellant were issued September 10 and 13, 2001. However, no evidence was presented at the hearing of anything but a cursory inspection in 2001 of Appellant's premises taking place before September 21, 2001.

Appellant's store includes two sections that only adults over twenty-one years old may enter, those sections being the adult video and DVD section (Adult Video Section), and the other being the section for video viewing booths (Booth Section). T1-260-61.

Appellee presented sketchy and incomplete testimony about the floor space taken up by each part of the store. Although Appellee presented testimony about the size of the Booth Section, T1-145-48, Appellee did not provide testimony about the amount of floor space taken by each booth, nor the amount of floor space taken by the Adult Video Section. Although Appellee presented testimony with a count of some merchandise, T1-94, Appellee's witnesses never made clear the extent to which a full count -- if any -- was made, nor the basis on which the count was made (e.g., whether the witnesses counted all videos and DVD's that were only on the retail floor area, and/or the merchandise not on the retail floor); whether videos and DVD's were classified as X-rated depending on whether they were located in the Adult Video Section, or whether the witness made a subjective conclusion about whether the item was X-rated (not a term of legal art, nor a rating governed by the Motion Picture Association of America), and how Appellee's witnesses ever thought that the non-precise term "X-rated" could establish that an item was "sexually oriented" as governed by the SOBE regulations.

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[2] The trial transcript before ALJ Simon is designated as T1 for March 5, 2002, and T2 for March 8, 2002).

Appellant presented the testimony of private detective and former District Metropolitan Police Officer William Vain, T.1-246, who visited the Appellant's premises unannounced on two occasions, once in February 2002, and again in early March 2002. T1-248-52. Mr. Vain produced a fully detailed and fully measured map of the premises (the map is part of the record in this instant appeal, and was admitted into evidence as JMM Corp's Exhibit 1 (T1-267-69)), whose layout has not changed between the time the NOI's were issued and the time that private detective Vain visited. T1-253-54. Mr. Vain's testimony showed that he spent meticulous time, effort and ability to produce an accurate diagram of the premises. *Id.*

Mr. Vain's diagram and testimony show that Appellant's floorspace is 1522 square feet (see bottom right hand corner of diagram), and that the Adult Video Section comprises about 100 square feet (or less than 7% of the store's total floor space).

Each of the video booths measures 5 feet by 3 feet, Vain Diagram, which amounts to 15 square feet per booth multiplied by eight booths currently in operation, which amounts to 120 square feet taken by the eight video booths (or 7.9% of floorspace) that currently function.

Mr. Vain took a meticulous count of Petitioner's merchandise, and the listing of his results was admitted into evidence (T1-280-81). Of the merchandise on the retail sales floor, the items in the Adult Video Section (553 videos and DVD's) comprised less than 12% of all video's and DVD's in the non-adult and adult retail sections (4766 total videos and DVD's were in both sections).

Appellee provided no evidence about the amount of income or revenue that Appellant derives from the store. Appellee's proposed findings of fact to ALJ Simon presented an unsupported claim that 75% of Appellant's "stock and trade" is sexually oriented. At best for Appellee, the evidence reveals a store that devotes the vast majority of its floor space and merchandise units to items that are not sexually explicit. The store's inventory includes action, Spanish, adventure, martial arts, suspense, horror, thriller, and children's DVD's. *See* Bill Vain list (Appellant's Ex. 3 before DCRA ALJ Simon, below). The Adult Video Section and Booth Section are kept in the back of the store, only people over 21 years old are allowed in that section, and an employee is kept in the Booth Section to monitor and clean the area. T1-259-65.

The case before DCRA ALJ Henry McCoy

Appellant's evidence before ALJ Henry McCoy was similar to the evidence that was presented before DCRA ALJ Lennox Simon. Unfortunately, the Office of Administrative Hearing's final denial of reconsideration relief prevented Appellant from determining whether the master recording of the ALJ McCoy hearing was defective, as described in Appellant's Motion to reschedule the July 25, 2006, hearing and because an accurate transcript or tape recording helps assure the accuracy of the Spanish-language testimony that took place when Appellant's owner Jose Montiel took the witness stand.

ARGUMENT

1. Appellant incorporates by reference its attached Prehearing statements before the DCRA's Office of Adjudication.

Incorporated herein by reference are the contents of Appellant's attached Appellant's Correction to Pre-Hearing Statement filed July 23, 2002, and his Hearing Memorandum for the March 5, 2002, hearing before ALJ Simon, before the DCRA Office of Administrative Hearings.

