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MEMORANDUM

DATE: January 10, 2008

FROM: Angela Shin, Legal Assistant

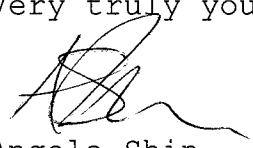
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 X Please file the enclosed document(s). Enclosed please find the original copy that is to be filed, plus fifteen (15) extra copies that is to be distributed accordingly.

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Thank you for your time. Please call me if I can be of service with this memorandum or with any other matter. Thank you.

Very truly yours,



Angela Shin
Legal Assistant

Enclosure(s)

cc: Doris Parker-Wooldridge, Esq.

ANC Chairperson (ANC)

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17670

EXHIBIT NO. 22

Board of Zoning Adjustment
District of Columbia
CASE NO. 17670
EXHIBIT NO. 22

IN THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

MATTER OF EIMAJ, INC., AND NICHOLAS T. FILLORAMO, APPELLANTS

Case No. 17670

On appeal from D.C. Office of Admin. Hrgs. Case No. CR-1-05-N100089

AMENDED BRIEF AND INITIAL ARGUMENTS OF APPELLANT

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

Appellants Eimaj, Inc., And N.T. Filloramo, hereby appeal the Final Order (mailed on March 12, 2007 by the District of Columbia Office of Administrative Hearings) that sustains a Notice of Infraction for allegedly operating a Sexually Oriented Business Establishment (SOBE) while having a certificate of occupancy (COO) for a non-SOBE.

B. COURSE OF THE PROCEEDINGS

By the Final Order (attached as Exhibit 1 to Appellant's Initial Arguments filed on May 11, 2007), the District of Columbia Office of Administrative Hearings sustained a Notice of Infraction (Exhibit 2 attached to Appellant's Initial Arguments) against Appellant Eimaj, Inc. for allegedly operating a Sexually Oriented Business Establishment (SOBE) while having a certificate of occupancy (COO) for a non-SOBE.

This appeal is timely filed. The Final Order was issued March 12, 2007, and the law affords sixty days to appeal to the Board of Zoning Adjustment.

This matter commenced with the Notice of Infraction ("NOI") issued on April 29, 2005, alleging that Appellant Eimaj, Inc., was operating outside the scope of its certificate of occupancy.

After a hearing, on August 31, 2006, Administrative Law Judge Janet James Mahon issued the initial Order ("Initial Order") (Exhibit 3) directing the Government to file a written statement addressing the extent to which former Acting Zoning Administrator Gladys Hicks's January 28, 1998, Opinion attached thereto ("Hicks Memo") was the Government's current interpretation for determining whether a business is a SOBE; the extent of deference owed to the Hicks Memo; and whether any authority supported not applying the Hicks Memo to mixed use video store.

The Final Order states that the Government submitted a statement indicating that the Hicks Memo had not been rescinded nor modified. However, according to the June 20, 2000, Decision and Order of Administrative Law Judge Lennox Simon ("Simon Order") (attached to Appellant's Initial Arguments) in the Matter of JMM Corp., DCRA Office of Adjud. No. OAD 00-2524-G, the then-Zoning Administrator "indicated that Zoning Administrator Opinions are advisory and not legally binding." Simon Order at 3.

The Final Order concludes that "Respondents were operating beyond the scope of the certificate of occupancy in violation of D.C. Code § 6-641.09 because they were operating a sexually oriented business without a certificate of occupancy for a sexually oriented business. At the time of the violation, the authorized fine for a violation of D.C. Official Code § 6-641.09 was \$500. See 16 DCMR 3231.1; 16 DCMR 3201.1(b). As the violation has been established, a fine of \$500 will be imposed."

STATEMENT OF MATERIAL FACTS

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

Since May 1991, Appellant Nicholas Filloramo has owned and operated Eimaj, Inc., trading as Royce Video at 7445 Georgia Ave., NW, Washington, DC 20012. Royce Video sells a wide assortment of videos and other products, and operates under a Certificate of Occupancy ("COO") that includes the phrase "not sexually oriented." Mr. Filloramo characterizes his store as a general merchandise store, and not as an adult video store.

No businesses in the District of Columbia have a COO for a SOBE. Testimony of then-Zoning Administrator Bill Crews in *J.M.M. v. D.C.*, BZA Appeal No. 17504 (Feb. 20, 2007; transcript excerpt to be obtained and provided, and are also on the BZA's website); testimony of

then-Acting Zoning Administrator Toye Bello, *DCRA v. JMM Corp.*, DCRA Office of Adjud. Nos. 01-OAD-2626-E and 01-OAD-2541-G (March 8, 2002) (transcript page 70 (attached to Appellant's Initial Arguments at Exhibit 5)). Unless a business has a SOBE COO, the COO automatically says not sexually oriented. 11 DCMR §§ 744 and 754.

