

**IN THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT**

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

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

**INITIAL ARGUMENTS OF APPELLANTS**

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FILLORAMO, APPELLANTS.

BOARD OF ZONING ADJUSTMENT  
District of Columbia

CASE NO. 17670

EXHIBIT NO. 2

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District of Columbia  
CASE NO. 17670  
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**DEPARTMENT OF CONSUMER AND 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 5<sup>th</sup> Street, N. W.  
Washington, D.C. 20000  
Respondent.

OAD # 00-2524-G

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**DECISION AND ORDER**

**Background**

JMM Corporation t/a Fun Fair Video (hereinafter "Respondent") was issued a Notice of Infraction Number 42251 for the operation of a Sexually Oriented Video Business at 919 5<sup>th</sup> Street, N.W. without a Certificate of Occupancy.

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 May 23, 2000. The hearing was convened pursuant to the provisions of the District of Columbia Administrative Procedure 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.

Present at the hearing were :Anthony Hooks, Kevin Carter, Frank Moody and Steve Allen, Investigators, DCRA's Office of Compliance; Sgt. Edward Delisi, and Det. Mark A. Gilkey, DC Metropolitan Police Department; Matthew Green Esq, Counsel for the DCRA; Ross Buchholz Esq, Office of the Corporation Counsel; Jose M. Montel, Respondent; and James T. Wright, Esq and Adgie O'Briant, Jr., Esq, Respondent's counsel.

## **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 May 23, 2000, administrative hearing.

1. JMM Corporation t/a Fun Fair video is owned and operated by Respondent Jose Montel. On March 8, 2000, DCRA's Office of Compliance received an investigative request from the office of Councilman Jack Evans regarding a complaint from a constituent who was concerned about Respondent selling and renting sexually oriented videos. (Testimony of Steve Allen, Kevin Carter and Anthony Hooks).
2. On April 5, 2000, Investigators Steve Allen and Anthony Hooks conducted a preliminary investigation of the subject premises which revealed a sexually oriented business. On April 7, 2000, Notice of Infraction #42251 in the amount of \$500.00 was issued to Respondent (Testimony of Steve Allen, Kevin Carter and Anthony Hooks).
3. On April 9, 2000, an investigative inspection of the premises was conducted. DCRA investigators personally observed that there was a section with a selection of video tapes that were not sexually oriented which occupied an area approximately 12' in length which held 529 tapes. It was further observed that the entire remainder of the premise's stock consisted of sexually oriented material for sale and rent to the public. A count of the merchandise revealed, a total of 1,413 sexually oriented videotapes, 153 sexually oriented DVDs, 198 pornographic magazines and 153 sexual accessories including dildos, body oils, vibrators, lubricants and condoms and other sex toys for sale to the public. Respondent had a total of 1942 video cassettes and 153 Digital Video Disc (DVDs) for sale to the public. Further, of that total, (1566) or 75% were sexually oriented. (Testimony of Steve Allen, Kevin Carter and Anthony Hooks)
4. DCRA's investigators personally observed several customers going in and out of the booths, two men going into the same booth, used condoms on the floor and observed what appeared to be semen stains on the floor of the subject booths (Testimony of Anthony Hooks).
5. On April 7, 2000, Sgt. Delisi of the Metropolitan Police Department (MPD) conducted an investigation of Respondent's business, and seized a substantial amount of sexually oriented materials Sgt. Delisi issued a form #61-D citation to Respondent who subsequently posted and forfeited collateral.
6. DCRA's Investigators also observed a locked door on the rear wall near the right corner of the premises. Upon investigation, it was determined that the door was accessible via an electronic lock controlled by an attendant (Mr. Francisco Pachico). Further investigation revealed that behind this door were located 16 video booths with 8 selections available for viewing. All selections were sexually oriented and required each patron to insert \$1.00 in coins to purchase 5 minutes of movie viewing time. (Testimony of Steve Allen, Kevin Carter, Anthony Hooks and Sgt. Edward DeLise).

7. All rental and sales observed by DCRA's investigators were for sexually oriented materials. When questioned as to what constituted the majority of sales for the business, store clerk Mr Pachico indicated that the majority of the business generated was for the sale and rental of sexually oriented videos. (Testimony of Investigators Steve Allen, Kevin Carter and Anthony Hooks.)
8. A review of the agency records in the Building and Land Regulation Administration, Zoning Division, revealed that Respondent was issued a Certificate of Occupancy on November 19, 1996, for the purpose of operating a video membership store, not sexually oriented. (Testimony of Anthony Hooks and Michael Johnson).
9. The January 29, 1998, opinion of the former Acting Zoning Administrator indicated that in determining whether a retail or wholesale video store selling or renting sexually oriented materials is a sexually oriented business, you must determine if more than 15% of a store's inventory is comprised of sexually oriented materials. (Testimony of Michael Johnson)..

### **DISCUSSION**

The Respondent applied for a Certificate of Occupancy to operate a membership video rental/sales store and indicated on its application an intent not to operate a business which was sexually oriented. The Certificate of Occupancy issued to the Respondent stated clearly that it was "not sexually oriented".

The current Zoning Administrator indicate that he had a zero to 5% tolerance for content and income derived from sexually oriented sales in order to meet the standard of what is not sexually oriented. He indicated that Zoning Administrator Opinions are advisory and are not legally binding. He further stated that if even you applied the previous Zoning Administrator's Opinion to the current circumstance, the Respondent would fail the 15% rule previously employed.

### **CONCLUSIONS OF LAW**

The ALJ having considered the evidence submitted at the May 23, 2000, administrative hearing concludes as follows:

1. 11DCMR § 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 overriding emphasis, therefore Respondent's activities fall within the above cited definition of a sexually oriented business

**ORDER**

It is **ORDERED** this 20th day of June 2000, that J.M.M. Corporation t/a Fun Fare Video shall pay a fine in the amount of five hundred dollars (\$500.00) and court cost in the amount of \$40.00 payable to the D.C. Treasurer. The certified check or money order shall be delivered to the Office of the Chief Financial Officer at 941 North Capitol Street, N.E., Suite 9600, Washington, D. C. 20001, within ten (10) calendar days of service of this Order upon it.

It is further **ORDERED** that J. M. M. Corporation t/a Fun Fare Video shall cease all business activity at 919 5<sup>th</sup> Street, N.W. Washington, D.C., until such time that he obtains a proper Certificate of Occupancy for his business.

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

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And Regulatory Affairs :  
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V. 01-OAD-2626-E, NOI#028120  
01-OAD-2541-G, NOI#035446  
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J.M.M. Corporation :  
T/A Fun Fair Video Re. 919 5th Street, N.W.  
Washington, DC 20001  
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Respondent :  
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Friday, March 8, 2002

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1 DIRECT EXAMINATION BY COUNSEL FOR  
2 THE GOVERNMENT  
3 BY MR. GREEN:  
4 Q For the record, sir, Mr. Bello, by  
5 whom are you employed?  
6 A The District of Columbia Government  
7 (inaudible).  
8 Q And in what capacity?  
9 A Currently the Acting Zoning  
10 Administrator.  
11 MR. GREEN: And I ask the Court to  
12 take notice of what the Zoning Administrator  
13 does.  
14 BY MR. GREEN:  
15 Q Maybe, for the record, you might want  
16 to briefly state what your functions and  
17 roles are?  
18 MR. KATZ: I'll object to taking any  
19 notice that's not been on the record.  
20 THE COURT: All right.  
21 MR. GREEN: What -- I don't know what

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1 you said. What -- what did you say now? I  
2 didn't hear you.  
3 MR. KATZ: I'm sorry you didn't hear me.  
4 MR. GREEN: Well, I think that if I'm  
5 going to be responsive to you, I've got to  
6 hear and understand what you said.  
7 Your Honor, I ask this man to please  
8 restate what -- what his objection is.  
9 THE COURT: Would you repeat your  
10 objection, Mr. Katz?  
11 MR. KATZ: I heard Mr. Green ask for  
12 the Court to take notice of the function Mr.  
13 Bello does. I do not have intimate  
14 familiarity with it, and so that is unfair  
15 for there to be notice of anything he does  
16 that's not on the record. It's unfair to  
17 take notice of anything that's not on the  
18 record without at least assuring that I'm  
19 familiar with it.  
20 MR. GREEN: Your Honor, in one of the  
21 things that I've said, if he'd listened

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1 clearly, was that I asked Mr. Bello to  
2 explain and define what his functions were --  
3 THE COURT: All right.  
4 MR. GREEN: -- so that there would be  
5 clarify. Now --  
6 THE COURT: All right, Mr. Green.  
7 Mr. Green, that's fine. Just -- just proceed  
8 --  
9 MR. GREEN: Yes, Your Honor.  
10 THE COURT: With Mr. Bello.  
11 BY MR. GREEN:  
12 Q Mr. Bello, again, please tell us what  
13 the Zoning Administrator does in the District  
14 of Columbia?  
15 A The Zoning Administrator has the  
16 responsibility for the interpretation and the  
17 enforcement of the zoning regulations.  
18 Q I see. With that in mind, do you  
19 have any familiarity with a concept known as,  
20 not sexually-oriented?  
21 MR. KATZ: Objection.

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1 THE COURT: What's the objection?  
2 MR. KATZ: It's not a term of legal  
3 art. The term of legal art is sexual-  
4 oriented business enterprise. That's our  
5 business establishment (inaudible) there's no  
6 relevance in that question.  
7 MR. GREEN: Well, Your Honor, we have  
8 on a Certificate of Occupancy the term, not  
9 sexually-oriented.  
10 Now, either -- if this man is the  
11 Zoning Administrator, he can tell us what it  
12 means.  
13 MR. KATZ: You might as well dismiss  
14 the case then if the certificate only says  
15 that, because that means the D.C. Government  
16 mistake -- mistake in not putting the term of  
17 art there. It was just from DCMR 199.1,  
18 which is sexual-oriented business  
19 establishment.  
20 THE COURT: Let me hold up a minute  
21 here.

1 that you could find an establishment that's  
2 operating among those standards, but those  
3 establishments will precede the amendment  
4 that created the definition for sexual-  
5 oriented establishment in the zoning  
6 regulations.

7 Q I understand your answer. I just  
8 want you to tell us, do you know if there's  
9 even one business in the District of Columbia  
10 that has a Certificate of Occupancy that says  
11 sexual-oriented business establishment?