2. The District's SOBE regulations are unconstitutional, and the DCRA's Office of Adjudication erred by refusing to consider any Constitutional issues raised below by Appellant.

a. **Appellant is not a SOBE AND DOES NOT REQUIRE A SOBE COO.**

Appellee, at all stages, has the burden to prove the alleged violation by a preponderance of the evidence. D.C. Code § 2-1802.03. As explained herein, Appellee did not meet this burden.

The DCMR (at 11 DCMR § 199.1) does not provide sufficient guidance for a retail business to know whether it will qualify as a SOBE, nor precisely which merchandise qualifies towards the SOBE definition. Neither the District's City Council nor the District's agencies have set forth a more detailed formal explanation of what qualifies as a SOBE. The closest we have is the 1998 informal and non-binding (*i.e.*, not binding on Appellant) opinion of then-Acting Zoning Administrator Gladys Hicks (the Hicks Opinion, at App. 78). However, the Hicks Opinion did not go through the formal rulemaking process that is necessary to give it the force of law. App. 78.

An unbroken chain of District zoning administrators and acting zoning administrators have agreed not to enforce against businesses that follow the Hicks Opinion and existed when the Hicks Opinion was issued. T2-71-73. The problem with the

Hicks Opinion is that it creates almost as many questions as it answers, by going on for several pages talking about a 15% standard on the one hand, but then not sufficiently defining the basis of the 15% (e.g., whether the 15% is based on floor space, unit-per-unit inventory, or any other standard). Particularly under such circumstances, businesses must be given the benefit of the doubt as to whether they qualify as SOBE's. Moreover, the SOBE definition and the Hicks Opinion are so vague and overbroad as to render the District's SOBE regulatory scheme unconstitutional under the First Amendment and under the due process guarantees provided under the Fifth and Fourteenth Amendments to the United States Constitution. *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002) (confirming that the First Amendment is violated by overly vague and overbroad regulations of expression).

Even assuming, *arguendo*, no constitutional infirmity in the District's SOBE regulatory scheme, the District cannot prevail here. *First*, concerning the Hicks memorandum, App. 78, there is nothing in the SOBE definition to show that 15% somehow distinguishes a SOBE from a non-SOBE; it is the job of the District's legislators and/or administrative rulemakers to make such distinctions by the formal lawmaking process. Because such a lawmaking process has not yet taken place, this Court will not define a SOBE under such a narrow definition.

Second, Appellee certainly is not entitled to ask for a more stringent SOBE definition than the one set forth in the Hicks Opinion. To do otherwise would be for the government to tell businesses that they have a certain safe harbor, but then to trample on that safe harbor the next day. Gladys Hicks drafted and adopted the Hicks Opinion. Her successor, acting zoning administrator Michael Johnson applied the Hicks Opinion to businesses like Appellant and others that already existed when the Hicks Opinion was issued. Johnson hearing transcript at p.21 (May 23, 2000, testimony excerpt, admitted into evidence on March 8, 2002). Mr. Johnson's successor, then-Acting Zoning Administrator Toye Bello, testified on March 8, 2002, that he fully adheres to the Hicks Opinion, and that Appellant will be permitted to operate within the provisions of the Hicks Opinion. T2-71-73.

After Appellant's prior NOI hearing of May 23, 2000, Appellant's predecessor counsel, Mr. Adgie O'Bryant, retained Ms. Hicks on Appellant's behalf -- when Ms. Hicks was back in the private sector -- to advise Respondent how to comply with the Hicks Opinion. T2-125. As confirmed by the testimony of Mr. O'Bryant and Appellant's owner Jose Montiel, Ms. Hicks advised that up to ten video viewing booths were permissible at Appellant's store, and Ms. Hicks also showed the floor area that would be permissible for a section selling sexually explicit merchandise. Mr. Montiel testified that he fully adhered to the advice of Ms. Hicks.

