

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

AUGUST 4, 2015

+ + + + +

The Special Public Meeting convened in the Jerrily R. Kress Memorial Hearing Room, Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 9:30 a.m., Lloyd Jordan, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

LLOYD JORDAN, Chairperson
MARNIQUE HEATH, Vice-Chairperson
JEFF HINKLE, Board Member (NCPC)
FREDERICK HILL, Board Member

ZONING COMMISSION MEMBER PRESENT:

ROBERT MILLER, Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
JOHN NYARKU, Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

MARY NAGELHOUT, ESQ.

The transcript constitutes the minutes from the Public Meeting held on August 4, 2015.

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2. Administrative Matters	4
3. <u>Appeal No. 18114-A of Ward 5 Improvement Association</u>	6
<p>Pursuant to 11 DCMR 3100 and 3101, from decisions of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Certificate of Occupancy No. 1001838 on April 21, 2010; Certificate of Occupancy No. 1002471 on June 22, 2010; and Certificate of Occupancy No. CO1101152 on June 24, 2011; all for a restaurant with nightclub (not a sexually oriented business establishment), in the C-M-2 District at premises 2127 Queens Chapel Road, N.E. (Square 4258, Lot 34)</p>	
Adjournment	57

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P-R-O-C-E-E-D-I-N-G-S

(9:48 a.m.)

CHAIRPERSON JORDAN: If we can please come to order. We're located in the Jerrily R. Kress Memorial Hearing Room at 441 Fourth Street, N.W.

Today's date is August 4th, 2015, and we're here for the public meeting of the Board of Zoning Adjustment of the District of Columbia.

My name is Lloyd Jordan, Chairperson. To my left is Marnique Heath, the vice-chair. To her left is Rob Miller, a member of the Zoning Commission, sitting in as a member of the Board of Zoning Adjustment. To my immediate right is Fred Hill, a new member of the Board, and to his right is Jeffrey Hinkle, a member of the Board.

Be advised that today's proceeding is being Webcast live and also being recorded by a court reporter. So therefore we're going to ask to refrain from any disruptive noises in the hearing room, or the meeting room. It's a good time to make sure the Board, that we have our devices on silent, and we'll proceed.

Today's agenda is a very limited agenda. We set on our agenda Case No. 18114, the remand issue on that particular case. This is a case that won't die. It's been around for years and years and years. I think it's become its own reality show. So that is our issue on the previously-announced and advertised

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1 agenda for today, and some administrative matters that the
2 Board needs to take up.

3 So let's start off. First, a couple of administrative
4 matters. We did not approve, during our last meeting, the
5 meetings that we hold on Monday with seeking legal advice from
6 council.

7 So for the month of September 15th, in accordance with
8 Section 45(c) of the Open Meetings Act, the District of
9 Columbia Section 507(c), I move that the Board of Zoning
10 Adjustment hold closed meetings on Monday, September 14th, 21st,
11 and 28th. These meetings will start at 4:00 p.m., and are held
12 for the purposes of obtaining legal advice from our counsel,
13 and deliberating upon but not voting on the cases scheduled
14 to be publicly heard, or decided by the Board on the day after
15 each such closed meeting.

16 Those cases have been identified on the Board's public
17 meeting and hearing agendas for September 15th, September 22nd,
18 and September 29th.

19 A closed meeting for these purposes is permitted by
20 Section 405(b)(4), and (b)(13) of the Act.

21 Is there a second?

22 VICE-CHAIRPERSON HEATH: Second.

23 CHAIRPERSON JORDAN: Will the secretary please take a
24 roll call vote. The motion has been seconded. Secretary,
25 please take a roll call vote.

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1 MR. MOY: Yes, sir. Thank you. When I call the member's
2 name, if you could reply with a yes or not.

3 Mr. Robert Miller.

4 ZC COMMISSIONER MILLER: Yes.

5 MR. MOY: Vice-Chairperson Marnique.

6 VICE-CHAIRPERSON HEATH: Yes.

7 MR. MOY: Chairman Jordan.

8 CHAIRPERSON JORDAN: Yes.

9 MR. MOY: Mr. Fred Hill.

10 MEMBER HILL: Yes.

11 MR. MOY: Mr. Jeffrey Hinkle.

12 MEMBER HINKLE: Yes.

13 MR. MOY: The motion carries, Mr. Chairman, on a vote of
14 five-zero.

15 CHAIRPERSON JORDAN: Okay. I request that the Office of
16 Zoning provide notice of these closed meetings in accordance
17 with the Act.

18 Okay. And let me officially greet and welcome Fred Hill
19 to the Board. Welcome, and this is a great case to get your
20 feet wet on.

21 MEMBER HILL: Thank you.

22 CHAIRPERSON JORDAN: And as I said, it's a monster that
23 still will not die. One other thing that I would want to add
24 for the Board's consideration is that we add to the September
25 15th --- is that correct, Mr. Moy? Yes. September 15th docket,

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1 a review of a ZRR, the zoning rewrite, regulations rewrite.
2 Comments have to be in by September 25th, and I think the Board
3 should take --- you know, just review. If there's something
4 particular as regards to --- I think it's Section Y that's
5 applicable to how the Board of Zoning Adjustment operates. If
6 we can just add that, if that's okay with everyone on the Board.
7 I think we just --- whether or not we're going to make any
8 comments or not, we at least need to be conscious and take a
9 look at it, collectively.

10 We had earlier made some comments, but we need to take
11 --- this is in now final rulemaking. Okay? Is that okay, by
12 consensus, we add that? It's not a typically light day, but
13 we only have ten hearing cases that day, so we can --- only
14 nine hearing cases. So this makes the tenth matter we take up,
15 and we have four or five decisions on that day.

16 All right. So let's then move in to where we are today.
17 We're here to answer the remand questions raised by the D.C.
18 Court of Appeals in regards to Case 181114. So Mr. Moy, do you
19 want to call it and we can just deal with it that way.

20 MR. MOY: Yes, sir. Very quickly, this is the only item
21 or case on the docket for the Special Public Meeting today,
22 and that is Appeal No. 18114-A of Ward 5 Improvement
23 Association on remand from the D.C. Court of Appeals.

24 The Board will recall, the Board last held deliberations
25 on the matter on June 16th, 2015, and the Board continued

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1 deliberations scheduled for this date, August 4th.

2 Very quickly, the Board did address the six questions
3 on remand, and from the staff's notes, two of the six of the
4 questions did not reach consensus by the Board, where there
5 were four members, and of course today we have a full body of
6 five members with us today, Mr. Chairman.

7 CHAIRPERSON JORDAN: Okay. First, because everyone was
8 not --- I don't think anybody was here, except for Mr. Hinkle,
9 maybe, for the full process of this thing since birth. We need
10 to make note, before we start, that everybody has reviewed all
11 the hearing, the transcripts or tapes. That would be the first
12 hearing that was held, I think is October 26, 2010. The
13 hearing held March 20, 2011, and the one, September 11 ---
14 September 2011, and all the exhibits that are in the file. So
15 we just need to acknowledge that. I know I have, and let's make
16 sure we're all on the record, because most of us were not around
17 for the birth of this baby.

18 So we need to --- if we can start, please, that we're
19 reviewed the record. We've just got to make sure everybody
20 acknowledges they reviewed the record.

21 ZC COMMISSIONER MILLER: Thank you, Mr. Chairman. Yes,
22 I have reviewed the extensive record in this case more than
23 once.

24 VICE-CHAIRPERSON HEATH: I've also reviewed the record,
25 multiple times, for different meetings.

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1 MEMBER HILL: Mr. Chairman, I've also reviewed the
2 record, and watched all the tapes, and read everything.

3 MEMBER HINKLE: Now Mr. Chairman, as you mentioned, I've
4 been here from the beginning, the initial hearing, so I'm very
5 familiar with this case.

6 CHAIRPERSON JORDAN: Poor you. Okay. I think we use as
7 a guide Office of, Attorney General's Office, a memorandum that
8 kind of outlined where we are. That's what we've been using
9 previously. But I also just want to caution the Board, that
10 what we're required through the D.C. Court of Appeals' opinion,
11 is also required, in general, is that anything, and decisions
12 that we've made, we have to support and show substantial
13 evidence in the record.

14 So we have to be guarded by how we proceed in this
15 decision. That's one of the reasons why this case is back,
16 because the Court of Appeals says that we did not show
17 substantial evidence in support, and we didn't answer some
18 various terms that we need to define.