12 A There's none that I know of.

13 Q Have you ever been to law school?

14 A No, sir; I never claimed to be a  
15 lawyer.

16 Q Have you ever read the Supreme Court  
17 case of FWPBS versus Salis (ph)?

18 A No, sir.

19 MR. GREEN: Your Honor -- Your Honor,  
20 I object. I object.

21 THE COURT: Objection --

1 MR. GREEN: Where are we going with  
2 this?

3 THE COURT: Objection sustained.

4 Let's -- let's -- let's go, Mr. Katz.

5 Any other questions for Mr. (inaudible)?

6 BY MR. KATZ:

7 Q Do you consider yourself bound by the  
8 Gladys Hicks' opinion that was put into  
9 evidence today?

10 A Absolutely, I am, because it's an  
11 extension of the zoning regulations as we  
12 apply them today.

13 Q So you don't have any plans to make  
14 any amendments to that opinion from Ms.  
15 Hicks.

16 A Not at all.

17 Q So you agree with every single page  
18 in her opinion?

19 A That's correct.

20 Q Do you feel that your successor as  
21 Zoning Administrator is going to be bound by

1 Ms. Hicks' opinion?

2 MR. GREEN: Objection, Your Honor.

3 That's speculative. We don't even know who  
4 the successor's going to be. It might be Mr.  
5 Katz.

6 MR. KATZ: I hardly think so.

7 MR. GREEN: We don't know.

8 MR. KATZ: But we know who it won't  
9 be; it won't be me. It will be neither  
10 offered nor accepted.

11 MR. GREEN: I don't want it either,  
12 but definitely (inaudible).

13 THE COURT: (Inaudible) of questions.

14 MR. KATZ: Well, I'm waiting for a  
15 ruling on my last question, sir.

16 THE COURT: Let me answer it.

17 I'm --

18 MR. GREEN: It's speculative. It's  
19 speculative, Your Honor, and he can't answer  
20 it.

21 THE COURT: But -- but he did answer.

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1 He said, he didn't know. He couldn't speak  
2 for someone else. That was an answer.

3 MR. GREEN: All right.

4 BY MR. KATZ:

5 Q You're certainly not aware of  
6 anything in the law that requires the Zoning  
7 Administrator to accept the written opinion  
8 of their predecessor, are you?

9 A Other -- not (inaudible) remarks.

10 But the only (inaudible) upon which wouldn't  
11 is if it's grossly inconsistent with the  
12 regulations.

13 Q You're going to be following Ms.  
14 Hicks' opinion; is that correct?

15 A I surely must.

16 Q Throughout the entire time that you  
17 are the Zoning Administrator?

18 A That is correct.

19 Q So if Mr. Montiel's business ends up  
20 satisfying your office that is following that  
21 opinion, then you have no further reason to

## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE**

Appellants Eimaj, Inc., And N.T. Filloramo, hereby appeal the attached 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.

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### **B. COURSE OF THE PROCEEDINGS**

By the attached Final Order (Exhibit 1 hereto), the District of Columbia Office of Administrative Hearings sustained a Notice of Infraction (Exhibit 2 hereto) 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 attached 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 attached 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 attached June 20, 2000, Decision and Order of Administrative Law Judge Lennox Simon ("Simon Order") 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."

No businesses in the District of Columbia have a COO for a SOBE. Testimony of Zoning Administrator, *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 Toyé Bello, *DCRA v. JMM Corp.*, DCRA Office of Adjud. Nos. 01-OAD-2626-E

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and 01-OAD-2541-G (March 8, 2002) (transcript page 70 (attached hereto 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 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..

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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.")

A 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

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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, 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.

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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.

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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.

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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 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).

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 but an Acting Zoning Administrator, but only two years after the Hicks Memo was issued, her successor testified 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.

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

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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 can be characterized as sexual aids, similar to such items as personal massagers found at Sharper Image stores. Appellants already have explained above why the Hicks memo is flawed, unreliable, and without legal force.

h. **The SOBE provisions are enforced 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 SOBE regulation violates Appellants' due process rights.

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

The NOI is unconstitutionally and statutorily vague, and, therefore, cannot sustain a finding of any violation of law,. 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.

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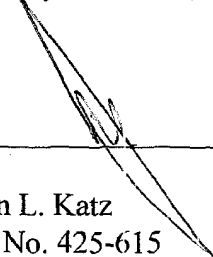
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**CONCLUSION**

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

Respectfully submitted,

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Jonathan L. Katz  
DC Bar No. 425-615  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing BZA Appeal Form 125, Appellant's letter authorizing undersigned counsel to act on his behalf in this appeal, and accompanying initial brief of Appellant was delivered by first-class mail, postage prepaid, on May 11, 2007, to:

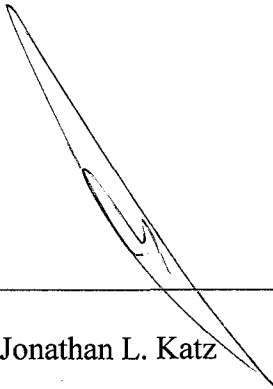
Sinclair Long, Esquire (Counsel for Appellee)  
Jill Stern, Esquire  
DCRA  
941 N. Capitol St., NE, No. 9400  
Washington, DC 20002

Capital Building, Inc. (building owner)  
10205 Cavanaugh Farm Way  
Rockville, MD 20850

Nicholas T. Filloramo (Lessee)  
5225 Pooks Hill Rd.  
Suite 1601 South  
Bethesda, MD 20814

Office of Administration Hearings  
941 N. Capitol St., NE, No. 9100  
Washington, DC 20002

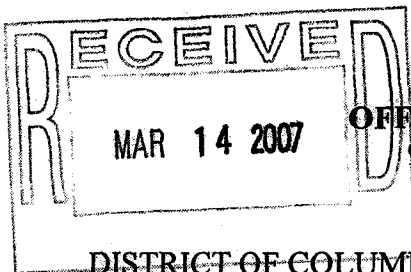
ANC Chairperson (ANC)  
ANC 4B  
6856 Eastern Ave., NW  
Box 314  
Washington, DC 20011.



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Jonathan L. Katz

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**DISTRICT OF COLUMBIA  
OFFICE OF ADMINISTRATIVE HEARINGS**

941 North Capitol Street, NE Suite 9100  
Washington, DC 20002-4210

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OFFICE OF  
ADMINISTRATIVE HEARINGS

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DISTRICT OF COLUMBIA  
DEPARTMENT OF CONSUMER AND  
REGULATORY AFFAIRS  
Petitioner

Case No: CR-I-05-N100089

v.

EIMAJ, INC. AND N.T. FILLORAMO  
Respondents

**FINAL ORDER**

**I. Introduction**

This case involves a Notice of Infraction served by the Government on Respondents Eimaj, Inc. and N.T. Filloramo alleging a violation of D.C. Official Code §6-641.09 for operating beyond the scope of a certificate of occupancy. In the Notice, the Government alleged that the violation occurred on April 29, 2005 at Royce Video located at 7445 Georgia Ave, N.W., and sought a fine of \$500.

Respondents denied the violation, and a hearing was held on July 13, 2005. At the hearing, J. Sinclair Long, Esq., appeared for the Government, and Allen James, the charging inspector, testified for the Government. Andrea Bagwell, Esq., appeared for Respondents. Respondents' witnesses were Nicholas Filloramo, the named Respondent and owner of Royce Video, and Mr. Gilliam, who operates another business in the neighborhood.

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The Government contends that Respondents were operating beyond the scope of the certificate of occupancy because they were operating a sexually oriented business with a certificate of occupancy for a business that is not sexually oriented.<sup>1</sup>

The principal issue in this case is whether the nature and amount of sexually oriented materials that Respondents' video store displays for sale exceeds the amount that a video store with both general interest and sexually oriented merchandise (called a "mixed use" video store) may display without a certificate of occupancy for a sexually oriented business.

Based on the entire record in this matter, I hereby make the following findings of fact and conclusions of law:

## **II. Findings of Fact**

Nicholas Filloramo has operated Royce Video at 7445 Georgia Ave, N.W. since 1991. On May 13, 1991, Eimaj., Inc, a company that Mr. Filloramo owns, obtained a certificate of occupancy to use the premises for the purpose of renting videos, cassettes, and electronic equipment "Not Sexually Oriented." Respondent's Exhibit "RX" 6. The

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<sup>1</sup> D.C. Official Code § 6-641.09, the statute Respondent is charged with violating, provides in pertinent part:

Building permits; certificates of occupancy

(a) ... In the event that ...[regulations adopted under provisions of this subchapter] provide for the issuance of certificates of occupancy or other form of permit to use, it shall be unlawful to use any building, structure, or land until such certificate or permit be first obtained. It shall be unlawful to erect, construct, reconstruct, alter, convert, or maintain or to use any building, structure, or part thereof or any land within the District of Columbia in violation of the provisions of said sections or of any of the provisions of the regulations adopted under said sections...

application for the certificate of occupancy states that the proposed use of the premises is for the rental of video cassettes and electronic equipment. There is no place on the application form where an applicant is asked to state whether the business is sexually oriented. RX 6.

On April 29, 2005, Inspector Allen James inspected Royce's Video as a result of a complaint that a sexually oriented business was being operated on the premises.<sup>2</sup> The inspector measured the interior space in the store with a tape measure to determine its total square footage. His measurements indicated that the total square footage of the store open to the public was 1494 square feet. Then, based on his visual observations of the areas in the store with sexually oriented merchandise, he estimated that approximately 50% of the floor area of the store was used for the sexually oriented materials. The balance of the store contained videos for a general audience and other general merchandise. The inspector did not count items on display in the store.

A drawing of the floor plan of the store provided by Respondents shows that the portion of Respondent's store where inventory is on display in areas open to the public used for retail sales totals 1489 square feet.<sup>3</sup> RX 26. This space is comprised of 825 square feet that contains general entertainment videos and other general merchandise, and 637 square feet that contains adult entertainment videos and other sexually oriented merchandise. Based on Respondent's floor plan drawing, 42.7% of the store area where

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<sup>2</sup> The inspector does not know the identity of the complainant. Mr Filloramo believes that an organization that wishes to occupy the building where his store is located made the complaint. However, I find that the evidence is inadequate to establish the identity of the complainant and it is not relevant to this case.

<sup>3</sup> This figure does not include the portions of the establishment that are used as office, restroom, or storage.

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inventory is on display and open to the public contains adult entertainment and sexually oriented material. Since the Inspector's determination that 50% of the store contained sexually oriented material was based on visual observations and not actual measurements, I will credit the measurements on the drawing submitted by Respondents and find that the floor area containing sexually oriented material was 42.7%.

The portion of the store containing sexually oriented material is in the rear of the store and is separated from the rest of the store by a wall with a door. A sign on the door says "Adult Movie Room – No One Under 18." RX 25 and 26. Although most of the adult entertainment room contains videos, there is also a display case that contains approximately ten items of merchandise that are commonly known as sex toys.

A report on Royce Video's 2005 inventory submitted by Respondent shows a total of 39,036 items. RX 27. The total number of items in the adult category shown on the inventory report is 9,418, consisting of 8,034 adult movies, 435 adult toys, 216 adult magazines, and 733 adult miscellaneous items. The total number of items shown on the general inventory category in the inventory report is 29,618.<sup>4</sup> Thus, based on this report, 24% of the total inventory in the store is "adult inventory." It is undisputed that all the items categorized as adult inventory are all sexually oriented.

