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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF *
J.M.M. CORPORATION

Appellant * **BZA Appeal No. 17504**

* **(Hearing: December 5, 2006)**

INITIAL BRIEF AND ARGUMENTS OF APPELLANT JMM CORP.

As directed by the Board at the last proceedings in July 2006, Appellant JMM Corp. files this hearing brief, which replaces all previously-filed briefs.

The Appendix to this Brief are duplicated from the Appendix used by Appellant in the District of Columbia Court of Appeals case (Court of Appeals Nos. 04-AA-000104 and 04-AA-000149) that resulted in a Court of Appeals decision granting leave to Appellant to file this present appeal before the BZA and to have it considered timely-filed, even though Appellant originally filed its appeal to the District of Columbia Board of Appeals. .

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A. NATURE OF THE CASE

JMM's appeal challenges 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., called Fun Fair Video, at 919 5th St., NW, Washington, DC 20001, which is the subject of this appeal.

B. COURSE OF THE PROCEEDINGS

This appeal challenges orders issued, respectively, on July 2, 2002, and December 6, 2002, against Petitioner by DCRA Administrative Law Judge Lennox J. Simon (App. 44-52) and DCRA Administrative Law Judge Henry McCoy (App. 39-43).

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 (App. 44-52): (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. 44-52.

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. The District of Columbia Court of Appeals subsequently issued an opinion permitting Appellant to re-file said appeal to the Board of Zoning Administration, which was timely accomplished. Court of Appeals Nos. 04-AA-000104 and 04-AA-000149.

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. App. 39-43.

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. The District of Columbia Court of Appeals subsequently issued an opinion permitting Appellant to re-file said appeal to the Board of Zoning Administration, which was timely accomplished. Court of Appeals Nos. 04-AA-000104 and 04-AA-000149.

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. The District of Columbia Court of Appeals subsequently issued an opinion permitting Appellant to re-file said appeal to the Board of Zoning Administration, which was timely accomplished. Court of Appeals Nos. 04-AA-000104 and 04-AA-000149.

[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 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.

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.

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.

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.

[2] The trial transcript before ALJ Simon is designated as T1 for March 5, 2002, and T2 for March 8, 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. A. 64-77.

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, the Hicks Memorandum's attempts to define SOBE's is not binding law.

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 notice of infraction (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 was 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 Simon committed the same error. 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 (D.D.C.) (*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. <u>The SOBE regulations place unconstitutionally unbridled discretion in the hands of the government.</u> 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).

<u>d. ALJ Simon was without authority to issue any sanction other than a fine.</u> don't have to read

A money penalty is the only sanction available against Appellant in this proceeding. D.C. Code § 2-1802.03 (h). Consequently, this ALJ Simon was without authority 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 ALJ Simon had such authority – which he did not -- 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.*

<u>e. ALJ McCoy was without authority to revoke Appellant's COO and Mechanical Amusement License, and erred in doing so</u> for reasons including those listed above and for the following reasons. 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).

The government has the burden to prove the alleged violations and to prove its eligibility to the relief sought, by a preponderance of the evidence. D.C. Code §§ D.C.

Code 2-509 and 2-1802.03; see *also Philadelphia Newspapers, Inc., et al. v. Hepps et al.*, 475 U.S. 767, 777 (1986) (placing burden of proof on the government when it limits First-Amendment protected speech).

The regulations governing the Notice of Intent to Revoke JMM's COO is governed in pertinent part by DCMR § 12A-118.4. However, a careful reading of DCMR § 12A-118.4 reveals a focus on problems involving physically safe structures. No allegation has been made that the building or other structural aspects of Respondent's store is physically unsafe. Moreover, this regulatory scheme is discretionary as to revocation of COO's, but ALJ McCoy erroneously seemed to have treated this regulatory scheme as mandating revocation of JMM's COO.

The statute governing the Notice of Intent to Revoke Mechanical Amusement License is governed in pertinent part by D.C. Code §47-2844(a). This code section D.C. Code §47-2844(a) provides for discretion as to revocation of licenses, and the discretion listed therein is placed solely in the hands of the mayor. D.C. Code as § 2-502(1)(A) defines Mayor as the "Mayor of the District of Columbia, or his or her designated agent." This Notice of Intent to Revoke was not brought before the Mayor, as defined in the foregoing definition. Therefore, ALJ Simon had no authority to revoke Respondent's mechanical amusement license. *Id.*

Assuming, *arguendo*, that ALJ Simon had authority to decide whether to revoke Respondent's mechanical amusement license, the revocation authority provided to the mayor under D.C. Code §47-2844(a) is unconstitutionally vague and overbroad. This code provision purports to give the mayor –improperly -- unbridled discretion to revoke any license, without sufficient limiting guidelines for doing so. See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990) (prohibiting unbridled government discretion to limit First-Amendment protected activity).

Moreover, the revocation of Respondent's COO and Mechanical Amusement License only applies to Respondent's current location at 919 Fifth Street, NW, Washington, DC. It is noteworthy that the government reissued Respondent's Mechanical Amusement License on June 21, 2001, which falls after the date of Administrative Law Judge Simon's year 2000 notice of infraction decision concerning Respondent. Therefore, the Petitioner cannot now be heard to claim that Respondent somehow committed an error in seeking its current license.

f. The government is estopped from benefiting from Judge McCoy's order.

As shown by ALJ Simon's and ALJ McCoy's opinions, App. 29-52, the hearings before ALJ Simon and ALJ McCoy address essentially the same operative facts. Consequently, having chosen to proceed against Respondent on said factual allegations at the NOI hearing, despite Appellant's objection to having an NOI hearing as well as a separate hearing for revoking the COO and the mechanical amusement license, the government should be found under the legal rules of estoppel to be prohibited from benefiting from any provisions of ALJ McCoy's order. The government should not be permitted to have it both ways, and should have chosen – but did not -- to proceed *either* with the March 5 NOI hearing before ALJ Simon (which it did) or choose to proceed in the matter before ALJ McCoy. Respondent made this timely objection -- whether it is characterized as an estoppel objection or *res judicata* objection-- in Judge Simon's forementioned NOI proceeding before the first witness was ever sworn. March 5, 2002, transcript at pp. 46-49.

Furthermore, Judge McCoy's order, if enforced, would effectively result in the closure of Petitioner's business. Such relief should not be permitted here, particularly where the government presented only brief testimony from only two witnesses, both being from the Metropolitan Police.

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 Brief was served by first-class mail on November 3, 2006, to:

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Jonathan L. Katz

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Appel. Nos. 04-AA-000104
& 04-AA-000149

JMM CORPORATION,

Appellant

v.

DISTRICT OF COLUMBIA DEPARTMENT
OF CONSUMER & REGULATORY AFFAIRS,

Appellees.

PETITION FOR REVIEW FROM DISTRICT OF COLUMBIA BOARD OF APPEALS AND REVIEW (PREDECESSOR TO OFFICE OF ADMINISTRATIVE HEARINGS), BAR Docket Nos. CI5875-02 & CI5958-03

APPENDIX

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13. Former Acting Zoning Administrator's opinion on the DCRA's definition of sexually oriented business establishment (78-87).

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
441 4TH Street, N.W., Suite 540S
Washington, DC 20001-2714

DISTRICT OF COLUMBIA OFFICE OF ADMINISTRATIVE HEARINGS
2004 APR 26 A 11: 33

JMM CORPORATION, Appellant, v. DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS Appellee	Case No.: BA-04-10001 (Former BAR Case Nos. 02-5875-CI and 03-5958-CI)

ORDER DENYING MOTION FOR RECONSIDERATION

On January 22, 2004, the Board of Appeals and Review (the "Board") issued an order dismissing these appeals for lack of jurisdiction. On February 9, 2004, Appellant JMM Corporation filed a motion for reconsideration, which was denied by the Board on February 12, 2004. On February 17, 2004, Appellant filed a motion to amend the order denying reconsideration and to supplement its motion for reconsideration.

As of March 22, 2004, the Office of Administrative Hearings has jurisdiction of all adjudicated cases formerly within the jurisdiction of the Board of Appeals and Review. D.C. Official Code §§ 2-1831.02(a), 2-1831.03(a)(3). Accordingly, the Office of Administrative Hearings now must decide appellant's pending motion.

The motion will be denied. In substance, appellant's motion seeks reconsideration of the Board's order denying its motion for reconsideration. Neither the rules of the Board nor the rules of the Office of Administrative Hearings authorize the filing of a second motion for

(1)

reconsideration.[1] *See* 1 DCMR 513 (permitting the filing of one petition for reconsideration of the Board's decision on an appeal, not for reconsideration of its decision on a motion for reconsideration); D.C. Official Code § 2-1831.16(a) and 1 DCMR 2909 (both authorizing the filing of a petition for reconsideration of a final order, not an order on a petition for reconsideration).

Litigation must end at some point, and the Board's denial of appellant's motion for reconsideration marked the end of this administrative appeal. Appellant's motion, therefore, must be denied.

Accordingly, it is, this 26th day of April, 2004:

ORDERED, that Appellant's Motion to Amend Order denying Reconsideration of Order Dismissing Appeal, filed with the Board on February 17, 2004, is **DENIED.**

John P. Dean
Administrative Law Judge

[1] For that reason, I need not decide which rules govern the disposition of a motion such as this one, which was filed when the Board had jurisdiction of the case, but is being decided when the Office of Administrative Hearings has jurisdiction.

2

Certificate of Service:

By First Class Mail (Postage Paid):

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I hereby certify that on April 26, 2004 this document was served upon the above-named parties at the address(es) and by the means stated, and upon representatives of the Government indicated on the right by first class mail

Paula Petero
Clerk / Deputy Clerk

By First Class Mail (Postage Paid)

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

JMM Corporation Appellant v. Department of Consumer and Regulatory Affairs Appellee	)	BAR Docket No. 02-5875-CI 03-5958-CI

ORDER

Upon consideration of Appellant's Motion for Leave to Supplement Motion to Reconsider Dismissal Order & Supplemental Motion to Reconsider, filed on February 17, 2004, it is

ORDERED this 9th day of March 2004 that the Appellee is to file a reply within fourteen days' time to Appellant's reconsideration motions.

Fritz R. Kahn
Fritz R. Kahn, Presiding Legal Member

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

JMM CORPORATION	*	
Appellant	*	BAR Docket Nos 03-5958-CI
v.	*	
DCRA	*	
Appellee	*	

RECEIVED
FEB 17 2004
BOARD OF APPEALS AND REVIEW

APPELLANT'S MOTION FOR LEAVE TO SUPPLEMENT MOTION TO RECONSIDER DISMISSAL ORDER, AND SUPPLEMENTAL MOTION TO RECONSIDER

Appellant JMM Corporation respectfully moves for leave to supplement its Motion to Reconsider Dismissal Order, and hereby supplements its Motion to Reconsider Dismissal Order. Appellant states the following grounds in support of this Motion:

THIS MOTION IS BEING TIMELY FILED

1. This Motion is being filed within the required fifteen days after the Board's Dismissal Order was served by mail (either mailed on January 30, 2004 or February 2, 2004). The governing regulations provide for a reconsideration motion to be filed within ten days after an order is issued, 1 DCMR § 513.1, which brings us to February 9, 2004, at the earliest.

The governing regulations provide an additional five days to file the reconsideration motion where, as here, the order is mailed to the parties, 1 DCMR § 501.5, which brings us to February 14, 2004, at the earliest. Because February 14, 2004, was a Saturday, Appellant has until the next business day that is not a legal holiday (*i.e.*, February 17, 2004) to file this Motion.

Fax service is not provided for by the Board of Appeals' rules, so Appellant was not under proper legal notice that fax service would suffice for triggering the deadline for filing this Motion.

THE DISMISSAL ORDER SHOULD BE REVERSED

2. Appellant was not under reasonable notice to file its appeal with the Board of Zoning Adjustment. For one thing, the signature page of the final order of ALJ McCoy below includes a direction for appeals to be filed with the Board of Appeals: "AN APPEAL, IF TAKEN, MUST BE FILED WITH THE BOARD OF APPEALS AND REVIEW WITHIN FIFTEEN (15) DAYS FROM THE RECEIPT OF THIS DECISION, ACCORDING TO THE RULES OF THRE [sic] BOARD OF APPEALS AND REVIEW."

Appellant also was not under reasonable notice to file its appeal with the Board of Zoning Adjustment due to the nature of the allegations below against Appellant. This appeal is from an ALJ order addressing two DCRA notices of intent. The first notice of intent is a Notice of Intent to Revoke Mechanical Amusement License Number 31005263. The claimed legal basis for said notice of intent is D.C. Code § 47-2844, which is not a

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zoning code, and which, therefore, is properly before the Board of Appeals.

The second notice of intent claims to be issued concerning Appellant's Certificate of Occupancy. However, Appellant has consistently maintained that this case is about the Appellee's effort to unconstitutionally censor Appellant's First Amendment rights, rather than being the type of zoning matter that would properly be appealed to the Board of Zoning Adjustment. *See,* Appellant's Prehearing Statement and Corrected Prehearing Statement below (which attaches Appellant's Constitutional arguments from the ALJ proceeding that is now on appeal as **BAR Docket No 02-5875-CI)** (which cites *Flanagan Enterprises, Inc., of Georgia v. Fulton County, Georgia,* 242 F.3d 976 (11th Cir. 2001), *cert. denied,* 536 U.S. 904 (2002) (invalidating restrictions on adult businesses in absence of reasonable reliance of sufficient studies supporting negative secondary effects of adult entertainment businesses in Fulton County, Georgia)).

3. The Board's Order of Dismissal cites a case that did not exist at the time that Appellant filed its notice of appeal. The case referred to by the Board is *Walsh v. D.C. Board of Appeals and Review,* 826 A.2d 375 (D.C. Cir. 2003). Furthermore, because this appeal involves much more than zoning regulations, the Board of Appeals clearly has jurisdiction. To rule otherwise

7

will be to risk that the Board of Zoning Adjustment will reject jurisdiction on a claim that the appeal includes issues that are not within the Board of Zoning Adjustment's appellate authority.