19 And also we're bound to look at this from the state of
20 what information that was in front of the Zoning Administrator
21 at the time of the --- prior to the time of the second --- the
22 issuance of the final permit C of O. Would that be correct,
23 Ms. Nagelhout? Good. Okay. Did I miss anything? We're good?
24 All right.

25 All right. So with that, let me go through.

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1 So based upon Question 1: What information was available
2 to the Zoning Administrator at the time of the issuance of the
3 second permit, C of O, on June 24th, indicates from our record,
4 and notes, that the Board has reached a conclusion that we did
5 not --- number two was: How should the BZA define key terms
6 and regulation listing specific sexual activities,
7 particularly fondling, and other erotic touchings of human
8 genitalia, pubic regions, buttocks, and breasts, and acts of
9 sexual stimulation or arousal, considering both the ZA's
10 interpretation of those words defined in the zoning
11 regulations to have the meaning given in Webster's Unabridged
12 Dictionary, 11 DCMR 199.2.

13 That from our, from the notes, the official notes and
14 records from the Office of Zoning, we have not reached a
15 conclusion for that.

16 Then the third thing that we have to address on --- I
17 guess it'll be page seven of the memoran --- well, I know the
18 pages. How should the Board distinguish fondling from other
19 erotic touchings of the human genitalia, pubic regions,
20 buttocks, or breasts? And that we partially answered. And then
21 the second part we have open being that the fondling and other
22 erotic touches were not distinguished except that one Board
23 member described other erotic touching as something devoted
24 to or intending to be --- intending to arouse sexual desire
25 without a temporal aspect. So number three we have to visit.

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1 Number four. Whether the Zoning Administrator
2 reasonably made determinations regarding erotic touching at
3 the Stadium Club, including whether the activities described
4 by witnesses who attended the Stadium Club are consistent with
5 the ZA's determination, and whether the rules and regulations
6 for dancers and other measures implemented by the management
7 of the Stadium Club were effective to ensure compliance with
8 the zoning regulations. That was open.

9 Then I obviously have number five in my notes
10 that were open, but I think that might be --- whether evidence
11 in the record adequately supports a determination by the ZA
12 that the type of activities occurring at the Stadium Club does
13 not promote sexually, stimulation or arousal, and therefore
14 will not constitute a specific sexual activity --- constitute
15 a specific sexual activity considering especially the Board's
16 decision in the California Steakhouse case.

17 And then finally, number six, whether the Board ---
18 that we had agreement on whether or not the Board should
19 evaluate potential acts of sexual stimulation or arousal by
20 considering the intent of the provider of a specific type of
21 nude dancing, and some other metric such as a reasonable person
22 standard. Right. Okay. So let's go to our --

23 VICE-CHAIRPERSON HEATH: We agreed on that one.

24 CHAIRPERSON JORDAN: Yes, we agreed on that one. Right.
25 Yes. That 's what we have. That 's what I have in my notes. Okay.

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1 So let's go --- we did one. Going to go to two.

2 How should the Board define key terms and regulations
3 listing specific sexual activities, particularly fondling and
4 other erotic touching, and erotic touching and acts of sexual
5 stimulation and arousal, considering both the ZA's
6 interpretation and words that are not defined in the zoning
7 regulations, shall have the same meaning given in --- okay.
8 So that's what's before us.

9 The Board previously found, in the underlying case, that
10 there was no evidence of specific sexual activities, is what
11 the notes indicate, and I guess from the decision.

12 The Board reaffirmed the California Steakhouse standard
13 of basing a determination of sexual stimulation arousal on
14 whether the position assumed by the women, and the manner in
15 which the women display themselves are clearly designed to
16 stimulate, arouse patrons of the establishment.

17 This conclusion is consistent with the Board's apparent
18 decision on Question 6, and does not adopt the reasonable
19 person standard.

20 Ms. Nagelhout, when you talk about the Board reaffirm
21 the CSH standard --- are you referring to the original
22 decision, and those last two paragraphs in red?

23 Since the Board found no evidence of specific sexual
24 activities. That would be from the original decision? Is that
25 what you're ---

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1 MS. NAGELHOUT: Yes.

2 CHAIRPERSON JORDAN: Okay. And the second part, the part
3 underneath it?

4 MS. NAGELHOUT: The same.

5 CHAIRPERSON JORDAN: Okay. All right. And then on the
6 memorandum, you see the positions by the parties, when we ask
7 specially for them to brief us on this issue.

8 All right. So the question is: How should the Board
9 define these key terms? How do we define --- are we being asked
10 to further say that fondling, what the act of fondling is?

11 MS. NAGELHOUT: Yes. Actually, re-reading this --- this
12 discussion, right under number two does --- that is my
13 description of what happened in the first decision meeting,
14 which is consistent with what happened in the initial decision,
15 but --

16 CHAIRPERSON JORDAN: Okay. Got you.

17 MS. NAGELHOUT: That's what I thought you had decided.
18 Yes, the Court of Appeals found that you need more specific
19 findings of fact, and initially, the Board accepted the ZA's
20 definition, and the Court said you need to make a de novo
21 interpretation of fondling.

22 CHAIRPERSON JORDAN: And wasn't that just basically
23 going to the temporal aspect of, that it needs to either linger
24 --- that he said it needs to take more than just a quick brush,
25 or --- but it needs to linger. I think that was the term. That's

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1 what we're being asked --

2 MS. NAGELHOUT: Yes.

3 CHAIRPERSON JORDAN: Okay. You know, one thing that I
4 think that we were asked to do, and I kind of took a stab at
5 it, I think we might want to try to address --- and this is
6 me talking, folks. Everybody just add in. I think that, one,
7 if anything, we're being called upon to make some decisions
8 about the zoning regulations interpretation. I think in any
9 case, it should have probably gone to the Zoning Commission
10 by sua sponte. This is one that should have gone, because I
11 think those things should be cases where the Board of Zoning
12 Adjustment is being called upon to make some alterations of
13 the zoning regulations, and something that has a policy impact.

14 And this, to me, would have been one that points to cases
15 which may be individually looked at. But I kind of took a stab,
16 and I don't know, Mary, if this is out of line. And I don't
17 know if the Court of Appeals was asking. But I though the Court
18 of Appeals was asking us to kind of put some teeth to the
19 regulation, that the fines with sexual activity is and all this
20 --- and fondling, So that we can --- so that a person --- and
21 I think we already said it should be a reasonable standard.
22 We, as a Board, in remand, have said that.

23 Would that be correct?

24 MS. NAGELHOUT: I think you said you're looking at this
25 from the intent of the provider, meaning the dancer, who is

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1 operating in the, within the scheme of how the business is set
2 up by the club operator.

3 CHAIRPERSON JORDAN: Okay. So that's not a reasonable
4 person, then.

5 MS. NAGELHOUT: No. That's not the audience member.
6 That's the what is the intent of the dancer here.

7 CHAIRPERSON JORDAN: Okay.

8 MS. NAGELHOUT: And in California Steakhouse, the Board
9 made specific findings about the dancers' intent, based on what
10 they were doing, and I think the Court found, that in the
11 initial decision in this case, the Board did not make similarly
12 specific findings about what exactly is fondling, what is other
13 erotic touch, what is sexual stimulation, arousal.

14 CHAIRPERSON JORDAN: Got it; got it. So then I'll just
15 kind of take a stab. As you know, not sleeping like I should,
16 and don't have anything else to do on Friday and Saturday nights
17 --- you know, I've said this before, and I said it the first
18 time we --- beginning at the first hearing, I think either in
19 March or September 2011 --- that was four years ago --- you
20 know, we've been called upon, Board, to make a decision about
21 these questions on these issues, that throughout the United
22 States, you'll find a zillion and one cases wrestling with this
23 kind of stuff. You know, this is not easy.

24 So what I thought that we might want to take a look at
25 --- and let me just show what I'm thinking, how I will look

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1 at, try to guide this. Just my thought.

2 You know, looking at the definitions, and as we go
3 through our opinion that we issued on --- in this case, 199
4 defines what a sexually-oriented business is, that we need to
5 find a substantial or significant portion of the business was
6 actually doing this.

7 But more in light of what we've been called on, this
8 question, I thought that we might want to add --- and I don't
9 know if it's outside of the scope, Mary --- excuse me --- Ms.
10 Nagelhout, if we are outside the scope on this, is that we add
11 to the definition that specific sexual activities referred to
12 in the definition of sexually-oriented business establish ---
13 defined 199 as follows:

14 The intentional or knowingly purposely --- or
15 intentionally, or knowingly, or purposely perform the acts of
16 human masturbation, sexual intercourse, sexual stimulation,
17 or arousal, sodomy, or bestiality, semi comma. B. Fondling
18 or erotic touching of human genitalia, pubic regions, buttocks
19 and breasts, and that would intend to cause the condition of
20 a human male or female genitalia to become in a state of sexual
21 stimulation or arousal.