Respondent's store is located in a free-standing building. There is an advertising display covering a significant portion of the front of the building. The advertising

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<sup>4</sup> The Government did not question the categorization of any of the entries on the inventory report or the accuracy of the inventory report. The general inventory total includes over 10,000 diamond cases for DVD's and over 3,000 cases for video tapes as general merchandise items. There was no evidence about whether these cases were display items or carried as inventory for routine sale.

includes the names and posters for some general audience movies, but does not include the names and posters for adult movies. Although almost all of the display advertising on the front of the store relates to general interest materials, there is a reference to adult toys in prominent lettering. RX 23, RX 29.

In addition to the complaint that led to the Notice of Infraction in this case, there was a previous complaint in 2004. That complaint led to an inspection and the issuance of a Notice of Violation and Notice to Abate on June 3, 2004. That Notice required the removal of 40% of the adult videos as corrective action. Mr. Gilliam, who operates a business in the same neighborhood, is not aware of any neighborhood complaints about Royce Video.

On January 28, 1998, the Acting Zoning Administrator, Gladys Hicks issued a signed opinion entitled "Determining Whether a Retail or Wholesale Video Store Selling or Renting Sexually Oriented Materials is a Sexually Oriented Business." The Administrator stated that she was issuing the opinion to give notice to businesses and the public about how many sexually oriented materials a mixed use video store may offer for sale and/or rental before it must obtain a certificate of occupancy as a sexually oriented business establishment restricted to operating only in the limited zoning districts where sexually oriented businesses are permitted.<sup>5</sup>

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<sup>5</sup> The Administrator's Opinion indicates that a sexually oriented business establishment, with the approval of the Board of Zoning Adjustments, could be located only in C-3-B, C-3-C, C-4, C-M and M zoning districts unless a business has grandfathering rights.

The Zoning Administrator's Opinion (the "Opinion") contains a report of a survey conducted in 1997 of the twenty-five mixed use video stores in the District of Columbia. The survey did not include establishments that carried no sexually oriented material or that have authority to operate sexually oriented businesses. The survey found that fifteen of the stores, including Royce Video, had more than 28% material that is sexually oriented. The Opinion states:

All of the fifteen businesses would meet any reasonable interpretation of a 'sexually oriented business establishment' as sexually oriented materials are a significant and substantial portion of their stock in trade.

The Zoning Administrator then adopted an interpretation which sets out several criteria for determining whether a business is a "sexually oriented business," as that term is used in 11 DCMR 199.1. One of the criteria for determining whether a mixed use video store is sexually oriented is whether more than 15% of inventory on display is sexually oriented.<sup>6</sup> Twenty of the twenty-five mixed use video stores surveyed had more than 15% of sexually oriented materials.

On February 3, 1998, the Chairman of the Council of the District of Columbia, Linda Cropp, and the Chairman of the Committee on Consumer and Regulatory Affairs, Harold Brazil, wrote a joint letter to David Watts, the Director of the Department of Consumer and Regulatory Affairs 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." RX 3. They requested that DCRA "delay implementation of these regulations on existing businesses that have been operating

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<sup>6</sup> The Zoning Administrator's Opinion contains several other standards for determining whether a business is sexually oriented, which are discussed below.

without complaints, until there has been an opportunity for the affected businesses and communities to comment on these newly established standards.” RX 3.

Mr. Filloramo and other video store owners who were concerned about the impact of that opinion on their businesses then met Mr. Watts. Mr. Filloramo testified that Mr. Watts told them that the criteria set out in the Opinion would not be applied to existing businesses, and that they could continue operations as long as they kept their sexually oriented inventory under 50%. I am crediting that testimony for the following reasons: 1) there was no conflicting testimony; and 2) Members of the Council had urged DCRA to reconsider the criteria in the Opinion as applied to existing business, making it plausible that Mr. Watts gave assurances to the owners of existing businesses that the criteria in the Opinion would not be applied to them.

### **III. Conclusions of Law**

The zoning regulations at 11 DCMR 199.1 define a 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 materials, that are distinguished or characterized by their emphasis on matters depicting, describing, or related to specified sexual activities and specified anatomical areas.

The Opinion interpreting the regulation as applied to mixed use video stores was issued pursuant to the Zoning Administrator’s authority to interpret and enforce the zoning regulations. This authority was conferred by a provision that makes the Zoning

Administrator “responsible for administratively interpreting and enforcing the zoning regulations.”<sup>7</sup> The District of Columbia Court of Appeals has held that an agency’s interpretation of its regulation is to be accorded great deference and not reversed unless clearly erroneous or inconsistent with the regulation. *Kalorama Citizens Association v. District of Columbia Board of Zoning Adjustment*, 640 A.2d 179, 180 (D.C. 1994); *Wallick v District of Columbia Board of Zoning Adjustments*, 486 A.2d 1183, 1184 (1985).<sup>8</sup> Since there is no basis for finding the interpretation clearly erroneous, this tribunal is required to defer to the interpretation unless it has been withdrawn or modified.

#### Current Status of the Administrator’s Opinion

Since the Opinion of the Zoning Administrator was issued in 1998, there have not been any reported decisions by the Board of Zoning Adjustment, District of Columbia Court of Appeals, or District of Columbia Superior Court that address the zoning of mixed use video stores or discuss the Opinion of the Zoning Administrator. In addition, no revisions of the Zoning Administrator’s opinion could be located. Because of this, and Mr. Filloramo’s credible testimony that the Director of DCRA told owners of existing

<sup>7</sup> Reorganization Order No. 55, II F (D.C. Code Ann. Title 1- Administration, Appendix at 182, 185 (1973))

<sup>8</sup> In these cases, the court deferred to interpretations of the Board of Zoning Adjustments. Cases decided by this administrative court involving infractions of zoning laws and regulations may be appealed to the Board of Zoning Adjustments D.C. Official Code § 2-1831.16(b). It is nevertheless appropriate for this tribunal to defer to interpretations of the Zoning Administrator because deference is paid to an agency’s interpretations of its regulations primarily because of the special expertise of each agency in its field. *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1334 n. 10 (6<sup>th</sup> Cir. 1978). If the interpretations of a regulation by the Zoning Administrator and the Board differ, it is within the province of the court that reviews the decision of the Board of Zoning Adjustment to determine which interpretation merits deference. *Martin v OSHRC*, 111 S.Ct. 1171 (1991)

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video stores in 1998 that they were not subject to the Opinion, it was unclear whether the Opinion had been rescinded or modified.

Consequently, this administrative court issued an Order on August 31, 2006 directing DCRA to file a statement about whether the 1998 Opinion is DCRA's current interpretation for determining whether a mixed use video store is sexually oriented and whether there was any opinion or other authority that exempts mixed use video stores in existence at the time the Opinion was issued. In response, counsel for DCRA submitted a statement indicating that the Opinion has not been rescinded or modified and that there is no ruling or modification exempting businesses that were operating at the time the Opinion was issued. Respondents were afforded the opportunity to reply, but have not done so.<sup>9</sup> As the Opinion has not been revoked or revised, it is the agency's interpretation of its own regulation that we must defer to in resolving this case.

#### The Zoning Administrator's Opinion

The Opinion first notes that zoning laws may be used to restrict the location of sexually oriented businesses. The Supreme Court has sanctioned the use of zoning restrictions to combat the undesirable secondary effects, such as increased crime and reduced property values, which sexually oriented businesses can have on surrounding neighborhoods. The Court has said, however, that such restrictions must do so "without violating the government's paramount obligation of neutrality in its regulation of

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<sup>9</sup> Counsel for DCRA inexplicably treated our request for legal argument on these issues as interrogatories, and provided extremely terse responses. However, as he is acting as counsel for DCRA, we must assume that he is accurately representing the status of the Administrator's Opinion.

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protected communication.” *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925 (1986) (quoting *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 70 (1975)).

The Administrator then surveyed relevant case law, the regulations of mixed use video stores in other jurisdictions, and the results of DCRA’s survey of twenty-five mixed use video stores in the District. Based on this review, the Administrator formulated several standards for determining when a mixed use video store is sexually oriented. The standards enunciated in the Opinion are based upon the following factors: the percent of sexually oriented inventory on display; the amount of a store’s print, radio and TV advertising that is sexually oriented; whether promotional materials place a disproportionate emphasis on sexually oriented materials; whether the business sells sex toys; whether there are booths or other apparatus for viewing sexually oriented material; and, the percentage of revenues generated by sexually oriented merchandise.

In this case, there is evidence relating only to two of the standards: the percentage of sexually oriented inventory, and the sale of sex toys. We will address each of these standards in turn.

#### Inventory on Display

Under the Administrator’s interpretation, a business is a sexually oriented business if more than 15% of its inventory on display in areas open to the public, counted piece-by-piece, is sexually oriented. Specifically, the Opinion states:

.... the Zoning Administrator interprets the District of Columbia Zoning Regulations, 11 DCMR 199.1, as is set forth below.

A. A retail or wholesale business has a substantial and significant portion of its stock in trade in sexually oriented materials, and is therefore a

sexually oriented business, when any of the factors set forth below in paragraphs 1,2,3,or 4 applies:

1. More than 15% of its inventory on display, in areas open to the public, counted piece-by-piece, are sexually oriented.<sup>10</sup>

As noted above, Respondents' floor plan shows that the floor area containing sexually oriented material was 42.7%. However, the Administrator's interpretation contains no standard based on the percentage of floor area that contains sexually oriented material. Rather, inventory is to be counted "piece-by-piece."

The only evidence showing inventory counted piece-by-piece is Respondents' inventory listing. In that listing, Respondents categorize 24% of their inventory as adult.<sup>11</sup> While this list shows total inventory, it does not show the percent of "inventory on display, in areas open to the public, counted piece-by-piece" that is sexually oriented. It is possible, for example, that only a small number of the sexually oriented items in Respondents' inventory were on display in public areas.

Since the Government presented no evidence on what items in Respondents' inventory list were on display, I cannot conclude that more than 15% of the inventory on display in areas open to the public was sexually oriented.

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<sup>10</sup> The Administrator's opinion indicates that for the purpose of this calculation, materials in storerooms or other areas that cannot be seen by customers are not counted, but areas restricted to minors are considered "open to the public" and are counted.

<sup>11</sup> The total inventory listed for the store is 39,036 items. Respondents have categorized 29,618 items as "general inventory." Nearly half of the general inventory items are cases for DVD's and videotapes (DVD cases 10,157; Videotape cases 3,534). The Administrator's Opinion does not indicate whether items such as DVD cases, which do not have either sexually oriented or general interest content, should be counted for the purpose of determining the percent of inventory that is sexually oriented. If the cases are not counted, the percent of Respondents total inventory that is sexually oriented would be much higher than 15%.

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### Sale of Sex Toys

Even if the percentage of sexually oriented inventory is less than 15%, a mixed use video store may also be found to be a sexually oriented business under the Opinion if it sells merchandise commonly known as sex toys. The Opinion states:

B. Irrespective of the applicability of the factors set forth above, a business establishment is sexually oriented as set forth in either paragraphs 1 or 2 below:

1. The Zoning Administrator makes the determination that the sale of merchandise such as three dimensional reproductions 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.

