DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 Fourth Street, Suite 210
Washington, D.C. 20001

JMM CORPORATION T/A FUN FAIR VIDEO, Appellant,	)	
	)	**Appeal No.: 17504**
v.	)	
THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS Appellee.	)	

DISTRICT OF COLUMBIA'S OPPOSITION TO APPELLEE'S EMERGENCY MOTION TO STAY BZA'S FINAL ORDER

Appellee, the District of Columbia, Department of Consumer and Regulatory Affairs ("District"), by and through Undersigned Counsel, respectfully opposes JMM Corporation's ("Appellant") Emergency Motion to Stay BZA's Final Order in this proceeding, which was issued by the Board of Zoning Adjustment ("BZA/Board") on October 1 , 2007.

The Board must deny the Appellant's motion because Appellant has failed to meet its burden of proof. It is well established that a party seeking a stay must demonstrate that it is likely to prevail on the merits of the appeal, that irreparable injury will result if the stay is denied, that the opposing parties will not be harmed by a stay, and that the public interest favors the granting of a stay. *See Kuflom v. District of Columbia Bureau of Motor Vehicles Services*, 543 A.2d 340, 344 (D.C. 1988). As more fully shown below, Appellant presents no prospect of irreparable harm and has no likelihood of success on the merit of its appeal assuming such an appeal is filed;[1] moreover, granting of a stay will harm other parties, including the neighboring community, and the public interest does not favor granting a stay. Therefore, Appellant's motion for stay should be denied.

FACTUAL BACKGROUND

On March 6, 2007, the BZA rendered a decision in Appeal No. 17504, JMM Corporation.[2] The BZA considered two appeals: (1) the appeal of a July 2, 2002 Administrative Law Judge ("ALJ") decision upholding two Notices of Infraction for operating outside the scope of its certificate of occupancy; and (2) the appeal of a December 6, 2002 ALJ decision upholding the revocation of JMM's certificate of occupancy ("C/O") on the grounds that the C/O did not authorize the accessory mechanical amusement machine use and the revocation of JMM's mechanical amusement license "in the interest of public decency based on the content displayed on the mechanical amusement machines and its effect on the neighborhood." In its decision, the BZA denied Appellant's appeal, thereby upholding both ALJ decisions and the Notices that the decisions upheld.

In reaching its decision, the BZA found that the Fun Fair Video establishment constitutes a sexually-oriented business (SOBE) as set forth in 11 DCMR §199.1, based on abundant proof that part of its stock and trade consist of materials that fall within the SOBE definitions. Looking at such factors as percentage of sexually-oriented inventory and allocation of floor space, the Board further found that "The sale or rental of VHS/DVDs emphasizing specified anatomical areas and specified sexual activities, as

[1] As of the date of this Opposition, Appellant had not filed an appeal.
[2] The Final Date of Order was October 1, 2007, and the Order became effective on October 15, 2007.

well as the sale of time to watch such VHS/DVDs on the video monitors in the 10 video booths, constituted an important part of Appellant's business, and, indeed, appeared to be the main part of that business." BZA Decision at 11. Because Appellant's C/O limits its use to one that is not sexually oriented, the Board found that the Applicant was operating outside of its scope as of the date that the Notices of Infraction and Intent to revoke were issued, and the notices and the two decisions that sustained them, were affirmed by the Board and the appeal denied on this ground. The Board further found that, since the mechanical amusement machine use was not identified as an accessory use, this use was also beyond the scope of the C/O. With respect to the mechanical amusement license, the Board agreed with the ALJ that the evidence "demonstrated that public decency was compromised by the activity in and around Fun Fair Video and that revocation of [JMM'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." BZA Decision at 13.

On October 9, 2007, Appellant filed its Emergency Motion. As of the date of this Opposition, Appellant had not filed a petition for review before the District of Columbia Court of Appeals. In its Motion, Appellant indicated that it plans to file a timely appeal by October 31, 2007.

ARGUMENT

THE STAY MUST BE DENIED SINCE APPELLANT HAS FAILED TO MEET ITS BURDEN OF PROOF

To prevail on a motion for stay, the party seeking the stay must show: that it is likely to succeed on the merits; that it will suffer irreparable harm without the stay; that the stay will not harm opposing parties; and that the stay is favored by the public interest.