Appellant cannot be seen as culpable, seeing that Appellant, in good faith, was following the advice of Gladys Hicks, who was the very same person who issued the Hicks Opinion that all her successors have adhered to as to businesses that existed at the time her opinion was issued. To be liable, one must have the necessary liable intent; Respondent had no such intent.

b. The District of Columbia's SOBE regulations are unconstitutional for being enacted by agency regulation rather than by an act of the District of Columbia City Council. The District's SOBE regulations are unconstitutional by being a creature of agency enactment and not by being created and passed by the City Council. The proper purpose of administrative agencies is to administer regulations of First Amendment-protected activity, including sexually-related entertainment, and not -- as here -- to be using its unbridled discretion in both enacting, enforcing and ruling (in the case of ALJ Simon) on such restrictions. *FW/PBS, Inc., v. Dallas*, 493 U.S. 215, 225-26 (1990) (confirming that placing "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.")

In other words, not only are the District's SOBE regulations unconstitutional, but ALJ Simon -- who is an employee of the same agency he was ruling over in this case (the DCRA) -- lacks sufficient indicia of independence to have made a just, fair and constitutional decision in the first place. In fact, Judge Simon utterly refused to rule on any Constitutional issues in this case that cannot be fairly ruled upon without deciding the underlying First Amendment issues. *FW/PBS*, 493 U.S. 215 and T1-54 (where Judge Simon utterly refuses to address any of the many First Amendment issues raised by Appellant). Judge McCoy committed the same blunder. App. 29-30.

c. The District's SOBE regulations are unconstitutional for being vague, overbroad, and in violation of the First Amendment's protections of free speech and free expression, where, *inter alia*, the SOBE regulations were enacted without the use of reasonably reliable studies showing negative secondary effects of such businesses as Appellants, and where the regulations place unconstitutionally

unbridled discretion in the Board of Zoning Appeals in issuing and revoking SOBE certificates of occupancy ("COO's").

i. **The SOBE regulations failed to properly use any sufficient negative secondary effects studies.** The District's SOBE regulations are unconstitutional, because before governments can impose requirements for adult businesses to obtain permission to operate as an adult business, rather than as a garden variety business, governments first must show: (1) proof that the government has reasonably relied on sufficient studies showing negative secondary effects of adult entertainment; and (2) proof that a sufficient number of alternate available sites exist to accommodate a municipality's adult entertainment businesses. *Los Angeles v. Alameda Books,* 122 S. Ct. 1728 (2002).

The record fails to establish that Plaintiff has met either of these hurdles. Moreover, because ALJ Simon and ALJ McCoy refused to entertain any First Amendment or other Constitutional arguments, T1-54 and App. 29-30, this made Appellant unable to develop the trial record below to confirm this. Moreover, the District of Columbia's filing of the administrative record for passage of the SOBE regulations -- in Appellant's United States District Court litigation against the District (*JMM v. DC, et al., Civ. Act. No. 1:02CV40)* (dismissed to permit state-level proceedings first to be completed) -- also shows an absence of even one page of documentation addressing studies showing negative secondary effects of businesses providing adult entertainment.

Before Plaintiff can be permitted to enforce its SOBE regulations, Plaintiff has the burden of proof on the foregoing issues. P*hiladelphia Newspapers, Inc., et al. v. Hepps et al.,* 475 U.S. 767, 777 (1986). Specifically:

> In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified. *See Consolidated Edison Co. v. Public Service Comm'n of N.Y.,* 447 U.S. 530, 540 (1980) (content-based restriction); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978) (speaker-based restriction); *Renton v. Playtime Theatres, Inc.,* [475 U.S. 41, 51-53 (1986)] (secondary-effects restriction). *See also Speiser v. Randall,* 357 U.S. 513 (1958) (striking down the precondition that a taxpayer sign a loyalty oath before receiving certain tax benefits).

Id.

Although *Alameda* did not get five justices signing onto the same opinion, we see from reading Justice Kennedy's concurrence together with the four dissenters' opinion (which creates a majority of justices), that the distinction between content-based and content-neutral regulations in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), is "something of a fiction." Alameda, 122 S. Ct. at 1741 (Kennedy, J., concurring). *Renton,* therefore, is now less reliable in conducting secondary effects analysis, and Alameda places a stiffer burden no municipalities in proving reasonable reliance on sufficient secondary effects studies.

Justice Kennedy's concurrence in *Alameda Books* goes as far as to call for a trial to allow a challenge to the assumptions found in the secondary effects studies allegedly relied upon by the government in enacting the SOBE regulations. *Alameda Books,* 122 S. Ct. at

1733-34. Therefore, based on the foregoing discussion, *Alameda Books* establishes that ALJ Simon's July 2000 Order should not be enforced without at least holding a trial.