It is undisputed that Royce Video was offering sex toys for sale at the time of the inspection. Consequently, Royce Video was a sexually oriented business by virtue of its sale of sex toys.

Respondents maintained that even if Royce Video is a sexually oriented business as defined in the Opinion, it should not be found in violation because businesses in existence at the time the Opinion was issued were grandfathered. Respondents point to the following statement in the Opinion in support of this position.

Unless a business has grandfathering rights, sexually oriented business establishment may, with approval of Zoning Adjustment, be located only in C-3-B, C-3-C, C-4, C-M and M zoning districts.

This statement does not support Respondents' position. It states only that sexually oriented businesses may be located in certain restricted districts unless grandfathered. It

does not indicate that the twenty-five mixed use video stores surveyed (none of which had authority to operate as sexually oriented businesses) are grandfathered. Indeed, as noted above, the Opinion explicitly states that fifteen of the twenty-five businesses surveyed “would meet any reasonable interpretation of a ‘sexually oriented business establishment’ as sexually oriented materials are a significant and substantial portion of their stock in trade.”

Respondent also argues that it was grandfathered because the Director of DCRA told the owners of mixed use video stores in 1998 that the Opinion did not apply to them. While the Director of DCRA may have told the owners of existing businesses that they would be exempt, DCRA took no action to revise the Opinion or exempt existing businesses. When an agency changes its course, it must supply a reasoned analysis demonstrating that its prior standard is being deliberately changed, and not simply ignored. *Brentwood Liquors v. District of Columbia Alcoholic Beverage Control Board* 661 A.2d 652, 656 (D.C. 1995); *Greater Boston Television Corp. v. FCC* 444 F. 2d 841, 852 (D.C. Cir. 1970). The only reasoned analysis enunciating DCRA’s standards for determining when a mixed use video store is a sexually oriented business is the 1998 Opinion, which clearly does not exempt existing businesses. While DCRA could modify the Opinion and provide a reasoned analysis exempting existing businesses, it has not done so.

Finally, Respondents maintain that they should not be found in violation because there have been few complaints about their operation. While the number of neighborhood complaints is a factor that elected officials and zoning officials can and should take into account in developing zoning regulations, it is not a factor that this tribunal can take into account in deciding whether a regulation that has been adopted has been violated.

The Government has established that Respondents were operating beyond the scope of the certificate of occupancy in violation of D.C. Official 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.

#### **IV. Order**

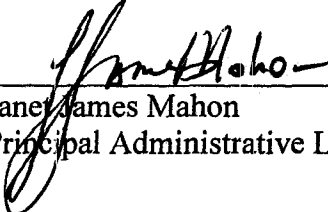
Based upon the foregoing findings of fact and conclusions of law, and the entire record in this matter, it is, hereby, this 9<sup>th</sup> day of March, 2007:

**ORDERED**, that Respondents shall pay a total of **FIVE HUNDRED DOLLARS (\$500)** in accordance with the attached instructions within 20 calendar days of the date of service of this Order (15 days plus 5 days service time pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

**ORDERED**, that if the Respondent fails to pay the above amount in full within 20 calendar days of the date of mailing of this Order, interest shall accrue on the unpaid amount at the rate of 1½ % per month or portion thereof, starting 20 days from the date of mailing of this Order, pursuant to D.C. Official Code § 2-1802.03(i)(1); and it is further

**ORDERED**, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits, pursuant to D.C. Official Code § 2-1802.03(f), the placement of a lien on real and personal property owned by Respondent, pursuant to D.C. Official Code § 2-1802.03(i), and the sealing of Respondent's business premises or work sites, pursuant to D.C. Official Code § 2-1801.03(b)(7); and it is further

**ORDERED**, that appeal rights of any person aggrieved by this Order are set forth below.

  
\_\_\_\_\_  
Janet James Mahon  
Principal Administrative Law Judge

## **PAYMENTS**

If a payment is required by this Order, to be properly credited to your case(s) the payment must be sent to the attention of the Clerk of the Office of Administrative Hearings. Payments are only accepted by check or money order and must be made payable to "D.C. TREASURER." More detailed information on how and where to make payments are included on the enclosed payment instruction sheet.

**IMPORTANT: Please do not call the D.C. Court of Appeals with questions about how to make any payments required under this Order.** If you have questions, please call the Clerk's Office at the Office of Administrative Hearings on 202-442-9094.

## **APPEALS OF VIOLATIONS OF THE DISTRICT OF COLUMBIA ZONING LAWS OR REGULATIONS**

Any party suffering a legal wrong or adversely affected or aggrieved by a determination involving infractions of the District of Columbia Zoning Laws or Regulations, including Title 11, Chapter 32 of the D.C. Municipal Regulations, may appeal such determination to the District of Columbia Board of Zoning Adjustment (the "Board") pursuant to D.C. Official Code § 2-1831.16(b) by filing a Notice of Appeal to the Board at the following address:

District of Columbia Board of Zoning Adjustment  
441 4<sup>th</sup> Street, N.W., Suite 210 South  
Washington, DC 20001  
202-879-2700

### **IMPORTANT NOTICES:**

1. By law, the amount of a lawfully imposed fine cannot be modified or reduced on appeal. D.C. Official Code § 2-1831.16(g).
2. In accordance with D.C. Official Code § 2-1802.04(a), this Order shall become final 15 calendar days after the date of service. Filing of an appeal does not stay (stop) the requirement to comply with a Final Order, including any requirement to pay a fine, penalty or other monetary sanction imposed by a Final Order. If you wish to request a stay, you must first file a written motion for a stay with the Office of Administrative Hearings. If the presiding Administrative Law Judge denies a stay, you then may seek a stay from the Board.

2007 MAY 11 PM 2:48

D.C. OFFICE OF ZONING

RECEIVED

**Certificate of Service**

**By U.S. Mail (Postage Paid):**

Eimaj, Inc  
N.T. Filloramo  
5225 Pooks Hill Road  
Bethesda, MD 20814

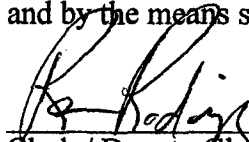
Andrea Bagwell, Esq.  
Harmon, Wilmot, & Brown, LLP  
1010 Vermont Ave, N.W.  
Suite 810  
Washington, D.C. 20005

**By Inter-Agency Mail:**

Sinclair Long, Esq.  
Department of Consumer and  
Regulatory Affairs  
941 North Capitol Street NE  
Washington, DC 20002

Jill Stern, Esq.  
Acting General Counsel  
Department of Consumer and  
Regulatory Affairs  
941 North Capitol Street NE, Suite 9400  
Washington, DC 20002

I hereby certify that on March 12,  
2007 this document was caused to be  
served upon the parties listed on this  
page at the addresses listed  
and by the means stated



Clerk / Deputy Clerk

## GOVERNMENT OF THE DISTRICT OF COLUMBIA

## NOTICE OF INFRACTION

Notice No. N 100089

Issuing Agency: ☐ DOH ☐ DMH ☒ DCRA ☒ 1<sup>st</sup> NOI 1 / 1  
☐ CFSA ☐ FEMS ☐ Other \_\_\_\_\_ ☐ 2<sup>nd</sup> NOI (1<sup>st</sup> NOI No. \_\_\_\_\_)  
 Date of Service

7445 GEORGIA AVE. N.W.

Location of Infraction: Type of Location: ☐ Vacant Lot ☐ Construction Site ☐ Occupied ☐ Other \_\_\_\_\_  
 EIMAJ INC (202) 723-5600

Business/Company Name Charge as Respondent (circle): YES NO  
 N.T. FILLORAMO Telephone Number  
 Individual Name (Last, First, Middle) Charge as Respondent (circle): YES NO  
 5225 ROCKS HILL RD. (202) 723-5600  
 Telephone Number

Mailing Address  
 BETHESDA MD 20814  
 City State Zip Code

Business License/Permit Type \_\_\_\_\_ Business License/Permit No. \_\_\_\_\_

You are charged with violating the District of Columbia laws or regulations stated below. You MUST SIGN and RETURN this form WITHIN 15 DAYS of the date of service. You must also indicate below each infraction whether you ADMIT, ADMIT WITH EXPLANATION or DENY. Instructions on back.

If you DENY one or more of the infractions, you must timely sign and return this form as your answer. If you do so, a hearing in your case is pre-scheduled on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ AM / PM at the following location:

Office of Administrative Hearings, \_\_\_\_\_, Suite \_\_\_\_\_, Washington, D.C.

|                                                                                  |                                |                                         |
|----------------------------------------------------------------------------------|--------------------------------|-----------------------------------------|
| D.C. Official Code AND/OR D.C. Municipal Regulation Citation<br>DC CODE 6-641.09 | Fine for Infraction<br>\$ 500- | Statutory Penalty (if applicable)<br>\$ |
|----------------------------------------------------------------------------------|--------------------------------|-----------------------------------------|

Nature of Infraction OPERATING OUTSIDE THE SCOPE OF CERTIFICATE OF OCCUPANCY  
 Date of Infraction 4/29/05 Time of Infraction 12:30 PM Previous Infractions Committed 1 2 3 4

ANSWER: ☐ ADMIT (Pay Fine) ☐ DENY (Appear for a Hearing) ☐ ADMIT WITH EXPLANATION (Hearing by Mail)

Signature \_\_\_\_\_

|                                                              |                           |                                         |
|--------------------------------------------------------------|---------------------------|-----------------------------------------|
| D.C. Official Code AND/OR D.C. Municipal Regulation Citation | Fine for Infraction<br>\$ | Statutory Penalty (if applicable)<br>\$ |
|--------------------------------------------------------------|---------------------------|-----------------------------------------|

Nature of Infraction \_\_\_\_\_  
 Date of Infraction \_\_\_\_\_ Time of Infraction \_\_\_\_\_ Previous Infractions Committed 1 2 3 4

ANSWER: ☐ ADMIT (Pay Fine) ☐ DENY (Appear for a Hearing) ☐ ADMIT WITH EXPLANATION (Hearing by Mail)

Signature \_\_\_\_\_

Total fine amount due for all infraction(s) \$ \_\_\_\_\_

**WARNING:** Failure to answer (see reverse) each infraction on this Notice within 15 days of the date of service by signing and returning this form will result in assessment of a penalty equal to and in addition to the specified amount of the fine. You also may be subject to other penalties and actions allowed by law including suspension and non-renewal of your license or permit, the sealing of your business, a lien being placed on your property, and attachment of your equipment. If this is your second Notice for the charges, your failure to respond within 15 days of the date of service will result in the assessment of a penalty equal to twice the amount of the fine. For Medicaid-funded facilities: This Notice and information obtained through this proceeding may be used for evaluation under applicable law, including 42 CFR Chs. 442 and 483 and for any proceeding under 42 CFR Ch. 431. For information call (202) 442-9091.

personally declare under penalty of perjury that I observed and/or determined that the infraction(s) charged have been committed.  
 [Signature] HIRE T. JAMES 5/6/05 796  
 Inspector's/Investigator's Signature Print Name Date Badge/Identification Number

I sign my name below to acknowledge receipt of this Notice of Infraction and not as an admission of guilt or liability to the charge(s) listed.