See *Barry v. Washington Post Co.*, 529 A.2d 319 (D.C. 1987). See also *Kuflom v. District of Columbia Bureau of Motor Vehicle Services*, *supra*, 543 A.2d at 344. Further, while an equitable balance of these factors must always be struck, pivotal consideration is usually given to the probability of success and the prospect of irreparable harm. *Cf. Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. 1976) (the primary justification for issuance of temporary relief is always prevention of irreparable injury); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 182 U.S. App. D.C. 220, 223, 559 F.2d 841 (1977) (movant for stay must show either a combination of probable success and possible irreparable harm, or a balance of hardships tipping sharply in its favor).

In the instant case, a stay is clearly not warranted since there is no reasonable likelihood of Appellant succeeding on the merits, and it has demonstrated no irreparable harm flowing from discontinuance of the sexually-oriented activities outside the scope of its C/O in which it is now engaged. Although the Appellant had multiple opportunities, since at least 2002, to mitigate the alleged harm, by, for example, operating a video store within the scope of its C/O or seeking a variance or special exception to conduct other activities, it choose not to do so. After pursuing its arguments in six tribunals over a seven year period, including before the Office of Adjudication, the Board of Appeals and Review, the District of Columbia Court of Appeals, Superior Court and the BZA, it is disingenuous for the Appellant now to argue that it did not have "its full day in court."

Appellant is Not Likely to Prevail on the Merits

The Appellant has failed to demonstrate a likelihood that it will prevail on the merits. *See Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F. 2d 921, 925 (D.C. Cir. 1958) ("[w]ithout a substantial indication of probable success, there would be *no justification* for the court's intrusion into the ordinary process of administration and judicial review.") [Emphasis added]

If and when Appellant does in fact file its proposed petition for review before the District of Columbia Court of Appeals, that Court's review of the Board's Final Order will be a limited one. The Board's decision will be upheld if there is a rational basis for it and if the facts found by the Board have substantial support in the record evidence. *See Sisson v. District of Columbia Board of Zoning Adjustment*, 805 A.2d 964, 970 (D.C. 2002); *National Cathedral Neighborhood Association v. District of Columbia Board of Zoning Adjustment*, 753 A.2d 984, 986 n.2 (D.C. 2000). Moreover, it is the BZA's responsibility to interpret the local zoning regulations, and its interpretation of those regulations is controlling unless plainly erroneous or inconsistent with the clear language of such regulations. *See Citizens Coalition v. District of Columbia Board of Zoning Adjustment*, 619 A.2d 940, 947 (D.C. 1993).

Here, the Board's Order correctly upheld the prior ALJ decisions with respect to the Notices of Infraction and Notices to Revoke based on Appellant's operation outside the scope of its C/O. Appellant was provided with full hearings in 2002 before the Office of Adjudication on these Notices. In addition, the BZA thoroughly considered the record evidence before it with respect to the NOI decision, and undertook a de novo review of the C/O decisions. The evidence established that a substantial portion of Appellant's business is devoted to the sale of erotic entertainment, through video monitor booths showing explicit sexual activity. DCRA investigators conducted recent investigations of the business on September 15, September 19, October 11 and October 15, 2007, and confirmed that the operations described to the Board were continuing at that date. See Affidavit of Clement Stokes, attached hereto.

The Board properly determined this establishment to be a "sexually oriented business establishment" (SOBE) within the meaning of 11 DCMR §199.1. The definition of sexually-oriented business establishment is as follows:

> 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 or its activity, live performances, films, or other materials, that are distinguished or characterized by their emphasis on matters, depicting, describing, or related to specified sexual activities and specified anatomical areas.
>
> These establishments may include, but are not limited to, bookstores, newsstands, theaters, and amusement enterprises. If an establishment is a sexually-oriented business establishment as defined here, it shall not be deemed to constitute any other use permitted under the authority of this title.

The record herein contains overwhelming evidence that the Appellant was operating outside of the scope of its C/O as of the date that the Notices of Infraction and the Intent to Revoke were issued and continues to operate its business establishment outside the scope of its C/O.

