GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF
J.M.M. CORPORATION

Appellant

* **BZA Appeal No. 17504**

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

INITIAL BRIEF AND ARGUMENTS OF APPELLANT JMM CORP.

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

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

A. NATURE OF THE CASE

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

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

B. COURSE OF THE PROCEEDINGS

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

On July 2, 2002, as a result of a contested hearing at which undersigned counsel defended Appellant, DCRA Administrative Law Judge Lennox J. Simon ruled as follows (App. 44-52): (1) ruled that Appellant was in violation of two notices of infraction alleging that Appellant was operating a SOBE without having a SOBE certificate of occupancy, and (2) ruled that the Office of Enforcement issue a cease and desist order for Appellant to cease all business at its location until obtaining "the required Certificate of Occupancy for his business." App. 44-52.

Appellant filed a timely notice of appeal therefrom with the District of Columbia Board of Appeals and Review; the Board of Appeals then assigned BAR Docket No. CI5875-02. The District of Columbia Court of Appeals subsequently issued an opinion permitting Appellant to re-file said appeal to the Board of Zoning Administration, which was timely accomplished. Court of Appeals Nos. 04-AA-000104 and 04-AA-000149.

On December 6, 2002, DCRA Administrative Law Judge Henry McCoy ruled as follows below in Appel. No. 04-AA-000149: (1) revoke Appellant's certificate of occupancy issued in 1996, and (2) revoke Appellant's mechanical booth license renewed on June 1, 2001. App. 39-43.

Appellant filed a timely notice of appeal therefrom with the District of Columbia Board of Appeals and Review, the Board of Appeals assigned BAR Docket No. CI5958-03. The District of Columbia Court of Appeals subsequently issued an opinion permitting Appellant to re-file said appeal to the Board of Zoning Administration, which was timely accomplished. Court of Appeals Nos. 04-AA-000104 and 04-AA-000149.

After directing Appellant to provide lengthy (and expensive) transcripts from the DCRA Office of Administrative Hearings[1], and after Appellant submitted an in-depth, formal brief to the Board of Appeals and Review, pursuant to the Board of Appeals' imposed deadline (filed on November 20, 2003), by certificate of service dated January 30, 2004, the Board of Appeals *sua sponte* dismissed both appeals below -- which had been consolidated by the Board of Appeals -- for alleged want of jurisdiction, without reaching any merits of either appeal. The District of Columbia Court of Appeals subsequently issued an opinion permitting Appellant to re-file said appeal to the Board of Zoning Administration, which was timely accomplished. Court of Appeals Nos. 04-AA-000104 and 04-AA-000149.

[1] While Appellant was able to provide the Board of Appeals a complete transcript of the two-day March 2002 hearing before ALJ Lennox Simon, the DCRA provided Appellant with an entirely inaudible set of audiocasettes from the July 29-30, 2002, hearing before ALJ Henry McCoy. App. 53-59.purportedly of the July 29-30, 2002, hearing before ALJ McCoy -- that was subsequently provided to undersigned counsel by the DCRA's Office of Adjudication had no sound whatsoever, when carefully checked by undersigned counsel and the owner of Bradford & Associates court reporters in Arlington, Va.

STATEMENT OF MATERIAL FACTS

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

The case before DCRA ALJ Lennox Simon

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

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

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

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

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

Appellant presented the testimony of private detective and former District Metropolitan Police Officer William Vain, T.1-246, who visited the Appellant's premises unannounced on two occasions, once in February 2002, and again in early March 2002.

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

T1-248-52. Mr. Vain produced a fully detailed and fully measured map of the premises (the map is part of the record in this instant appeal, and was admitted into evidence as JMM Corp's Exhibit 1 (T1-267-69)), whose layout has not changed between the time the NOI's were issued and the time that private detective Vain visited. T1-253-54. Mr. Vain's testimony showed that he spent meticulous time, effort and ability to produce an accurate diagram of the premises. *Id.*

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

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

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

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

The case before DCRA ALJ Henry McCoy

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

ARGUMENT

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

Incorporated herein by reference are the contents of Appellant's attached Appellant's Correction to Pre-Hearing Statement filed July 23, 2002, and his Hearing Memorandum for the March 5, 2002, hearing before ALJ Simon, before the DCRA Office of Administrative Hearings. A. 64-77.