Respondent's Signature \_\_\_\_\_ Date \_\_\_\_\_  
 OAH (WHITE) RESPONDENT (YELLOW) INSPECTOR (PINK) ENFORCEMENT (GOLDENROD)

SEP - 1 2006

**DISTRICT OF COLUMBIA**  
**OFFICE OF ADMINISTRATIVE HEARINGS**  
941 North Capitol Street, NE Suite 9100  
Washington, DC 20002-4210

DISTRICT OF COLUMBIA  
OFFICE OF  
ADMINISTRATIVE HEARINGS  
2006 AUG 31 A 10:31

DISTRICT OF COLUMBIA  
DEPARTMENT OF CONSUMER AND  
REGULATORY AFFAIRS  
Petitioner

Case No: CR-I-05-N100089

v.

EIMAJ, INC. AND N.T. FILLORAMO  
Respondent

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**ORDER**

This case involves a Notice of Infraction served by the Government on Respondents Eimaj, Inc and N.T. Filloramo alleging a violation of D.C. Official Code § 6-641.09 for operating beyond the scope of a certificate of occupancy. The Notice alleges that the violation occurred April 19, 2005 at Royce Video located at 7445 Georgia Ave, N.W, which is operated by Respondents. The Government seeks a fine of \$500 for the violation. Respondents denied the violation and a hearing was held on July 13, 2005.

Respondent Eimaj, Inc. was issued a certificate of occupancy in May 1991 authorizing it to use the premises at 7445 Georgia Ave, N.W for the purpose of rental of videos, cassettes and electronic equipment "Not Sexually Oriented." The Government's basic contention is that it is operating beyond the scope of that certificate because it is operating a sexually oriented business.

The zoning regulations at 11 DCMR 199.1 define a 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 materials, that are distinguished or characterized by their emphasis on matters depicting, describing, or related to specified sexual activities and specified anatomical areas.

In January 1998, the Zoning Administrator issued an opinion that sets out criteria for determining whether a video store that sells or rents both general audience and sexually oriented materials is a sexually oriented business for the purposes of the zoning regulations. (Attached) The opinion was issued pursuant to the Zoning Administrator's authority to interpret and enforce the zoning regulations. The District of Columbia Court of Appeals have repeatedly held that such an interpretation is to be accorded great deference and not reversed unless clearly erroneous or inconsistent with a regulation. *Kalorama Citizens Association v. District of Columbia Board of Zoning Adjustment* 620 A. 2d 179 (D.C. App. 1994)

The opinion of the Zoning Administrator enunciates several standards for determining whether a video sale or rental business has a substantial and significant portion of its stock in trade in sexually oriented materials and states that a business that meets any of the standards is a sexually oriented business. One of the standards for finding a business sexually oriented is that it has more than 15% of its inventory on display in areas open to the public.<sup>1</sup>

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<sup>1</sup> For the purpose of this calculation, materials in storerooms or there areas that cannot be seen by customers are not counted, but areas restricted to minors are considered "open to the public" and are counted.

The opinion of the Zoning Administrator was issued following a survey by the Department of Consumer and Regulatory Affairs of 25 mixed use video stores in the District of Columbia, none of which had authority under the zoning regulations to operate as sexually oriented businesses. The survey found that only five of the twenty-five store had less than 15% sexually oriented material.

Research of cases decided since the opinion was issued in 1998 has found no Board of Zoning Adjustment, District of Columbia Court of Appeals, or District of Columbia Superior Court case that addresses the zoning of mixed use video stores or discusses or applies the opinion of the Zoning Administrator. Although the opinion indicates that it was being sent to the Zoning Commission for review to ensure that this interpretation of the zoning regulation meets with the Commission's approval, no further reference to the opinion could be located in public documents.

Respondent Mr. Filleromo testified that after the opinion was issued in 1998, he and other owners of mixed use video stores met with Mr. Watts, who was the Director of DCRA, and was advised that the existing businesses would not be impacted by the opinion.

In the light of the above, it is unclear whether the criteria in the opinion have ever been applied and whether it represents the Zoning Administrator's current interpretation.

Before ruling on this case, I will therefore direct DCRA to file a written statement that addresses the following issues:

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- (1) Is the interpretation of the Zoning Administrator issued in January 1998 the current interpretation for determining whether a mixed use video store is sexually oriented
- (2) Did the Zoning Commission ever review the opinion, and if not, is the Zoning Administrator's opinion nevertheless owed deference under the D.C. Court of Appeals opinion in *Kalorama Citizens*, *supra*.
- (3) Is there any opinion, Board ruling or other authority to support the proposition that the opinion does not apply to mixed use videos that were in existence at the time the opinion was issued in 1998.

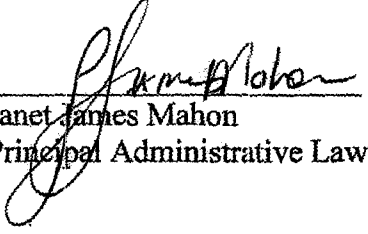
Accordingly, it is, this 31<sup>st</sup> day of August, 2006

**ORDERED**, that, on or before September 20, 2006, the Government shall file a written statement addressing the issues set out above or any other argument in support of finding a violation in this case; and it is further

**ORDERED**, that Respondents may file a written statement in reply to any statement filed by the Government on or before fourteen (14) days after that statement has been served by the Government; and it is further

**ORDERED**, that the Government shall mail a copy of any statement it files to both this Administrative Court at the above address and Respondents and that Respondents shall mail a copy of any statement it files to both this Administrative Court at the above address and the Government representatives listed below on the certificate of service, and it is further

**ORDERED**, that the failure of the Government to comply with the terms of this order without good cause may result in dismissal for want of prosecution pursuant to OAH Rule 2818.

  
Janet James Mahon  
Principal Administrative Law Judge

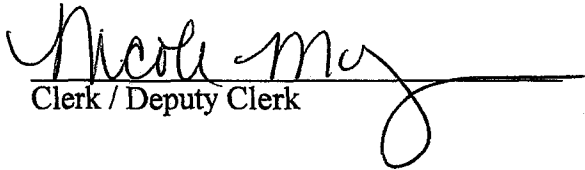
**Certificate of Service:**

**By U.S. Mail (Postage Paid):**

Eimaj, Inc  
N.T. Filloramo  
5225 Pooks Hill Road  
Bethesda, MD 20814

Andrea Bagwell, Esq.  
Harmon, Wilmot, & Brown, LLP  
1010 Vermont Ave, N.W.  
Suite 810  
Washington, D.C. 20005

I hereby certify that on August 31  
2006 this document was caused to be  
served upon the parties listed on this  
page at the addresses listed  
and by the means stated

  
Clerk / Deputy Clerk

**By Inter-Agency Mail:**

Sinclair Long, Esq.  
Office of Civil Infractions  
Department of Consumer and  
Regulatory Affairs  
941 North Capitol Street NE  
Washington, DC 20002

Jill Stern, Esq.  
Acting General Counsel  
Department of Consumer and  
Regulatory Affairs  
941 North Capitol Street NE, Suite 9400  
Washington, DC 20002

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GOVERNMENT OF THE DISTRICT OF COLUMBIA  
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS  
BUILDING AND LAND REGULATION ADMINISTRATION



Opinion of the Zoning Administrator

Determining Whether a Retail or Wholesale Video Store Selling or Renting Sexually Oriented Materials is a Sexually Oriented Business

Background

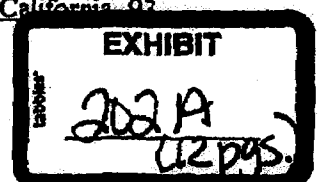
In response to letters and complaints received by the Department of Consumer and Regulatory Affairs alleging that certain retail video stores are, or are intended to be operated as, sexually oriented business establishments as that term is defined in the zoning regulations (Title 11 of the District of Columbia Municipal Regulations, Section 199.1), the Zoning Administrator finds it necessary to interpret the zoning regulations in regards to video stores which sell or rent both general interest<sup>1</sup> and sexually oriented materials.<sup>2</sup>

Unless a business has grandfathering rights, sexually oriented business establishments may, with approval by the Board of Zoning Adjustment, be located only in C-3-B, C-3-C, C-4, C-M and M zoning districts. These districts provide ample locations for sexually oriented business establishments, and, accordingly, there is no constitutional requirement that sexually oriented business establishments be allowed in any other zoning district. Businesses and the public, however, have a right to know, in more concrete terms, how many sexually oriented materials, if any, may a mixed use video store offer for sale and/or rental before it must obtain a certificate of occupancy as a sexually oriented business establishment and therefore be prohibited from operating in districts other than those listed above.<sup>3</sup> It is within the Zoning Administrator's

<sup>1</sup>General interest videos are videos which are not sexually oriented. Stores which carry only general interest videos are "general interest" stores, while stores that carry both general interest and sexually oriented videos are referred to as "mixed use" stores.

<sup>2</sup>"Sexually oriented materials" are those materials which can be characterized by their emphasis on matters depicting, describing, or related to specified sexual activities and specified anatomical areas, as defined at 11 DCMR § 199.1.

<sup>3</sup> The zoning regulations do not apply an obscenity standard in defining sexually oriented businesses. The Zoning Administrator, therefore, does not believe that in a zoning context it is appropriate to apply a "community standards" test as described in Miller v. California, 92 S.Ct. 2607 (1973.)



Respondent's J

## 2. Secondary Effects

The United States Supreme Court has made it clear that the application of zoning restrictions to sexually oriented businesses may be designed to combat the undesirable secondary effects of such businesses.<sup>5</sup> However, such restrictions must do so "without violating the government's paramount obligation of neutrality in its regulation of protected communication," City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925 (1986). Undesirable secondary effects "contribute to neighborhood blight," *id.*, and include "increased crime rates, depreciation of property values, deterioration of community character and the quality of urban life".<sup>6</sup> In addition, in Baltimore Boulevard, Inc. v. Prince George's County of Maryland, 684 F.Supp 884 (1988), while some sections of the county's zoning regulations for adult bookstores<sup>7</sup> were found to be unconstitutional, the section of the regulations that defined adult book stores as having more than 25%<sup>8</sup> of their stock in trade in sexually oriented materials passed constitutional muster.