In its motion, Appellant does not contest the description of its business operations or that its business was operating beyond the scope of its C/O. Instead, its challenge to the BZA's decision rests solely on constitutional grounds.[3] Appellant's constitutional challenge rests on the Board's refusal to consider claims that the District's SOBE regulations and regulatory scheme are unconstitutional. However the Board correctly pointed out during the hearing, and in its Order, that it lacks jurisdiction to consider

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[3] In its motion, Appellant also complains that the BZA erroneously declined to entertain its argument that the ALJs involved in this matter lacked the authority to order the revocation of its C/O and amusement license. However, Appellant's argument regarding ALJ authority is patently frivolous. *See* D.C. Code, § 2-1831.09(b)(9) (2007 Supp.) (ALJs have the power to suspend, revoke, or deny licenses or permits).

questions of constitutionality citing D.C. Official Code §6-541.07(g)(1).[4] Its authority is limited to hearing appeals alleging error in the administration and enforcement of the Zoning Regulations. The sole issue before the BZA was whether Appellant was operating a sexually-oriented business establishment outside the scope of its C/O. The BZA is not the proper venue to consider issues of constitutional law but is equipped only to address zoning issues as it properly concluded in the decision.

If the Appellant wanted to raise a constitutional challenge to the zoning regulations which formed the basis for the civil fines and C/O revocations imposed upon it, such challenge could have been raised in the courts at any time during the past seven years. Regardless of the merits of Appellant's constitutional challenge that issue was not before the BZA and has no bearing on the merits for purposes of the stay request before this Board. Appellant's constitutional challenge will presumably be raised in its court appeal, where it will have another opportunity to seek a stay before the court in conjunction with its petition for review, if timely filed.[5]

For these reasons, there is not a substantial likelihood that the Applicant will prevail on the merits.

<u>Appellant will not be irreparably injured if the stay is denied</u>.

Appellant cannot show irreparable injury, in the absence of a stay. *See Virginia Petroleum*, 259 F.2d at 925. Generally, a stay will not be granted *if the only harm alleged is economic loss*. [Emphasis added]. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974)

[4] The BZA also based its conclusion on Board of Zoning Adjustment Order No. 13967, *Appeal of California Steak House, Inc. See* BZA Decision at 2. Appellant has not cited any authority to rebut the BZA's conclusion that resolution of the constitutional issues is beyond its jurisdiction.

[5] Under standards established by the Supreme Court, the subject regulations pass constitutional muster, and the Appellant is unlikely to prevail on its constitutional arguments regardless of the forum. *See Gonzalez* v. *Carhart*, 127 S. Ct. 1610 (2007); *Smith v. Goguen*, 415 U.S. 566, 574 (1974)(inclusion of anatomical guidelines prevented statute from being void for vagueness.)

(""the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury.")

Appellant alleges an economic loss in its motion to stay if Appellant is forced to close its doors. This argument is without merit. Appellant has chosen to operate outside the scope of its original C/O (not "sexually oriented") resulting in the current closure circumstances. In other words the so-called economic loss of Appellant is a "self inflicted wound" and does not constitute irreparable injury. This matter has been litigated as far back as July 2, 2002 and December 6, 2002 respectively (the date of issuance of the two ALJ orders), and Appellant has been aware for the past five years that its operations at 919 5th Street, N.E. could be shut down as illegal. Nonetheless, it made no effort to bring its operations into compliance with the C/O, for example, by operating a bona fide video store.

Irreparable injury occurs where there is no adequate remedy at law. Appellant had such remedies at its disposal and choose to do nothing. Appellant has taken no steps to mitigate the so-called damage it claims will result from enforcement of the C/O revocation. All the Appellant had to do was operate within the scope of its original C of O or seek a special exception or variance. Instead the Appellant has chosen to operate outside the C of O at its own risk. Moreover, as noted earlier, Appellant could have also presented its constitutional arguments to a judicial forum long before this stage of the administrative enforcement process. It is disingenuous for Appellant to now argue irreparable injury to justify its continued noncompliance with applicable law, particularly since Appellant has the means to mitigate the harm. *See Application No. 16970-A of National Child Research Center, Order Denying Motion for Stay,* May 10, 2005, at 6.