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

a. **Appellant is not a SOBE and Does Not Require a SOBE COO.**

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

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

An unbroken chain of District zoning administrators and acting zoning administrators have agreed not to enforce against businesses that follow the Hicks Opinion and existed when the Hicks Opinion was issued. T2-71-73. The problem with the Hicks Opinion is that it creates almost as many questions as it answers, by going on for several pages talking about a 15% standard on the one hand, but then not sufficiently defining the basis of the 15% (e.g., whether the 15% is based on floor space, unit-per-unit inventory, or any other standard). Particularly under such circumstances, businesses must be given the benefit of the doubt as to whether they qualify as SOBE's. Moreover, the SOBE definition and the Hicks Opinion are so vague and overbroad as to render the District's SOBE regulatory scheme unconstitutional under the First Amendment and under the due process guarantees provided under the Fifth and Fourteenth Amendments to the United States Constitution. *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002) (confirming that the First Amendment is violated by overly vague and overbroad regulations of expression).

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

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

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

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

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

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

c. The District's SOBE regulations are unconstitutional for being vague, overbroad, and in violation of the First Amendment's protections of free speech and free expression, where, *inter alia*, the SOBE regulations were enacted without the use of reasonably reliable studies showing negative secondary effects of such businesses as Appellants, and where the regulations place unconstitutionally unbridled discretion in the Board of Zoning Appeals in issuing and revoking SOBE certificates of occupancy ("COO's").

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

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

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

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

sign a loyalty oath before receiving certain tax benefits).

Id.

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

Justice Kennedy's concurrence in *Alameda Books* goes as far as to call for a trial to allow a challenge to the assumptions found in the secondary effects studies allegedly relied upon by the government in enacting the SOBE regulations. *Alameda Books,* 122 S. Ct. at 1733-34. Therefore, based on the foregoing discussion, *Alameda Books* establishes that ALJ Simon's July 2000 Order should not be enforced without at least holding a trial.

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

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

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

ii. <u>The SOBE regulations place unconstitutionally unbridled discretion in the hands of the government.</u> Moreover, the District's mechanism for providing SOBE COO's is so onerous and provides so much unbridled discretion in the hands of the administering agency, as to render the SOBE regulatory scheme unconstitutional. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 214, 225 (1990), and 11 DCMR 744, 754, 801, 602.1, and 11-902.1 (the main SOBE provisions).

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

> 11 DCMR § 744.1 & 754.1. A sexually-oriented business establishment shall be permitted in C-3-C [/C-4] districts only, if approved by the Board

> of Zoning Adjustment in accordance with the conditions specified in § 3108 of chapter 31 of this title, subject to the requirements of this section.
>
> 744.2 and 754.2. No portion of the establishment shall be located within six hundred feet (600 ft.) of a Residential or Special Purpose district.
>
> 744.3 and 754.3. No portion of the establishment shall be located within six hundred feet (600 ft.) of a church, school, library, or playground, or the area that is under the jurisdiction of the Commission of Fine Arts pursuant to the Shipstead-Luce Act, 46 Stat. 366, as amended.
>
> 744.4 and 754.4. No portion of the establishment shall be located within three hundred feet (300 ft.) of any other sexually-oriented business establishment.
>
> 744.5 and 754.5. There shall be no display of goods or services visible from the exterior of the premises.
>
> 744.6 and 754.6. The establishment shall be compatible with other uses in the area.
>
> 744.7 and 754.7. The use shall not become objectionable because of its effect on the character of the neighborhood or because of noise, traffic, or other conditions.
>
> 744.8 and 744.8. The establishment shall not have an adverse impact on religious, educational, and governmental facilities located in the area.

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

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

in accordance with the Zoning Regulations and Zoning Maps, subject in each case to the special condition specified in this title..."

11 DCMR 3108.1 (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Brief was served by first-class mail on November 3, 2006, to:

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