Moreover, it is outdated and unconstitutional to automatically assume negative secondary effects from sexually explicit businesses. For instance, in Fulton County, Georgia, a government-commissioned study determined that there was no statistical correlation showing an increase in crime at adult entertainment establishments that served alcoholic beverages. *Flanagan Enterprises, Inc., of Georgia v. Fulton County, Georgia*, 242 F.3d 976 (11th Cir. 2001). "Rather, the statistics indicated greater instances of calls for service and reported crime at non-adult entertainment establishments that served alcoholic beverages." *Id.* at 979. Moreover, in mid-1997, Fulton County's six adult entertainment establishments commissioned "a study of the clubs' economic impact on their surrounding environs." *Id.*

In Fulton County, Georgia, "[t]he study revealed high occupancies and rental rates in existing buildings, expensive improvements, business expansions, turn-away business volume and proposed development in the Clubs' vicinities." *Id.* at 979.

Here, the Appellee has failed to show reasonable reliance on sufficient secondary effects studies.

ii. **The SOBE regulations place unconstitutionally unbridled discretion in the hands of the government.** Moreover, the District's mechanism for providing SOBE COO's is so onerous and provides so much unbridled discretion in the hands of the administering agency, as to render the SOBE regulatory scheme unconstitutional. *See*

FW/PBS, Inc. v. City of Dallas, 493 U.S. 214, 225 (1990), and 11 DCMR 744, 754, 801, 602.1, and 11-902.1 (the main SOBE provisions).

It is not likely that Appellant will soon, if ever, be able to obtain a sexually oriented business establishment operating certificate in zones C-3-C and C-4, to which SOBE certificates are limited. *See* 11 DCMR § 744, *et seq.* and 11 DCMR § 754, *et seq.* Specifically, following are the provisions giving unbridled discretion in the District to decide who if any, and under what restrictions, may obtain a SOBE certificate:

> 11 DCMR § 744.1 & 754.1. A sexually-oriented business establishment shall be permitted in C-3-C [/C-4] districts only, if approved by the Board of Zoning Adjustment in accordance with the conditions specified in § 3108 of chapter 31 of this title, subject to the requirements of this section.
>
> 744.2 and 754.2. No portion of the establishment shall be located within six hundred feet (600 ft.) of a Residential or Special Purpose district.
>
> 744.3 and 754.3. No portion of the establishment shall be located within six hundred feet (600 ft.) of a church, school, library, or playground, or the area that is under the jurisdiction of the Commission of Fine Arts pursuant to the Shipstead-Luce Act, 46 Stat. 366, as amended.
>
> 744.4 and 754.4. No portion of the establishment shall be located within three hundred feet (300 ft.) of any other sexually-oriented business establishment.
>
> 744.5 and 754.5. There shall be no display of goods or services visible from the exterior of the premises.
>
> 744.6 and 754.6. The establishment shall be compatible with other uses in the area.
>
> 744.7 and 754.7. The use shall not become objectionable because of its effect on the character of the neighborhood or because of noise, traffic, or other conditions.

> 744.8 and 744.8. The establishment shall not have an adverse impact on religious, educational, and governmental facilities located in the area.

Additionally, the Board of Zoning Adjustment ("BZA") is the sole body that issues SOBE certificates. 11 DCMR §§ 744, *et seq.*, 754, *et. seq.*, and 3108. Not only do 11 DCMR 744 and 754 set forth overly restrictive requirements for qualifying for a SOBE certificate, but 11 DCMR 744 and 754 provide for the BZA to follow 11 DCMR § 3108, as quoted below, in issuing any such certificates:

> [T]he Board is authorized to grant special exceptions, as provided in this title where, in the judgment of the Board, those special *exceptions will be in harmony with the general purpose and intent of the zoning Regulations and Maps*, and will not tend to affect adversely the use of neighboring properly in accordance with the Zoning Regulations and Zoning Maps, subject in each case to the special condition specified in this title..."

11 DCMR 3108.1 (emphasis added).

d. ALJ Simon was without authority to issue any sanction other than a fine.