22 That way, I felt that we move it to the point that we
23 really can earmark what kind of act. So it takes away the
24 unintentional kind of touching that somebody tried to offer.
25 It takes away their temporal, temporal matter, because I think

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1 we also struggled with, Is it more than a second? Is it two
2 seconds? Is it ten seconds? But it goes to what we've said
3 earlier, as a Board, that it's what the dancer intended to do.

4 So I just thought that might kind of get us there. Make
5 sense to anybody? Want me to re-read it? I just did this one
6 in the other room, so, you know, a bunch of thought went into
7 this particular one.

8 The specific sexual activities referred --- well,
9 Section 199 means the following, as we define
10 sexually-oriented business establishment, particularly
11 specific sexual activities.

12 It's the intentional, knowingly or purposely performing
13 acts of human --- so it's intentionally, or knowingly, or
14 purposely performing acts of human masturbation, sexual
15 intercourse, da, da, da, da, da. You know, the rest of that
16 paragraph.

17 Semi colon. Fondling, or --- we can make it and ---
18 fondling or other erotic touching of human genitalia, pubic
19 region, buttocks, and that is intended to cause the condition
20 in the human male, or female, genitalia, become in a state of
21 sexual stimulation or arousal.

22 Feedback, anybody? Would that be in mind of what we can
23 talk about here?

24 MS. NAGELHOUT: The Board cannot amend the definition.
25 That's the purview of the Zoning Commission. But I think the

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1 elements that you're talking about could inform --

2 CHAIRPERSON JORDAN: Should be our interpretation?

3 MS. NAGELHOUT: Could be, inform your interpretation;
4 yes.

5 CHAIRPERSON JORDAN: Okay. Okay. Okay.

6 MS. NAGELHOUT: But you can't --- I mean, the definition
7 is what's in 199 now. That's what you've got to work with.

8 CHAIRPERSON JORDAN: Okay. And that we interpret it to
9 mean that it has to be an intentional or knowingly, or purposely
10 performed, with the intent to cause a condition of human male
11 or female genitalia become in a state of sexual stimulation,
12 arousal, like that. That's our interpretation.
13 That the way we say it?

14 MS. NAGELHOUT: I think so. The Court has asked you to
15 define, especially, sexual stimulation or arousal, and to
16 distinguish fondling and --- or other erotic touching, and what
17 I'm hearing is that you're --- and we're looking at this from
18 the intent of the provider.

19 CHAIRPERSON JORDAN: Right.

20 MS. NAGELHOUT: So I think it's kind of saying the same
21 thing; but you can't rewrite the definition in this proceeding.

22 CHAIRPERSON JORDAN: Right. So we're saying --- I thought
23 we tried to define --- so I thought we were defining it when
24 we said that it's intentional, knowing, purposeful, intended
25 to cause a condition of the human male or female genitalia to

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1 become in a state of sexual stimulation or arousal. That's
2 how we would --- that's how I'm offering that we interpret it.
3 Not trying to rewrite it. But I mean that would be how we
4 interpret those two provisions provided under specific sexual
5 activities.

6 But are you saying we need to say define what fondling
7 is?

8 MS. NAGELHOUT: Yes. I mean, the Court of Appeals asked
9 you to --- the ZA looked up the definition and he gave it
10 meaning with the temporal aspects. The Court of Appeals asked
11 the Board to look at the definition, de novo. You're not
12 necessarily bound by what the ZA said, so --

13 CHAIRPERSON JORDAN: But are we saying, if we say
14 intentional, knowingly, or purposely, that a person, whether
15 or not they did it for two seconds, or whether or not they did
16 it for five seconds, they actually intended to cause ---
17 whatever?

18 MS. NAGELHOUT: Well, you still have to talk about what
19 is fondling, and what is --- I'm sorry.

20 CHAIRPERSON JORDAN: So that would be -- okay. Let's try
21 this, then. Help me, guys. I'm out here by myself. So that
22 would be a touching intended to cause the condition of human
23 male or female genitalia to become in a state of arousal and
24 stimulation?

25 Does that define fondling? Or other erotic touching?

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1 MS. NAGELHOUT: I can't tell you yes or no.

2 CHAIRPERSON JORDAN: Come on guys. Jump in here.

3 VICE-CHAIRPERSON HEATH: We have the definition of
4 fondling, though. That's where I'm getting caught up with --

5 CHAIRPERSON JORDAN: The Court of Appeals.

6 VICE-CHAIRPERSON HEATH: Right; exactly. Are we saying

7 ---

8 CHAIRPERSON JORDAN: You're saying fondling's defined
9 as.

10 VICE-CHAIRPERSON HEATH: As --

11 CHAIRPERSON JORDAN: Don't get scared.

12 VICE-CHAIRPERSON HEATH: But it's the definition that
13 involves lingering, touching that has a temporal aspect. I
14 mean, but we haven't --

15 CHAIRPERSON JORDAN: That was offered by the Zoning
16 Administrator you're saying?

17 VICE-CHAIRPERSON HEATH: Right. But we haven't defined
18 how long that is, and I guess that's what you were getting at
19 with your definition. I just --

20 CHAIRPERSON JORDAN: Good point.

21 VICE-CHAIRPERSON HEATH: Yes, I don't know if it's the
22 time aspect that we need to focus on, or if it's --- I'm just
23 not sure if we have --- we generally have a definition. If we're
24 not re-defining it, I don't understand what we're supposed to
25 do.

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1 CHAIRPERSON JORDAN: Because it talks about --- so I
2 think the Court of Appeals is saying they're going to adopt
3 the Zoning Admin --- you're going to consciously adopt the
4 Zoning Administrator's decision, or definition, but we have
5 to adopt it as a Board, look at it, and say does that fit and
6 make sense, that we want to adopt that? Or do we want to add
7 something ourselves to define it?

8 Would that be correct?

9 MS. NAGELHOUT: I think that's correct. Also, if you look
10 at number three, this kind of overlaps. Number two and three
11 overlap. You already did discuss --

12 CHAIRPERSON JORDAN: Yes. I see it. I can see it. That's
13 where you pulled it up. Okay. So three. Okay. So we said a
14 reasonable duration --- okay. So we already answered. So two
15 was already answered, then; right?

16 VICE-CHAIRPERSON HEATH: I think so.

17 CHAIRPERSON JORDAN: Yes.

18 VICE-CHAIRPERSON HEATH: I felt like we defined it.

19 CHAIRPERSON JORDAN: Two was already answered.

20 VICE-CHAIRPERSON HEATH: We just got hung up on --

21 CHAIRPERSON JORDAN: Wouldn't it be? If you look at ---
22 look at what, on number three here, that --

23 VICE-CHAIRPERSON HEATH: Yes. So we --

24 CHAIRPERSON JORDAN: I'm looking at the first part of
25 three.

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1 VICE-CHAIRPERSON HEATH: So we all agreed that fondling
2 requires either one, a reasonable duration, that's the
3 temporal aspect, possibly described as a duration consistent
4 with an intent to create sexual arousal and stimulation --

5 CHAIRPERSON JORDAN: Yes.

6 VICE-CHAIRPERSON HEATH: --- distinguishable form an
7 accidental touch, and that goes --

8 CHAIRPERSON JORDAN: Right.

9 VICE-CHAIRPERSON HEATH: --- to your definition. Or
10 two, a brief touch that occurs repeatedly.

11 CHAIRPERSON JORDAN: Doesn't that handle number two?

12 VICE-CHAIRPERSON HEATH: If we all agree on that.

13 CHAIRPERSON JORDAN: Yes.

14 VICE-CHAIRPERSON HEATH: Okay. I think where I was caught
15 up the last time, on number three, was distinguishing the
16 difference between fondling and other erotic touching.

17 CHAIRPERSON JORDAN: I don't think we can sit here --

18 VICE-CHAIRPERSON HEATH: I know. But --

19 CHAIRPERSON JORDAN: Verbatim. Is that what they're
20 asking us --- to list what those activities are?

21 VICE-CHAIRPERSON HEATH: If there's a difference between
22 the two, or --

23 CHAIRPERSON JORDAN: Yes. I think Mr. Miller's trying to
24 ---

25 ZC COMMISSIONER MILLER: No. I just wanted to say,

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1 interject that I agree with the vice-chair's definition that
2 you just offered for fondling, and I also agreed with your
3 distinction the last time, between fondling and then the
4 phrase, or other erotic touching and focusing on the or other
5 erotic touching as what is the --- is what is what is happening
6 in a sexually-oriented establishment, and where you and I, the
7 last time, found enough evidence in the record to support that
8 there was or other erotic touching.

