

**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**

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In the Matter of:

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

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

DECISION AND ORDER

STATEMENT OF THE CASE:

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

Background

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

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

**BOARD OF ZONING ADJUSTMENT
District of Columbia**

**CASE NO. 17504
EXHIBIT NO. 4**

Board of Zoning Adjustment
District of Columbia
CASE NO. 17504
EXHIBIT NO. 4

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 Zaggy, 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.

PRELIMINARY 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

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

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

2. On September 1, 2001, DCRA's Investigator conducted a second unannounced inspection of Respondent's business and observed patrons seeking booth rentals or proceeding directly to the X-rated movie and "sex toy" section in the rear of Fun Fair Video. (Government Exhibit #7 and Testimony of Investigator Hooks)
3. On September 10, 2001, DCRA's Investigator and Zoning Inspector conducted a third inspection of Fun Fair Video and observed a male patron leaving a pornographic video booth wherein what appeared to be semen was further observed on the floor upon his departure. An employee of Fun Fair Video promptly mopped up this fluid. (Government exhibit # 7 and Testimony of Investigator Hooks and Inspector James)
4. On September 21, 2001, two of DCRA's Investigators surveyed the video materials available for rent/sale on the premises. At the time of the survey, Respondent had an inventory of 1,996 general viewing VHS/DVD's measuring 20' in length by 21' in width, and 544 X-rated VHS/DVD's measuring 34' in length and 27' in width on the shelves of Fun Fair Video, along with 10 video booths which were showing X-rated videos. (Government exhibit #7 and Testimony of Investigators Hooks and Allen)
5. On December 14, 2001, an officer of the D.C. Metropolitan Police observed a male patron inside Fun Fair Video watching pornographic videos in a video booth with the door partially opened while masturbating. Police reports also indicate that numerous criminal activities were taking place in the area of Respondents business.(Government exhibit #5 and 6, and Testimony of Sergeant Gilkey)
6. On April 7, 2000, Respondent JMM Corporation / Fun Fair Video was issued Notice of Infraction #42251 in the amount of \$500.00. On June 20, 2000, Respondent was found liable after an administrative hearing in the amount of \$540.00 for operating a sexually oriented business in violation of the conditions of Certificate of Occupancy #B176169. (Government Exhibit #1 and testimony of Investigator Hooks)

DISCUSSION

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

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

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 to 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.

2. 11 DCMR § 199.1 defines a sexually oriented business establishment as: "An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals, films, materials and articles or an establishment that presents as a substantial or significant portion of its activity, live performances, films or other material which are distinguished or characterized by their emphasis on matters depicting, describing, or related to specified sexual activities and specified anatomical areas." In the instant matter, sex is the dominant emphasis, therefore Respondent's activities fall within the above-cited definition of a sexually oriented business.
3. 16 DCMR § 3201.2 provides that, "An infraction shall be a repeat infraction and shall carry the enhanced penalties set forth in §§ 3201.1 and 3224.1 if the infraction is a violation by the same person of the same provision of law or rule committed within the same three (3) year, period as the initial infraction. In the instant case, respondent has been cited for the identical violation as he was cited previously. Therefore, Respondent is a recidivist.

ORDER

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

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

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

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

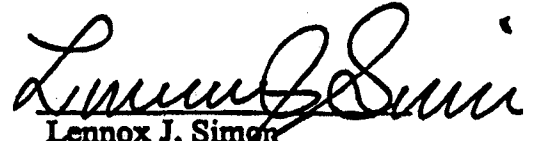
FURTHER ORDERED: that the total amount that is due and owing to the District of Columbia in the above captioned case is \$2, 080.00

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

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

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

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

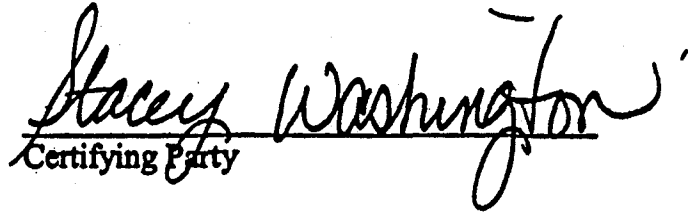

Lennox J. Simon
Administrative Law Judge, D.C.

CERTIFICATE OF SERVICE

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

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

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


Certifying Party

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 occupational law or regulation, then your matter is appealable to the appropriate Board or Commission in the Licensing Regulation Administration of the Department of Health.

If you are not licensed or your occupation or profession is not regulated by a Board or Commission, then your matter is appealable to the BOARD OF APPEALS AND REVIEW.

The following addresses and telephone numbers are for the appropriate appellate body:

BOARD OF APPEALS AND REVIEW

441 4th Street, N.W.

Suite 540S

Washington, D.C. 20001

(202) 727-8280

ALCOHOLIC BEVERAGE CONTROL BOARD

941 North Capitol Street, N.E.

Room 7W30

Washington, D.C. 20002

(202) 442-4445

BOARD OF ZONING ADJUSTMENT

441 4th Street, N.W.

Suite 210S

Washington, D.C. 20001

(202) 727-6311

**OCCUPATIONAL AND PROFESSIONAL
LICENSING ADMINISTRATION**

941 North Capitol Street, N.E.

Room 7W46

Washington, D.C. 20002

(202) 442-4320

**LICENSING REGULATION
ADMINISTRATION
DEPARTMENT OF HEALTH**

825 North Capitol Street, N.E.

Room 2164

Washington, D.C. 20002

(202) 442-5888

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