A money penalty is the only sanction available against Appellant in this proceeding. D.C. Code § 2-1802.03 (h). Consequently, this Court was without authority on June 20, 2000, to direct that Appellant be directed to cease business activity until obtaining a "required" COO (ALJ Simon does not describe the type of COO). Even if the Court had such authority, Appellee did not request any remedy other than a fine.

Judge McCoy's ruling displayed the unconstitutional unbridled discretion that is prohibited by *FW/PBS, supra.*

e. ALJ McCoy was without authority to revoke Appellant's COO and Mechanical Amusement License for reasons including those listed above. ALJ McCoy's ruling relies on insufficient evidence for the government to meet its burden of proof. Moreover, ALJ McCoy's ruling is primarily based on the government's above-listed previous efforts – against the First Amendment – to penalize Appellant. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 214, 225 (1990) (circumscribing the government's unbridled discretion in limiting First Amendment rights to free expression).

CONCLUSION

For the foregoing reasons, ALJ Simon's and ALJ McCoy's orders should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Supplemental Arguments was served by hand delivery and first-class mail on July 11, 2006, to:

Jill Stern, Esq.
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____

Jonathan L. Katz

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF ADJUDICATION

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OFFICE OF ADJUDICATION

MATTER OF J.M.M. CORPORATION	*	
	*	CASE NUMBERS
	*	2002-OAD-003/004
Respondent.	*	

<u>RESPONDENT'S CORRECTION TO PREHEARING STATEMENT, AND MOTION TO DISMISS THIS PROCEEDING</u>

Respondent, by undersigned counsel, hereby substitutes the attached corrected Hearing Memorandum for the one that was originally attached to Respondent's Prehearing Statement.

The attached corrected Memorandum corrects typographical errors that were inadvertently left in the version that was originally submitted with the Prehearing Statement, and updates the Supreme Court's Treatment of *Los Angeles v. Alameda Books, Inc.*, 222 F.3d 719, (9th Cir. 2000), *rev'd. on other gds.*, ____ U.S. ____, 122 S. Ct. 1728 (2002).

Moreover, similar to the arguments in Respondent's attached Hearing Memorandum, Respondent moves to dismiss this current cause of action, as the government is estopped from now relitigating the same issues that it litigated in the March 2002 hearing of *DCRA v. JMM Corporation*, DCRA Office of Adjudication Case Numbers 01-OAD-2626E and 01-OAD-2541G. The government had the choice to move to consolidate both actions, but did not do so.

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Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Correction to Pretrial Statement was served by telecopier on July 22, 2002, to:

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Jonathan L. Katz

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF ADJUDICATION

DCRA	*
v.	* CASE NUMBERS 01-0AD-2626E
J.M.M. CORPORATION	* 01-OAD-2541G
Respondent	* INFRACTION NUMBERS 028120 AND 035446
	*
	HEARING: 3/5/02

RESPONDENT J.M.M. CORPORATION'S HEARING MEMORANDUM

I. INTRODUCTION

Respondent J.M.M. Corporation ("JMM") hereby respectfully presents this hearing memorandum on some key issues to be presented at Respondent's above-listed hearing.

II. ARGUMENT

A. Respondent Moves to Dismiss This Action or, in the Alternative, to Postpone the Hearing To Avoid Duplicative Proceedings, Unfair Surprise, and Witness Unavailability to Respondent

A new development took place on March 1, 2002, in this administrative action that supports dismissing the above-captioned action. Specifically, without the government's notification of undersigned counsel, the government served Respondent with the following two documents ("Government Notices") on March 1, 2002: (1) Government's Notice of Intent to Revoke Certificate of Occupancy Number B82013; and (2) Government's Notice of Intent to Revoke Mechanical Amusement License Number 31005263.

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Both of the above-mentioned notices include allegations of fact that substantially overlap with the time frames and factual allegations involved in the above-captioned action. For instance, both notices, which mainly duplicate each other, address visits to Respondents' premises that were allegedly made on dates including September 1 and 21, 2001, which is from the same month that Respondent's NOI's were dated for the instant action. Undersigned counsel expects that many of the same factual and legal issues will be covered both on the current NOI hearing, and at the new hearing to be scheduled on the Government Notices.