9 CHAIRPERSON JORDAN: See. And I don't know if we have
10 cited where there's substantial evidence to support those --

11 ZC COMMISSIONER MILLER: I'm willing to go to that when
12 we get to that.

13 CHAIRPERSON JORDAN: Okay.

14 ZC COMMISSIONER MILLER: Substance of that.

15 CHAIRPERSON JORDAN: But our definitions don't have to
16 follow that, but we have to come back, then, with that. But
17 we're not called upon --- that's the other thing. We're not
18 called upon --- we're not required, and not allowed to reverse
19 the decision that's already been made. We're not called upon
20 by the Court of Appeals to do that. We're just to answer the
21 question. And so I just want to make sure we're all on the
22 same page. Would that be correct?

23 MS. NAGELHOUT: I think you could --- the Board remanded
24 the --- I mean, the Court remanded the order for a better ---

25 CHAIRPERSON JORDAN: Support for the decision made.

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1 MS. NAGELHOUT: Support for the decision; yes. But if you
2 wanted to change your decision at this point, I think you could,
3 but you would have to do that on the basis of substantial
4 evidence during this record, so --

5 CHAIRPERSON JORDAN: Okay. All right. So then why don't
6 we --- so the answer of number two was actually contained in
7 the first part, in red, under number three; right? Is that what
8 we're saying? And other erotic touching, we're going to ---
9 we are saying is actually the same thing a fondling? Is that
10 what we're saying? Or can you think of something different?

11 ZC COMMISSIONER MILLER: Ho. The Vice Chair offered a
12 different definition.

13 CHAIRPERSON JORDAN: what was that? What was that? Maybe
14 I missed. I'm sorry. What --

15 ZC COMMISSIONER MILLER: It was --- I think it was
16 designed to --- it goes to the earlier part of the definition,
17 designed to stimulate or cause sexual arousal.

18 CHAIRPERSON JORDAN: Okay. Okay. Yes.

19 ZC COMMISSIONER MILLER: Whether it's a fleeting touch
20 --

21 VICE-CHAIRPERSON HEATH: Exactly.

22 ZC COMMISSIONER MILLER: Even if it's a fleeting touch.

23 CHAIRPERSON JORDAN: Well, no, see, that's not what we're
24 saying. We said of reasonable duration. It's not fleeting.

25 ZC COMMISSIONER MILLER: That's the fondling part,

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1 although that was ---- she had ---

2 (Simultaneous speaking)

3 ZC COMMISSIONER MILLER: She agreed to your definition
4 of fondling again, and then we can talk about what or other
5 erotic touching is.

6 VICE-CHAIRPERSON HEATH: Sure. So we talked about
7 fondling as having a reasonable duration, and when I talked
8 about the distinction between fondling or other erotic
9 touching, to me that suggested the fact that the definition
10 here has or in it, suggests that they are different, and other
11 erotic touching doesn't in my ---in the definition that I was
12 citing, doesn't involve reasonable duration. It doesn't have
13 to be lingering.

14 But it's more, it's more to the point of having an intent
15 to create sexual arousal and stimulation, whether it's a brush,
16 or whether it's --

17 CHAIRPERSON JORDAN: So then, maybe then it's the second
18 part of what I talked about, and we say or other erotic touching
19 is other touching that's intended to ordinarily, purposely,
20 to cause --- okay --- to cause a condition in human and
21 female genitalia to become sexually stimulated.

22 VICE-CHAIRPERSON HEATH: Right. Yes.

23 CHAIRPERSON JORDAN: That makes sense?

24 VICE-CHAIRPERSON HEATH: That does.

25 CHAIRPERSON JORDAN: Okay.

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1 VICE-CHAIRPERSON HEATH: I would agree with that.

2 CHAIRPERSON JORDAN: We got that. Somebody? So can we
3 agree, then, that fondling we've already defined, and as the
4 vice-chair said, and then we talk about other erotic touching
5 would mean that it's any other touching that's intended,
6 knowingly, or purposely, to cause a condition in the human male
7 or female genitalia to become in a state of sexual stimulation,
8 arousal. How are we on that, everybody? Anybody opposed to
9 that? Do we need to vote on that definition, or do we have
10 by --- anybody object? Otherwise, we can say we move on.

11 (No response)

12 CHAIRPERSON JORDAN: Okay.

13 VICE-CHAIRPERSON HEATH: Does that satisfy number three?

14 CHAIRPERSON JORDAN: That satisfied number --- we're
15 actually on two, but I guess it's two-three; right? Which one
16 are we on? We were on two when we had that as an open question.
17 So I think that would take care of two. And then three --- and
18 it would take care of two and three. Yes; you're right. It takes
19 care of two and three. You're right.

20 Okay. All right. Let's see. All those in favor, aye.

21 (Chorus of ayes)

22 CHAIRPERSON JORDAN: Those opposed, nay.

23 (No response)

24 CHAIRPERSON JORDAN: Then we took care of two and three.

25 Okay. So then we move on to four.

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1 This is one of the times when the vice-chair was supposed
2 to take the chair, and --

3 (Laughter)

4 CHAIRPERSON JORDAN: Actually, I could have kept myself
5 out of play, out of town, and all that stuff, instead of coming
6 back in for this. Okay.

7 Whether the Zoning Administrator really made
8 determinations regarding erotic touching at the Stadium Club,
9 including whether activities described by the witnesses, or
10 attendants of Stadium Club, were consistent with the ZA's
11 determination of whether the rules and regulations, the
12 dancers and other measures implemented by the manager of the
13 Stadium Club were effective to ensure compliance.

14 Okay. All right. Does anybody want to start there,
15 because I don't -- I'm the one to keep talking.

16 Well, anyone? Going once. Going twice.

17 (No response)

18 CHAIRPERSON JORDAN: Well, I think that --- here's the
19 problem that I'm having. I think that the Board was not
20 presented with substantial evidence on the record to say that
21 these matters were going on. Let me talk about the evidence.

22 One. We have --- and that's the fallacy. I'm just using
23 affidavits. The affidavit that was --- is it Peacock?

24 VICE-CHAIRPERSON HEATH: Petock.

25 CHAIRPERSON JORDAN: Petock. Petock affidavit, as well

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1 as the affidavit of Cresswell --- is Cresswell --- to me were
2 suspect, and I think it even -- something that came out even
3 during the hearings where Suspect 1 --- it was raised during
4 the hearing by opposing counsel, and if you look at the
5 affidavits, these affidavits really are not independent
6 affidavits. They claim that they're independent, but this is
7 what going to the weight, of having witnesses in front of you
8 so you can cross-examine and discuss these things as opposed
9 to looking at documents.

10 As a sidebar, that's one of the other issues in regards
11 to zoning rewrite, that I thought the Board should take up,
12 about what requires review of the record.

13 But if you look at that affidavit, side by side, for them
14 to be created independently, it just doesn't make sense. One.
15 They both start off, kind of the same first line. I swear the
16 following to be true and accurate on my personal knowledge.
17 The first point. In number one, they both use the same language.
18 I'm over 21 years of age, resident of the District of Columbia.
19 The second paragraph starts off: On the evening of June 16th.

20 The third paragraph, they both use --- they use some of
21 the same terms, and key of art, as you step through it. Upon
22 cross-examination, they are asked: Well, who prepared it?, and
23 we don't have Cresswell because he never appeared. Petock
24 says: Well, I prepared it. And then it was driven in: Well,
25 where'd you get those terms? Oh, I just put those terms in

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1 myself.

2 It's verbatim, the words from the statute. And we have
3 that in both affidavits. So they kind of made it as some
4 suspect, a little bit suspect, to me.

5 Without having Cresswell, and no one asked Petock, but
6 his demeanor during the time of the hearing, he was fidgeting,
7 and he was --- he was kind of joking most of the time. I mean,
8 I don't know how serious he took. But was this a negotiated
9 affidavit? Meaning was there things that were not in
10 Cresswell's, for instance --- was this an affidavit that he
11 settled on and took some things out, added some things in?
12 That's the credibility aspect.

13 Regarding the --- and also, at the time of the hearing,
14 although it's not in this docket, Petock was asked, was he
15 intoxicated? He said: Well, I don't know if I was really out
16 of my mind, meaning that he wouldn't remember. But I certainly
17 couldn't drive. Again impressing upon what happens regarding
18 the mental capacity of someone.

