

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 12642 of the Kalorama Citizens Association, pursuant to Sections 8102 and 8206 of the Zoning Regulations, from the decision of Louis P. Robbins, Principal Deputy Corporation Counsel, that up to two or three mechanical amusement machines are allowed in the C-2-B District and from the decision of the Zoning Administrator and the Permit Branch in issuing Certificates of Occupancy allowing mechanical amusement machines at 1812 Adams Mill Road, N.W., (Square 2548, Lot 815) and 1792 Columbia Road, N.W., (Square 2560, Lot 806).

HEARING DATE: May 17, 1978
DECISION DATE: October 4, 1978

FINDINGS OF FACT:

1. The subject properties are located at 1812 Adams Mill Road, N.W., and at 1792 Columbia Road, N.W. Both properties are in C-2-B Districts. The property at 1812 Adams Mill Road contains an establishment known as "R and M Books". The property at 1792 Columbia Road contains an establishment known as "Brad's Book Store". Contiguous to premises 1792 is premises 1794 Columbia Road. Above its store front is a sign saying "arcade". Premises 1792 and 1794 are owned and managed by the same parties.

2. Certificate of Occupancy, No. B-95367, dated October 24, 1975 was issued to Benjamin Harrison McNeal to use the first floor of the building at 1812 Adams Mill Road, N.W. for "retail bookstore, mechanical amusement machines, retail sale of second hand merchandise."

3. Certificate of Occupancy No. B-100176, dated November 2, 1976 was issued to Walter Francis Riggins to use the first floor of the premises at 1792 Columbia Road, N.W. for a "bookstore and 2 mech. amusements machines". By letter of November 4, 1976 the Zoning Administrator denied the application of the

said Walter Francis Riggin to use the first floor of the 1792 Columbia Road premises as a retail book store and amusement arcade on the grounds that an amusement arcade was not permitted in the C-2-B District unless approved by the Board of Zoning Adjustment.

4. An application by Walter Francis Riggin to use premises 1794 Columbia Road, first floor, for a novelty store and amusement arcade was denied by letter of November 4, 1976 of the Zoning Administrator on the grounds that the property is located in a C-2-B District which is not a proper district for an amusement arcade unless approved by the BZA. The last recorded Certificate of Occupancy, No. B-97653, for said premises was issued April 8, 1976 for a "novelty store and amusement machs. two mechanical mach. only".

5. The Zoning Administrator, by letter of April 18, 1977, denied the application for a Certificate of Occupancy to use premises 1792 and 1794 Columbia Road, N.W., first floor, as an amusement enterprise in conjunction with a bookstore on the grounds that an amusement enterprise was not permitted in a C-2-B District unless approved by the BZA.

6. The most recent licenses issued by the D.C. Government authorized nine movie projector machines for 1792 Columbia Road and ten pinball machines for 1794 Columbia Road. Both premises have current applications for licenses that are still pending.

7. In 1977 the police removed from premises 1792 Columbia Road some eighteen machines in excess of the nine machines ostensibly licensed. The Certificate of Occupancy limited the number of machines to two. At premises 1794 Columbia Road the Certificate of Occupancy limited the number of amusement machines to two. It is operating with ten.

8. At premises 1812 Adams Mill Road the Certificate of Occupancy did not state the number of machines allowed. It has been operating with six machines. In addition, the Certificate of Occupancy had limited the business to the use of the first floor. It has been using the basement of the premises in addition to the first floor.

9. The appellant, by letter of December 11, 1977, requested the Zoning Administrator to revoke the Certificate of Occupancy on premises 1792 and 1794 since amusement arcades are allowed as a matter-of-right in C-3 Districts and not in C-1 and C-2 Districts. The appellant also requested that the pending applications for licenses be denied. A copy of the letter was sent to the License and Permits Division. The appellant was advised that the Corporation Counsel would rule on the issues and advise the appellant.