4. At worst for Appellant, this appeal should be remanded to the Board of Zoning Adjustment without prejudice, seeing that the ALJ order below directed Appellant to file its appeal with the Board of Appeals. *Felicity's, Inc., v. DCRA,* 817 A.2d 825, 829 (D.C. Cir. 2003). Specifically, "'[w]here an agency fails to provide statutorily required notice to an [aggrieved party] of the body which an administrative appeal should be taken, "the proper course is to remand [the case to that body] without prejudice for the earlier failure to appeal to [that body]."'" *Id.* at 829 (citations omitted) (emphasis added).

5. Seeing that Appellant vigorously asserts that this case involves unconstitutional censorship of Appellant's First Amendment rights, it is particularly onerous on Appellant's Constitutional rights to require Appellant to proceed to the Board of Zoning Adjustment where the cost of the appeal is so expensive compared to the cost of appealing to the Board of Appeals. 11 DCMR § 3180(e) (setting an $800.00 appeal fee).

WHEREFORE, for the foregoing reasons, Appellant respectfully moves for the Board of Appeals to reverse its order of dismissal.

Respectfully submitted

MARKS & KATZ, LLC

Jonathan L. Katz
D.C. Bar No. 425-615
1400 Spring Street, Suite 410
Silver Spring, MD 20910
(301) 495-4300
Fax: (301) 495-8815

Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Motion For Leave To Supplement Motion To Reconsider Dismissal Order, And Supplemental Motion To Reconsider was served by hand delivery this 17th day of February, 2004, to:

William Bennett, Esq.
Corporation Counsel's Office
441 4th St., NW, NO. 450N
Washington, D.C. 20001

Jonathan L. Katz

(9

Government of the District of Columbia
Board of Appeals and Review
441 4th Street, N.W.
5th Floor South, Suite 5[illegible]
Washington, D.C. 20001

JMM Corporation
c/o Jonathan Katz, Esq.
Marks & Katz, LLC
1400 Spring Street, Suite 410
Silver Spring, MD 20910

(2)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

JMM CORPORATION	*	
Appellant	*	**BAR Docket Nos 03-5958-CI**
v.	*	
DCRA	*	

ORDER

UPON CONSIDERATION OF Appellant's Motion For Reconsideration of Dismissal, it is this ______________________ day of February, 2004, hereby

ORDERED that Appellant's Motion is GRANTED; and it is further

ORDERED that this appeal is not dismissed; and it is further

ORDERED that Appellant's reply brief be filed within sixty days from the date of this Order, unless Appellant notifies the Board of ongoing problems obtaining an audible recording of the trial below.

____
Member
Board of Appeals

SEND COPIES TO:

Jonathan L. Katz, Esquire
Marks & Katz, LLC
1400 Spring Street, Suite 410
Silver Spring, MD 20910

William Bennett, Esquire
Corporation Counsel's Office
441 4th St., NW, NO. 450N
Washington, D.C. 20001

11

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

JMM CORPORATION	*	
Appellant	*	BAR Docket No 02-5875-CI
v.	*	
DCRA	*	
Appellee	*	

RECEIVED
FEB 17 2004
BOARD OF APPEALS AND REVIEW

APPELLANT'S MOTION TO AMEND ORDER DENYING RECONSIDERATION OF ORDER DISMISSING APPEAL

Appellant JMM Corporation respectfully moves to favorably amend the Board's Order denying reconsideration of its Order dismissing this appeal. Appellant further moves for leave to supplement its Motion to Reconsider Dismissal Order, and hereby supplements its Motion to Reconsider Dismissal Order. Appellant states the following grounds in support of this Motion:

1. This Motion is being filed within the required fifteen days after the Board's Dismissal Order was served by mail (either mailed on January 30, 2004 or February 2, 2004). The governing regulations provide for a reconsideration motion to be filed within ten days after an order is issued, 1 DCMR § 513.1, which brings us to February 9, 2004, at the earliest.

The governing regulations provide an additional five days to file the reconsideration motion where, as here, the order is mailed to the parties, 1 DCMR § 501.5, which brings us to

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February 14, 2004, at the earliest. Because February 14, 2004, was a Saturday, Appellant has until the next business day that is not a legal holiday (*i.e.*, February 17, 2004) to file this Motion. *Id.*

Fax service is not provided for by the Board of Appeals' rules, so Appellant was not under proper legal notice that fax service would suffice for triggering the deadline for filing this Motion.

THE DISMISSAL ORDER SHOULD BE REVERSED

2. This appeal involves an ALJ's ruling on two notices of infraction from two separate dates, alleging a violation of 11 DCMR § 3205.4 (providing for compliance "with any condition to the issuance of the certificate of occupancy.") However, Appellant has consistently maintained that this case is about the Appellee's effort to unconstitutionally censor Appellant's First Amendment rights, rather than being the type of zoning matter that would properly be appealed to the Board of Zoning Adjustment. *See* Appellant's Hearing Memorandum below (which cites *Flanagan Enterprises, Inc., of Georgia v. Fulton County, Georgia,* 242 F.3d 976 (11th Cir. 2001), *cert. denied,* 536 U.S. 904 (2002) (invalidating restrictions on adult businesses in absence of reasonable reliance of sufficient studies supporting negative secondary effects of adult entertainment businesses in

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Fulton County, Georgia)); *see also* Appellant's appeal and reply briefs herein.

3. The Board's Order of Dismissal cites a case that did not exist at the time that Appellant filed its notice of appeal. The case referred to by the Board is *Walsh v. D.C. Board of Appeals and Review*, 826 A.2d 375 (D.C. Cir. 2003). Furthermore, because this appeal involves much more than zoning regulations, and involves critical First Amendment censorship issues, the Board of Appeals clearly has jurisdiction. *See* Appellant's brief and reply brief herein. To rule otherwise will be to risk that the Board of Zoning Adjustment will reject jurisdiction on a claim that the appeal includes issues that are not within the Board of Zoning Adjustment's appellate authority.

4. At worst for Appellant, this appeal should be remanded to the Board of Zoning Adjustment without prejudice, seeing that the ALJ order below did not properly advise Appellant on the right place to appeal (*e.g.,* the ALJ's Order includes a notice that: "In general all civil infraction orders are appealable to the BOARD OF APPEALS AND REVIEW. There are a few exceptions." The appeal notice might make mention of the Board of Zoning Adjustment, but it also proceeds to advise people to appeal to the Board of Appeals if the applicants not licensed in a health occupation (Appellant is not licensed in a health occupation). .

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Consequently, at worst here, "'[w]here an agency fails to provide statutorily required notice to an [aggrieved party] of the body which an administrative appeal should be taken, "the proper course is to remand [the case to that body] <u>without prejudice</u> for the earlier failure to appeal to [that body]."'" *Felicity's, Inc. v. DCRA,* 817 A.2d 825, 829 (D.C. Cir. 2003) (citations omitted) (emphasis added).

5. Seeing that Appellant vigorously asserts that this case involves unconstitutional censorship of Appellant's First Amendment rights, it is particularly onerous on Appellant's Constitutional rights (including First Amendment rights and due process rights) to require Appellant to proceed to the Board of Zoning Adjustment where the cost of the appeal is so expensive compared to the cost of appealing to the Board of Appeals and to the District of Columbia Circuit Court. 11 DCMR § 3180(e) (setting an $800.00 appeal fee to the Board of Zoning Adjustment). The $800.00 appeal fee is also disproportionate to the $2080 in fines and costs that were ordered below, particularly where a fine is the only sanction that the ALJ was empowered to impose in this notice of infraction matter. *See* Appellant's brief and reply brief herein.

WHEREFORE, for the foregoing reasons, Appellant respectfully moves for the Board of Appeals to reverse its order of dismissal.

13

Respectfully submitted

MARKS & KATZ, LLC

Jonathan L. Katz
D.C. Bar No. 425-615
1400 Spring Street, Suite 410
Silver Spring, MD 20910
(301) 495-4300
Fax: (301) 495-8815

Attorneys for Appellant

C16

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Motion To Amend Order Denying Reconsideration Of Order Dismissing Appeal was served by hand delivery this 17th day of February, 2004, to:

William Bennett, Esq.
Corporation Counsel's Office
441 4th St., NW, NO. 450N
Washington, D.C. 20001

Jonathan L. Katz

(17

Government of the District of Columbia
Board of Appeals and Review
441 4th Street, NW
5th Floor South, Suite [illegible]
Washington, DC 20001

$0.60

JMM Corporation
c/o Jonathan Katz, Esq.
Marks & Katz, LLC
1400 Spring Street, Suite 410
Silver Spring, MD 20910

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

JMM CORPORATION	*	
Appellant	*	**BAR Docket No 02-5875-CI**
v.	*	
DCRA	*	
Appellee	*	

ORDER

UPON CONSIDERATION OF Appellant's Motion For Reconsideration of Dismissal, it is this ____________ day of February, 2004, hereby

ORDERED that Appellant's Motion is GRANTED; and it is further

ORDERED that this appeal is not dismissed, and will be resolved by the Board of Appeals.

____
Member
Board of Appeals

SEND COPIES TO:

Jonathan L. Katz, Esquire
Marks & Katz, LLC
1400 Spring Street, Suite 410
Silver Spring, MD 20910

William Bennett, Esquire
Corporation Counsel's Office
441 4th St., NW, NO. 450N
Washington, D.C. 20001

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

JMM Corporation Appellant	)	
v.	)	BAR Docket No.02-5875-CI
Department of Consumer and Regulatory Affairs Appellee	)	

ORDER

Upon consideration of the Motion to Reconsider Dismissal Order, filed by Appellant's counsel, Jonathan Katz, Esq., on February 9, 2004, the Board finds that the motion failed to specify the matters of record or points of law alleged to have been erroneously decided or overlooked, as required by 1 DCMR §513.3, and it is

ORDERED this 12th day of February 2004 that the Motion for Reconsideration is DENIED.

Fritz R. Kahn

Fritz R. Kahn, Presiding Legal Member

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW
441 4th Street, Suite 540-South
Washington, D.C. 20001
(202)727-8280 – phone
(202)737-3497 – fax

JMM Corporation
c/o Jonathan Katz, Esq.
Marks & Katz, LLC
1400 Spring Street, Suite 410
Silver Spring, MD 20910

BAR Docket No: 02-5875-CI
03-5958-CI

CERTIFICATE OF SERVICE

I hereby certify that the attached Order rendered on March 9th, 2004 for the above referenced case was mailed, postage pre-paid, on March 9, 2004 to the Appellant, at the address listed above.

J. Levin
for the Board of Appeals and Review

cc: William Bennett, Assistant Corporation Counsel
441 4th Street, NW #450N
Washington, DC 20001

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

RECEIVED
FEB - 9 2004
BOARD OF APPEALS AND REVIEW

JMM CORPORATION	*	
Appellant	*	BAR Docket Nos 03-5958-CI
v.	*	
DCRA	*	
Appellee	*	

APPELLANT'S MOTION TO RECONSIDER DISMISSAL ORDER

Appellant JMM Corporation respectfully moves to reconsider the dismissal of this appeal, which dismissal was based on a determination of lack of jurisdiction. Appellant states the following grounds for this reconsideration motion:

1. Whether or not Appellant's appeal included a violation of the District of Columbia's Zoning Regulations -- which Appellant contends was not involved -- a part of this appeal involves the revocation of Appellant's license to operate video viewing booths, and that part of the appeal does not remotely involve any zoning regulations, either in terms of the law involved in issuing the license nor in the law invoked in revoking the license.

2. Consequently, because this appeal includes critical issues that do not involve zoning regulations, then the Board of Appeals properly has jurisdiction.

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

JMM CORPORATION		*
	Appellant	* **BAR Docket No 02-5875-CI**
v.		*
DCRA		*
	Appellee	*

APPELLANT'S MOTION TO RECONSIDER DISMISSAL ORDER

Appellant JMM Corporation respectfully moves to reconsider the dismissal of this appeal, which dismissal was based on a determination of lack of jurisdiction. Appellant states the following grounds for this reconsideration motion:

1. Appellant contends that this appeal properly belongs with the Board of Appeals, and that this appeal does not involve a violation of zoning regulations that would require otherwise.

2. Appellee has never properly challenged jurisdiction in this appeal. Appellant suggests that this be taken into account for this Reconsideration Motion.

WHEREFORE, for the foregoing reasons, Appellant respectfully moves the Board of Appeals to reconsider and reverse its dismissal of this appeal.

2004 FEB -9 P 3:16

(23)

Respectfully submitted

MARKS & KATZ, LLC

/s/

Jonathan L. Katz
D.C. Bar No. 425-615
1400 Spring Street, Suite 410
Silver Spring, MD 20910
(301) 495-4300
Fax: (301) 495-8815

Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Motion For Reconsideration was served by hand delivery this 9th day of February, 2004, to:

William Bennett, Esq.
Corporation Counsel's Office
441 4th St., NW, NO. 450N
Washington, D.C. 20001
Fax: (2020 442-9447

/s/

Jonathan L. Katz

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

JMM CORPORATION	*	
Appellant	*	**BAR Docket No 02-5875-CI**
v.	*	
DCRA	*	
Appellee	*	

ORDER

UPON CONSIDERATION OF Appellant's Motion For Reconsideration of Dismissal, it is this ____________________ day of January, 2004, hereby

ORDERED that Appellant's Motion is GRANTED; and it is further

ORDERED that Appellant's reply brief be filed within sixty days from the date of this Order, unless Appellant notifies the Board of ongoing problems obtaining an audible recording of the trial below.