19 Then there's a question, overall: Was there
20 compensation for the people who prepared these affidavits?
21 They did not receive direct financial contribution, but it came
22 out during cross-examination. Well, the question was, Why did
23 you stay --- why did you buy any drinks? Why did you stay as
24 long as you did, and all --- and Petock says: Well, I had a
25 good time, and we was really enjoying ourselves. So what he

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1 was getting, could be compensated at a rate of \$385, was the
2 benefit of that evening, a good time.

3 I'm just saying I don't find the affidavit in themselves
4 very credible. I think it raises a lot of issues, and I think
5 we need --- I think the affidavits, then, to me, are discounted.

6 I think we have to give more weight to Petock than you
7 give to Cresswell, because we had Petock here. We didn't have
8 Cresswell at all. Then the affidavits weren't prepared for
9 a month after they went there. A month after. There was no
10 discussion, and there was not the ability to find out whether
11 or not they had a chance to --- that they literally record in
12 their mind what they saw. Or is this further reflection?

13 That's one of the things that we talk about when we have
14 a witness. Is this your present recollection or how did it
15 get there? Something else I was going to say.

16 The other thing they testified to, and Petock did it
17 twice. He said he didn't find to be sexually aroused. And these
18 people were not --- these people were not professional
19 investigators, and there's a whole discussion about whether
20 or not they had the ability, or a right to do it.

21 But you weigh that, in my opinion, to whether you had
22 professional, independent evaluators, who had no relationship
23 --- excuse me. Let me go back.

24 Both Cresswell and Petock were personal friends of the
25 Appellant. Personal friends. They interact with him on a daily

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1 basis. We have the testimony, and the affidavits of two
2 independent bodies, that of DCRA, and the ABC, Alcohol
3 Beverage, on this, by two professional investigators, that
4 came back differently, going back again to the affidavits.
5 They were there on the same night. They were there on the same
6 night. The ABC investigator and DCRA investigator were on
7 different nights, and different times.

8 Do we take what someone --- and I think questionable ---
9 take one night as a way a business operates, or it perceives
10 going on? We're going toward the aspect of whether or not the
11 enforcement of the rules --- and we had clear testimony, it
12 was not contradicted in regards to what the policy was, nor
13 was it contradicted from the witness for the Stadium Club,
14 that they had rules in place, and that they disciplined their
15 people when it was brought to their knowledge. It was never
16 contradicted.

17 None of the affidavits, none of the testimony, went to
18 the fact of whether or not --- and I challenge anybody in this
19 record to point to something here that supports a statement
20 that the Stadium Club did not seek to enforce, that their
21 disciplinary measures that they --- once it was to their
22 knowledge, they did not discipline. There's nothing in the
23 records to the contrary. Nothing. Not in these affidavits, and
24 not by any other witnesses' testimonies that were presented.

25 So that's kind of where I fall down in regards to number

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1 four, and I think that the decision that this Board made
2 earlier, that there was not a showing that the activities were
3 different than the way the Zoning Administrator looked at it,
4 we do have some difference of opinion but I don't think it's
5 substantially supported by the record, or more importantly,
6 that this was a substantial, significant or substantial
7 activity of this business.

8 And they also testified here that they sold food, that
9 they're a restaurant, they sell food, and that the measures
10 implemented by the managers of the Stadium Club were not
11 effective or in compliance. There was no evidence of that. So
12 that's just my shot at it. I'm shutting up.

13 Please, anyone. Anyone. Mr. Hinkle?

14 MEMBER HINKLE: Yes. I don't have much else to add from
15 what you just stated. I'm in complete agreement with all of
16 your statements there, and having, you know, sat through all
17 the testimony, and, you know, initially, I thought that the
18 Zoning Administrator did not do the right job and the right
19 investigations. But as the process of the hearing on this case
20 went through, there were some other actions, and there were
21 the visits by the ABRA investigator seven times, in fact, as
22 well as the DCRA investigator.

23 And certainly, as you did, I had to weigh their testimony
24 against those, and the affidavits that were provided by the
25 Appellant, and they convinced me that that --- this business

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1 was not operating as it should be, on that account. And I
2 really thought that the Zoning Administrator made the right
3 determination at the end.

4 CHAIRPERSON JORDAN: Anyone else, please. Mr. Miller?

5 ZC COMMISSIONER MILLER: Thank you, Mr. Chairman. I
6 guess going back to the California Steakhouse standard of the,
7 quote, the positions assumed by the women, and the manner in
8 which the women displayed themselves, are clearly designed to
9 stimulate or arouse patrons of the establishment. That that
10 standard I think --- I think there is substantial evidence in
11 the record, that dancers at the Stadium Club do perform
12 performances that meet that standard, in a way that meets the
13 definition of both or other erotic touching and designed to
14 cause sexual stimulation or arousal in the definition of a
15 sexually-oriented business establishment.

16 There are twenty --- over a doz --- over two dozen women,
17 I think, in an evening, or an hour, that are --- I think in
18 an average evening, there are 25 to 35 women in an average
19 evening, performing these strip tease dances, and assuming
20 positions, and exposing their specified anatomical areas in
21 a way that they are designed to get tips. That's what this club
22 is designed to do. That's --- I mentioned last time, I
23 acknowledged last time, that the terms, strip club,
24 gentlemen's club, strip tease, are not used classifications
25 in our zoning regulations, and --- but I thought they were

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1 relevant to our determination of whether we think there is
2 erotic touching by the Stadium Club dancers, and whether we
3 think there are acts by the Stadium Club dancers designed to
4 cause, quote, sexual stimulation or arousal. Findings which
5 we conclude that there are specified sexual activities, and
6 the definition of whether sexually-oriented business
7 establishment is.

8 So I again --- because the Stadium Club holds itself out
9 to be a, both a steakhouse restaurant, which it is on the
10 inside, and the other side holds itself out to be a gentlemen's
11 club, and people go in there and pay a lot of big bucks, not
12 to have wonderful drinks necessarily, but to be entertained.
13 But I think in a sexually stimulating or exciting way, that
14 the dancers clearly are there to cause, in order to get the
15 tips that make their living. Just repeating what I had said
16 last week --- last month, a strip club is a place where people
17 go to watch performers take their clothes off in a
18 sexually-exciting way, a nightclub with performances by
19 strippers. A gentlemen's club, which they, I think on their
20 --- I think what they call themselves, a nightclub that
21 features scantily-clad women dancers or strip teasers.

22 Strip tease, quote, is a form of erotic entertainment
23 in which a person gradually undresses to music,
24 a performance where someone removes clothing in a
25 sexually-exciting way.

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1 So they are constantly, in these dances, touching each
2 --- their bodies, exposing their genitals, close to the
3 customers, in a way to get the tips, and I just think it defies
4 --- I think that it defies common sense, understanding, what
5 a strip club is, to say that that's not what they are intending
6 to do. The affidavit, which I understand, Mr. Chairman, you're
7 giving us credit to it --- but the affidavit --- both the
8 affidavit, and I think the Zoning Administrator, both
9 testified that they observed these numerous dance routines
10 where the women were totally naked, but there was the touching
11 that occurred in every single one of them.

12 It may have not been lingering enough for the Zoning
13 Administrator to conclude that it'd be fondling, but for my
14 money, it was repeated enough that it met the fondling that
15 --- it doesn't meet the fondling, it certainly meets the other
16 erotic touching definition. And that's the part of the dance
17 routine. That's the whole purpose of the dance routine.

18 The Stadium Club manager even acknowledged that lap
19 dances were taking place in the back rooms, but he wasn't ---
20 but he didn't think that that many were taking --- that many
21 were being done there because they were costing \$300 a half
22 an hour. And he said, quote: How many lap dances can you have
23 in the back room? And the whole issue of the lap dance, I mean
24 gets to some evidence that there might be that specified sexual
25 activity of masturbation. But I don't think we need to go there,

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1 because I think we have the or other erotic touching and
2 designed to cause sexual stimulation or arousal, that the
3 dancers themselves are doing as part of their routine, over
4 and over, and over again, during the course of an evening.