In sum, it is clear that through zoning, the District may restrict the placement of sexually oriented businesses to protect its citizens from the undesirable secondary effects of such establishments. Furthermore, it appears that in addition to clearly described standards regarding how a business promotes itself, combined with percentage-based formulae will give all the parties concerned clear guidelines. Moreover, the use of numerical standards will serve as a protection against unfair or arbitrary enforcement. Understanding the foregoing, the question then becomes what percentage of sexually oriented materials may a mixed use video store carry or display and what other activities may it engage in without creating undesirable secondary effects. In that regard, to learn what other governments have determined in this respect, and to assess video retailing industry norms, the Zoning Administrator considered the zoning regulations for adult businesses

---

<sup>5</sup>From the 1995 resolution of the City Planning Commission of the City of New York. In addition to conducting its own study, New York based its findings on research done by the Town of Islip, New York, Los Angeles, California, Indianapolis, Indiana, Whittier, California, Austin, Texas, Phoenix, Arizona, Manatee County, Florida, New Hanover, North Carolina, and the State of Minnesota, all of which concluded that adult uses tended to produce adverse secondary effects.

<sup>7</sup>At the time the suit in Baltimore Boulevard began, an "adult book store" in Prince George's County was defined as:

Any commercial establishment that has twenty-five percent (25%) of its stock in books, periodicals, photographs, drawings, sculpture, motion pictures, films or other visual representations which depict sadomasochistic abuse, sexual conduct or sexual excitement as defined by Article 27 Section 416A of the Annotated Code of Maryland and does not otherwise qualify as a theatre or nonprofit free lending library.

<sup>8</sup>While Baltimore Boulevard was pending, the county lowered the threshold to 5%, and in 1997, it raised the threshold to 10% of a store's inventory. This change went into effect in January of 1998.

stores. In its annual publication, "AVN's 1998 Adult Entertainment Guide," the magazine revealed that in stores which carry both adult and general release titles, the adult titles comprise, on average, 18.5% of a store's inventory. In addition, in the Northeast region of the country, the "adult percentage of the video market" is 36%, while the in the Southeast and Mid-South regions the percentages are 11.7% and 9.9%, respectively. The survey also discovered that in the Northeast the average number of adult videos in stores which carried both adult and general interest videos was 700. In the Southeast and Midsouth, the average inventory of sexually oriented video tapes in mixed use video stores was 267 and 279 items, respectively.

#### 4. Survey of Video Stores in the District Which Carry Sexually Oriented Materials

Beginning in November of 1997, the Department of Consumer and Regulatory Affairs conducted a survey (see Appendix II), of all of the 25 mixed use video stores in the District.<sup>11</sup> The purpose of the survey was to determine the percentage and actual number of sexually oriented materials in the respective businesses, as well as the percentage and actual square footage of floor space used in each store for the sale and display of sexually oriented materials. The Department did not include video stores which carried no sexually oriented materials, nor did it survey establishments which have the authority under the zoning regulations to operate as sexually oriented businesses.

As regards the percentage of the inventory represented by sexually oriented materials, the survey showed a broad division into two segments: a high end, beginning at 28%, and a low end, beginning at 6% and reaching no higher than 19%. There were no stores in a middle segment ranging from 20% to 27%. Of the fifteen stores in the high end, nine would exceed New York's 40% standard. Of those, five went beyond 50%, and four of the latter-five also offered "sex toys" for sale.<sup>12</sup> All of the fifteen businesses would meet any reasonable interpretation of a "sexually oriented business establishment," as sexually oriented materials are a significant and substantial portion of their stock in trade. In contrast, ten stores at the lower end, which run the gamut from single-store operations to a local chain and a national chain, carried sexually oriented materials in an average of 13% of their total stock.

#### 5. Other Factors

In determining whether sexually oriented materials are a significant or substantial part of a business's stock in trade, the Zoning Administrator thinks it is also appropriate to look at how extensively a video store promotes and/or advertises the sexually oriented materials it has for sale or rental, because advertising and/or promotion are among "the aggregate of things necessary to carry on a business." If a video store expends a substantial effort in advertising or promoting sexually oriented materials, it will likely be perceived as a sexually oriented business, and attract or cause the undesirable secondary effects, such as diminution of property values, and altering

<sup>11</sup> The Department used the telephone directory, advertisements, and site visits to identify the video stores.

<sup>12</sup> "Sex toys" are further discussed in this opinion under Standards For Determining Whether a Business is Sexually Oriented, Subsection B(1).

Therefore, while taking other factors into account, the Zoning Administrator believes that if more than 15% of a store's inventory is comprised of sexually-oriented materials, it is a sexually oriented business establishment. This standard accommodates the District's legitimate mixed use video stores which have an average of 13% of their stock in sexually oriented materials, and limits the sale and rental of such items to the kind of accessory or incidental use contemplated by the zoning regulations.

**Standards For Determining Whether a Business is Sexually Oriented.**

Based upon the foregoing, the Zoning Administrator interprets the District of Columbia Zoning Regulations, 11 DCMR §199.1, as is set forth below.

- A. A retail or wholesale business has a substantial or significant portion of its stock in trade in sexually oriented materials, and is therefore a sexually oriented business, when any of the factors set forth below in paragraphs 1, 2, 3, or 4 applies:
1. More than 15% of its inventory on display, in areas open to the public,<sup>13</sup> counted piece-by-piece,<sup>14</sup> are sexually oriented.
  2. It devotes more than 15% of any one of its advertisements (in column inches for print advertising and in air-time seconds for radio and television advertisements) to the sexually oriented materials it sells or rents. For print advertising, the words or pictures describing sexually oriented materials cannot be the only words or pictures in the advertising, and cannot be larger than the smallest pictures and/or typeface advertising non sexually oriented materials. In addition, the Zoning Administrator will consider the use of color, type size, layout or other graphic devices used in the store's advertising to determine whether a disproportionate emphasis has been placed on the store's sexually oriented materials.
  3. Looking at each individual promotional activity separately (which includes but is not limited to contests, guest appearances, discounts, coupons or web site information), the store gives disproportionate emphasis to the sexually oriented materials in its inventory. Factors such as the use of color, type size, layout and other graphic devices will also be considered.
- B. Irrespective of the applicability of the factors set forth above, a business establishment is sexually oriented as set forth in either of paragraphs 1 or 2 below:

<sup>13</sup> "Open to the public" means 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.

<sup>14</sup> Materials in a storeroom or other areas that cannot be seen by customers, whether general interest, or sexually oriented, shall not be counted.

| Store Name          | Address                        | Zone  | City/State | Total<br>Square<br>Feet<br>Retail<br>Space | Square Feet<br>of Retail<br>Space for<br>Sexually<br>Oriented<br>Materials | Percentage<br>of Retail<br>Space Used<br>for Sexually<br>Oriented<br>Materials | Total<br>Number<br>General<br>Interest<br>Items | Total<br>Number<br>Sexually<br>Oriented<br>Materials | Percentage<br>of<br>Materials<br>Which are<br>Sexually<br>Oriented | Sexual<br>Accessories<br>Sold |
|---------------------|--------------------------------|-------|------------|--------------------------------------------|----------------------------------------------------------------------------|--------------------------------------------------------------------------------|-------------------------------------------------|------------------------------------------------------|--------------------------------------------------------------------|-------------------------------|
| Tower Video         | 2000 Pennsylvania Avenue, N.W. | C-3-C | B-157551   | 1,656                                      | 192                                                                        | 12%                                                                            | 19,287                                          | 3,536                                                | 15%                                                                | NO                            |
| Video Corner        | 2311 Clavert Street, N.W.      | C-2-B | B-156671   | 531                                        | 126                                                                        | 24%                                                                            | 3,058                                           | 3,889                                                | 56%                                                                | NO                            |
| Video Corner        | 1222 N Street, N.W.            | C-2-A | B-163357   | 1,231                                      | 165                                                                        | 13%                                                                            | 3,403                                           | 2,184                                                | 39%                                                                | NO                            |
| Video Entertainment | 905 H Street, N.E.             | C-2-A | B-177591   | 520                                        | 72                                                                         | 14%                                                                            | 1,987                                           | 392                                                  | 16%                                                                | NO                            |
| Video King          | 1845 Columbia Road, N.W.       | C-2-B | B-162133   | 1,020                                      | 84                                                                         | 8%                                                                             | 5,748                                           | 1,175                                                | 17%                                                                | NO                            |
| Washington Video    | 1511 17th Street, N.W.         | C-2-B | B-145356   | 1,387                                      | 1,152                                                                      | 83%                                                                            | 1,990                                           | 1,871                                                | 48%                                                                | NO                            |
| Washington Video    | 1653 Wisconsin Avenue, N.W.    | C-2-A | B-158804   | 550                                        | 130                                                                        | 24%                                                                            | 2,325                                           | 1,151                                                | 33%                                                                | NO                            |
| Washington Video    | 2012 S Street, N.W.            | C-3-B | B-140483   | 508                                        | 224                                                                        | 44%                                                                            | 3,104                                           | 2,228                                                | 42%                                                                | NO                            |
| Washington Video    | 401 M Street, S.W.             | UR    | B-159667   | 856                                        | 208                                                                        | 24%                                                                            | 1,763                                           | 1,152                                                | 40%                                                                | NO                            |
|                     |                                |       |            |                                            |                                                                            |                                                                                |                                                 |                                                      |                                                                    |                               |
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GOVERNMENT OF THE DISTRICT OF COLUMBIA  
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS  
BUILDING AND LAND REGULATION ADMINISTRATION



Opinion of the Zoning Administrator

Determining Whether a Retail or Wholesale Video Store Selling or Renting Sexually Oriented Materials is a Sexually Oriented Business

Background

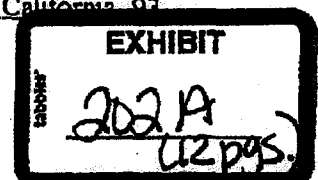
In response to letters and complaints received by the Department of Consumer and Regulatory Affairs alleging that certain retail video stores are, or are intended to be operated as, sexually oriented business establishments as that term is defined in the zoning regulations (Title 11 of the District of Columbia Municipal Regulations, Section 199.1), the Zoning Administrator finds it necessary to interpret the zoning regulations in regards to video stores which sell or rent both general interest<sup>1</sup> and sexually oriented materials.<sup>2</sup>

Unless a business has grandfathering rights, sexually oriented business establishments may, with approval by the Board of Zoning Adjustment, be located only in C-3-B, C-3-C, C-4, C-M and M zoning districts. These districts provide ample locations for sexually oriented business establishments, and, accordingly, there is no constitutional requirement that sexually oriented business establishments be allowed in any other zoning district. Businesses and the public, however, have a right to know, in more concrete terms, how many sexually oriented materials, if any, may a mixed use video store offer for sale and/or rental before it must obtain a certificate of occupancy as a sexually oriented business establishment and therefore be prohibited from operating in districts other than those listed above.<sup>3</sup> It is within the Zoning Administrator's

<sup>1</sup>General interest videos are videos which are not sexually oriented. Stores which carry only general interest videos are "general interest" stores, while stores that carry both general interest and sexually oriented videos are referred to as "mixed use" stores.

<sup>2</sup>"Sexually oriented materials" are those materials which can be characterized by their emphasis on matters depicting, describing, or related to specified sexual activities and specified anatomical areas, as defined at 11 DCMR § 199.1.