____
Member
Board of Appeals

SEND COPIES TO:

Jonathan L. Katz, Esquire
Marks & Katz, LLC
1400 Spring Street, Suite 410
Silver Spring, MD 20910

William Bennett, Esquire
Corporation Counsel's Office
441 4th St., NW, NO. 450N
Washington, D.C. 20001

28

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

J.M.M. CORPORATION,	)	
	)	
Appellant,	)	
	)	
v.	)	Docket Nos. 02-5875-CI and
	)	03-5958-CI
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS,	)	
	)	
	)	
Appellee.	)	

ORDER

These appeals are from the Decision and Order of Administrative Law Judge Lennox J. Simon, dated July 2, 2002, finding Appellant to have incurred the violations as charged in Notices of Infraction No. 028120, issued September 10, 2001, and No. 035446, issued September 13, 2001, imposing fines and costs and directing that a cease and desist order be entered and from the Decision and Order of Administrative Law Judge Henry W. McCoy, dated December 6, 2002, ordering the revocation of Appellant's Certificate of Occupancy and Mechanical Amusement License.

In essence, the Notices of Infraction charged Appellant with operating its business in a manner which did not conform to the conditions of Certificate of Occupancy No. B176169, issued November 19, 1996. Judge Simons found that the terms of the Certificate of Occupancy had been violated by Appellant, imposed fines and costs, and recommended the entry of a cease and desist order. Judge McCoy, based on the same notices of infraction, concluded that Appellant's Certificate of Occupancy and Mechanical Amusement License No. 31005263, issued April 28, 1999, should be revoked.

DCMR Titles 11 and 12, implicated in these appeals, are zoning regulations. Pursuant to D.C. Code §2-1803.01 (2001), appeals involving infractions of Chapter 6, Zoning and Height of Buildings, of Title 6 shall be entertained and determined by the District of Columbia Board of Zoning Adjustment and not by this Board. See, Walsh v. D.C. Board of Appeals and Review (D.C. Court of Appeals, June 12, 2003).

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WHEREFORE, it is ORDERED that the appeals be, and they are hereby, dismissed for want of jurisdiction.

Fritz R. Kahn [signature]

Fritz R. Kahn

Dated: January 22, 2004

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW
441 4th Street, Suite 540-South
Washington, D.C. 20001
(202)727-8280 – phone
(202)737-3497 – fax

JMM Corporation
c/o Jonathan Katz, Esq.
Marks & Katz, LLC
1400 Spring Street, Suite 410
Silver Spring, MD 20910

BAR Docket No: 02-5875-CI
03-5958-CI

CERTIFICATE OF SERVICE

I hereby certify that the attached Order, rendered on January 22, 2004 for the above referenced case was faxed and mailed, postage pre-paid, on January 30, 2004 to the Appellant, at the address listed above.

P. Maddox-Lewis
for the Board of Appeals and Review

cc: William Bennett, Assistant Corporation Counsel
441 4th Street, NW #450N
Washington, DC 20001

28

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF ADJUDICATION
941 NORTH CAPITOL STREET, NE – ROOM #9100
P.O. Box 37140
WASHINGTON, DC 20013-7200
(202) 442-8167

IN THE MATTER OF	:	
	:	**2002-OAD-003**
J.M.M. Corporation		**2002-OAD-004**
t/a Fun Fair Video	:	
919 – 5th Street, NW		
Washington, DC 20002	:	
Respondent	:	

DECISION AND ORDER

STATEMENT OF THE CASE

On June 20, 2000 and July 2, 2002, the Respondent was found liable for operating outside the scope of his Certificate of Occupancy. On February 27, 2002, the Department of Consumer and Regulatory Affairs served the Respondent with a Notice of Intent to Revoke Certificate of Occupancy #B176169 and Notice of Intent to Revoke Mechanical Amusement License #31005263. As provided in each of the notices, the Respondent requested a hearing on the intents to revoke, which was scheduled initially for May 31, 2002.

On or about May 21, 2002, the Respondent filed a motion for discovery, continuance, and for the provision of foreign language interpreters at the hearing. In an order rendered July 9, 2002, the Respondent's motion for a continuance and foreign language interpreters was granted, but denied as to discovery. In lieu of discovery, the parties were to file prior to the hearing a list of their witnesses, a list of their exhibits, any stipulations, and any novel legal issues presented by the case.

The Respondent followed with a motion to dismiss arguing that the government was estopped from trying the Respondent for the same offenses twice and that the sexually oriented business enterprise regulations are unconstitutional. The Respondent's estoppel argument was based primarily on timing in that he was served with the notices of intent to revoke his certificate of occupancy and business license at the same time

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notice of infraction violations based on the same fact pattern were pending. As the Petitioner in its response correctly points out, these are two entirely separate causes of action that lead to entirely different results. And, as the Respondent has been repeatedly informed, this forum lacks jurisdiction to rule on the constitutionality of District of Columbia laws, rules, and regulations. Therefore, the Respondent's motion to dismiss is denied.

The hearing in this matter was held over two days, July 29th and July 30th, 2002 and was facilitated by the presence of two Spanish language interpreters as requested by the Respondent. At the conclusion of the hearing, the record was left open until September 3, 2002 solely for the submission of proposed findings of fact and conclusions of law. Along with the allowed post hearing submission, the Respondent also submitted a motion to supplement the record with updated audiotape certification, and with a transcript by an official court reporter of the March 5th and 8th, 2002 administrative hearings on Notices of Infractions #028120 and #035446. Insofar as the record closed for documentary evidence on July 30, 2002, the Respondent's motion to supplement the record is denied.

Matthew J. Green, Jr., Esq., represented the Government/Petitioner. Jonathan L. Katz, Esq. represented the Respondent.

The hearing in this matter was conducted in accordance with the District of Columbia Administrative Procedures Act, D.C. Official Code § 2-501 *et seq.* (2001); 12 DCMR 118.4.1, and, D.C. Official Code § 47-2844 *et seq.* (2001)

ISSUES

The issues in this matter are as follows:

1. Did the Respondent operate his business outside the scope of its Certificate of Occupancy?

2. Did the Respondent operate his business in such a manner that it would be in the public interest to revoke his mechanical amusement business license?

SUMMARY OF THE EVIDENCE

Exhibits

The Government/Petitioner introduced the following exhibits, which were admitted into evidence:

Exhibit #1: Office of Compliance Investigative Report dated September 19, 2001.

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Exhibit #2: Mechanical Amusement Machine business license record for J.M.M. Corporation.

Exhibit #3: Certificate of Occupancy #B176169 issued to J.M.M. Corporation on November 19, 1996.

Exhibit #4: Application of J.M.M. Corporation for Certificate of Occupancy.

Exhibit #5: Copy of Notice of Infraction #035446.

Exhibit #6: Copy of Notice of Infraction #028120.

Exhibit #7: Series of photographs showing merchandise and interior layout of the business.

Exhibit #8: February 5, 2002 MPD memorandum on arrests in the area of Fun Fair Video.

Exhibit #9: OAD Decision and Order on NOI #042251 rendered June 20, 2000.

Exhibit #10: OAD Decision and Order on NOI #028120 and NOI #035446 rendered on July 2, 2002.

Exhibit #11: Washington, D.C. street map.

The Respondent introduced the following exhibits, which were admitted into evidence:

Exhibit #1: Series of 15 photographs showing the interior and exterior of Fun Fair Video on February 26, 2002.

Exhibit #1A[1]: Enlargements of the photographs in Exhibit #1.

Exhibit #2: Schematic of the floor plan for Fun Fair Video.

Exhibit #3: Transcript of testimony of Toye Bello at the hearing on NOIs #028120 and #035446.

Exhibit #4: Transcript of testimony of Michael Johnson.

[1] During the hearing, this group of photographs were marked and introduced as "Respondent's Exhibit #3". A later review of exhibit numbering determined there was a previously designated Respondent's Exhibit #3. Therefore, the photographs have been renumbered as "Respondent's Exhibit #1A".

Exhibit #5: Transcript of testimony of Adgie O'Bryant at the hearing on NOIs #028120 and #035446.

Exhibit #6: Certification of tape recordings.

Exhibit #7: January 29, 1998 Opinion of the Zoning Administrator.

Testimony

For the Petitioner:

Anthony Hooks, Investigator, Office of Compliance, Weights, and Measures
Sergeant A. Mark Gilkey, MPD

For the Respondent:

Jose M. Montiel, owner, J.M.M. Corporation
Sandra Castro, Legal Assistant, Marks & Katz
William Vain, Private Investigator, Hoale & Kanaka and Associates

Spanish language interpreters provided by International Language Services, L.L.C.:

Karin Storch
Monique Fernandez

FINDINGS OF FACT

Based upon the substantial evidence presented at the hearing, the following Findings of Fact are made:

1. The Respondent, J.M.M. Corporation, operates the business Fun Fair Video at 919 – 5th Street, NW. Jose M. Montiel owns the J.M.M. Corporation.

2. On November 19, 1996, the Respondent applied for a certificate of occupancy for the location 919 – 5th Street, NW to operate a video membership store with retail sales.

3. On November 19, 1996, the Respondent was issued Certificate of Occupancy #B176169 to operate a video membership store, not sexually oriented.

4. On April 28, 1999, the Respondent obtained a mechanical amusement license to operate ten (10) video booths at 919 – 5th Street, NW. The license was renewed on June 1, 2001, #31005263, and expires on May 31, 2003.

5. The Respondent's inventory consisted of both general and adult videos and DVDs and adult sexual accessories plus a separate room devoted to the video booths that showed only X-rated videos.

6. On June 20, 2000, a Decision and Order was rendered finding the Respondent liable for the civil infraction charge of operating in a manner that the actual occupancy did not conform with that permitted.

7. On August 22, 2001, the Office of Compliance conducted an investigation of Fun Fair Video that resulted in a determination that a significant portion of the Respondent's stock in trade was sexually oriented and the certificate of occupancy did not include the operation of mechanical amusement machines.

8. On September 9, 2001, the Respondent was issued Notice of Infraction #028120 for operating in a manner that the actual occupancy did not conform with that permitted.

9. On September 13, 2001, the Respondent was issued Notice of Infraction #035446 for operating in a manner that the actual occupancy did not conform with that permitted.

10. On February 27, 2002, the Department of Consumer and Regulatory Affairs served upon the Respondent the instant notices to revoke the certificate of occupancy and the business license.

11. On July 2, 2002, a Decision and Order was rendered finding the Respondent liable based on Notices of Infraction #028120 and #035446 both charging operating outside the scope of the certificate of occupancy. The Respondent was also declared a recidivist and the associated fines were doubled.

12. The Respondent's video booths projected only sexually explicit videos that the customer paid $1.00 for five minutes of viewing time.

13. The Metropolitan Police Department received an increase in the number of complaints about prostitution in the area when the Respondent's business was open.

14. One of the arrested prostitutes was identified as having frequented the Fun Fair Video store.

15. Condom wrappers were found on the floors of the video booths and in the aisles outside the booths.

16. A male customer masturbated while inside one of the video booths.

DISCUSSION

Certificate of Occupancy. On February 27, 2002, the Department of Consumer and Regulatory Affairs served the Respondent with a Notice of Intent to Revoke Certificate of Occupancy Number B176169. The notice of intent to revoke was issued pursuant to D.C. Official Code § 2-509(a) (2001), which provides in any contested case the parties must be given reasonable notice of the hearing. In the instant case, the Government/Petitioner proposes to revoke the Respondent's certificate of occupancy after the Respondent was found on several occasions to be operating his business so as not to conform with that permitted by the occupancy permit.

This action to revoke the Respondent's certificate of occupancy is taken pursuant to 12 DCMR § 118.4, which states "[T] he Director is authorized to revoke a certificate of occupancy pursuant to any of the sections 118.4.1 through 118.4.5." Section 118.4.1 states "[A] ny certificate of occupancy previously issued or issued pursuant to Section 118.0 shall be revoked by the Director, after notice, if the actual occupancy does not conform with that permitted."

In its charges and specifications and evidence and testimony at the administrative hearing, the Government/Petitioner attempted to demonstrate that the Respondent was operating a sexually oriented business, which was contrary to the certificate of occupancy he was issued. Admitted into evidence were documents to show that on November 19, 1996 the Respondent applied for and received Certificate of Occupancy #B176169 to operate a video membership store with retail sales and rentals at 919 – 5th Street, N.W. The certificate of occupancy states on its face that the purpose is "Video Membership Store" "Not Sexually Oriented". The evidence also shows that on April 28, 1999 the Respondent obtained a mechanical amusement license to operate ten (10) video booths at this same location.

At the hearing, the Government/Petitioner brought forth both documentary and testimonial evidence to support revocation of the Respondent certificate of occupancy pursuant to 12 DCMR § 118.4.1. Two separate decisions and orders were admitted into evidence to show that on three separate dates the Respondent had been issued notices of infraction for using a building without complying with the certificate of occupancy and had been found in violation and assessed a fine. In addition, in the most recent decision and order on July 2, 2002, the Respondent was declared a recidivist and the fines were doubled.

In each of the administrative hearings on the notices of infraction, the presiding judge based his decision on the amount of floor area, services and products devoted to what was determined to be a sexually oriented business enterprise. The regulations at 11 DCMR § 199.1 defines "sexually-oriented business establishment" as follows:

> "[a] n establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other

> periodicals, films, materials, and articles or an establishment that presents as a substantial or significant portion of its activity, live performances, films, or other material which are distinguished or characterized by their emphasis on matters depicting, describing, or related to specified sexual activities and specified anatomical areas."

The Petitioner and the Respondent look to the January 29, 1998 opinion of the Acting Zoning Administrator to support their respective arguments on the interpretation of what constitutes a sexually oriented business establishment. In an opinion entitled "Determining Whether a Retail or Wholesale Video Store Selling or Renting Sexually Oriented Materials is a Sexually Oriented Business", then Acting Zoning Administrator Gladys Hicks interpreted the zoning regulations as they regard video stores that sell or rent both general interest and sexually oriented materials.

For our purposes here, it is only necessary to look to Ms. Hicks' "Standards For Determining Whether a Business is Sexually Oriented".[2] First, based on her discussion, a retail or wholesale store was a sexually oriented business if (1) more than 15% of its inventory on display, in areas open to the public[3], counted piece-by-piece[4], are sexually oriented; (2) more than 15% of its advertisement is devoted to the sexually oriented materials that it sells or rents; and, (3) each promotional activity gives disproportionate emphasis to the sexually oriented materials in its inventory.