See also Application No. 16553-H of the George Washington University, Order Denying Motion for Stay, May 6, 2003, at 3. Consequently, the concept of equity should not be used to protect one who has chosen to operate outside the scope of clearly-articulated legal requirements while it seeks an appeal from the consequences of its own law breaking. *Cf. Slater v. Biehl,* 793 A.2d 1268, 1279 n. 13 (D.C. 2002) (he who comes into equity must come with clean hands). Therefore, Appellant's motion must be denied because Appellant fails to meet the second element required for a stay.

The District and the public will be harmed by a stay

The Appellant's motion also must be denied because the District of Columbia government and the public at large will be harmed if a stay is granted. While Appellant must show irreparable harm to succeed on a stay, other parties need only be "substantially harmed" for the stay to be denied. *See Virginia Petroleum*, 259 F. 2d at 925. Granting Appellant's motion would substantially harm the District government by undermining its authority to penalize and prevent violations of local regulations designed to protect its citizens from unbridled commerce in sexually-explicit material. The District should not be precluded from enforcing violations of the law after due process has been accorded to the offending party via an evidentiary hearing and full administrative deliberations. The public itself obviously also has a strong interest in having regulations and statutes designed to protect its welfare and safety enforced by its local government. To permit the Appellant to stay the administrative orders at issue and avoid liability for infractions proven, by a preponderance of the evidence would expose the neighboring community to harmful activity and eviscerate the public's confidence in the enforcement of local law. Indeed, the public harm is specifically identified in the

Board's March 6, 2007 Order which refers to the ALJ's 2002 conclusion that the evidence in this case "demonstrated that public decency was compromised by the activity in and around Fun Fair Video and that revocation of [JMM'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". (BZA Appeal No. 7504, p.13)

The damage that would result by granting the stay is real and significant. The Board's Order was based on overwhelming evidence of the illegal activities engaged in by the Appellant. Over the past five years, the surrounding neighborhood has changed and new condominium buildings have been built with significant investment by developers and purchasers. The Advisory Neighborhood Commission representing this community has expressed strong concern about Fun Fair Video's operations. Moreover, those operations appear to be providing a magnet for other illegal activities in the neighborhood including drug activity and prostitution which the Metropolitan Police Department has been investigating in response to citizen complaints. See also Affidavit of Clement Stokes. These concerns have prompted a significant community outcry, by the Advisory Neighborhood Commission which is a party to these proceedings as well as individual residents, particularly those residing at 555 Massachusetts Avenue which overlooks Fun Fair Video. Granting the stay would encourage Appellant to maintain its current illegal operations. This would result in the continuation of the present adverse conditions with no hope of amelioration. Such a result would greatly harm the District and the community.

<u>The public interest does not favor granting a stay</u>.

The public interest would be disserved by the granting of a stay. As noted above, a stay would likely perpetuate the conditions that are compromising public decency and causing the unacceptable and unsafe environment in a neighborhood that, as ALJ McCoy stated, "District citizens call ...home."

As described in Investigator Stokes affidavit, the conditions observed by him, as recently as September and October 2007, indicate, not only that the business is a sexually-oriented business establishment, but that patrons of Fun Fair are being solicited to engage in sexual acts.

Therefore, unless and until Appellant complies with the Board's Final Order, the adjacent neighborhood will continue to suffer harm. Balancing these factors results in a conclusion that the public interest favors a denial of the Appellant's Motion to Stay.

Conclusion

In conclusion, the Board must deny Appellant's Emergency Motion to Stay BZA's Final Order issued in this proceeding because Appellant has failed to meet its burden of proof. Appellant is unlikely to prevail on the merits and will not suffer irreparable injury if this motion is denied; moreover, the District and the public will be harmed by a stay and the public interest does not favor granting a stay.

WHEREFORE, for these foregoing reasons, the District of Columbia requests this Board deny the Appellant's Emergency Motion to Stay BZA's Final Order.

Respectfully Submitted,

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Certification of Service

I hereby certify that a copy of the forgoing Opposition to Appellant's Emergency Motion to Stay BZA's Final Order, was sent postage pre-paid via U.S. Mail this 17th day of October 2007 to Jonathan Katz, Esq., located at 1400 Spring Street, Suite 410, Silver Spring, Md., 20910.

Matthew J. Green, Jr.