5 I mean, I think it's --- I think there's enough evidence
6 in the record, that these performances were, did involve erotic
7 touching, and were designed to cause sexual stimulation or
8 arousal, both from the affidavits and from the Zoning
9 Administrator, and from the Stadium Club management. I think
10 there would have been --- this case would have been a lot easier
11 if the Zoning Administrator had asked for some of the
12 videotapes from the 34 cameras that are in that club, and, you
13 know, it's the kind of thing that I think the Supreme Court
14 said: You know it when you see it, about --- I think they said
15 that about pornography. I think if -- some of those stimulating
16 videotapes that we all had to review as part of this record,
17 if they'd included some of the videotapes from the Stadium
18 Club, it would have been a lot more exciting to have watched.
19 Or watched --- not exciting. I shouldn't use that word. It
20 would have been a lot less boring to have reviewed this record,
21 over and over again.

22 But I think we would have seen what --- I think we all
23 know what a strip tease dance is. So I just don't really suspend
24 common sense. The Zoning Administrator had a --- you said he
25 -- you say he's impartial, but he was just trying to uphold

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1 his decision. But he was under there for, you know, a short
2 amount of time. This happens --- then he acknowledged that
3 there was this erotic, there was this type of touching where
4 --- I just --- to me, that there's enough evidence there for
5 us to find that this a sexually-oriented business. And two,
6 this is --- this Board can make that finding, that's different,
7 and change it, opinion of the previous Board, if we're so
8 inclined. We may not have --- there may not be a majority here,
9 that is so inclined, but this Board can in fact change its
10 decision about whether this is a sexually-oriented business
11 establishment, and I find it to be one based on the record,
12 and common sense about what a strip club is.

13 CHAIRPERSON JORDAN: As I said before, you know, this is
14 something where we need to base upon record, on the record,
15 substantial evidence in the record, and I don't see where we
16 have a record of what was in the videotapes. That's not before
17 us. We have not seen it, it was not presented to us, nor
18 described, what was in the videotape.

19 I don't think it supports a substantial finding by this
20 Board. Strip tease dance, depending on where you are, and who's
21 viewing it, whether or not we have --- this term, strip tease,
22 one, I don't see where Stadium Club held itself out as a strip
23 club, and a gentlemen club --- you have gentlemen clubs even
24 in Utah, and it depends on how that language is used.

25 So there was nothing presented to us as a definition,

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1 both in the regulation, nor before us at the hearing.

2 So even if you assume that there was some erotic
3 touching, there was nothing in the record. The ultimate finding
4 of this Board as to whether or not this business is a
5 sexually-oriented business, is that we have to find it was a
6 significant and substantial activity of the club.

7 We had no evidence saying, one way or the other, well,
8 most of their money comes from restaurant, or whatever. But
9 secondly, we have, at best --- if you're going to give some
10 credibility --- if you give credibility --- now I'm not really
11 giving credibility to the affidavits. As I said, that they were
12 there one night, and to some extent, certainly, had had
13 substantial drinks. And then so how do you weigh those two
14 affidavits as being sacrosanct versus professional expert
15 investigators from two independent agencies going on different
16 periods of time?

17 I'm not --- first of all I don't give a dog. I don't have
18 a dog in this hunt. Period. And I don't even like those kind
19 of clubs. But what I'm saying is that you have to weigh that,
20 we, as the Board, have to make a substantial finding. We have
21 to move beyond what our gut feeling is, as Mr. Hinkle said
22 initially, right off the bat, he didn't like it, but he had
23 to go with what the evidence produced.

24 We also, then, talk about dozens of women doing these
25 types of activities. That wasn't presented in either the

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1 affidavit nor in the testimony given here. The affidavits ---
2 and those witnesses talked about two or three ladies that they
3 talked about. They didn't say --- nobody else said there was
4 ginger, Maryann, and a whole bunch of other folks doing it.
5 And none of these affidavits show that -- or the witness
6 testified that they went to the management and said,
7 management, these people are doing these things, what you going
8 to do about it?

9 Not before us. But we did have the direct testimony, at the
10 hearing, by the Stadium Club people, that here's the rules,
11 gave us examples of people that they actually disciplined.

12 So I'm not trying to knock what you're saying.; I'm just
13 giving what my view, and response would be to what you said.
14 Substantial evidence. We have to move beyond what our gut is,
15 and what we --- you know, to some extent, what we think. We
16 can have some reasonable inference, certainly, but we have to
17 have the initial basis to be evidence in the record. So anyone
18 else, please?

19 VICE-CHAIRPERSON HEATH: So I agree with you, Mr.
20 Chairman, on the basis of not finding the affidavits to be
21 credible. But where I get caught up, and tending more to still
22 feel the same way that I did the last time, during our last
23 hearing on this, you know, when we think about what the dancers,
24 the acts the dancers are performing on a regular basis, each
25 night, similar to what Commissioner Miller has cited, when we

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1 think about this relative to the definitions that we have
2 established, I think those definitions are different than the
3 definitions that --- or the definition that the Zoning
4 Administrator was considering when he was making his
5 determination.

6 And so if we're looking at this differently, we've
7 looked at fondling, or other erotic touching. We've looked at
8 the fact that this --- we're examining this as looking at it
9 from the perspective of the intent of the dancer rather than
10 a reasonable person standard.

11 I think if we look at the intent of the dancers, as we
12 heard was to perform, to make tips, when I think about it that
13 way, it's hard for me to say that there's not evidence that
14 this --- that they're performing on the basis of trying to
15 create sexual, sexually-arousing stimulation for
16 entertainment, in order to collect money in tips.

17 So, again, I don't know how --- if I'm making this clear,
18 but my --- where I get caught up with this is there's a
19 definition difference between what we've established, and what
20 the Zoning Administrator has established, that makes it hard
21 for me to say that I feel like the Zoning Administrator's
22 decision was accurate, because I feel like his definition was
23 not in line with what we have said is the definition of
24 specified sexual activities, particularly fondling or other
25 erotic touching, and that there clearly was the desire to

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1 create sexual arousal for the purpose of making tips.

2 CHAIRPERSON JORDAN: What about the second part? Where's
3 the evidence that says that the policy of the --- that there's
4 a policy, and compliance, that they don't seek to --

5 VICE-CHAIRPERSON HEATH: Right.

6 CHAIRPERSON JORDAN: What do we have --

7 VICE-CHAIRPERSON HEATH: Yes. I do agree with you there,
8 Mr. Chairman ,that there is no evidence that says that they
9 weren't --- that the establishment --- and I struggled with
10 this too, because there was no evidence that said that the
11 establishment wasn't adhering to the rules, and that they
12 weren't disciplining if people didn't --- if they broke the
13 rules. Yes. That I don't --- I didn't see any evidence to
14 support that they weren't following the rules.

15 CHAIRPERSON JORDAN: Anyone else? Please, Mr. Hill.

16 MEMBER HILL: So I think that I'm going to go with ---
17 I've looked at all the record, and watched the tapes, and
18 everything, and I'm agreeing with everybody in terms of the
19 intent of what the dancers are trying to do. Like if they're
20 intending to arouse, then that's where they're intending to
21 do, that's what the goal is. And I'm a little unclear as to
22 what we're kind of answering right now, as to what the question
23 on the table is.

24 But that's my thoughts in terms of, you know, it's an
25 intent. As to what the intention is at the club, going to the

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1 club, being there.

2 CHAIRPERSON JORDAN: So number four: Whether the Zoning
3 Administrator reasonably determined regarding erotic
4 touching, the Stadium included the activities described.

5 And so I'm saying we do not have --- I'm saying that we
6 don't have enough evidence, but I'm hearing three of you saying
7 that they believe there's enough evidence, that there would
8 have been some type of violation of what we've determined as
9 our definition.

10 VICE-CHAIRPERSON HEATH: Yes, based on our --

11 CHAIRPERSON JORDAN: But the second part, that the
12 measures implemented by the management of the Stadium Club were
13 effective, or ineffective. Did they have rules in place? And
14 did they try to comply with those rules? And so even --- so
15 that's kind of the second part. So the first part, I hear you
16 three are saying that you believe the Zoning Administrator
17 erred in regards to whether or not this --- the activities of
18 those girls on that night, June 16th, violated the standard we
19 put in place. I'm using standard. Our interpretation of what
20 the standard, or the regulation. Okay.

21 But the second part was that whether rules and
22 regulations in place, that the managers sought to discipline
23 or force, or this type of activity. And my argument is that
24 there was nothing presented in the hearing that said it was
25 not, except to the contrary, that they presented direct

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1 testimony that it was.

2 It also gets very --- so if you take that you have some
3 people doing it, are we now putting a standard in that a
4 manager, or an owner must manage their operation absolutely?
5 And that we all know that people have a tendency to violate
6 rules and regulations only once it's brought to management's
7 attention, how they act on it.