It is neither fair nor proper for the government to force Respondent into two hearings that will address such similar issues, facts and law. Therefore, because the current NOI's fully overlap with the allegations in the Government notices, the current NOI's should be dismissed. Alternatively, the hearing on the current NOI's should be consolidated with the hearing to be held on the Government Notices. To do otherwise will cause an undue strain on Respondent's resources (Respondent, e.g., is paying an hourly rate to his investigator witness, who is to testify at all hearings, and an hourly rate for a Spanish interpreter); and will not serve judicial economy.

B. Respondent Has Three Good Faith Grounds For Postponing the March 5 Hearing

Respondent requests a hearing postponement for the following grounds. *First*, Respondent filed a formal discovery motion with this Court on February 13, 2002, but has still received no ruling. This Motion became necessary when opposing counsel made

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no reply to Respondent's requests as far back as October 2001 for discovery; on March 4, 2002, opposing counsel confirmed his refusal to provide discovery. To force Respondent to go to the hearing without obtaining advance discovery will amount to an unfair trial by fire, with the government having full knowledge of the information it plans to provide at trial, but with the government's refusal to share that information.

Second, unless Respondent's above-listed request to dismiss this action is granted, it is important that this instant action be consolidated with the hearing on the above-described Government Notices.

Third, Respondent requests a postponement in order to obtain better results in delivering witness subpoenas and in getting witnesses to appear at trial. For instance, undersigned counsel had a process server deliver witness subpoenas to Respondent's predecessor counsel Adgie O'Bryant and James Wright, for purposes of proving that the NOI's are premature and should be dismissed, in that they were issued when Respondent was following the Gentlemen's agreement reached between Respondent's predecessor counsel and with the Zoning Administration for continuing to operate Respondent's business.

C. <u>The District of Columbia Has an Unconstitutional SOBE Regulation Scheme. The Proper Analytical Approach to this Case is to Not Even Reach A Decision on the Facts Without First Determining these Constitutional Issues.</u>

The District of Columbia's regulation scheme for sexually oriented business flies in the face of well settled Supreme Court

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and federal appellate principals for safeguarding the First Amendment in the face of municipalities' efforts to regulate adult entertainment businesses.

Current District of Columbia law -- exclusively set forth in municipal regulations and not by statue -- only permits sexually oriented businesses ("SOBE's") to be located in outside zone districts C-3-C and C-4. 24 DCR 5144 (Dec. 8, 1977); 11 DCMR 744, 754, 801, 602.1, and 11-902.1. Respondent is not located in either of these zones. Instead, JMM is located in zone C-2-C, which means JMM would have to move if it were required to operate with a SOBE certificate. As will be briefly discussed here, the DCMR's definition of a SOBE is unconstitutionally vague and overbroad, and the current system for approving SOPE certficates constitutes a system of unconstituional unbridled discretion by zoning deciisonmakers, and constitues an unconstituonal system of prior restraint.

This hearing does not properly turn on whether Respondent has a non-sexually oriented certificate, and whether Respondent was opeating as a SOBE, because the District has an unconstiutional SOBE regulation scheme, and becaus it is unfair and improper to ask Resopndent or any other layperson to state whehter therir business is a SOBE when rthe DCMR's defnintiOon of a SOBE is vague and overbroad.

1. The District's Failure to Reasonably Rely on Studies of Negative Secondary Effects Is Fatal to the District's SOBE Regulation Scheme

The Supreme Court has established that a municipality cannot regulate sexually oriented businesses without first reasonably relying on studies demonstrating negative secondary effects from adult entertainment. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). Here, the history of the District's SOBE regulation scheme shows no reasonable reliance whatsoever on negative secondary effects studies. One needs only to go to 24 DCR 5144 (Dec. 8, 1977) to see the absence of any reasonable reliance on secondary effects studies. 24 DCR 5144 contains the original final rulemaking that makes up the bulik of the District's current SOBE agency regulations. Although the preamble to thsi rulemaknig states a Zoning Commission "finding" of negative impact from SOBE's, nowhere does the preamble show that any independent studies were conducted and reasonably relied upon, as required by Renton, 475 U.S. at 51-52.

2. **<u>The District's SOBE Regulation Scheme Amounts to Unconstituional Prior Restraint</u>**

Unlike the usual presumption of validity afforded most legislative enactments, "'any system of prior restraint ... comes to this Court bearing a heavy presumption against its validity.'" See *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 214, 225 (1990) (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975)). The Supreme Court's cases addressing prior restraints "have identified two evils that will not be tolerated in such schemes. First, a scheme that places 'unbridled discretion in the hands of a government official or agency

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constitutes a prior restraint and may result in censorship.'" *See FW/PBS*, 493 U.S. at 226 (quoting *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). "Second, a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *FW/PBS*, 493 U.S. at 226.