Ms. Hicks then sets out a second set of criteria that are to be applied "irrespective of the applicability of the factors set forth above."[5] Here a business establishment is sexually oriented if either of the following apply:

1. The Zoning Administrator makes the determination that the sale of merchandise such as three dimensional reproduction of human genitalia, and other items which are commonly known as "sex toys", are sexually oriented because such merchandise either "depicts" human genitals and other specified anatomical areas, or are related to specified sexual activities, and that the sale or display of such items is not a customary accessory use to a mixed use video store in the District of Columbia. A business that sells or displays such merchandise is a sexually oriented business.

2. Furthermore, the presence or operation of booths or other apparatuses which sexually oriented video tapes may be viewed on the premises of a video store, and for which consideration of any kind is charged, is not a

[2] Opinion of the Zoning Administrator, January 28, 1998, p. 7.
[3] The Opinion defines "open to the public" to mean those areas of the business establishment where customers are ordinarily allowed. Areas that are restricted to minors are considered "open to the public" for this calculation.
[4] The Opinion notes that materials in a storeroom or other areas that cannot be seen by customers, whether general interest, or sexually oriented, shall not be counted.
[5] Opinion of the Zoning Administrator, January 28, 1998, pp. 7 and 8.

> customary accessory use to a mixed use video store. A business that provides or operates such apparatuses is a sexually oriented business.

In their efforts to use the Zoning Administrator's opinion to support their respective arguments, the Petitioner and the Respondent went through detailed descriptions of the floor plan of the Fun Fair Video and the nature, content, and quantity of the inventory. Based on the evidence presented, the store either did or did not reach the threshold of 15% of stock in trade to constitute a sexually oriented business.

The Petitioner based its analysis on an August 22, 2001 investigation conducted by the Office of Compliance. In a resulting investigative report admitted into evidence and further testified to, the investigator, Anthony Hooks, claims that upon entering the business know as "Fun Fair Video-Movie" he observed a room measuring approximately 20' x 21' or 420 square feet, containing a selection videotapes that were not sexually oriented. A door in the far wall opened to a room containing x-rated materials and sex toys depicting human genitalia. Investigator Hooks did not give a measurement for this room.

Investigator Hooks went on to describe another room accessed via an electronic lock controlled by an attendant. Located in this room were ten (10) video booths that required patrons to pay $1.00 to purchase movie-viewing time. Investigator Hooks inserted $1.00 and found all the selections available to be sexually oriented. He estimated this room to be approximately 34' x 27' or 918 square feet.

The investigative report of the Office of Compliance also related the results of investigations conducted on August 30, September 1, September 6, September 10, and September 21, 2001. The various investigators either alone or with Investigator Hooks all observed activity that centered on the sexually oriented aspects of the business. Investigator Steve Allen along with Hooks conducted a survey on September 21st where they determined that the Respondent had "1966 general viewing VHS/DVD's and 544 X-rated VHS/DVD's available to the public."

The investigative report concluded that the Respondent "allocated over 50% of the available space in the store for X-rated materials." However, in its charging documents, the Petitioner concluded that the "aggregate of the area, services and products of the Respondent's business constituted approximately 75% of the business' stock in trade allocated to a sexually oriented business enterprise." The Petitioner did not explain the discrepancy.

In addition to concluding that a significant portion of the Respondent's stock in trade was sexually oriented, the investigative report noted a conflict between the purpose listed on the application for the certificate of occupancy and the actual use of the premises. There was no mention of the operation of mechanical amusement machines on the application and the Respondent did not amend the certificate of occupancy to include the video booths after he receive his license for them and had them installed.

The Respondent countered the Petitioner's evidence by attempting to show that it has revamped the inventory and its presentation so as to fall well within the 15% threshold for what constitutes a sexually oriented business. While the Petitioner's evidence focused on the business as it was in August and September 2001, the Respondent chose to focus on the changes made in 2002 based on the inventory counts and floor plan measurements made by its witness private detective William Vain in February, March, and July 2002.

As to floor area, the Respondent had admitted into evidence a floor plan schematic showing the entire business occupied 1500 square feet and that the adult video section comprised only 100 square feet or less than 7% of the total. For the area occupied by the video booths, the Respondent states that each booth measures 5' x 3' which equals 15 square feet multiplied by eight operating booths[6] for a total of 120 square feet or 7.9% of the total floor area by the Respondent's calculation. Thus the Respondent concludes that the adult video section plus the video booths occupy only 14.9% of the total floor area, which is within the 15% set by the Zoning Administrator. The flaws in this calculation are that there are ten (10) video booths, not eight (8), and more importantly the entire area containing the video booths, not just the footprint of each booth, should be part of the calculation.

The Respondent goes on to give a breakdown of the store's merchandise to show that items in the adult video section comprise less than 12% of all video's and DVD's in the store. In addition, Mr. Vain testified to the absence of any and all sex toys. Based on these changes, the Respondent urges a finding in its favor.

The Respondent asks that the inquiry here focus on the changes that have been made to its business after it was served on February 27, 2002 with the notice of intent to revoke its certificate of occupancy. The Respondent does not refute that on three separate occasions it was cited for the civil infraction of operating its business in a manner that was not in compliance with its certificate of occupancy. In all three cases, the Respondent was found liable because it was determined that it was operating a sexually oriented business in contravention of its certificate of occupancy.

The Petitioner presented evidence as to approximate size of the various areas of the Respondent's business devoted to general interest and sexually oriented materials, as it existed around August and September 2001. The Petitioner also testified as to the amount of inventory that was sexually oriented. All of this designed to support the conclusion that more than 15% of the business stock in trade was sexually oriented and therefore the Respondent was operating a sexually oriented business without the appropriate certificate of occupancy. By all that is just, it is fortunate that the court does not have to rely on the Petitioner's figures and assumptive conclusions as to the percentage devoted to a sexually oriented business. Nor need the court rely on the Respondent. They have both missed the mark.

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[6] There are actually ten (10) booths on the premises with access to two barred as being out of order. For the purposes of this calculation, they should have been included in the multiplier.

The Petitioner and the Respondent have blindly focused on the level of the Respondent's business that is sexually oriented and whether it meets the 15% threshold set by the Zoning Administrator in an opinion issued in 1998. The Petitioner brings forth approximate floor measurements and questionable inventory counts[7] to argue that "approximately 75%" of the Respondent's stock in trade is sexually oriented. The Respondent counters with self-serving measurements taken after it has reformatted the business floor plan layout and inventory to argue that it is under the 15% threshold. This is notwithstanding that these changes should have been made immediately after the issuance of the first notice of infraction and could have been argued in mitigation of the fine.

Since the parties put their faith in the Zoning Administrator's opinion, let's see where it takes us. As previously stated, the Opinion sets out standards for determining whether a business is sexually oriented. Since both the Petitioner and the Respondent have provided less than reliable baseline figures, the 15% rule is somewhat difficult to apply. However, the Opinion sets out another set of criteria that can be applied irrespective of the 15% rule. Of pertinent application here are those provision, which state that any business that sells or displays sex toys is a sexually oriented as is any business, which provides booths for the viewing of sexually oriented videotapes. Both provision apply to the Respondent.

The Respondent does not dispute that during August and September of 2001 that it had sex toys for display and sale. The Respondent only argues that it has now removed all those items. However, there still remains the matter of the video booths. They are there for the sole purpose of allowing patrons to view sexually oriented videos on the premises for $1.00 for five minutes. The video booths alone meet the test for qualifying a business as sexually oriented. And, insofar as the Respondent's certificate of occupancy states the business is "not sexually oriented", the operation of the business with the sexually explicit video booths constituted operating in a manner that did not conform to what was permitted by the certificate of occupancy.

Finally, and apart from the sexual content of the videos available in the booths, at no time did the Respondent amend his certificate of occupancy to permit the presence of mechanical amusement machines on the premises. The presence and operation of the video booths was in direct violation of the certificate of occupancy that was issued for the premises. On this basis alone, there is reliable, probative, and substantial evidence to support the Director of the DCRA in this action to revoke the Respondent's certificate of occupancy because the actual occupancy does not conform with that permitted.

Business License. The Petitioner also seeks to revoke the Respondent's mechanical amusement machines license. On April 28, 1999, the Respondent obtained a license to operate ten (10) video booths, which he installed in the rear portion of the premises located at 919 – 5th Street, NW. The license, #31005263, was renewed on June

[7] The inventory counts are deemed questionable because the Petitioner's charges and specifications asserts that Investigator Hooks observed 153 sex toys during his August 22, 2001 visit to the premises. However, Investigator Hooks makes no such inventory count in his investigative report.

1, 2001 and expires on May 30, 2003. The evidence in the record is uncontested that the video booths were set up to play only sexually explicit videos for $1.00 for five minutes of viewing time.

The authority to revoke a business license is provided for in D.C. Official Code § 47-2844(a)(2001), which states in pertinent part "...the Mayor is further authorized and empowered to suspend or revoke any license issued hereunder when, in his judgment, such is deemed desirable in the interest of public decency or the protection of lives, limbs, health, comfort, and quiet of the citizens of the District of Columbia, or for any other reason he may deem sufficient." The Respondent argues that since this authority is solely in the hands of the Mayor, or his designated agent, this tribunal is without authority to revoke the Respondent's mechanical amusement license. The Director, DCRA, is the Mayor's designated agent for carrying out his enforcement authority; and, this tribunal has been given the jurisdiction to hear contested cases under that enforcement authority.

In contested case hearings, the District of Columbia Administrative Procedures Act (DCAPA) sets out the standard of proof that must be met in every decision and order adverse to any party to a case. In D.C. Official Code § 2-509(e)(2001), it provides "[F] indings of fact and conclusions of law shall be supported by and in accordance with the reliable, probative, and substantial evidence."

In order to revoke the Respondent's mechanical amusement license the evidence presented must meet the standard set by the DCAPA as set forth in D.C. Official Code § 2-509(e)(2001). This requires a showing in the record of "reliable, probative, and substantial evidence" supporting the conclusion that revocation of Respondent's business license will be "in the interest of public decency" or necessary for "the protection of lives, limbs, health, comfort, and quiet of the citizens of the District of Columbia." See Proctor v. Hackers' Board, 268 A.2d 267 (D.C. App., 1970).

To make its case on the negative impact of Fun Fair Video-Movie on the surrounding neighborhood, the Petitioner relied mainly on the testimony of Sergeant Mark A. Gilky, Metropolitan Police Department, Detective Grade 1, Supervisor, Prostitution Enforcement Unit. Sergeant Gilky testified that he had been inside the subject premises, saw the "pornographic" tapes for sale and rental, saw the sex toys on display for sale, observed the video booths and noticed activity in the booths, observed what appeared to be semen on the floor of one of the booths, and observed condom wrappers on the floors of the booths and in the aisle outside the booths. While he did not observe any sexual acts between patrons, he did observe a male individual masturbating in one of the booths. Investigator Hooks recounted similar incidents in his investigative report.

As for activity outside the business premises, Sergeant Gilky testified that the area around the Respondent's business was an active area for prostitution by female impersonators. A memorandum listing the arrest figures compiled by Sergeant Gilky for the immediate area of 5th and K Streets, NW where Fun Fair Video is located was admitted into evidence over the Respondent's objection. Sergeant Gilky identified two of the individuals listed on the arrest report as frequent visitors to the video store. He also testified that he regularly observed alleged prostitutes and men seeking their services meet up a block away after being inside and leaving the Respondent's video store.

It was the testimony of Sergeant Gilky that the Respondent's business had a direct impact on the level of prostitution activity in the area. While unsupported by actual figures, it was his testimony that the level of activity went way down during a three to five month period when Fun Fair Video was closed. During that time there were no complaints from the community and his officers were not being called to the scene. He went on to say that this all changed and the level of activity returned when the business reopened.

On cross-examination, he discounted the impact of a nude female go-go bar on prostitution in the area. According to the Sergeant, The Rogue, which is located right on the southeast corner of 5th and K Streets, NW, caters to a different clientele who focus upon the female dancers as opposed to the prostitutes who walk the area and frequent the video store who are female impersonators.

The Respondent counters by pointing out that his place of business is not the only potential magnet for the prostitutes in the area. In addition to pointing out the sexual nature of the entertainment at The Rogue, the Respondent also pointed out the liquor store located on the southwest corner of 5th and K Streets, NW where people loiter outside and the various vacant lots adjacent to the video store and in the immediate area where prostitution activity occurs.

The Respondent also testified as to the changes he has made in the inventory of his store to place a greater emphasis on videos of general interest and to mark clearly that area devoted to sexually oriented videos. The Respondent testified that he has removed all the sex toys from display, which he did at the direction of Investigator Hooks. He stated that he doesn't want prostitutes or people having sex in his store. As he use to live in the area, he is concerned about crime in the area and therefore he makes sure there is order in his store. He placed "No Loitering" signs on the exterior of his building and now he doesn't have people standing out in front.

With regard to the area where the video booths are located, the Respondent testified that a customer, who is asked for identification to verify age, has to pay a fee in order to have the electronic door lock released so he can open the door to that area. There are video surveillance cameras to monitor the halls to prevent damage and loitering. It is the responsibility of the cashier who releases the lock to also monitor the cameras to prevent more than one person from entering the same booth. There also is an employee stationed in the booth area with responsibility for keeping the area clean.

The evidence presented by the Petitioner has a direct bearing on maintaining the "public decency" and protecting the "comfort and quiet" of the citizens in the area where the Respondent's business is located. The testimony by Sgt. Gilky established a direct link between the level of street prostitution in the area and Respondent's business being open. In addition, there was the testimony on the type of activity occurring inside the business in the area containing the video booths. Both Sgt. Gilky and Investigator Hooks testified to observing similar activities that strongly suggested that sex between patrons was occurring in the booths or that at least one patron actually left the door open to allow anyone walking by to see him as he masturbated in the booth. The presence of condom wrappers on the floor and the hasty clean up of what appeared to be semen lends further credence that sex between patrons was occurring in the booths.