8 You know, I remember being over, well, several different
9 agencies, and even governments, and matters were brought to
10 --- and newspapers would say, wow, they're letting this go on.
11 Well, we didn't even know anything about it. Once we found out,
12 you discipline. For instance, there were people who --- one
13 agency I had, they were letting people undercut payments for
14 various fees they should be charging. Well, we found out there
15 were a couple, two or three people doing it. It wasn't what
16 we were doing as a policy. We had a policy against it once we
17 found out. We went at it.

18 So I just want us to be careful about what we have, when
19 we say something is a policy, because then we need to make sure
20 every business is managed absolutely, and that no employee
21 violates that. But the question is, once a violation is known
22 to management, how do you treat it? How do you treat it? So
23 that's all I've got to say.

24 So on this one, I think we bifurcate the response on this
25 one, and do we believe that the Zoning Administrator erred in

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1 finding that there was sexual activity --- I guess I can put
2 that in that nutshell --- and I'm going to say all those that
3 believe the Zoning Administrator erred in saying that there
4 was not sexual activity, all in favor say aye.

5 (Chorus of ayes)

6 CHAIRPERSON JORDAN: Those opposed, nay?

7 (Chorus of nays)

8 CHAIRPERSON JORDAN: Nay. Mr. Moy, I don't know if you
9 necessarily have to poll the Board, but I think you're clear,
10 that the record would show --- don't you agree? You want to
11 --

12 MR. MOY: Yes, sir.

13 CHAIRPERSON JORDAN: Okay. And then the second part: Did
14 the Stadium Club have compliance measures in place, that would
15 have enforced the rules and regulations. And so that would
16 be it. Or better still, was there evidence showing that they
17 did not have any rules in place to enforce it? Or that they
18 were adequate. Or rules --- I'm trying to read this thing --
19 and measures implemented by the managers. And we have testimony
20 that they did. And that's the problem with this thing.

21 So let's still vote on the second part, on the and part.
22 All those that believe that there was evidence to support that
23 the managers had rules in place for compliance, signify by
24 saying aye.

25 (Chorus of ayes)

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1 Those opposed nay.

2 Okay. Let's poll the Board, Mr. Moy.

3 ZC COMMISSIONER MILLER: I mean, I just --

4 CHAIRPERSON JORDAN: Okay.

5 ZC COMMISSIONER MILLER: They had rules, they currently
6 have rules in place. But what it's --- were they effective and
7 in compliance with the zoning requirements? We've just, by a
8 three to two vote, interpreted the zoning requirements to
9 include or other erotic touching as distinguishable from
10 fondling, and the Zoning Administrator was relying on the
11 fondling part of it. So that's where I can't say that -- to
12 ensure compliance with the zoning requirements because we just
13 interpreted the requirements in a way that was different than
14 what the Zoning Administrator was focusing on.

15 So that's my hesitation. Clearly, they had regulations,
16 but they weren't getting all the definition of zoning, of
17 specified sexual activity as we just outlined here, at least
18 three of us did, in terms of the or other erotic touching.

19 So I'm not sure if we need to vote separately on this.
20 But I think if we're forcing to say that it ensured compliance
21 with zoning requirements, we've just said that it wasn't based
22 on an interpretation that obviously we newly are making here,
23 because that's what the court remanded us to do. I can't go
24 along with it, that they were effective, ensured compliance
25 with zoning requirements, because we've just said that they

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1 weren't in compliance with zoning requirements.

2 CHAIRPERSON JORDAN: No; we didn't say that. What we
3 said --- we provided a definition. Thank you, Mr. Miller. We
4 provided a definition, and so you have to take that same
5 definition and apply it across the board, as if it was in place
6 at the time. That's the way I would look at it. And they had
7 --- their policies--

8 ZC COMMISSIONER MILLER: Let me say the Zoning
9 Commissioner erred in his interpretation.

10 CHAIRPERSON JORDAN: Correct. But that's not --- so now
11 we're looking at the evidence that was --- we're not --- we're
12 looking at the evidence of what we, as a Board, thought would
13 be substantial. So whether or not the Zoning Administrator used
14 a definition that was wrong, what was the ultimate result of
15 that? Whether he used a definition that said fondling was you
16 had to touch the top of your head, and we say no. Or we added:
17 You've got to touch the top of your head.

18 But still, we have to say, ultimately, even with that
19 new definition, even with the new definition, then was there
20 rules in place, that the owner had, to enforce either touching
21 the top of the head or not touching the top of the head. That's
22 the way we have to look at it. It doesn't just follow suit.
23 It goes to what the owner actually did.

24 Otherwise, we'll have this case for 12,000 times.

25 VICE-CHAIRPERSON HEATH: Well, it was clear that there

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1 -- the owner had rules in place, and the rules as they defined
2 them, they felt that they were enforcing. You know, I think
3 in the case of this club, they clearly have 34 cameras
4 distributed throughout, so they're very aware of what's going
5 on, and have the ability to get things in line, if people are
6 violating the rules, fairly quickly.

7 But, again, based on the definition that we have just
8 put in place, I don't feel that --- I don't feel their rules
9 complied with what we have said is the definition of --

10 CHAIRPERSON JORDAN: Okay.

11 VICE-CHAIRPERSON HEATH: --- fondling and other erotic
12 touching.

13 CHAIRPERSON JORDAN: So let me put it a different way,
14 and I think we just --- unless somebody else has something else,
15 and we could just move forward. Let me say I think that if
16 --- that we --- that we're voting on whether or not there were
17 rules in place that would seek compliance of the SOBE laws as
18 we've defined them here today. Is that a simpler statement?
19 Okay. So let's do a roll call vote on that, Mr. Moy, and get
20 it --

21 MR. MOY: Could you state that again. I'm sorry.

22 CHAIRPERSON JORDAN: Was there evidence that there were
23 rules in place that would seek compliance of the SOBE laws as
24 we've defined them here today.

25 Does that make sense to everybody? All right. I mean,

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1 I need to make a motion first, and then we're going to answer
2 that question? Or do we just consensus, by consensus, that is
3 the question that we're about to vote on. Okay? So let's just
4 say that was the motion, and seconded by some --- who wants
5 to second, make sure the record's clear?

6 VICE-CHAIRPERSON HEATH: I'll second that that is the
7 question.

8 CHAIRPERSON JORDAN: So now let's, instead of doing a
9 voice vote, let's do a roll call vote. Please, Mr. Moy.

10 MR. MOY: Okay. All right.

11 CHAIRPERSON JORDAN: Do you understand what the question
12 is?

13 MR. MOY: Yes, I understand the question, and I guess I'm
14 going on the original vote that was at the former motion, which
15 now has been withdrawn.

16 CHAIRPERSON JORDAN: That's just --- I didn't --- yes,
17 we --

18 MR. MOY: Okay. I've got it. All right. All right.

19 CHAIRPERSON JORDAN: So this is the one that's before us.
20 I think it's simpler and clearer.

21 MR. MOY: All right. So in that case, then, I would record
22 the vote as two to three.

23 CHAIRPERSON JORDAN: No. We're getting ready to vote.

24 MR. MOY: Oh, you're ready to vote. I'm sorry.

25 CHAIRPERSON JORDAN: I'm saying we're not going to do a

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1 voice vote. I'm asking you to do the initial vote by roll call.

2 MR. MOY: By roll call. Okay. All right. When I call the
3 member's name, if you could reply with yes or no.

4 Mr. Miller.

5 ZC COMMISSIONER MILLER: No.

6 MR. MOY: Vice-Chairperson Heath.

7 VICE-CHAIRPERSON HEATH: No.

8 MR. MOY: Chairman Jordan.

9 CHAIRPERSON JORDAN: Yes.

10 MR. MOY: Mr. Hill.

11 MEMBER HILL: No.

12 MR. MOY: Mr. Hinkle.

13 MEMBER HINKLE: Yes.

14 MR. MOY: Staff would record the vote as two to three.

15 The motion fails, Mr. Chairman.

16 CHAIRPERSON JORDAN: Okay. And I think then --- and help
17 me here again --- I think that we answered number five.

18 So Board, I believe by consensus, would you agree that
19 our last vote on number four answers number five, unless
20 somebody votes --- anybody has any opposition to that as a
21 consent. Would we agree?

22 VICE-CHAIRPERSON HEATH: I agree.

23 CHAIRPERSON JORDAN: Okay. So what we need to --- and then
24 we already answered number six. So where we are now is that
25 we need to --- that I am going to step back. Those who need

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1 to provide substantial evidence need to cite the evidence as
2 to what we consider was fondling. Would that be correct, Ms.
3 Nagelhout?