Here, the District has a vague and overbroad definition of a SOBE, ane the DCRA has in the past resorted to relying on each Zoning Administrator's interpretation of the SOBE definition. Such a pracitice is not constitutional. *See FW/PBS*, 493 U.S. at 226.

Moreover, the District's system for providing SOBE certificates constitutes a prior restraint. *First*, undersigned counsel understands that such certificates are not even issued, and that no retailer who sells sexually explicite products in the District has a SOBE certificate. Instead, it appears that retailers with high sales of sexually explicit products survive by the grace of avoiding enforcement action, possibly by keeping a low profile in exchange. It further appears that the current enforcement actions against Respondent arise from unconstituionally selective enforcement, apparently driven prmiarily by a very vocal neighborhood association many of whose members do not want an adult bookstore in their backyard. However, in a democracy, the cries of "not in my backyard" must not silence the necessity to enforce laws fairly and evenly.

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3. <u>**The Disrtrict's SOBE Regulation Scheme Provides Insufficient Assurances That A SOBE Certificate Will Be Issued and Will Not be Revoked**</u>

The two regulatory provisions for issuing SOBE certificates (11 DCMR 744 and 754) read the same:

> 744.1 A sexually-oriented business establishment shall be permitted in C-3-C districts only, if approved by the Board of Zoning Adjustment in accordance with the conditions specified in § 3108 of chapter 31 of this title, subject to the requirements of this section.
>
> 744.2 No portion of the establishment shall be located within six hundred feet (600 ft.) of a Residential or Special Purpose district.
>
> 744.3 No portion of the establishment shall be located within six hundred feet (600 ft.) of a church, school, library, or playground, or the area that is under the jurisdiction of the Commission of Fine Arts pursuant to the Shipstead-Luce Act, 46 Stat. 366, as amended.
>
> 744.4 No portion of the establishment shall be located within three hundred feet (300 ft.) of any other sexually-oriented business establishment.
>
> 744.5 There shall be no display of goods or services visible from the exterior of the premises.
>
> 744.6 The establishment shall be compatible with other uses in the area.
>
> 744.7 The use shall not become objectionable because of its effect on the character of the neighborhood or because of noise, traffic, or other conditions.
>
> 744.8 The establishment shall not have an adverse impact on religious, educational, and governmental facilities located in the area.

Additionally, the Board of Zoning Adjustment ("BZA") is the sole body that issues SOBE certificates. 11 DCMR 744, 754, and 3108. Not only do 11 DCMR 744 and 754 set forth overly restrictive requirements for qualifying for a SOBE certificate, but 11 DCMR 744 and 754 provide for the BZA to follow 11 DCMR § 3108 in issuing any such certificates:

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> [T]he Board is authorized to grant special exceptions, as provided in this tittle where, in teh judgment of the Board, those special *exceptions will be in harmony with the general purpose and intent of the zoning Regulations and Maps*, and will not tend to affect adversely the use of neighboring properly in accordance with the Zoning Regulations and Zoning Maps, subject in each case to the special condition specified in this title..."

11 DCMR 3108.1 (emphasis added).

The most constitutionally troubling of the foregoing provisions are the last two provisios:

> 744.7 The use shall not become objectionable because of its effect on the character of **the neighborhood** or **because of noise**, traffic, or other conditions.
>
> 744.8 The establishment shall not have an adverse impact on religious, educational, and governmental facilities located in the area.

In other words, teh District's SOBE regulation provisions place too much unbridled discrtion in the hands of decisionmakers both in issuing SOBE certificates, but also in revoking them.

It is also constitutionally troubling that not one SOBE provision ever went through the Disrict's elected legislator, but instead was written by unelected agency employees, from the same agency that today is interpreting these regulatory provisions.