10. The Corporation Counsel, by letter of February 2, 1978, replied that the Zoning Regulations do not define "Amusement Enterprises" but that the Zoning Regulations in Sub-section 5101.5 do provide that "accessory uses and accessory buildings customarily incidental to uses otherwise authorized by this Sub-section are permitted". The Corporation Counsel further stated that the Zoning Administrator has followed a policy, since 1964, pursuant to this position, that up to three such machines might be authorized as accessory uses (depending on the size of the establishment). The Corporation Counsel pointed out that, were such accessory uses not permitted, the effect would be to prohibit the use, in limited numbers, of certain amusement devices which he described as "common and unobjectionable", such as children's rides or pinball machines in certain kinds of retail establishments.

11. The appellant, in the subject appeal, now appeals from the administrative decision of the Corporation Counsel that up to two or three mechanical amusement machines are allowed in the C-2 District and from the decision of the Zoning Administrator and the Permit Branch in issuing Certificates of Occupancy allowing mechanical amusement machines at 1812 Adams Mill Road and 1792 Columbia Road, N.W. The applicant requests the Board to determine that no number of pornographically-oriented movie machines are permitted in C-2 Districts either as amusement enterprises or as accessory uses to other primary uses, that the Zoning Administrator exceeded his authority in making determinations to the contrary, and that the Certificates of Occupancy for the subject premises should be revoked as contrary to the Zoning Regulations and the Building Code.

12. The Zoning Administrator testified that the subject use of two or three mechanical amusement machines was allowed in the C-2 Districts at the time the subject Certificates of Occupancy were issued. The Zoning Regulations do not define amusement enterprise nor do Webster's dictionary. In the mid sixties, the then Zoning Administrator made an oral ruling that he would allow up to three machines to be permitted as accessory uses under Sub-section 5101.5 of the Zoning Regulations which permitted accessory uses customarily incidental to the main authorized use. Four machines would constitute an amusement enterprise and would be first permitted in the C-3-A District. At the time of the oral ruling there was no distinction made between sexually-oriented and non-sexually oriented machines.

13. In the years prior to May 12, 1958, arcades were located in two locations in the District of Columbia. They were along the 400 and 500 blocks of Ninth Street and along the 1200 block of New York Avenue, N.W. Arcades contained mostly pinball type machines. There were a limited number of movie machines and they were not sexually-oriented. There were very few arcades where "risque" magazines were sold. The term "adult bookstore" was unknown. The connotation of "arcade" was mechanical amusement machines. The machines were a primary use. Bookstores existed but they contained no amusement machines, sex-oriented or otherwise.

14. Sub-section 8104.1 of the Zoning Regulations provides that no person shall use any structure, land or part thereof for any purpose other than a one family dwelling until a Certificate of Occupancy has been issued to such person that such use complies with the Zoning Regulations and the building code.

15. The record showed that no inspections of all three subject premises were made prior to the issuance of Certificates of Occupancy. After inspection on April 17, 1978, it was determined by a building inspector of the D.C. Government that the premises at 1792 Columbia Road violated the building code in that there was inadequate fire protection of the ceiling between the first and second floor and between the basement and the first floor. The deficiency would have been present at the time the Certificate of Occupancy was issued.

16. After inspection on April 17, 1978, it was determined by

a building inspector of the D.C. Government that the premises at 1812 Adams Mill Road violated the building code in that there was inadequate headroom at the three steps split level archway, rear first floor entrance to the two mechanical amusements machines at the foot of the split-level corridor. This deficiency would have been present at the time the Certificate of Occupancy was issued.

17. The Regulations define an accessory use as one which is "customarily incidental and subordinate to the principal use".

18. The evidence of record is clear that in 1958, when these Regulations were adopted, amusement machines were not accessory to bookstores. It was not the custom at that time for bookstores to have amusement machines. In fact, there were only a limited number of machines, and those were located almost entirely in the downtown area. The Board finds that the Regulations at that time clearly could not and did not contemplate amusement machines as accessory uses in bookstores.

19. The Board finds that as to amusement machines in general, the situation has not changed. There are a larger number of bookstores which fall within the definition of a sexually-oriented business establishment which have amusement machines. However, with only a limited number of exceptions (including the two properties at issue here), those bookstores are located in C-3-B or C-4 Districts, where amusement enterprises are permitted as a matter-of-right. There is thus no issue presented in this appeal regarding those bookstores.

