*** CURRENT THROUGH D.C. LAW 16-163, EFFECTIVE SEPTEMBER 19, 2006, AND THROUGH D.C. ACT 16-474 ***
*** ANNOTATIONS CURRENT THROUGH JUNE 22, 2006 ***

TITLE 2. GOVERNMENT ADMINISTRATION
CHAPTER 18. ADMINISTRATIVE REVIEW OF CIVIL INFRACTIONS
SUBCHAPTER II. PROCEDURES

◆ **GO TO DISTRICT OF COLUMBIA CODE ARCHIVE DIRECTORY**

D.C. Code § 2-1802.03 (2006)

§ 2-1802.03. Hearing [Formerly § 6-2713]

(a) The administrative law judge or attorney examiner shall conduct a hearing on a notice of infraction in accordance with Chapter 5 of this title, except as otherwise provided by this chapter. The Mayor shall bear the burden of establishing an infraction by a preponderance of the evidence.

(b) If a respondent fails, without good cause, to appear at a hearing of which the respondent has been served a notice, the administrative law judge or attorney examiner may proceed with the hearing and enter a final order in the case.

(c) After due consideration of the evidence and arguments, the administrative law judge or attorney examiner shall determine whether the Mayor has established the infraction. Where the Mayor has not established the infraction, the administrative law judge or attorney examiner shall enter an order dismissing the notice of infraction. Where the Mayor has established the infraction, the administrative law judge or attorney examiner shall enter an appropriate written order, which shall set forth findings of fact, conclusions of law, and a sanction.

(d) An order entered pursuant to this section is civil in nature.

(e) Upon a finding that the respondent has committed the infraction, the administrative law judge or attorney examiner may order the respondent to pay a civil fine and, where appropriate, penalties pursuant to § 2-1801.04(a)(2) and costs pursuant to § 2-1801.04(b).

(f) The administrative law judge or attorney examiner may suspend any permit or license which authorizes the respondent to engage in the activity to which the infraction relates if the respondent fails to pay any fines, penalties, and costs, with interest thereon, in accordance with the administrative law judge's or attorney examiner's order. Suspension of the permit or license shall continue until the respondent complies with the administrative law judge's or attorney examiner's order.

(g) Upon request of the respondent, the administrative law judge or attorney examiner may stay the imposition of any sanction imposed pending administrative review.

(h) The Mayor may cause to be entered any final order requiring a respondent to pay fines, penalties, or costs as a judgment against the respondent in the Civil Actions Branch of the Civil Division of the Superior Court of the District of

Columbia. The Mayor may enforce the judgment in the same manner as any other civil judgment may be enforced under District law.

(i) The Mayor may place liens on property for nonpayment of fines, penalties, and costs as follows:

(1) The amount to be paid under a notice of infraction shall be a continuing and perpetual lien in favor of the District upon all property, whether real or personal, belonging to the respondent and shall have the same force and effect as a lien created by judgment. Interest shall accrue thereon at the rate of one and 1/2% per month, or part thereof, from the date of the order or default final order.

(2) The lien shall attach to all property belonging to the respondent at any time during the period of the lien, including any property acquired by the respondent after the lien arises.

(3) The lien shall have priority over all other liens, except liens for District taxes and District water charges. The lien shall be satisfied by payment of the amount of the lien to the agency that issued the final order; provided, that the lien shall not be valid as against a bona fide purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice by filing in the Recorder of Deeds.

(4) For reasonable cause shown, the Mayor may abate the amount of the final order.

(5) The Mayor may contract with any person to collect the amount of the lien and remunerate the person by fee, by a percentage of the amount collected, or both.

(6) Notwithstanding the foregoing, if the lien has been converted to a real property tax lien under § 47-1340, the real property tax lien shall be enforced under Chapter 13A of Title 47.