Also troubling are the display provisions of the SOBE regulations: "744.5 There shall be no display of goods or services visible from the exterior of the premises." This prohibition flies in the face of the Supreme Court's holding in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975). The Court in *Erznoznik* held that "the limited privacy interest of persons on the public streets cannot justify [the] censorship of otherwise protected speech on the basis of its content." *Erznoznik*, 422 U.S. at 212. DCMR 11-744.5 most egregiously runs afoul of Erznoznik for even banning the outside visibility of material that does not show nudity or sexual conduct. Section 128.H.4 DCMR 11-744.5 is so vastly overbroad as to give the Board of Zoning Adjustment authority to refuse a license to a business that has an outside sign promoting a performance of *Hair* or the recent acquisition of *Debbie Does Dallas* on DVD, or even the Playboy bunny logo. Consequently, DCMR 11-744.5 is substantially overbroad and violates the Supreme Court's ruling in *Erznoznik*.

The District's SOBE regulations contain the following two twin evils that make the regulations unconstitutional: Many

> licensing schemes commonly contain two defects: discretion and the opportunity for delay. An ordinance that gives public officials the power to decide whether to permit expressive activity must contain precise and objective criteria on which they must make their decisions; an ordinance that gives too much discretion to public officials is invalid... Licensing ordinances must also require prompt decisions. An ordinance that permits public officialsto effectively deny an application by sitting on it indefinitely is also invalid.

Lady J . Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358, 1361 (11th Cir. 1999) (citations omitted).

Additionally, the District's SOBE regulation scheme lacks adequate procedural safeguards by failing to ensure prompt resolution of applications for SOBE certificates. Clearly, "without procedural safeguards to ensure a prompt resolution, an applicant [for an adult entertainment permit] may conclude that

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seeking a determination is too burdensome a task to pursue, impermissibly chilling the exercise of protected speech." *See 11126 Baltimore Boulevard, Inc., v. Prince George's County*, 58 F.3d 988, 94 (4th Cir. 1995) (citations omitted).

4. **<u>Viewing Booths Do Not Make a Business Any More Sexually Oriented Than Do Explicit Magazines</u>**

The 1998 Gladys Hicks (former Zoning Administrator) memo automatically equates video viewing booths with a SOBE. However, the Ninth Circuit has recognized that there is nothing unique about booths that should make them be treated any more harshly than the sale of magazines or videos. *City of Los Angeles v. Alameda Books, Inc.*, 222 F.3d 719, (9th Cir. 2000), *rev'd. on other gds.*, _____ U.S. _____, 122 S. Ct. 1728 (2002).

Additionally, more and more studies are revealing that there is no automatic correllation between adult entertainment businesses and negative secondary effects.
it is outdated and unconstitutional to automatically assume negative secondary effects from sexually explicit products. Fulton County, Georgia's experience is a case in point. *See Flanagan Enterprises, Inc., of Georgia v. Fulton County, Georgia*, 242 F.3d 976 (11th Cir. 2001). In Fulton County, a government-commissioned study determined that there was no statistical correlation showing an increase in crime at adult entertainment establishments that served alcoholic beverages. "Rather, the statistics indicated greater instances of calls for service and reported crime at non-adult entertainment establishments that

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served alcoholic beverages." *Id.* at 979. Moreover, in mid-1997, Fulton County's six adult entertainment establishments commissioned "a study of the clubs' economic impact on their surrounding environs." *Id.*

In Fulton County, Georgia, "[t]he study revealed high occupancies and rental rates in existing buildings, expensive improvements, business expansions, turn-away business volume and proposed development in the Clubs' vicinities." *Id.* at 979.

It appears that some or most municipalities commission secondary effects studies with the intention of getting study results that justify the intended legislation; that is disingenuous, and does not foster accurate secondary effects studies. In the Fulton County example, as well, it seems that the County hoped that its subsequent study would detract from the privately commissioned study; however, the results of the county-commissioned study similarly revealed no negative secondary effects from adult entertainment. Consequently, the Eleventh Circuit refused to allow Fulton County to use other jurisdictions' secondary effects studies to try to justify Fulton County's adult entertainment zoning regulations. *Flanagan,* 242 F.3d 976

III. CONCLUSION

Consequently, the District has an outdated and unconstutional SOBE regulation scheme. This and other unconstutional laws cannot be enforced.

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If it is important to the District to continue to regulate SOBE's, then the City Council must introduce and pass constitutional legislation to achieve that goal. For the meantime, there are no constitutional regulations or statutes that permit the enforcement action that is today taking place against Respondent.

Therefore, Respondent moves for the dismissal of all charges against Respondent.

Respectfully submitted

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