<sup>3</sup> The zoning regulations do not apply an obscenity standard in defining sexually oriented businesses. The Zoning Administrator, therefore, does not believe that in a zoning context it is appropriate to apply a "community standards" test as described in Miller v. California, 97 S.Ct. 2607 (1973.)



Respondent's J

interpretive authority to provide such clarification. Pursuant to Reorganization Order No. 555, III, F (D.C. Code Ann. Title I, Administration, Appendix at 182, 185 (1973)), the Zoning Administrator "shall be responsible for administratively interpreting and enforcing the zoning regulations." The District of Columbia Court of Appeals has repeatedly recognized this authority, often stating, as it did in Kalorama Citizen's Association v. District of Columbia Board of Zoning Adjustment, 640 A.2d 179 (D.C. App. 1994), that:

we give "great deference" to the agency's interpretation of its regulations, which we may not reverse unless it is clearly erroneous or inconsistent with the regulations.

It is the purpose of this Opinion to interpret the zoning regulations of the District of Columbia so as to provide standards by which proprietors of mixed use video stores and the public may determine whether a video store is a sexually oriented business establishment.

### Discussion

#### 1. Sexually Oriented Business Establishments: Definitions

The zoning regulations at 11 DCMR § 199.1 define a 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 terms "substantial," "significant," and "stock in trade" are not defined in the zoning regulations. When a specific word is not defined in the zoning regulations, the Zoning Administrator relies on Webster's Unabridged Dictionary (3rd Edition), to provide clarity.<sup>1</sup> In considering these definitions, the Zoning Administrator concludes that "substantial" means "to a large degree" but not necessarily a majority of a business's stock in trade. This is especially so because "substantial" is used in conjunction with the word "significant." "Significant" is not synonymous with "predominant" or other majoritarian terms, and therefore it is clear to the Zoning Administrator that the Zoning Commission set a standard of less than 50%. In examining a business's stock in trade, the Zoning Administrator will assess "the aggregate of things necessary to carry on the business,"<sup>2</sup> which, in addition to inventory items, includes advertising and promotion activities and signage.

<sup>1</sup> See the Appendix to this opinion which carries the full definition of each term, with the relevant portions highlighted in bold italic.

<sup>2</sup> Webster's, *supra*.

## 2. Secondary Effects

The United States Supreme Court has made it clear that the application of zoning restrictions to sexually oriented businesses may be designed to combat the undesirable secondary effects of such businesses." However, such restrictions must do so "without violating the government's paramount obligation of neutrality in its regulation of protected communication," City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925 (1986). Undesirable secondary effects "contribute to neighborhood blight," *id.*, and include "increased crime rates, depreciation of property values, deterioration of community character and the quality of urban life".<sup>6</sup> In addition, in Baltimore Boulevard, Inc. v. Prince George's County of Maryland, 684 F.Supp 884 (1988), while some sections of the county's zoning regulations for adult bookstores<sup>7</sup> were found to be unconstitutional, the section of the regulations that defined adult book stores as having more than 25%<sup>8</sup> of their stock in trade in sexually oriented materials passed constitutional muster.

In sum, it is clear that through zoning, the District may restrict the placement of sexually oriented businesses to protect its citizens from the undesirable secondary effects of such establishments. Furthermore, it appears that in addition to clearly described standards regarding how a business promotes itself, combined with percentage-based formulae will give all the parties concerned clear guidelines. Moreover, the use of numerical standards will serve as a protection against unfair or arbitrary enforcement. Understanding the foregoing, the question then becomes what percentage of sexually oriented materials may a mixed use video store carry or display and what other activities may it engage in without creating undesirable secondary effects. In that regard, to learn what other governments have determined in this respect, and to assess video retailing industry norms, the Zoning Administrator considered the zoning regulations for adult businesses

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<sup>6</sup>From the 1995 resolution of the City Planning Commission of the City of New York. In addition to conducting its own study, New York based its findings on research done by the Town of Islip, New York, Los Angeles, California, Indianapolis, Indiana, Whittier, California, Austin, Texas, Phoenix, Arizona, Manatee County, Florida, New Hanover, North Carolina, and the State of Minnesota, all of which concluded that adult uses tended to produce adverse secondary effects.

<sup>7</sup>At the time the suit in Baltimore Boulevard began, an "adult book store" in Prince George's County was defined as:

Any commercial establishment that has twenty-five percent (25%) of its stock in books, periodicals, photographs, drawings, sculpture, motion pictures, films or other visual representations which depict sadomasochistic abuse, sexual conduct or sexual excitement as defined by Article 27 Section 416A of the Annotated Code of Maryland and does not otherwise qualify as a theatre or nonprofit free lending library.

<sup>8</sup>While Baltimore Boulevard was pending, the county lowered the threshold to 5%, and in 1997, it raised the threshold to 10% of a store's inventory. This change went into effect in January of 1998.

promulgated by the City of New York and Prince George's County, Maryland, as well as a recent national survey conducted of approximately 4,000 video stores by the publication Adult Video News.<sup>9</sup>

### 3. Regulations in Other Jurisdictions and Industry Practices

#### A. New York City Regulations:

In 1995, in case # N 950384 ZRY, the Planning Commission of the City of New York amended the City's zoning regulations concerning "Adult Establishments." In the amendments, New York defined an adult establishment as follows:

[A] book store which has a "substantial portion" of its stock in trade in any one or more of the following...video cassettes,<sup>10</sup> or other visual representations which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

In the resolution enacting the zoning amendments, the New York City Planning Commission advised that if more than 40% of a store's stock in trade or retail space was devoted to sexually oriented material, the business would be considered an adult establishment. In addition, New York established a cap of 10,000 square feet of retail space for the display of sexually oriented materials regardless of how much total retail space a store occupies.

#### B. Prince George's County Regulations:

The County Council has revised inventory percentages twice since Baltimore Boulevard was filed. First, the county lowered its inventory threshold to 5% (from 25%) and then raised the threshold to 10% in late 1997. Regardless of the percentage amount, however, Prince George's County has used inventory percentages to define sexually oriented businesses for at least 10 years.

#### C. Video Industry Survey:

From 1996 through 1997, Adult Video News conducted a survey of more than 4,000 video

<sup>9</sup> "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence is relied upon is reasonably believed to be relevant to the problem that the city addresses." In addition, "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Renton, supra. See also FW/PBS, Inc. v. City of Dallas, 110 S.Ct. 596 (1990). It is the Zoning Administrator's opinion that this reasoning also applies to the administrative interpretation of regulations.

<sup>10</sup> Because the New York City Regulations were updated, video tapes were included in its definition of materials. While video tapes are not specifically mentioned in the District's zoning regulations, they certainly fall within the category of "other material."

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stores. In its annual publication, "AVN's 1998 Adult Entertainment Guide," the magazine revealed that in stores which carry both adult and general release titles, the adult titles comprise, on average, 18.5% of a store's inventory. In addition, in the Northeast region of the country, the "adult percentage of the video market" is 36%, while the in the Southeast and Mid-South regions the percentages are 11.7% and 9.9%, respectively. The survey also discovered that in the Northeast the average number of adult videos in stores which carried both adult and general interest videos was 700. In the Southeast and Midsouth, the average inventory of sexually oriented video tapes in mixed use video stores was 267 and 279 items, respectively.

#### 4. Survey of Video Stores in the District Which Carry Sexually Oriented Materials

Beginning in November of 1997, the Department of Consumer and Regulatory Affairs conducted a survey (see Appendix II), of all of the 25 mixed use video stores in the District.<sup>11</sup> The purpose of the survey was to determine the percentage and actual number of sexually oriented materials in the respective businesses, as well as the percentage and actual square footage of floor space used in each store for the sale and display of sexually oriented materials. The Department did not include video stores which carried no sexually oriented materials, nor did it survey establishments which have the authority under the zoning regulations to operate as sexually oriented businesses.

As regards the percentage of the inventory represented by sexually oriented materials, the survey showed a broad division into two segments: a high end, beginning at 28%, and a low end, beginning at 6% and reaching no higher than 19%. There were no stores in a middle segment ranging from 20% to 27%. Of the fifteen stores in the high end, nine would exceed New York's 40% standard. Of those, five went beyond 50%, and four of the latter five also offered "sex toys" for sale.<sup>12</sup> All of the fifteen businesses would meet any reasonable interpretation of a "sexually oriented business establishment," as sexually oriented materials are a significant and substantial portion of their stock in trade. In contrast, ten stores at the lower end, which run the gamut from single-store operations to a local chain and a national chain, carried sexually oriented materials in an average of 13% of their total stock.

#### 5. Other Factors

In determining whether sexually oriented materials are a significant or substantial part of a business's stock in trade, the Zoning Administrator thinks it is also appropriate to look at how extensively a video store promotes and/or advertises the sexually oriented materials it has for sale or rental, because advertising and/or promotion are among "the aggregate of things necessary to carry on a business." If a video store expends a substantial effort in advertising or promoting sexually oriented materials, it will likely be perceived as a sexually oriented business, and attract or cause the undesirable secondary effects, such as diminution of property values, and altering

<sup>11</sup> The Department used the telephone directory, advertisements, and site visits to identify the video stores.

<sup>12</sup> "Sex toys" are further discussed in this opinion under Standards For Determining Whether a Business is Sexually Oriented, Subsection B(1).

neighborhood character, which the zoning regulations are designed to prevent. Furthermore, in addition to using percentages of retail space and inventory as guidelines, it is appropriate to establish numerical standards. Numerical standards are required, because at some point, even following the percentage guidelines, a business could have such a large number of sexually oriented materials that the store would generate undesirable secondary effects.

In addition, if a video store also sells sexually oriented magazines or books, the Zoning Administrator will determine whether said books or magazines are a substantial or significant portion of all of the magazines and books offered for sale by the business. Similarly, if the sexually oriented materials for sale are new, then the general interest items of the same category which are offered for sale should also be new. This comparison will be made so that video stores will not be able to feign compliance with the Zoning Regulations by carrying used or undesirable general interest items while stocking new, more merchantable, sexually oriented materials.

### Conclusions

In assessing the facts, it is clear that there is a significant range between the inventory percentages set by Prince George's County and the City of New York. In addition, the volume of business done in adult videos in mixed use video stores varies dramatically region by region. The Zoning Administrator, however, cannot agree with Prince George's County that if a video store has as little as 10% of its stock in trade in sexually oriented materials it will cause undesirable secondary effects. Nor, on the other hand, can the Zoning Administrator agree that the 40% figure promulgated by New York City will provide an adequate bulwark against undesirable secondary effects.