(j) The Mayor may enforce payment of the fines, penalties, costs, and interest imposed against the real property of the respondent as follows:

(1) The agency that issued the notice of infraction shall record a real property tax lien, captioned "Notice of Converted Real Property Tax Lien", with the Recorder of Deeds stating the name of the respondent, describing the real property against which the real property tax lien attaches by square and lot number, and specifying the amount of the real property tax lien. The real property tax lien shall be deemed a delinquent real property tax from the date of the conversion, shall accrue interest at the rate of interest charged for delinquent real property tax, and shall be perpetual. Subject to § 47-1340(f), payment thereof shall be credited to the General Fund of the District of Columbia. The real property may be sold at the next tax sale, regardless of the date of the conversion, in the same manner, under the same conditions, and subject to the same impositions of interest, costs, expenses, fees, and other charges, as real property sold for delinquent real property tax.

(2) The aggregate amount of the fines, penalties, costs, and interest secured by the lien imposed under subsection (i) of this section may appear on a real property tax bill, and such aggregate amount shall (A) be deemed an additional real property tax to be collected in the same manner and under the same conditions as real property tax is collected, including the sale of the real property for delinquent tax; (B) be credited to the General Fund of the District of Columbia; and (C) be subject to the same penalty and interest provisions as delinquent real property tax is subject as of the date of such real property tax bill. The lien under subsection (i) of this section, with penalty and interest as provided under

this section, shall be converted to real property tax as of the due date for payment of the real property tax bill if payment is not made.

HISTORY: 1981 Ed., § 6-2713; Oct. 5, 1985, D.C. Law 6-42, § 203, 32 DCR 4450; Mar. 8, 1991, D.C. Law 8-237, § 2(i), 38 DCR 314; Apr. 27, 2001, D.C. Law 13-281, § 105(b), 48 DCR 1888; April 13, 2005, D.C. Law 15-354, § 9(b), 52 DCR 2638.

NOTES:
SECTION REFERENCES. --This section is referenced in § 42-3131.14.

EFFECT OF AMENDMENTS. --Section 105(b) of D.C. Law 13-281 substituted "and costs, with interest thereon, " for "or costs" in (f); and rewrote (i).
D.C. Law 15-354 substituted "notice of infraction" for "final order" in the first sentence of (j)(1).

LEGISLATIVE HISTORY OF LAW 6-42. --See note to § 2-1801.01.

LEGISLATIVE HISTORY OF LAW 8-237. --See note to § 2-1801.06.

LEGISLATIVE HISTORY OF LAW 13-281. --See note to § 2-1801.02.

LEGISLATIVE HISTORY OF LAW 15-354. --See note to § 2-1801.03.

EDITOR'S NOTES. --For provisions regarding the Mayor's authority to issue rules to implement the Abatement and Condemnation of Nuisance Properties Omnibus Amendment Act of 2000 in accordance with the District of Columbia Administrative Procedure Act, see § 601 of D.C. Law 13-281.

*** THIS DOCUMENT IS CURRENT THROUGH THE OCTOBER 2006 REVISIONS ***

TITLE 16. CONSUMERS, COMMERCIAL PRACTICES, & CIVIL INFRACTIONS
CHAPTER 31. CIVIL INFRACTIONS: ADMINISTRATIVE PROCEDURES

CDCR 16-3117 (2006)

16-3117. COLLECTION PROCEEDINGS AND LIENS

3117.1 The failure of a respondent to pay monetary sanctions imposed by an ALJ or to comply with a decision of an ALJ within fifteen (15) days of the date of service of the decision shall subject the respondent to suspension of the respondent's license or permit.

3117.2 The Director may refer to a collection agency or the Corporation Counsel cases which involve a respondent's failure to make timely payment for the initiation of civil proceedings to collect fines, penalties, costs, and interest owed by the respondent. The Director may contract with any person to collect the amount of a lien and pay such person a fee or percentage, of the amount collected, or both. The civil proceedings may result in garnishment of wages, attachment of property, and liens and foreclosures against property.