4 MS. NAGELHOUT: Yes. Fondling or other erotic touching.

5 CHAIRPERSON JORDAN: Yes. For the record, please,
6 identify it, because we've got to be supported by the record,
7 and OAG, we sometimes put them in a box of trying to interpret
8 where we are and making up these orders, and sometimes, you
9 know --- so let's help them with that. Please, anyone want to
10 begin that? I'm looking at the three to two voters.

11 ZC COMMISSIONER MILLER: Well, in general, without going
12 to specific exhibits, I would say that the testimony of the
13 Zoning Administrator, and of the Stadium Club management, and
14 of the Appellant, in describing the dances includes erotic
15 touching designed to stimulate or arouse.

16 CHAIRPERSON JORDAN: That's --- I'm sorry Mr. --

17 ZC COMMISSIONER MILLER: I know it's an inclusionary
18 statement, but if --

19 (Simultaneous speaking)

20 CHAIRPERSON JORDAN: That's where you get in trouble.

21 ZC COMMISSIONER MILLER: But I think that they were not
22 focusing --- the ZA was not focusing on the or other erotic
23 touching aspect. He was focusing on a lingering aspect, that
24 it had to be a certain time period, where they were touching
25 their anatomical areas. So I will try to go in to the specific

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1 descriptions that each of them made. But I just would make that
2 general statement.

3 CHAIRPERSON JORDAN: Okay. For what little bit I know of
4 the law, I think we're required --- it cannot be conclusionary.
5 We need to say this happened, this person happened, this
6 happened, this happened. I think that's what the Office of
7 Attorney General's looking for. Would that be correct?

8 MS. NAGELHOUT: Well, he did mention some specific
9 witnesses, so that was a start, but --

10 (Pause)

11 ZC COMMISSIONER MILLER: Again, without going to a
12 specific page and citation number, the fact the Stadium Club
13 --- not the fact. The testimony where the Stadium Club
14 management, and the Appellant, acknowledged that there was
15 lap dancing, I think is one --- each of those areas where that's
16 acknowledged. The Zoning Administrator doesn't acknowledge
17 this because they never went back to the back rooms, and never
18 made any assumptions about apparently what was going on in the
19 back rooms. But there is testimony from the Stadium Club
20 management that they knew there was some lap dancing in the
21 back rooms, and that so did the Appellant, and that's two
22 examples, wherever they mention that, where there are
23 specified sexual activities designed to stimulate or arouse.

24 CHAIRPERSON JORDAN: That's what I've been trying to say.
25 Counsel has advised again, that we need to cite and understand

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1 how this is substantial, significant, and the factors that
2 support what we're saying. That's what I thought I said from
3 the beginning, when we started this exercise today. And I know
4 it's difficult. I know it's really, really difficult, but we've
5 got to do it. So --

6 ZC COMMISSIONER MILLER: How we say it's -- how we say
7 it's substantial? That we --- three of us have said that there
8 was sexual activity. There are three stages there. Half the
9 club is devoted to the strip tease dancing. It's at least ---
10 it's a substantial part of the club's activity.

11 CHAIRPERSON JORDAN: Let me try something else, and I
12 don't know, Ms. Nagelhout, if this works. What if we had a draft
13 order, whenever you get to do a draft order, and then it gives
14 Board members time to comment upon that draft order as its
15 finding, and gives time to -- you know, in a letter, you're
16 going to dig in to your notes, and then you can include it.
17 Because right now, maybe it's not fair that they're doing
18 direct recall of what they saw in the record, but they have
19 a basis for it.

20 MS. NAGELHOUT: So you would like a draft order
21 reflecting what I've seen of the Board's deliberations --

22 CHAIRPERSON JORDAN: Yes.

23 MS. NAGELHOUT: --- so far, and then put off a final vote
24 until after you've seen that?

25 CHAIRPERSON JORDAN: I think maybe we --

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1 MS. NAGELHOUT: That's fine.

2 CHAIRPERSON JORDAN: Does that make sense?

3 VICE-CHAIRPERSON HEATH: Yes. It does.

4 CHAIRPERSON JORDAN: Does that make sense? Because I
5 mean, we're struggling here to try to support that --

6 VICE-CHAIRPERSON HEATH: Are you suggesting, though,
7 too, Mr. Chairman, that in this draft order we, who oppose the
8 motion would also include -- well, I'm saying that's because
9 we're the ones who opposed it. But we would include information
10 that we took from the record, detail, that we're having a hard
11 time citing to now. We'd be able to include that in the order.

12 CHAIRPERSON JORDAN: Yes.

13 VICE-CHAIRPERSON HEATH: Okay.

14 CHAIRPERSON JORDAN: Because we have to make sure,
15 whatever goes back, that we have factual statements, not legal
16 conclusions, and they need to be substantial evidence, what
17 we find as substantial evidence. That's what the OAG is always
18 tasked with, and a lot of times, what we have them do --- and
19 they beat me up about it, so I try to be a little more
20 deliberate, we as a body, that we have to support what we say
21 because they have to support it. As you look at these --- and
22 they're guessing a lot of times. They hear us but they're
23 guessing. So I think this way, it gets us past being on ---
24 as you say, being in front right now with it. Some of the stuff
25 you know, but -- because of something you saw, but you can't

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1 put your finger on it. Okay?

2 VICE-CHAIRPERSON HEATH: Yes.

3 CHAIRPERSON JORDAN: So I would offer that to be what our
4 orders of the day are, unless someone has --- unless somebody
5 just wants to drill through it today and do it.

6 I think we've answered the questions. We just now need
7 to see what a draft order, and in support, whatever factual
8 --- but understand, Board, you can't just read this order and
9 just let it go. You're going to have to add to it.

10 VICE-CHAIRPERSON HEATH: Right.

11 CHAIRPERSON JORDAN: All right. Is that okay, Mr. Miller?
12 You good with that?

13 ZC COMMISSIONER MILLER: Yes. I would ask for the
14 Attorney General's assistance in identifying those areas where
15 each of the witnesses did describe activities, going there,
16 and then we can say that they were or were not near-naked
17 performances with incidental touching. We can say, we could,
18 based on our interpretation, they were integral to the
19 performance.

20 CHAIRPERSON JORDAN: Let me see --- okay. Mr. Hill?

21 MEMBER HILL: Sure. Yes.

22 CHAIRPERSON JORDAN: Mr. Hinkle?

23 MEMBER HINKLE: Yes.

24 CHAIRPERSON JORDAN: Okay. So there'll now be our order
25 as we move forward today, and I guess that concludes us for

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1 today.

2 Is there anything else that we need to handle today?

3 MR. MOY: Mr. Chairman ---

4 CHAIRPERSON JORDAN: Oh, no, Cliff. No.

5 MR. MOY: I haven't left this one yet. Is the Board
6 wishing to create a deadline for this draft order?

7 CHAIRPERSON JORDAN: Oh, yes. Yes, we need to have this
8 expedited, so we can get this done. What about --- we meet on
9 September 15th. What about September 22nd? By September --- well,
10 we need to get it probably before September --- that we have
11 it before that Friday. Right? Is that Tuesday? Is that a
12 Tuesday?

13 MR. MOY: The 22nd is a Tuesday. Mr. Miller's back with
14 the Board on the 20th, but that's in October. That may be a little
15 bit too late. So we should look for a date in September.

16 CHAIRPERSON JORDAN: We're just going to comment upon ---
17 on the draft order, and they're going to submit their responses
18 back, and add to it. So let's do this. We put it on for the
19 22nd for final action, but let's, if we can, get it by September
20 15th, the draft. Yes. Okay? Is that good, Board? All right.
21 So then that would be our order.

22 VICE-CHAIRPERSON HEATH: So we need the draft from --

23 CHAIRPERSON JORDAN: Yes, OAG's going to give us the
24 draft by September 15th, and you're going to, you know, get it
25 back --- you know, we need to get it back to OAG within probably

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1 three days, and then we can have it sent out to us on Friday.
2 Okay. On the Friday before the 22nd. All right?

3 MEMBER HINKLE: So we would vote on the 22nd, on the order?
4 Okay.

5 CHAIRPERSON JORDAN: Yes, just approving the order,
6 completely. Okay. All right. Then is there anything else, Mr.
7 Moy?

8 MR. MOY: Not from the staff, sir.

9 CHAIRPERSON JORDAN: Good. Does the Board have anything
10 else we need to address?

11 (No response)

12 CHAIRPERSON JORDAN: All right. Then we're adjourned.
13 Thank you.

14 (Whereupon, the above-entitled matter went off the
15 record at 11:07 a.m.)

16

17

18