The Respondent countered by focusing his testimony on what has been done to change the business inventory since February 2002. The Respondent also testified that the video booth area is monitored as to the number of patrons allowed into the area at one time and that the area is under constant video surveillance. The Respondent also directed attention to other businesses in the area that could be the source of the prostitution activity in the area.

In weighing the evidence presented and the credibility of the witnesses, the Petitioner's evidence and witnesses is found to be more credible. The Petitioner has managed to meet its burden by presenting reliable, probative and substantial record evidence by more credible witnesses that it would be in the interest of public decency to revoke the Respondent's mechanical amusement business license. The evidence taken as a whole points to a business operation that allowed itself to become a place where casual sex between patrons or self-gratification could occur inside the video booths; or in the alternative a place that facilitated individuals meeting and making arrangements to meet outside the business for sex.

The Respondent would have it believed that he made every effort to prevent sex from occurring on his property or from being a meeting place for prostitutes and their customers. However, the Petitioner's evidence and testimony was overwhelmingly to the contrary. The Petitioner testified that prostitution complaints by citizens and calls for police service went down dramatically when the Respondent was closed for business. Rather than contest this by showing the contrary, the Respondent chose to cast doubt on the Petitioner's testimony that implied that it was the magnet for prostitution. The Respondent presented no testimony that the Petitioner's testimony on citizen's complaints was wrong or that prostitution activity in the area changed depending on when its business was open.

The Petitioner did not present a voluminous amount of evidence to show the negative impact of the Respondent's business on the surrounding community where it is located. However, insofar as the Respondent did not present any evidence to the contrary, what evidence the Petitioner did present became the substantial record evidence. This evidence demonstrated that public decency was compromised by the activity in and around Fun Fair Video and that revocation of the Respondent's business license for the video booths would serve to protect the comfort and quiet of those neighboring District citizens who call that general vicinity home.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that:

1. The Respondent operated Fun Fair Video in a manner that the actual occupancy did not conform to that permitted by failing to amend Certificate of Occupancy #B176169 to permit the presence of mechanical amusement machines on the premises.

2. The Respondent operated Fun Fair Video in such a manner that pursuant to D.C. Official Code § 47-2844(a)(2001) it is deemed desirable in the interest of public decency to revoke Mechanical Amusement License #31005263.

ORDER

Accordingly, it is this **6th day of December 2002**, hereby

ORDERED: That the Respondent's Certificate of Occupancy #B176169 issued on November 19, 1996 to operate a video membership store at 919 – 5th Street, NW, is **revoked**; and, it is

FURTHER ORDERED: That the Respondent's Mechanical Amusement License #31005263 renewed on June 1, 2001 for ten (10) video booths is **revoked**.

By: Henry W. McCoy

HENRY W. MCCOY
ADMINISTRATIVE LAW JUDGE

NOTICE

THIS DECISION AND ORDER IS FINAL. A PARTY HAS THE RIGHT TO FILE AN APPEAL WITH THE BOARD OF APPEALS AND REVIEW (441 – 4TH STREET, N.W., SUITE 540 SOUTH, WASHINGTON, D.C. 20001, (202) 727-8280. AN APPEAL, IF TAKEN, MUST BE FILED WITH THE BOARD OF APPEALS AND REVIEW WITHIN FIFTEEN (15) DAYS FROM THE RECEIPT OF THIS DECISION, ACCORDING TO THE RULES OF TRHE BOARD OF APPEALS AND REVIEW.

CERTIFICATE OF SERVICE

I hereby certify on this 9th day of December 2002, that a copy of the foregoing Decision and Order was sent either by certified mail, return receipt requested; regular first class mail, postage prepaid; or, hand-delivered to the following persons:

1. Matthew J. Green, Jr., Esq.
   Department of Consumer & Regulatory Affairs
   Office of the General Counsel
   941 North Capitol Street, NE
   Room 9400
   Washington, DC 20002

2. Jonathan L. Katz
   Marks & Katz, L.L.C.
   1400 Spring Street
   Suite 410
   Silver Spring, Maryland 20910

CERTIFYING PARTY

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER & REGULATORY AFFAIRS
OFFICE OF ADJUDICATION
941 North Capitol Street, N.W., Room #9100
Washington, D.C. 20002
Tel. (202) 442 - 8167

In the Matter of:

J.M.M. Corporation t/a Fun Fair Video
919 5th Street, N.W.
Washington, D.C. 20001
Respondent.

Case Numbers
01-OAD-2626-E, NOI #028120
01-OAD-2541-G, NOI #035446

DECISION AND ORDER

STATEMENT OF THE CASE:

On September 10, 2001, Respondent JMM Corporation t/a Fun Fair Video was cited and issued Notice of Infraction (NOI) # 028120 in the amount of $500,00 for failing to comply with the conditions of Certificate of Occupancy #B176169. On September 13, 2001, Respondent was again cited and issued NOI # 035446 in the amount of $500.00 for failing to comply with the conditions of Certificate of Occupancy #B176169.

Background

This case comes before this Court two years after Respondent was cited for violating the conditions of Certificate of Occupancy #B176169, found liable after an administrative hearing and ordered to pay a fine in the amount of $540.00 for operating JMM Corporation t/a Fun Fair Video as a sexually oriented business enterprise. Because of the identical nature of the infractions, Respondent can be labeled a recidivist, and faces double fines in this matter pursuant to Title16 DCMR § 3201.2.

At the request of the Respondent, a hearing was held before the Honorable Lennox J. Simon, Administrative Law Judge (ALJ), D.C. Department of Consumer and Regulatory Affairs (DCRA), Office of Adjudication (OAD) on March 5th and 8th 2002. The hearing was convened pursuant to the provisions of the District of Columbia Administrative Procedures Act, D.C. Code Sec. 1-1501 et seq; (a) (1992) and the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, D.C. Code 6-2701 et seq.

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Present at the hearing were: Anthony Hooks and Steve Allen Investigators, DCRA's Investigation Division: Allan James Inspector, DCRA's Zoning Inspection Division, Anthony Bello, DCRA's Acting Zoning administrator; Sergeant Mark Gilkey, D.C. Metropolitan Police Department; Steve Pardieck, witness; Matthew J. Green Jr, Esquire, DCRA's Office of the General Counsel; Jose Montel, Respondent; Adgie O'Bryant Jr, Esquire, Witness; Mike Zaggby, Interpreter; William D, Vain, private investigator; and Jonathan L. Katz Esquire, Respondent's counsel. The following observers were also present: Margaret Limehouse, Paul Masiarchin, Lydia Goring, Lawrence Matheon and Deborah Ziska.

PRELIMANARY MATTERS

1. As a preliminary matter, Matthew J, Green, Esquire, counsel for DCRA made an oral Motion to Quash a subpoena served on himself compelling him to testify as a witness at the March 5, 2002, hearing. Specifically, Respondent served subpoenas on government's counsel as well as government's investigator Anthony Hooks compelling them to testify about a gentleman's agreement which allegedly occurred in a prior hearing concerning said Respondent. DCRA Counsel argued that the DCRA Civil Infraction Act of 1985 and the regulations promulgated thereunder do not make any provisions for pretrial discovery or for discovery in general in administrative proceedings. DCRA's Counsel Further argued that by forcing government's counsel to be a witness and to recuse him from the role of government's counsel in this case would create an undue hardship on the government. However, the Court found that although Respondent's counsel has made reference to a "gentlemen's agreement", he has failed to present any written evidence in support of such agreement. Therefore, pursuant to the Civil Infractions Act, Petitioner's Motion to Quash Respondent's two subpoenas is hereby **GRANTED.**

2. As a second preliminary matter, Matthew J. Green, Esquire, counsel for DCRA made an oral Motion to Classify Respondent as a Recidivist. In response, Respondent's counsel asserts that he was not given advanced notice of government's intention to classify his client as a recidivist. However the court found that the question of notice is irrelevant. This is because, Respondent has appeared before and has been adjudicated by this Court previously for the same exact issue, and for this he must be classified as a recidivist. Moreover, Respondent has made no attempt in addressing this Court's order on June 20, 2001, which directed Respondent to obtain the proper Certificate of Occupancy. JMM Corporation t/a Fun Fair Video went on a six to nine month hiatus and upon reopening, Respondent has made no attempt to get the proper Certificate of Occupancy in conformity with the requirements that this Court has established for this particular zone. Respondent has blatantly ignored the dictates of the Court, therefore, Petitioner's Motion to Classify Respondent as a Recidivist is hereby **GRANTED.**

3. As a first preliminary matter, Jonathan Katz, Esquire, Respondent's counsel made a Motion for Continuance. Respondent argued that this case must be continued based on the unavailability of some of Respondent's witnesses and the alleged unconstitutionality of Title 11 DCMR § 199.1 of the District of Columbia statute. The Court finds that this matter has been pending before OAD September 2001, and that Respondent had ample time to procure his

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witnesses. Moreover, this Court has no authority to render a District of Columbia law or statute unconstitutional. Therefore, Respondent's Motion for Continuance is hereby **DENIED.**

4. As a second preliminary matter, Jonathan Katz, Esquire, Respondent's Counsel made a Motion to Dismiss the proceedings. Respondent argues that this matter should be dismissed based on insufficient notice. This Court is perplexed by Respondent's posture in bringing this motion, for he had sufficient time to prepare his case, and to bring this motion now can hardly be viewed as anything but a stall tactic. Therefore, Respondent's Motion to Dismiss is hereby **DENIED.**

ISSUE PRESENTED

Whether Respondent JMM Corporation t/a Fun Fair Video exceeded the scope of Certificate of Occupancy # B176169 by operating a sexually oriented video business at 919 5th Street, N.W. Washington, D.C. ?

SUMMARY OF THE EVIDENCE

The following evidence and pleadings were considered by the ALJ in this matter.

Government's Exhibit # 1 June 20, 2002, Decision and Order issued against Respondent
Government's Exhibit # 2 Mechanical amusement machine license #31005263
Government's Exhibit # 3 Certificate of Occupancy # B176169
Government's Exhibit # 4 Notice of infraction # 028120
Government's Exhibit # 5 MPD Prostitution Enforcement Unit investigative Report (02/05/02)
Government's Exhibit # 6 MPD Prostitution Enforcement Unit investigative Report (01/25/02)
Government's Exhibit # 7, A-Z, Photos depicting X- rated videos, oils, dildos & advertisements
Respondent's Exhibit # 1, 1-17, Photos depicting X-rated videos, booths, & other advertisements
Respondent's Exhibit # 2, A-Q, Photos depicting X-rated videos, booths & other advertisements
Respondent's Exhibit # 3, Floor plan and measurements for Respondent's place of business
Respondent's Exhibit # 4, Partial Transcripts of Respondent's May 23, 2000 hearing

FINDINGS OF FACT

After reviewing the entire record, the following Findings of Fact are made from the testimony heard and the evidence adduced at the March 5, 2002, administrative hearing.

1. JMM Corporation t/a Fun Fair Video is owned and operated by Respondent Jose Montel. On August 22, 2001, at approximately 3:30p.m., DCRA's Investigator conducted an unannounced inspection of the premises known as Fun Fair Video located at 919 5th Street, N.W. During the investigation, DCRA's Investigator observed ten video booths that charged patrons $1.00 for five minutes of pornographic viewing and observed for sale 153 sexual

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accessories including dildos depicting the human penis, vibrators, body oils, lubricants and condoms. (Government's exhibit #7 and Testimony of Investigator Hooks)

2. On September 1, 2001, DCRA's Investigator conducted a second unannounced inspection of Respondent's business and observed patrons seeking booth rentals or proceeding directly to the X-rated movie and "sex toy" section in the rear of Fun Fair Video. (Government Exhibit #7 and Testimony of Investigator Hooks)

3. On September 10, 2001, DCRA's Investigator and Zoning Inspector conducted a third inspection of Fun Fair Video and observed a male patron leaving a pornographic video booth wherein what appeared to be semen was further observed on the floor upon his departure. An employee of Fun Fair Video promptly mopped up this fluid. (Government exhibit # 7 and Testimony of Investigator Hooks and Inspector James)

4. On September 21, 2001, two of DCRA's Investigators surveyed the video materials available for rent/sale on the premises. At the time of the survey, Respondent had an inventory of 1,996 general viewing VHS/DVD's measuring 20' in length by 21' in width, and 544 X-rated VHS/DVD's measuring 34' in length and 27' in width on the shelves of Fun Fair Video, along with 10 video booths which were showing X-rated videos. (Government exhibit #7 and Testimony of Investigators Hooks and Allen)

5. On December 14, 2001, an officer of the D.C. Metropolitan Police observed a male patron inside Fun Fair Video watching pornographic videos in a video booth with the door partially opened while masturbating. Police reports also indicate that numerous criminal activities were taking place in the area of Respondents business.(Government exhibit #5 and 6, and Testimony of Sergeant Gilkey)

6. On April 7, 2000, Respondent JMM Corporation / Fun Fair Video was issued Notice of Infraction #42251 in the amount of $500.00. On June 20, 2000, Respondent was found liable after an administrative hearing in the amount of $540.00 for operating a sexually oriented business in violation of the conditions of Certificate of Occupancy #B176169. (Government Exhibit #1 and testimony of Investigator Hooks)

DISCUSSION

While Respondent has paid two $500 fines imposed on him for operating a sexually oriented business without a license in OAD # 00-2524-G, he has also rebelliously continued to operate said sexually oriented business, Fun Fair Video. This renders Respondent a recidivist and exposes him to double fines pursuant to 16 DCMR § 3201.2. Certificate of Occupancy Number B176169 issued on November 19, 1996 authorized Respondent to operate a non-sexually related video membership store at the premises located at 919 5th Street, NW. Respondent has continued to disregard the nature of his license and now by asserting the following arguments.