The District's survey shows that a majority (fifteen) of the mixed use video stores in the District have close to 30% or more of their inventory in sexually oriented materials, with more than half of those stores exceeding even New York City's standards. All fifteen are clearly sexually oriented because sexually oriented materials are a substantial and significant portion of their stock in trade. All fifteen may be expected to cause the negative secondary effects that have been found in the studies and cases referred to above. That these stores already operate in the District in no way implies a contrary finding concerning secondary effects. Rather, the fact is that the District in recent years, due to budget constraints, loss of personnel, restructuring, and other factors, has lacked the resources to enforce all aspects of the zoning regulations, let alone conduct studies to document the effect of such businesses on the surrounding neighborhoods. In addition, neither the Constitution nor the applicable cases require the District to conduct such a study. The concerns raised by residents of at least two neighborhoods about alleged sexually oriented video stores beginning operations provide sufficient basis for the Zoning Administrator to act to interpret the zoning regulations and to devote still-scarce resources to enforce them, before additional businesses commence operations and before existing businesses expand sexually oriented operations without effective regulation.

After considering the measures taken in other jurisdictions, and examining mixed use video stores in the District, the Zoning Administrator believes that a standard approximating the national average of 18.5% of a store's inventory (as reported in Adult Video News), is appropriate.

Therefore, while taking other factors into account, the Zoning Administrator believes that if more than 15% of a store's inventory is comprised of sexually-oriented materials, it is a sexually oriented business establishment. This standard accommodates the District's legitimate mixed use video stores which have an average of 13% of their stock in sexually oriented materials, and limits the sale and rental of such items to the kind of accessory or incidental use contemplated by the zoning regulations.

**Standards For Determining Whether a Business is Sexually Oriented.**

Based upon the foregoing, the Zoning Administrator interprets the District of Columbia Zoning Regulations, 11 DCMR §199.1, as is set forth below.

A. A retail or wholesale business has a substantial or significant portion of its stock in trade in sexually oriented materials, and is therefore a sexually oriented business, when any of the factors set forth below in paragraphs 1, 2, 3, or 4 applies:

1. More than 15% of its inventory on display, in areas open to the public,<sup>13</sup> counted piece-by-piece,<sup>14</sup> are sexually oriented.
2. It devotes more than 15% of any one of its advertisements (in column inches for print advertising and in air-time seconds for radio and television advertisements) to the sexually oriented materials it sells or rents. For print advertising, the words or pictures describing sexually oriented materials cannot be the only words or pictures in the advertising, and cannot be larger than the smallest pictures and/or typeface advertising non sexually oriented materials. In addition, the Zoning Administrator will consider the use of color, type size, layout or other graphic devices used in the store's advertising to determine whether a disproportionate emphasis has been placed on the store's sexually oriented materials.
3. Looking at each individual promotional activity separately (which includes but is not limited to contests, guest appearances, discounts, coupons or web site information), the store gives disproportionate emphasis to the sexually oriented materials in its inventory. Factors such as the use of color, type size, layout and other graphic devices will also be considered.

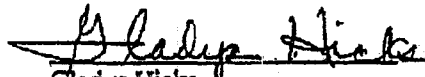
B. Irrespective of the applicability of the factors set forth above, a business establishment is sexually oriented as set forth in either of paragraphs 1 or 2 below:

<sup>13</sup> "Open to the public" means 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.

<sup>14</sup> Materials in a storeroom or other areas that cannot be seen by customers, whether general interest, or sexually oriented, shall not be counted.

1. The Zoning Administrator makes the determination that the sale of merchandise such as three dimensional reproductions 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 through 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 customary accessory use to a mixed use video store. A business that provides or operates such apparatuses is a sexually oriented business.
- C. After obtaining a certificate of occupancy as a non-sexually oriented business, a business may still be determined to be operating as a sexually oriented business establishment based on the source of its revenues. In making an assessment after a business has opened, the Zoning Administrator may consider, in addition to the other factors discussed herein, the percentage of business, in dollar volume, generated by the establishment's sexually oriented materials, and apply the 15% standard.

In order to ensure that this interpretation of the zoning regulations meets with the approval of the Zoning Commission, a copy of this opinion shall be sent to the Commission for review.

  
Gladys Hicks,  
Acting Zoning Administrator  
January 29, 1998

| Store Name          | Address                        | Zoning District | Gal. O. A. | Total Square Feet of Retail Space | Square Feet of Retail Space for Sexually Oriented Materials | Percentage of Retail Space Used for Sexually Oriented Materials | Total Number of General Interest Items | Total Number of Sexually Oriented Materials | Percentage of Materials Which are Sexually Oriented | Sexual Accessories Sold |
|---------------------|--------------------------------|-----------------|------------|-----------------------------------|-------------------------------------------------------------|-----------------------------------------------------------------|----------------------------------------|---------------------------------------------|-----------------------------------------------------|-------------------------|
| Tower Video         | 2000 Pennsylvania Avenue, N.W. | C-3-C           | B-157551   | 1,656                             | 192                                                         | 12%                                                             | 19,287                                 | 3,536                                       | 15%                                                 | NO                      |
| Vided Corner        | 2311 Clavert Street, N.W.      | C-2-B           | B-156671   | 531                               | 126                                                         | 24%                                                             | 3,058                                  | 3,889                                       | 56%                                                 | NO                      |
| Video Corner        | 3222 N Street, N.W.            | C-2-A           | B-163357   | 1,231                             | 165                                                         | 13%                                                             | 3,403                                  | 2,184                                       | 39%                                                 | NO                      |
| Video Entertainment | 905 H Street, N.E.             | C-2-A           | B-177591   | 520                               | 72                                                          | 14%                                                             | 1,987                                  | 392                                         | 16%                                                 | NO                      |
| Video King          | 1845 Columbia Road, N.W.       | C-2-B           | B-162133   | 1,020                             | 84                                                          | 8%                                                              | 5,748                                  | 1,175                                       | 17%                                                 | NO                      |
| Washington Video    | 1511 17th Street, N.W.         | C-2-B           | B-145356   | 1,387                             | 1,152                                                       | 83%                                                             | 1,990                                  | 1,871                                       | 48%                                                 | NO                      |
| Washington Video    | 1653 Wisconsin Avenue, N.W.    | C-2-A           | B-158804   | 550                               | 130                                                         | 24%                                                             | 2,325                                  | 1,151                                       | 33%                                                 | NO                      |
| Washington Video    | 2012 S Street, N.W.            | C-3-B           | B-140483   | 508                               | 224                                                         | 44%                                                             | 1,104                                  | 2,228                                       | 42%                                                 | NO                      |
| Washington Video    | 401 M Street, S.W.             | UR              | B-159667   | 856                               | 208                                                         | 24%                                                             | 1,763                                  | 1,152                                       | 40%                                                 | NO                      |
|                     |                                |                 |            |                                   |                                                             |                                                                 |                                        |                                             |                                                     |                         |
|                     |                                |                 |            |                                   |                                                             |                                                                 |                                        |                                             |                                                     |                         |
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|                     |                                |                 |            |                                   |                                                             |                                                                 |                                        |                                             |                                                     |                         |

| Store Name                 | Address                        | Zoning District | C.O.#     | Total Square Feet of Retail Space | Square Feet of Retail Space for Sexually Oriented Materials | Percentage of Retail Space Used for Sexually Oriented Materials | Total Number of General Interest Items | Total Number of Sexually Oriented Materials | Percentage of Sexually Oriented Materials Which are Sexually Oriented | Sexual Activity Permitted |
|----------------------------|--------------------------------|-----------------|-----------|-----------------------------------|-------------------------------------------------------------|-----------------------------------------------------------------|----------------------------------------|---------------------------------------------|-----------------------------------------------------------------------|---------------------------|
| Capitol Video Sales        | 2028 P Street, N.W.            | C-2-B           | B-158531  | 987                               | 406                                                         | 41%                                                             | 2,335                                  | 2,177                                       | 48%                                                                   | NO                        |
| Capitol Video Sales        | 1729 Connecticut Avenue, N.W.  | C-3-B           | B-170134  | 1,563                             | 875                                                         | 56%                                                             | 3,302                                  | 5,596                                       | 63%                                                                   | YES                       |
| Capitol Video Sales        | 514 8th Street, S.E.           | C-2-A           | B-137377  | 3,920                             | 480                                                         | 25%                                                             | 4,642                                  | 8,370                                       | 65%                                                                   | YES                       |
| Capitol Video Sales        | 201 Massachusetts Avenue, N.E. | C-2-A           | B-148182  | 1,012                             | 312                                                         | 31%                                                             | 5,049                                  | 2,060                                       | 29%                                                                   | NO                        |
| Discount Magazines & Video | 750 6th Street, N.W.           | C-4             | B-1891525 | 338                               | 130                                                         | 38%                                                             | 5,015                                  | 1,993                                       | 28%                                                                   | YES                       |
| Fun Fair                   | 919 5th Street, N.W.           | C-2-C           | B-176169  | 243                               | 1,155                                                       | 93%                                                             | 898                                    | 2,924                                       | 77%                                                                   | YES                       |
| Lamont Video               | 3171 Mt. Pleasant Street, N.W. | C-2-A           | B-160478  | 1,116                             | 216                                                         | 19%                                                             | 4,843                                  | 661                                         | 12%                                                                   | NO                        |
| Penn Video                 | 645 Pennsylvania Avenue, S.E.  | C-2-A           | B-167198  | 600                               | 38                                                          | 58%                                                             | 2,476                                  | 2,176                                       | 47%                                                                   | NO                        |
| Potomac Video              | 3408 Idaho Street, N.W.        | C-2-B           | B-167024  | 1,600                             | 90                                                          | 5%                                                              | 10,790                                 | 686                                         | 6%                                                                    | NO                        |
| Potomac Video              | 3418 Connecticut Avenue, N.W.  | C-2-A           | B-149814  | 1,216                             | 209                                                         | 17%                                                             | 9,457                                  | 2,198                                       | 19%                                                                   | NO                        |
| Potomac Video              | 4301 Connecticut Avenue, N.W.  | C-3-A           | B-167328  | 1,029                             | 169                                                         | 16%                                                             | 6,876                                  | 762                                         | 10%                                                                   | NO                        |
| Potomac Video              | 4828 Connecticut Avenue, N.W.  | C-3-A           | B-150747  | 1,918                             | 163                                                         | 9%                                                              | 12,330                                 | 890                                         | 7%                                                                    | NO                        |
| Potomac Video              | 5536 Wisconsin Avenue, N.W.    |                 | B-175850  | 5,322                             | 760                                                         | 14%                                                             | 15,550                                 | 1,821                                       | 11%                                                                   | NO                        |
| Royce's Video Outlet       | 7445 Georgia Avenue, N.W.      | C-2-A           | 1920161   | 1,311                             | 665                                                         | 51%                                                             | 1,823                                  | 6,081                                       | 61%                                                                   | YES                       |
| Stage One Video            | 3748 10th Street, N.W.         | C-2-A           | B-177060  | 1,747                             | 370                                                         | 10%                                                             | 5,256                                  | 1,171                                       | 18%                                                                   | NO                        |
| Tape Headz Video           | 1709 17th Street, N.W.         | C-2-B           | B-172514  | 386                               | 170                                                         | 44%                                                             | 1,719                                  | 1,052                                       | 38%                                                                   | NO                        |