After the Hicks Memo was issued in January 1998, Chair Linda Cropp of the City Council and Harold Brazil (then Chair of the Committee on Consumer and Regulatory Affairs Harold Brazil) wrote a joint letter to DCRA Director David Watts stating that they were “concerned that these new standards may have an adverse impact on many existing businesses which have not been the subject of complaints from residents.” Final Order at 6. They requested that DCRA “delay implementation of these regulations on existing businesses that have been operating without complaints, until there has been an opportunity for the affected businesses and communities to comment on these newly established standards” *Id.* at 6-7.

Subsequently in 1998, Appellant Filloramo and other video store owners met with DCRA Director Watts. Mr. Watts told them that the Hicks Memo would not be applied to existing businesses, and that they could continue operations as long as they kept their sexually oriented inventory under 50%. Final Order at 7. The ALJ below credited this testimony from Appellant Filloramo. *Id.*

Respondent is located in zoning district C/2/A. 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..

Appellants confirm that Royce Video is a general business, and not an adult entertainment business, nor a SOBE. Appellants strongly dispute the ALJ's determination that Royce is a SOBE.

ARGUMENT

a. **Appellant is not a SOBE and does not require a SOBE COO.**

At all stages, Appellee, 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 or not 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 (see Simons Order at 3 (attached hereto)) opinion of then-Acting Zoning Administrator Gladys Hicks (the Hicks Memo). However, the Hicks Opinion did not go through the formal rulemaking process that is necessary to give it the force of law. *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.")

Additionally, the Hicks Opinion is all the more unreliable by having been issued by an acting, rather than permanent, zoning administrator; by having been superseded by a subsequent Zoning Administrator's sworn testimony that "indicated that Zoning Administrator Opinions are advisory and not legally binding." Simon Order at 3; by its lack of sufficient thoroughness and analysis; and by its failure to refer to negative secondary effects studies (which is discussed further below).

A further 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% standard (e.g., whether the 15% is based on floor space (and the extent to which only floorspace open to customers should be counted), unit-per-unit inventory, or any other standard). Particularly under all of the above discussions about the Hicks Opinion, businesses must be given the benefit of the doubt as to whether they qualify as SOBE's. Moreover, the SOBE definition in the DCMR 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, 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.

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.

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.")

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") .

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 the government has met either of these hurdles.

Before Plaintiff can be permitted to enforce its SOBE regulations, Plaintiff has the burden of proof on the foregoing issues. *Philadelphia 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 on 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.

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.

The SOBE regulations place unconstitutionally unbridled discretion in the hands of the government. 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 754.8. 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 property 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).

The availability of SOBE COO's in the District seems more illusory than reality. *First*, the foregoing 600-foot buffer zones amount to two football fields; it is doubtful that any part of the District is located more than 600 feet from the playgrounds, schools, and other facilities listed in *See* 11 DCMR § 744, et seq. and 11 DCMR § 754.

d. **Appellant was not put on sufficient notice to comply with the Hicks Memo.**

The Final Order relies heavily on the Hicks Memorandum. However, not only was the Memorandum's author an Acting Zoning Administrator and not a permanent one, but only two years after the Hicks Memo was issued, her successor testified under oath that "Zoning Administrator Opinions are advisory and not legally binding." Simon Order at 3.

Moreover, until receiving the NOI in 2005, Appellant was on fair notice from then-DCRA Director David Watts that it could continue operations as long as it kept its sexually oriented inventory under 50%. Final Order at 7. The ALJ below credited this testimony from Appellant Filloramo. *Id.*

Appellant was entitled to, but did not receive, fair advance notice that the government no longer intended to honor the 50% ceiling for sexually oriented inventory. *Naegele Outdoor Advertising v. Durham*, 803 F. Supp. 1068 (M.D. N.C. 1992), *aff'd* 19 F.3d 11, (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1994). *Naegele* sets forth a formula for requiring amortization periods (*i.e.*, delays in implementation of new zoning rules or procedures for existing enterprises) and/or eminent domain payments for existing businesses (*e.g.* Royce Video).

Applying the amortization test to signs affected by zoning changes, *Naegele* said: "Factors relevant to the reasonableness of the amortization period include many of those discussed above, including the initial cost of, or investment in, the signs, the degree to which the signs have been fully depreciated, the remaining useful life, the replacement cost and salvage value of the signs, the alternative uses for the signs, the loss of revenue as a result of the ordinance, and the percentage of signs affected." *Naegele Outdoor Advertising v. Durham*, 803 F. Supp. 1068, 1077-78. Similarly here, the NOI action below against Appellant was

unconstitutional for failing to impose a reasonable amortization period, a sufficient eminent domain payment, or both.