Respondent states that no businesses in the District of Columbia have a Certificate of Occupancy for a sexually oriented business establishment. Furthermore, Respondent points out that Fun Fair Video is located in zoning district C-2-C and that the District of Columbia's Municipal

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Regulations only speak of permitting sexually oriented businesses 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 that the business meets the stringent requirements set forth in said regulatory provisions. Respondent then sets forth that numerous retail businesses in the District of Columbia sell sexually explicit material without having a Certificate of Occupancy for a sexually oriented business enterprise. This Court finds Respondent's argument preposterous. The fact that other businesses in the area are operating sexually oriented business enterprises without a proper license is absolutely irrelevant, and does not give Respondent the right breach the terms of his Certificate of Occupancy as the owner of Fun Fair Video.

The Respondent also makes a frivolous argument about the floor space the pornography in Fun Fair Video occupies. Respondent asserts "Petitioner presented sketchy and incomplete testimony about the floor space taken up by each part of the store." However, even when giving Respondent the benefit of the doubt, it is clear to this Court that 10 pornographic video booths and over 500 pornographic VHS/DVD's constitutes a sexually oriented business. When including the space occupied by the video booths, Petitioner contends that the aggregate of area, services and products of Fun Fair Video constituted approximately 75% of the business' stock in trade allocated to a sexually oriented business enterprise. This Court finds that Respondent does not fit into any gray area between a sexual and non-sexual business enterprise, but rather is a quintessential sexual oriented business.

Finally, Respondent puts forth a constitutionally based argument, stating that the definition of a sexually oriented business enterprise is so vague and overbroad as to render 11 DCMR § 199.1, the District's sexually oriented business enterprise statute, unconstitutional under the First Amendment and under the due process guarantees provided under the Fifth and Fourteenth Amendments to the United States Constitution. Unfortunately for Respondent, this Court is not the proper forum to hear a constitutionally based argument. The Respondent is welcome to go to the D.C. City Council and try to convince them to change the existing law. The Respondent may also go to the D.C. Court of Appeals and attempt to prove to them that 11 DCMR § 199.1, the District's regulatory scheme concerning sexually oriented business, is unconstitutional.

CONCLUSIONS OF LAW

The ALJ having considered all of the evidence submitted at the March 5, 2002, administrative hearing concludes as follows:

1. 11 DCMR § 3205.4 provides that, "Any person who owns, controls, occupies, maintains, or uses any building, structure, or land or any part of any building, structure or land shall at all times comply with any condition to the issuance of the Certificate of Occupancy for the building, structure, or land, or part thereof." Respondent is in violation by applying for and receiving a Certificate of Occupancy "not sexually oriented" and operating in derogation of said application and issued certificate.

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2. 11 DCMR § 199.1 defines a sexually oriented business establishment as: "An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals, films, materials and articles or an establishment that presents as a substantial or significant portion of its activity, live performances, films or other material which are distinguished or characterized by their emphasis on matters depicting, describing, or related to specified sexual activities and specified anatomical areas." In the instant matter, sex is the dominant emphasis, therefore Respondent's activities fall within the above-cited definition of a sexually oriented business.

3. 16 DCMR § 3201.2 provides that, "An infraction shall be a repeat infraction and shall carry the enhanced penalties set forth in §§ 3201.1 and 3224.1 if the infraction is a violation by the same person of the same provision of law or rule committed within the same three (3) year, period as the initial infraction. In the instant case, respondent has been cited for the identical violation as he was cited previously. Therefore, Respondent is a recidivist.

ORDER

WHEREFORE, it is this 2nd day of July 2002.

ORDERED: that Respondent J.M.M. Corporation t/a Fun Fair Video shall pay a fine in the amount of one thousand ($1,000.00) ($500.00 for NOI # 028120 and $500.00 for NOI # 035446) for the above referenced violations.

FURTHERE ORDERED: that Respondent J.M.M. Corporation t/a Fun Fair Video shall pay an enhanced fine in the amount of one thousand $1,000.00 dollars for a recidivist

FURTHER ORDERED: that Respondent JMM Corporation t/a Funfair Video pay court costs in the amount of eighty ($80.00) dollars

FURTHER ORDERED: that the total amount that is due and owing to the District of Columbia in the above captioned case is $2, 080.00

FURTHER ORDERED: that all payments of fines, penalties and cost shall be submitted either in person to the Office of the Chief Financial Officer at 941 North Capitol Street, N.E., Suite 9600, Washington, D.C. 20001, or mailed via first class mail, postage pre paid to Office of the Chief Financial officer, attn: Dwight Lofton, 941 North Capitol Street, N.E. Suite #9600, P.O. Box #37140, Washington, D.C. 2002. Additionally, all checks shall be made payable to the D.C. Treasurer.

FURTHER ORDERED: that Respondent's failure to pay or to make arrangements for the payment of all fines, penalties, and cost within fifteen (15) calendars days of service of the Decision and Order, may result in an additional 25% collection charge if this matter is referred to a collection agency.

FURTHER ORDERED: that the Respondent shall have fifteen (15) days from the receipt of this order to file an appeal with the Board of Appeals and Review or applicable Board.

FURTHER ORDERED: that the Office of Enforcement issue a cease and desist order to Respondent, J.M.M. Corporation t/a Fun Fair Video, directing Respondent to cease all business activity at 919 5th Street, N.W., Washington, D.C., until such time that Respondent obtains the required Certificate of Occupancy for his business.

Lennox J. Simon
Administrative Law Judge, D.C.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed on July 2, 2002, the foregoing Decision and Order in 01-OAD-2626-E and 01-OAD-2541-G postage prepaid to the following parties:

Jonathan L. Katz, Esquire
Marks & Kats, LLC
1400 Spring Street, #410
Silver Spring. Maryland 20910

Matthew J. Green, Jr. Esquire
Office of the General Counsel
941 North Capitol Street, N.E., Suite #9400
Washington, D.C. 20002

Stacey Washington
Certifying Party

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IMPORTANT NOTICE

Respondent's failure to pay or to make arrangement for the payment of all fines, penalties, and cost within fifteen (15) calendar days of service of the Decision and Order, **MAY RESULT IN AN ADDITIONAL 25% COLLECTION CHARGE** if this matter is referred to a collection agency.

IMPORTANT NOTICE

Respondent's failure to appeal this Order or to arrange for payment of all fines, penalties and costs within fifteen (15) calendar days of receipt of this Order SHALL OPERATE TO SUSPEND AUTOMATICALLY THE LICENSE OR PERMIT until the fines, penalties and costs are paid, thereby subjecting Respondent to subsequent and enhanced violations for unlicensed or unpermitted activities. Admits with Explanation are appealable only to the extent that the Attorney Examiner has imposed an illegal sanction(s) under the Civil Infractions Act or its implementing regulations.

APPEAL RIGHTS

UPON THE EXPIRATION OF THE ABOVE-NOTED FIFTEEN (15) CALENDAR DAYS, THIS ORDER WILL BE FINAL. THE RESPONDENT HAS A RIGHT TO APPEAL AS DESCRIBED BELOW.

HOW TO APPEAL

Please read this notice carefully if you decide to appeal the decision.

In general all civil infraction orders are appealable to the BOARD OF APPEALS AND REVIEW. There are a few exceptions.

If your matter concerns a violation of the Alcoholic Beverage Control Act (for example, failure to supervise, or failure to have the appropriate lettering on the front of the establishment) then your matter is appealable to the ALCOHOLIC BEVERAGE CONTROL BOARD.

If your matter concerns a violation of D.C. Zoning Regulations or Chapter 4 (Zoning and Height of Buildings) of Title 5 of the D.C. Code then your matter is appealable to the BOARD OF ZONING ADJUSTMENT.

If you hold an occupational or professional license, except related to a health occupation, and the matter concerns a violation of a professional or occupational regulation, then your matter is appealable to the appropriate Board or Commission in the Occupational and Professional Licensing Administration.

G

If you are licensed in a health occupation, and the matter concerns a violation of a health occupation law or regulation, then your matter is appealable to the appropriate Board or Commission in the Licensing Regulation Administration of the Department of Health.

If you are not licensed or your occupation or profession is not regulated by a Board or Commission, then your matter is appealable to the BOARD OF APPEALS AND REVIEW.
The following addresses and telephone numbers are for the appropriate appellate body:

BOARD OF APPEALS AND REVIEW
441 4th Street, N.W.
Suite 540S
Washington, D.C. 20001
(202) 727-8280

BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Suite 210S
Washington, D.C. 20001
(202) 727-6311

LICENSING REGULATION ADMINISTRATION DEPARTMENT OF HEALTH
825 North Capitol Street, N.E.
Room 2164
Washington, D.C. 20002
(202) 442-5888

ALCOHOLIC BEVERAGE CONTROL BOARD
941 North Capitol Street, N.E.
Room 7W30
Washington, D.C. 20002
(202) 442-4445

OCCUPATIONAL AND PROFESSIONAL LICENSING ADMINISTRATION
941 North Capitol Street, N.E.
Room 7W46
Washington, D.C. 20002
(202) 442-4320

RECEIVED
AUG 21 2003
BOARD OF APPEALS AND REVIEW

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

J.M.M. CORPORATION,
Appellant

v. Docket No. 03-5958-CI

DEPARTMENT OF CONSUMER
AND REGULATORY AFFAIRS
Appellee/Petitioner

APPELLANT'S RESPONSE TO THE BOARD'S ORDER TO SHOW CAUSE

This filing constitutes Appellant JMM Corporation's response to the Board's August 11, 2003 Order for Appellant to advise the Board why the appeal should not be dismissed for want of prosecution. Appellant states the following grounds to keep this appeal active:

1. Appellant reincorporates by reference all factual statements and arguments presented in Appellant's Motion to Reschedule Conference Call ("Motion to Reschedule") (dated July 9, 2003).

2. The sole reason for Appellant's July 9, 2003, Motion to Reschedule was due to the discovery that the audiotape of the proceedings below was of insufficient audibility even for a certified court reporter from LAD Court reporting to faithfully transcribe the proceedings. See Affidavit of Sandra Castro at ¶¶ 1-4 (attached hereto) (confirming that LAD Court reporting found the audiotapes of the proceedings below to be insufficiently audible).

3. Absent the poor quality of the audiotapes from the proceedings below, Appellant would have had the transcript ready

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before the previously scheduled telephone conference date. Because of the poor audio quality, Appellant filed its July 9, 2003, Motion to reschedule the July 17, 2003, conference call.

4. By order dated July 10, 2003, the Board granted an indefinite postponement of the telephonic pre-hearing conference. However, the Board's Order did not grant the remaining relief sought in Appellant's proposed order (e.g., directing the Office of Adjudication of the District of Columbia Board of Regulatory Affairs ("DCRA") to permit Appellant's counsel and Appellant's court reporter to preview the master tapes of the proceedings below; ordering the master tape be made available to the Board of Appeals in the event of a dispute over the audibility of the master tape; and, in the event of no dispute of the master tapes' quality, to grant Appellant the option of having the transcript provided by the tribunal below, or by a court reporter of Appellant's choosing).

5. Subsequent to the Board's July 10, continuance order, undersigned counsel received back from LAD Court Reporting the audiotapes of the proceedings below. Undersigned counsel's Legal Assistant Sandra Castro then listened to every side of all seven audio tapes, and confirmed that they are of insufficient audibility to transcribe. See Sandra Castro Affidavit at ¶¶ 4-5 (attached hereto). Undersigned counsel listened to an excerpt of one of the audiotapes, to hear the same loud buzzing referenced in ¶ 4 of Ms. Castro's attached Affidavit.

6. The Board's Show Cause Order comes just thirty days after the Board's July 10, 2003, Order that the pre-hearing

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conference is indefinitely postponed. But for the inaudibility of the tapes from the proceedings below - which audiotaping was performed at all times by the Office of Adjudication - Appellant would not have had to seek any postponement. In the worst case scenario - while it would be under protest by Appellant - if the choice were between having a teleconference without a transcript and to dismiss this appeal, Appellant would opt for the teleconference (but would also ask that the teleconference not dispose of the case on the merits; Appellant wishes a scheduling order to be issued so that all issues in this case may be fully briefed and orally argued).

7. Based on the foregoing problems with the poor audiotape quality, Appellant proposes the following: the issuance of the proposed Order submitted by Appellant with Appellant's July 9, 2003, Motion to Reschedule Conference Call. In the alternative, Appellant proposes being permitted to provide a biweekly status report to the Board on Appellant's progress in getting access to listen to (and transcribe it, if the sound quality is sufficient) the master audiotape of the proceedings below. Attached is Appellant's Motion to the tribunal below to provide access to said master tape.

8. Based on the current posture of securing a reliable transcript, Appellant has filed the attached audiotape with the tribunal below.

9. Appellant has already spent substantial funds --- and in good faith -- for counsel, costs and transcripts (of prior administrative proceedings below, and has secured and filed all

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transcripts for its pending appeal before the Board with Docket Number 02-5875-CI) to protect its rights below and at the instant proceedings, and has no intention of abandoning its appellate rights before the Board of Appeals. This appeal seeks to overturn orders below that unlawfully and unconstitutionally direct the closure of Appellant's business. Appellant should not be made to suffer for the previously unexpected poor audio quality of the proceedings below.

WHEREFORE, Appellant respectfully moves for the Board to keep this appeal active; and to enter Appellant's proposed Order that is attached to Appellant's July 9, 2003, Motion to Reschedule, or, in the alternative, to direct Appellant to inform the Board every two weeks of Appellant's good faith efforts to obtain access to obtain an affordable transcript of the master audiotape from the proceedings below, and to inform the Board if and when Appellant contends that the master audiotape also is insufficiently audible.

Respectfully submitted

MARKS & KATZ, L.L.C.

