

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



MEMORANDUM

TO: Parties in BZA Appeal No. 17504
JMM Corp./Fun Fair Video

FROM: Jerrily R. Kress, FAIA **RSN**
Director Office of Zoning **J**

DATE: October 10, 2007

RE: Motion filed by the Appellant Requesting Stay of BZA Order No.
17504 - JMM Corp./Fun Fair Video

Please be advised that the above-cited and attached motion was filed on October 9, 2007. The Board of Zoning Adjustment ("Board") is scheduled to consider the motion at a special public meeting on Tuesday, October 23, 2007, at 9:30 A.M. Responses to the above motion for stay must be received by the Board no later than 3:00 P.M. on Wednesday, October 17, 2007. No replies to the responses will be accepted.

Please call Richard S. Nero, Jr., Deputy Director of Operations, on (202) 727-6311, if you have any questions relative to the foregoing.

rsn
Attachment

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17504
EXHIBIT NO. 41

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Board of Zoning Adjustment
District of Columbia
CASE NO. 17504
EXHIBIT NO. 41

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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

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D.C. OFFICE OF ZONING

RECEIVED

APPELLANT'S EMERGENCY MOTION TO STAY BZA'S FINAL ORDER

Appellant JMM Corp./Fun Fair Video respectfully moves to stay the final order of the Board of October 1, 2007, for the following grounds:

1. Appellant plans to file a timely appeal to the District of Columbia Court of Appeals. The deadline for doing so is October 31, 2007.
2. The Board's final order provides that it will take effect October 11, 2007. It will be highly prejudicial and unjust to Appellant for the Board's final order to take effect before Appellant can have its full day in the District of Columbia Court of Appeals.

Appellant did not have its full day in court before the Board, seeing in part that the Board refused to entertain (1) Appellant's claims that the Administrative Law Judges below were without authority to order the revocation of Appellant's certificate of operation and amusement license, and without authority to direct Appellant to cease operations until

obtaining the "appropriate" certificate of operation, (2) Appellant's arguments that the District's Sexually Oriented Business Enterprise ("SOBE") are unlawfully and unconstitutionally vague and overbroad, so as to make them void and without lawful effect, and (3) Appellant's meritorious Constitutional challenges to the District of Columbia's unconstitutional regulatory scheme for defining and regulating SOBE's, unconstitutional scheme for granting and revoking SOBE certificates of occupancy, and unconstitutionally-enacted SOBE regulations which fail to rely on any studies -- let alone relevant studies -- linking such businesses as Appellant's to negative secondary effects. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

3. Appellant reincorporate by reference all written arguments previously filed by Appellant in this matter. Those arguments show meritorious grounds for winning before a tribunal (e.g., the District of Columbia Court of Appeals) that will, in fact, rule on Appellants' Constitutional issues and challenges to the government's SOBE regulations. See above and Appellant's written arguments in this matter. In deciding whether to grant a stay on appeal, tribunals tend to look at the appealing party's likelihood of success on the merits (high, for the reasons presented herein), irreparable harm to the appellant of denying a stay (the prejudice will be irreparable and financially

permanent for Appellant to be required to close its business before this case can be heard in the D.C. Court of Appeals), prejudice to the opposing party if a stay is granted (little to no prejudice exists, in part seeing that Appellant has operated as an ongoing business throughout this BZA litigation, and its negative impact on the surrounding neighborhood, if any, is limited), and the public interest (the public interest always is served by protecting party's First Amendment and other Constitutional rights). *Akassy v. William Penn Apts., L.P.*, 891 A.2d 291, 309 (D.C. 2006) (granting a stay to tenants litigating against a landlord, of a trial court order pending appeal, based on the irreparable harm that would have been suffered by the tenants without a stay).

4. Like the courts, this Board of Zoning Adjustment was established as an independent tribunal, charged with dispassionately deciding issues about Appellant and all other parties, regardless of how inflamed the passions of the public may be for Appellant, no matter how much Appellant has been in the news, no matter how much elected officials may wish to please their constituents by acting against Appellant, and no matter which way the political and policy winds are blowing. See, e.g. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223-24, 110 S. Ct. 596 (1990).

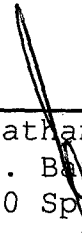
5. The regulatory rules governing this motion include DCMR § 11-3130.5, which provides: "In the event an appeal is filed in a court of competent jurisdiction from an order of the Board, all time limitations in this section shall commence to run from the decision date of the court's final determination of the appeal. Unless stayed by the Board or a court of competent jurisdiction, an appellant or applicant may proceed pursuant to the order of the Board prior to the court's final determination."

However, much more fundamental grounds justify granting this stay request. The Constitution does not permit unbridled discretion in administrative agencies to stop the operations of adult entertainment businesses. That is the proper function of the courts. See, e.g. *FW/PBS v. Dallas*, 493 U.S. 215, 223-24. Thus far, the Board has been unwilling to handle any Constitutional issues, including unbridled discretion by administrative agencies in regulating adult entertainment businesses.

WHEREFORE, for all the foregoing reasons Appellant moves for a stay of the imposition and execution of the Board's October 1, 2007 order until this matter is fully and finally adjudicated in the District of Columbia Court of Appeals.

Respectfully submitted,

MARKS & KATZ, L.L.C.



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CERTIFICATE OF SERVICE OF GOOD FAITH EFFORTS

Undersigned counsel has made the following good faith efforts to obtain consent from the government to this Motion: on October 9, 2007, undersigned counsel spoke with Assistant Attorney General Matthew Green, Esquire, who was counsel for record for the government during the proceedings before the Board in this matter. However, Mr. Green says that he does not have authority to consent to this motion and that he understands the matter is being held by the Civil Division of the Attorney General at this time.



Jonathan L. Katz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Emergency Motion to Stay Execution of the BZA's Ruling was served by fax and first-class mail on October 9, 2007, to:

Matthew Green, Esquire
Attorney General's Office
Civil Division
941 North Capitol Street, N.E.
Suite 9400
Washington, DC 20002
Fax: 202-442-9447



Jonathan L. Katz

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF
J.M.M. CORPORATION

Appellant

*

* BZA Appeal No. 17504

ORDER

UPON CONSIDERATION of Appellant's foregoing Motion to stay the Board's final Order of October 1, 2007, it is this ____ day of October hereby

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

ORDERED that within thirty days from the date of this Order, the Appellant shall provide proof that he has filed an appeal to the District of Columbia Court of Appeals in this matter; and it is further

ORDERED that this stay shall continue in effect until the final resolution of this matter in the District of Columbia Court of Appeals.

Board of Zoning Adjustment

October ____, 2007,.