3117.3 A lien shall be satisfied when a respondent submits payment in full to the agency that issued the final order.

3117.4 The failure of a respondent to pay the amount owed under a final order shall result in a continuing and perpetual lien in favor of the District.

3117.5 A lien which results from the amount to be paid under a final order shall have the same force and effect as a lien created by a judgment

3117.6 A lien shall be in favor of the District upon all real and personal property owned by the respondent.

3117.7 A lien shall attach to all property belonging to the respondent including any property acquired by the respondent after the lien arises.

3117.8 A lien shall have priority over all other liens except the following:

(a) Liens for District taxes; and

(b) Liens for District water charges.

3117.9 The Director may take the following steps to collect fines, penalties, costs, and interest imposed against real property owned by the respondent:

(a) The lien shall be recorded with the Recorder of Deeds as a real property tax lien captioned "Notice of Converted Real Property Tax Lien" and immediately deemed a delinquent real property tax;

(b) The lien shall include the name of the respondent, description of the real property by square and lot number, and the amount of the real property tax lien;

(c) The lien shall be a delinquent real property tax from the date of the filing of notice with the Recorder of Deeds;

(d) Interest on the lien shall accrue at the rate of interest charged for delinquent real property tax; and

(e) The real property may be sold at a delinquent real property tax sale in the same manner as real property sold for delinquent real property tax.

3117.10 The amount secured by a lien may appear on the real property tax bill and shall be an additional real property tax to be collected in the same manner and under the same conditions as real property tax is collected.

3117.11 If payment has not been made by the due date for payment of the real property tax bill, a lien shall immediately be converted to a real property tax.

3117.12 The Director may prepare a list of delinquent respondents who have not paid or appealed the final order within fifteen (15) days of personal service.

3117.13 The Director may publish periodically the delinquent list in one (1) or more general circulation newspapers published in the District.

3117.14 A lien shall be valid against the following persons when notice has been filed with the Recorder of Deeds:

(a) Bona fide purchaser;

(b) Holder of a security interest;

(c) Mechanic's lienor; or

(d) Judgment lien creditor.

History of Regulations since Last Compilation by Agency (July 1998)
May 31, 2002 16 DCMR 3113.6, 3114 amended, 3114.2 new, 3117 amended, 3117.2 amended, 3117.3 to 3117.14 new, 3118.1 amended, 3118.2 amended 3118.14 new, 3199 amended at 49 DCR 4995 by the Department of Consumer and Regulatory Affairs; statutory authority D.C. Official Code §§ 2-1801 et seq. (2001), Mayor's Order 86-38

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

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17504
EXHIBIT NO. 34

(29

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.

30

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.

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[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

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[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.

<u>Business License</u>. 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 5^{th} 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 5^{th} 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
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

[redacted]atter of:

[redacted].M.M. Corporation t/a Fun Fair Video	Case Numbers
[redacted]19 5th Street, N.W.	01-OAD-2626-E, NOI #028120
[redacted]ashington, D.C. 20001	01-OAD-2541-G, NOI #035446
Respondent.	

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.

44

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

48

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

46

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

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)

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)

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)

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

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

DISCUSSION

Respondent has paid two $500 fines imposed on him for operating a sexually oriented ess without a license in OAD # 00-2524-G, he has also rebelliously continued to operate exually oriented business, Fun Fair Video. This renders Respondent a recidivist and es him to double fines pursuant to 16 DCMR § 3201.2. Certificate of Occupancy Number 169 issued on November 19, 1996 authorized Respondent to operate a non-sexually related membership store at the premises located at 919 5th Street, NW. Respondent has continued egard the nature of his license and now by asserting the following arguments.

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

(47)

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.

98

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.

49

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

50

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 cost 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.

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If you are licensed in a health occupation, and the matter concerns a violation of a health occupatio law or regulation, then your matter is appealable to the appropriate Board or Commission in th 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 BOARI
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

52