Jonathan L. Katz
D.C. Bar No. 425-615
1400 Spring Street, Suite 410
Silver Spring, MD 20910
(301) 495-4300
Fax: (301) 495-8815

Attorneys for Appellant/Respondent

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Response to the Board's Order to Show Cause was served by first class mail on August 21, 2003, to:

Matthew Green, Jr., Esquire
DCRA
941 North Capitol Street, N.E.
Suite 9400
Washington, DC 20002
Phone: (202) 442-8402
Fax: (202) 442-9447
Counsel for the DCRA

Mr. William Bennett, Esq.
Corporation Counsel's Office
441 Fourth St.
Washington, DC 20001

Jonathan L. Katz

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AFFIDAVIT

I HEREBY CERTIFY AS FOLLOWS:

1. My name is Sandra Cathalina Castro. I am over eighteen years of age, and am fully competent to testify to the following:

2. I am the Legal Assistant at Marks & Katz, LLC, who has been assisting said law firm with all their matters involving J.M.M. Corporation from the very beginning.

3. I personally requested by telephone to the Office of Administrative hearings of the District of Columbia Department of Consumer and Regulatory Affairs, to provide me a certified copy of the hearing proceedings in the matter of J.M.M. Corporation, Case Nos. 2002-OAD-003 and 2002-OAD-004. The request for a copy was granted, but the request for certification was denied. However, with the tapes was provided documentary confirmation of the tapes' authenticity.

I also asked the same office if it would prepare a transcript in-house, for which our law firm would pay. I was told that was not done.

4. Consequently, I located a court reporting company that was prepared to transcribe the above-describe audio tapes which total seven. However, soon after delivering the tapes to the court reporter from LAD Court Reporting, the court reporter called me, saying that the tapes were not sufficiently audible to provide a transcript.

Consequently, I personally spent over thirty minutes personally checking each side of each of the seven tapes for audibility. This revealed substantial inaudibility that makes it too difficult to fully know what is being said on the record except for when Government attorney Matthew Green, Jr. is speaking. Every part of the tapes I have listened to has a loud buzzing that substantially interferes with audibility. I also encountered echoing on Tape 5 that further interferes with audibility.

5. By comparison, before our law firm hired a court reporting company to do so, I personally transcribed over 50 pages of excerpts from the audio tapes of J.M.M. Corporation's hearing in Case Nos. 01-OAD-2626E and 01-OAD 2541G, March 5 and 8, 2002. Although the audibility of the foregoing March 2002

tapes is not the best quality, most of it can be heard. In my opinion, which includes nearly three years of experience as the legal assistant for Marks & Katz, LLC, the above-described audio tapes from July 29, 2003, are not sufficiently audible to provide an accurate record of the proceedings of the same

I HEREBY SWEAR UNDER THE PENALTIES OF PERJURY THAT THE FOREGOING IS TRUE TO THE BEST OF MY KNOWLEDGE.

____
Sandra Cathalina Castro

SUBSCRIBED AND SWORN TO before me this 20 day of August 2003.

Wanda Wilmore
____
Notary Public

My Commission Expires:

WANDA WILMORE
Notary Public
Montgomery Co., MD
My Comm. Exps. Jan. 11, 2005

Ex. 2

OFFICE OF ADMINISTRATIVE HEARINGS
DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

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

RESPONDENT'S MOTION FOR ACCESS TO MASTER AUDIOTAPE OF HEARING

Respondent JMM respectfully moves for an Order giving Respondent access to the master audiotape ("Master Audiotape") of the July 29-30, 2002, hearing ("Hearing") in this matter, for the following grounds:

1. Respondent reincorporates by reference the attached Appellant's Response to the Board's Order to Show Cause ("Response"), from Respondent's appeal to the Board of Appeals in this matter.

2. As confirmed in the attached Response and Affidavit of Sandra Castro, the audiotape provided by the Office of Administrative Hearings to Respondent of the Hearing in this matter is not audible enough to provide an accurate transcript.

3. Therefore, Respondent has no choice but to move for the following relief: an order giving Respondent's counsel, counsel's designated assistants, and counsel's designated certified court reporters full access to the master Audiotape of the Hearing, to determine whether the Master Audiotape is sufficiently audible to produce an accurate transcript; and giving Respondent the choice of ordering the transcript to be produced by the Office of Administrative Hearings at the same rate billed by the District of Columbia Superior Court's court reporter's office, or to produce the transcript from the Master through a court reporter selected by Respondent.

WHEREFORE, Respondent respectfully moves for the relief sought in ¶ 3 above.

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Respectfully submitted

MARKS & KATZ, L.L.C.

Jonathan L. Katz
D.C. Bar No. 425-615
1400 Spring Street, Suite 410
Silver Spring, MD 20910
(301) 495-4300
Fax: (301) 495-8815

Attorneys for Appellant/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Motion For Access To Master Audiotape Of Hearing was served by first-class mail on August 21, 2003, to:

Matthew Green, Jr., Esquire
DCRA
941 North Capitol Street, N.E.
Suite 9400
Washington, DC 20002
Phone: (202) 442-8402
Fax: (202) 442-9447
Counsel for the DCRA

Mr. William Bennett, Esq.
Corporation Counsel's Office
441 Fourth St.
Washington, DC 20001

Jonathan L. Katz

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OFFICE OF ADMINISTRATIVE HEARINGS
DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

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

ORDER

UPON CONSIDERATION OF Respondent's foregoing Motion For Access To Master Audiotape Of Hearing, it is this __________ day of ______________________________ hereby

ORDERED that Respondent's Motion is hereby GRANTED; and it is further

ORDERED that Respondent's counsel, counsel's designated assistants, and counsel's designated certified court reporters shall have immediate and full access to the master Audiotape of the July 29-30, 2002, Hearing, to determine whether the Master Audiotape is sufficiently audible to produce an accurate transcript; and it is further

ORDERED that Respondent be given the choice of ordering the transcript to be produced by the Office of Administrative Hearings at the same rate billed by the District of Columbia Superior Court's court reporter's office, or to produce the transcript from the Master through a court reporter selected by Respondent.

____

JUDGE

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SEND COPIES TO:
Matthew Green, Jr., Esquire
DCRA
941 North Capitol Street, N.E.
Suite 9400
Washington, DC 20002
Phone: (202) 442-8402
Fax: (202) 442-9447
Counsel for the DCRA

Mr. William Bennett, Esq.
Corporation Counsel's Office
441 Fourth St.
Washington, DC 20001

Jonathan L. Katz, Esq.
1400 Spring St., Suite 410
Silver Spring, MD 20910

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

RECEIVED
JUL 23 11 PM '02
OFFICE OF ADJUDICATION

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

RESPONDENT'S CORRECTION TO PREHEARING STATEMENT, AND MOTION TO DISMISS THIS PROCEEDING

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

MARKS & KATZ, L.L.C.

Jonathan L. Katz
D.C. Bar No. 425-615
1400 Spring Street, Suite 410
Silver Spring, MD 20910
(301) 495-4300
Attorneys for Respondent

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:

Matthew Green, Jr., Esquire
DCRA
941 North Capitol Street, N.E.
Suite 9400
Washington, DC 20002
Phone: (202) 442-8402
Fax: (202) 442-9447
e-mail: matthew.green@dc.gov

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. <u>Respondent Has Three Good Faith Grounds For Postponing the March 5 Hearing</u>

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. **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.**

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 defninti0on of a SOBE is vague and overbroad.

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

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. The District's SOBE Regulation Scheme Amounts to Unconstituional Prior Restraint

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 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

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. <u>CONCLUSION</u>

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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GOVERNMENT OF THE DISTRICT OF COLUMBIA

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

Opinion of the Zoning Administrator

Determining Whether a Retail or Wholesale Video Store Selling or Renting Sexually Oriented Materials is a Sexually Oriented Business

Background

In response to letters and complaints received by the Department of Consumer and Regulatory Affairs alleging that certain retail video stores are, or are intended to be operated as, sexually oriented business establishments as that term is defined in the zoning regulations (Title 11 of the District of Columbia Municipal Regulations, Section 199.1), the Zoning Administrator finds it necessary to interpret the zoning regulations in regards to video stores which sell or rent both general interest[1] and sexually oriented materials.[2]

Unless a business has grandfathering rights, sexually oriented business establishments may, with approval by the Board of Zoning Adjustment, be located only in C-3-B, C-3-C, C-4, C-M and M zoning districts. These districts provide ample locations for sexually oriented business establishments, and, accordingly, there is no constitutional requirement that sexually oriented business establishments be allowed in any other zoning district. Businesses and the public, however, have a right to know, in more concrete terms, how many sexually oriented materials, if any, may a mixed use video store offer for sale and/or rental before it must obtain a certificate of occupancy as a sexually oriented business establishment and therefore be prohibited from operating in districts other than those listed above.[3] It is within the Zoning Administrator's

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[1] General interest videos are videos which are not sexually oriented. Stores which carry only general interest videos are "general interest" stores, while stores that carry both general interest and sexually oriented videos are referred to as "mixed use" stores.

[2] "Sexually oriented materials" are those materials which can be characterized by their emphasis on matters depicting, describing, or related to specified sexual activities and specified anatomical areas, as defined at 11 DCMR § 199.1.

[3] The zoning regulations do not apply an obscenity standard in defining sexually oriented businesses. The Zoning Administrator, therefore, does not believe that in a zoning context it is appropriate to apply a "community standards" test as described in Miller v. California, 93 S.Ct. 2607 (1973.)

interpretive authority to provide such clarification. Pursuant to Reorganization Order No. 555, III. F (D.C. Code Ann. Title 1.-Administration, Appendix at 182, 185 (1973)), the Zoning Administrator "shall be responsible for administratively interpreting and enforcing the zoning regulations." The District of Columbia Court of Appeals has repeatedly recognized this authority, often stating, as it did in Kalorama Citizen's Association v. District of Columbia Board of Zoning Adjustment, 640 A.2d 179 (D.C. App. 1994), that:

> we give "great deference" to the agency's interpretation of its regulations, which we may not reverse unless it is clearly erroneous or inconsistent with the regulations.

It is the purpose of this Opinion to interpret the zoning regulations of the District of Columbia so as to provide standards by which proprietors of mixed use video stores and the public may determine whether a video store is a sexually oriented business establishment.

Discussion

1. Sexually Oriented Business Establishments: Definitions

The zoning regulations at 11 DCMR § 199.1 define a sexually oriented business establishment as follows:

> [A]n establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals, films, materials and articles or an establishment that presents as a substantial or significant portion of its activity, live performances, films or other material which are distinguished or characterized by their emphasis on matters depicting, describing, or related to specified sexual activities and specified anatomical areas.

The terms "substantial," "significant," and "stock in trade" are not defined in the zoning regulations. When a specific word is not defined in the zoning regulations, the Zoning Administrator relies on Webster's Unabridged Dictionary (3rd Edition), to provide clarity.[4] In considering these definitions, the Zoning Administrator concludes that "substantial" means "to a large degree" but not necessarily a majority of a business's stock in trade. This is especially so because "substantial" is used in conjunction with the word "significant." "Significant" is not synonymous with "predominant" or other majoritarian terms, and therefore it is clear to the Zoning Administrator that the Zoning Commission set a standard of less than 50%. In examining a business's stock in trade, the Zoning Administrator will assess "the aggregate of things necessary to carry on the business,"[5] which, in addition to inventory items, includes advertising and promotion activities and signage.

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[4] See the Appendix to this opinion which carries the full definition of each term, with the relevant portions highlighted in bold italic.

[5] Webster's, supra.

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2. Secondary Effects

The United States Supreme Court has made it clear that the application of zoning restrictions to sexually oriented businesses may be "designed to combat the undesirable secondary effects of such businesses." However, such restrictions must do so "without violating the government's paramount obligation of neutrality in its regulation of protected communication," City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925 (1986). Undesirable secondary effects "contribute to neighborhood blight," *Id.*, and include "increased crime rates, depreciation of property values, deterioration of community character and the quality of urban life".[6] In addition, in Baltimore Boulevard, Inc. v. Prince George's County of Maryland, 684 F.Supp 884 (1988), while some sections of the county's zoning regulations for adult bookstores[7] were found to be unconstitutional, the section of the regulations that defined adult book stores as having more than 25%[8] of their stock in trade in sexually oriented materials passed constitutional muster.

In sum, it is clear that through zoning, the District may restrict the placement of sexually oriented businesses to protect its citizens from the undesirable secondary effects of such establishments. Furthermore, it appears that in addition to clearly described standards regarding how a business promotes itself, combined with percentage-based formulae will give all the parties concerned clear guidelines. Moreover, the use of numerical standards will serve as a protection against unfair or arbitrary enforcement. Understanding the foregoing, the question then becomes what percentage of sexually oriented materials may a mixed use video store carry or display and what other activities may it engage in without creating undesirable secondary effects. In that regard, to learn what other governments have determined in this respect, and to assess video retailing industry norms, the Zoning Administrator considered the zoning regulations for adult businesses

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[6]From the 1995 resolution of the City Planning Commission of the City of New York. In addition to conducting its own study, New York based its findings on research done by the Town of Islip, New York, Los Angeles, California, Indianapolis, Indiana, Whittier, California, Austin, Texas, Phoenix, Arizona, Manatee County, Florida, New Hanover, North Carolina, and the State of Minnesota, all of which concluded that adult uses tended to produce adverse secondary effects.

[7]At the time the suit in Baltimore Boulevard began, an "adult book store" in Prince George's County was defined as:

> Any commercial establishment that has twenty-five percent (25%) of its stock in books, periodicals, photographs, drawings, sculpture, motion pictures, films or other visual representations which depict sadomasochistic abuse, sexual conduct or sexual excitement as defined by Article 27 Section 416A of the Annotated Code of Maryland and does not otherwise qualify as a theatre or nonprofit free lending library.

[8]While Baltimore Boulevard was pending, the county lowered the threshold to 5%, and in 1997, it raised the threshold to 10% of a store's inventory. This change went into effect in January of 1998.

