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 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.

[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

[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.

---

[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 5th 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 5th 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

 (40)

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