Furthermore, an amortization period, payment under eminent domain from the government, or both, can help cushion the blow that a business experiences when zoning practices and laws change in a harmful way to those businesses. For instance, here, Appellants still have around two years left on their lease. It will be an unjust hardship for Appellants to have to keep paying monthly rent on their building if the enforcement of the SOBE regulations prevent Appellants from running a viable business.

Moreover, as discussed above, the District's SOBE definition and limits therein are unconstitutional. Consequently, it would not have been Constitutional in the first place for the government to decide at some point that it would shift gears and bring an NOI action against Appellant.

e. **Grandfathering and estoppel principles made the Notice of Infraction invalid.**

As described above, in 1998, DCRA Director David Watts authorized Appellants to be grandfathered in – so to speak -- so as to follow a 50% formula for not being considered a SOBE, versus the 15% formula in the Hicks Memo. The NOI was issued without any advance notice to Appellants that the DCRA, the D.C. government, or both had withdrawn from such grandfathering. Issuing the NOI without a grace period to remove the 50% formula violated Appellants' Due Process and property rights under the Fifth Amendment.

“Grandfathering,’ by its very nature, operates to vest a right as of a time certain, by operation of law.” *Page Associates v. District of Columbia*, 463 A.2d 649 (D.C. 1983). The DCRA Director David Watts not only authorized such grandfathering to Appellants in 1998, but

then the government allowed Appellants to operate under a 50% formula for years until issuing the NOI (aside from the 2004 NOI mentioned in the Final Order, which was improvidently issued and ultimately not pursued by the government, apparently after recognizing that Appellants fell within the 50% formula). This situation acted as protecting a property right on Appellants, which right was violated when through a drastic and unannounced about-face the government issued the NOI against Appellants.

f. **The government is estopped from this NOI proceeding.**

“The fundamental principle of equitable estoppel applies to government agencies, as well as private parties.” *Investors Research Corp. v. SEC*, 628 F.2d 168, 175 (D.C. Cir. 1980); *cert. den.* 449 U.S. 919 (1980). Here, by DCRA Director David Watts’s 1998 action of applying a 50% formula to pre-existing businesses, the government was estopped from pursuing this NOI proceeding absent a sufficient notice and grace period for Appellants to come into compliance with any new proposed formula for defining a SOBE.

g. **The Final Order over-relies on the Hicks Memo**

The Final Order over-relies on the Hicks Memo, to the point of calling Appellants’ store a SOBE merely because a small number of its merchandise *might* be characterized as sexual aids, similar to such items as personal massagers found at Sharper Image stores and other merchandise found in numerous general merchandise stores. Appellants already have explained above why the Hicks memo is flawed, unreliable, and without legal force.

h. **The SOBE provisions are enforced selectively, arbitrarily and capriciously.**

There is no rhyme nor reason about what makes the government target some businesses with NOI enforcement, but to leave alone similarly-situated businesses. In this case, it appears the NOI only was issued after the authorities received an anonymous complaint, even though the

evidence before the ALJ otherwise showed no other complaints about the store, no negative effects from the business, and no prognosis that the store's positive contributions to the community would not continue. Such selective enforcement of the SOBE regulation violates Appellants' due process rights and is unlawful selective enforcement. *Hospitality Temps Corp. v. District of Columbia*, 926 A.2d 131, 140 (D.C. 2007)

h. **The NOI is unconstitutionally vague.**

The NOI is unconstitutionally and statutorily vague, and, therefore, cannot sustain a finding of any violation of law. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). The NOI merely alleges Appellant was "operating outside the scope of certificate of occupancy." That description did not give Appellant sufficient notice to defend himself at the hearing below. D.C. Code § 2-1802.(b)(2) provides that in an NOI the Mayor shall (1) cite to "the law or regulation alleged to have been violated," and (2) provide the "nature, time, and place of the infraction." In this instance, the NOI cites to the code section allegedly violated, without providing any real nature of the alleged offense.

CONCLUSION

For the foregoing reasons, the ruling below should be reversed.

Respectfully submitted,

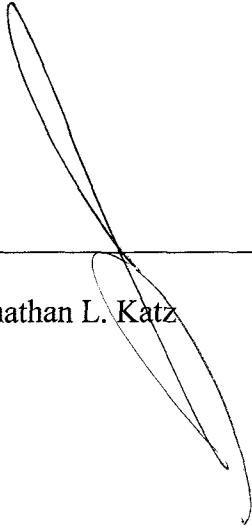
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amended Brief was delivered by first-class mail, postage prepaid, on January 10, 2008, to:

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