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promulgated by the City of New York and Prince George's County, Maryland, as well as a recent national survey conducted of approximately 4,000 video stores by the publication Adult Video News.[9]

3. Regulations in Other Jurisdictions and Industry Practices

A. New York City Regulations:

In 1995, in case # N 950384 ZRY, the Planning Commission of the City of New York amended the City's zoning regulations concerning "Adult Establishments." In the amendments, New York defined an adult establishment as follows:

> [A] book store which has a "substantial portion" of its stock in trade in any one or more of the following...video cassettes,[10] or other visual representations which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

In the resolution enacting the zoning amendments, the New York City Planning Commission advised that if more than 40% of a store's stock in trade or retail space was devoted to sexually oriented material, the business would be considered an adult establishment. In addition, New York established a cap of 10,000 square feet of retail space for the display of sexually oriented materials regardless of how much total retail space a store occupies.

B. Prince George's County Regulations:

The County Council has revised inventory percentages twice since Baltimore Boulevard was filed. First, the county lowered its inventory threshold to 5% (from 25%) and then raised the threshold to 10% in late 1997. Regardless of the percentage amount, however, Prince George's County has used inventory percentages to define sexually oriented businesses for at least 10 years.

C. Video Industry Survey:

From 1996 through 1997, Adult Video News conducted a survey of more than 4,000 video

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[9] "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence is relied upon is reasonably believed to be relevant to the problem that the city addresses." In addition, "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Renton, supra. See also FW/PBS, Inc. v. City of Dallas, 110 S.Ct. 596 (1990). It is the Zoning Administrator's opinion that this reasoning also applies to the administrative interpretation of regulations.

[10] Because the New York City Regulations were updated, video tapes were included in its definition of materials. While video tapes are not specifically mentioned in the District's zoning regulations, they certainly fall within the category of "other material."

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stores. In its annual publication, "AVN's 1998 Adult Entertainment Guide," the magazine revealed that in stores which carry both adult and general release titles, the adult titles comprise, on average, 18.5% of a store's inventory. In addition, in the Northeast region of the country, the "adult percentage of the video market" is 36%, while the in the Southeast and Mid-South regions the percentages are 11.7% and 9.9%, respectively. The survey also discovered that in the Northeast the average number of adult videos in stores which carried both adult and general interest videos was 700. In the Southeast and Midsouth, the average inventory of sexually oriented video tapes in mixed use video stores was 267 and 279 items, respectively.

4. Survey of Video Stores in the District Which Carry Sexually Oriented Materials

Beginning in November of 1997, the Department of Consumer and Regulatory Affairs conducted a survey (see Appendix II), of all of the 25 mixed use video stores in the District.[11] The purpose of the survey was to determine the percentage and actual number of sexually oriented materials in the respective businesses, as well as the percentage and actual square footage of floor space used in each store for the sale and display of sexually oriented materials. The Department did not include video stores which carried no sexually oriented materials, nor did it survey establishments which have the authority under the zoning regulations to operate as sexually oriented businesses.

As regards the percentage of the inventory represented by sexually oriented materials, the survey showed a broad division into two segments: a high end, beginning at 28%, and a low end, beginning at 6% and reaching no higher than 19%. There were no stores in a middle segment ranging from 20% to 27%. Of the fifteen stores in the high end, nine would exceed New York's 40% standard. Of those, five went beyond 50%, and four of the latter five also offered "sex toys" for sale.[12] All of the fifteen businesses would meet any reasonable interpretation of a "sexually oriented business establishment," as sexually oriented materials are a significant and substantial portion of their stock in trade. In contrast, ten stores at the lower end, which run the gamut from single-store operations to a local chain and a national chain, carried sexually oriented materials in an average of 13% of their total stock.

5. Other Factors

In determining whether sexually oriented materials are a significant or substantial part of a business's stock in trade, the Zoning Administrator thinks it is also appropriate to look at how extensively a video store promotes and/or advertises the sexually oriented materials it has for sale or rental, because advertising and/or promotion are among "the aggregate of things necessary to carry on a business." If a video store expends a substantial effort in advertising or promoting sexually oriented materials, it will likely be perceived as a sexually oriented business, and attract or cause the undesirable secondary effects, such as diminution of property values, and altering

[11] The Department used the telephone directory, advertisements, and site visits to identify the video stores.

[12] "Sex toys" are further discussed in this opinion under Standards For Determining Whether a Business is Sexually Oriented, Subsection B(1).

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neighborhood character, which the zoning regulations are designed to prevent. Furthermore, in addition to using percentages of retail space and inventory as guidelines, it is appropriate to establish numerical standards. Numerical standards are required, because at some point, even following the percentage guidelines, a business could have such a large number of sexually oriented materials that the store would generate undesirable secondary effects.

In addition, if a video store also sells sexually oriented magazines or books, the Zoning Administrator will determine whether said books or magazines are a substantial or significant portion of all of the magazines and books offered for sale by the business. Similarly, if the sexually oriented materials for sale are new, then the general interest items of the same category which are offered for sale should also be new. This comparison will be made so that video stores will not be able to feign compliance with the Zoning Regulations by carrying used or undesirable general interest items while stocking new, more merchantable, sexually oriented materials.

Conclusions

In assessing the facts, it is clear that there is a significant range between the inventory percentages set by Prince George's County and the City of New York. In addition, the volume of business done in adult videos in mixed use video stores varies dramatically region by region. The Zoning Administrator, however, cannot agree with Prince George's County that if a video store has as little as 10% of its stock in trade in sexually oriented materials it will cause undesirable secondary effects. Nor, on the other hand, can the Zoning Administrator agree that the 40% figure promulgated by New York City will provide an adequate bulwark against undesirable secondary effects.

The District's survey shows that a majority (fifteen) of the mixed use video stores in the District have close to 30% or more of their inventory in sexually oriented materials, with more than half of those stores exceeding even New York City's standards. All fifteen are clearly sexually oriented because sexually oriented materials are a substantial and significant portion of their stock in trade. All fifteen may be expected to cause the negative secondary effects that have been found in the studies and cases referred to above. That these stores already operate in the District in no way implies a contrary finding concerning secondary effects. Rather, the fact is that the District in recent years, due to budget constraints, loss of personnel, restructuring, and other factors, has lacked the resources to enforce all aspects of the zoning regulations, let alone conduct studies to document the effect of such businesses on the surrounding neighborhoods. In addition, neither the Constitution nor the applicable cases require the District to conduct such a study. The concerns raised by residents of at least two neighborhoods about alleged sexually oriented video stores beginning operations provide sufficient basis for the Zoning Administrator to act to interpret the zoning regulations and to devote still-scarce resources to enforce them, before additional businesses commence operations and before existing businesses expand sexually oriented operations without effective regulation.

After considering the measures taken in other jurisdictions, and examining mixed use video stores in the District, the Zoning Administrator believes that a standard approximating the national average of 18.5% of a store's inventory (as reported in Adult Video News), is appropriate.

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Therefore, while taking other factors into account, the Zoning Administrator believes that if more than 15% of a store's inventory is comprised of sexually oriented materials, it is a sexually oriented business establishment. This standard accommodates the District's legitimate mixed use video stores which have an average of 13% of their stock in sexually oriented materials, and limits the sale and rental of such items to the kind of accessory or incidental use contemplated by the zoning regulations.

Standards For Determining Whether a Business is Sexually Oriented.

Based upon the foregoing, the Zoning Administrator interprets the District of Columbia Zoning Regulations, 11 DCMR §199.1, as is set forth below.

A. A retail or wholesale business has a substantial or significant portion of its stock in trade in sexually oriented materials, and is therefore a sexually oriented business, when any of the factors set forth below in paragraphs 1, 2, 3, or 4 applies:

1. More than 15% of its inventory on display, in areas open to the public,[13] counted piece-by-piece,[14] are sexually oriented.

2. It devotes more than 15% of any one of its advertisements (in column inches for print advertising and in air-time seconds for radio and television advertisements) to the sexually oriented materials it sells or rents. For print advertising, the words or pictures describing sexually oriented materials cannot be the only words or pictures in the advertising, and cannot be larger than the smallest pictures and/or typeface advertising non sexually oriented materials. In addition, the Zoning Administrator will consider the use of color, type size, layout or other graphic devices used in the store's advertising to determine whether a disproportionate emphasis has been placed on the store's sexually oriented materials.

3. Looking at each individual promotional activity separately (which includes but is not limited to contests, guest appearances, discounts, coupons or web site information), the store gives disproportionate emphasis to the sexually oriented materials in its inventory. Factors such as the use of color, type size, layout and other graphic devices will also be considered.

B. Irrespective of the applicability of the factors set forth above, a business establishment is sexually oriented as set forth in either of paragraphs 1 or 2 below:

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[13] "Open to the public" means those areas of the business establishment where customers are ordinarily allowed. Areas that are restricted to minors are considered "open to the public" for this calculation.

[14] Materials in a storeroom or other areas that cannot be seen by customers, whether general interest, or sexually oriented, shall not be counted.

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1. The Zoning Administrator makes the determination that the sale of merchandise such as three dimensional reproductions of human genitalia, and other items which are commonly known as "sex toys," are sexually oriented because such merchandise either "depicts" human genitals and other specified anatomical areas, or are related to specified sexual activities, and that the sale or display of such items is not a customary accessory use to a mixed use video store in the District of Columbia. A business that sells or displays such merchandise is a sexually oriented business.

2. Furthermore, the presence or operation of booths or other apparatuses through which sexually oriented video tapes may be viewed on the premises of a video store, and for which consideration of any kind is charged, is not a customary accessory use to a mixed use video store. A business that provides or operates such apparatuses is a sexually oriented business.

C. After obtaining a certificate of occupancy as a non-sexually oriented business, a business may still be determined to be operating as a sexually oriented business establishment based on the source of its revenues. In making an assessment after a business has opened, the Zoning Administrator may consider, in addition to the other factors discussed herein, the percentage of business, in dollar volume, generated by the establishment's sexually oriented materials, and apply the 15% standard.

In order to ensure that this interpretation of the zoning regulations meets with the approval of the Zoning Commission, a copy of this opinion shall be sent to the Commission for review.

Gladys Hicks

Gladys Hicks,
Acting Zoning Administrator
January 29, 1998

APPENDIX

The terms "substantial", "significant" and "stock in trade" are defined below. The portions of the definitions which the Zoning Administrator believes are relevant to this issue have been highlighted in bold italics.

1. [1] **substantial** \sebz'tanchel, -b'st-, -taan-\ adj [ME *substancial*, fr. LL, fr. *substantial*, fr L *substantia* substance + *alis* -al -- more at SUBSTANCE] **1 a** : consisting of, relating to, sharing the nature of or constituting substance : existing as or in substance : MATERIAL ⟨~life⟩ ⟨the~ realities⟩ ⟨most ponderous and~ things -- Shak.⟩ **b** : not seeming or imaginary : not illusive : REAL, TRUE ⟨the~ world⟩ ⟨a mere dream neither~ nor practical⟩ **c** : being of moment : IMPORTANT, ESSENTIAL **2 a** : adequately or generously nourishing : ABUNDANT, PLENTIFUL ⟨set a ~ table⟩ ⟨after that too~ dinner⟩ **b** : Possessed of goods or an estate : moderately wealthy : WELL-TO DO ⟨a~ man⟩; *often* : having a good and well maintained income producing property ⟨a~ farmer⟩ ⟨the more~ tradesman⟩ **c** : considerable in amount, value, or worth ⟨made a~ gain on the transaction⟩ **3 a** : having good substance : firmly or stoutly constructed : STURDY, SOLID, FIRM ⟨a~ house⟩ ⟨~ cloth⟩ b : having a solid or firm foundation : soundly based : carrying weight ⟨a~ argument⟩ ⟨~ evidence⟩ **4 a**: being that specified to a large degree or in the main ⟨a~ victory⟩ ⟨a~ lie⟩ **b**: of or relating to the main part of something **syn** see MASSIVE

   [2] **substantial** \"\ n -s [ME *substancial*, fr. *substancial*, adj.] : something that is substantial as **a** : something having substance or actual existence **b**: something having good substance or actual value **c** : ***something of moment : an important material matter, thing, or part***

2. [1] **significant** \kent\ adj [L significant-, *significans*, pres. part. of *significare* to signify -- more at SIGNIFY] **1** : having meaning; esp : full of import : SUGGESTIVE, EXPRESSIVE ⟨the painter's task to pick out the ~ details -- Herbert Read⟩ ⟨~ anecdote⟩ **2 a** : suggesting or containing some concealed, disguised, or special meaning : standing as a sign or token ⟨perhaps her glance was~⟩ **b** : INDICATIVE ⟨his actions were more~ of his real purpose than were his words⟩ **3 a** : having or likely to have an influence or effect : deserving to be considered : ***IMPORTANT, WEIGHTY, NOTABLE ⟨even though the individual results may seem small, the total of them is ~F. D. Roosevelt⟩*** **b** : characterized by conveyance of an idea, though, or feeling ⟨transform what would otherwise be meaningless juxtapositions or sequences of sensations into~ entities -- Vernon Lee⟩ **c** : probably caused by something other than mere chance ⟨~ decrease in average yearly growth⟩ ⟨statistically~ correlation between vitamin deficiency and disease⟩ **d** : characteristic and essential to the determination of some larger element of a language : DISTINCTIVE ⟨a~ grammatical form⟩ ⟨every language . . . moves within a clearly definable range of ~ speech sounds -- R. A. Hall b. 1911⟩ ⟨the difference between the initial of keel and cool is not~ in English⟩ **syn** see EXPRESSIVE

   [2] **significant** \"\ N-S : something that has or conveys significance : SIGN, TOKEN, SYMBOL

3. **stock-in-trade** \'==-'=\ *n* 1: the equipment necessary to or used in the conduct of a trade or business: as **a** : the goods kept for sale by a shopkeeper **b** : the fittings and appliances of a workman **c** : ***the aggregate of things necessary to carry on a business*** **2** : something held to resemble standard equipment of a tradesman or business ⟨the light an frivolous charm which was her *stock-in-trade* --S. H. Adams⟩ ⟨its civic beauty, its *stock-in-trade*, is being ruined by parked cars -- Janet Flanner⟩ ⟨this motive had been a *stock-in-trade* of medieval art -- Verena Trudel⟩

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