20. The Board finds that across the board, the large majority of bookstores do not have amusement machines, and that such machines could not be considered as "customarily incidental and subordinate" to the main use of selling books.

21. Among the community organizations in favor of the relief requested by the appellant were the Marie H. Reed Community Learning Center, the Adams Morgan Organization, the Ontario Road Association, the Oyster School Community Council, the Sheridan Kalorama Neighborhood Council, the Dupont Circle Citizens Association, the Midway Civic Association, the Third District Citizens Advisory Counsel, and the Citizens Association of Georgetown. The common grounds for the support of the appeal were that the

subject bookstores were a liability to the neighborhood, that they had a bad effect on the morals of the community, that the District of Columbia was lax in systematically inspecting for zoning and licensing violations and that now was the opportunity for the Board of Zoning Adjustment to remedy the situation as to the subject premises.

22. Advisory Neighborhood Commission 1-C and Advisory Neighborhood Commission 1-D supported the appellant's request that no number of sexually-oriented movie machines be permitted in C-2 Districts either as amusement enterprises or as accessory uses to other primary uses and that the Certificate of Occupancy of the subject premises be revoked, on the grounds that if the said machines were allowed to remain in C-2 Districts they would proliferate rapidly and have a deleterious affect on the entire city, including the residential neighborhoods which were close to the subject adult bookstores.

23. In addressing the issues and concerns of the ANC's the Board notes that they are based on sexually-oriented machines. It further notes that Zoning Commission Order No. 188, effective December 16, 1977, provides for the definition of sexually-oriented business establishments, prohibits such establishments in any zone district other than C-3-B and C-4 and permits them in C-3-B and C-4 Districts only under certain conditions. In this respect the future concerns of the ANC's have been met. As to the instant appeal the Board under the Zoning Regulations, must determine the merits of a case based on the Zoning Regulations then in effect. As is hereinafter provided in this Order, the immediate concerns of the ANC's will be met.

CONCLUSIONS OF LAW:

The appeal as filed before the Board raised the question of whether amusement machines are proper accessory uses to bookstores in C-2-B Districts. As the use regulations for C-2-B are identical to those for C-2-A and C-2-C, the Board has considered this case as it relates to all C-2 Districts. As to the administrative decision of the Corporation Counsel that two or three mechanical amusement machines might be authorized under the accessory use provisions in the C-2 Districts, the Board concludes that, based on the findings of fact, there is no history that

mechanical amusement machines were accessory uses to bookstores. Rather the history reflects that amusement machines constituted an arcade and that the machines were the prime use of the arcade. The machines were of the nature of pinball machines and not sex-oriented machines. The arcade and the bookstores were separate entities and separate Certificates of Occupancy and Licenses were issued. Each was a primary use. They were not accessory to each other. Accordingly, the Board concludes that mechanical amusement machines, whether of the sexually-oriented style or otherwise, are not accessory uses to bookstores

It then follows that since mechanical amusement machines are not accessory to book stores that any Certificates of Occupancy based thereon were issued in error. Accordingly the Certificates of Occupancy issued for premises 1812 Adams Mill Road and 1792 Columbia Road, N.W. were issued contrary to the Zoning Regulations.

Additionally, the premises at 1812 Adams Mill Road and 1792 Columbia Road have building violations thereon. A Certificate of Occupancy cannot issue where such violations exist. For this additional reason, the Certificates of Occupancy issued for these premises were issued in error.

As to the premises 1794 Columbia Road the business is being operated in space other than permitted by its Certificate of Occupancy. A Certificate of Occupancy is valid only for the premises, or part thereof, so indicated on the Certificate of Occupancy.

The findings of fact further reflect that as to all the subject properties there are machines licensed in excess of the number indicated on the Certificate of Occupancy and there are machines operated in excess of those licensed. The Board as well as the community, is gravely concerned about the lack of coordination between the occupancy and licensing authorities. It is urged that licenses conform to Certificates of Occupancy and that any continued non-conformance, upon notice, be referred to the proper authorities for prompt enforcement.

The Board finds that Zoning Commission Order No. 188 is not controlling in these instances. Under the Zoning Regulations the Board's decision is controlled by the Zoning Regulations in effect at the time the Certificates of Occupancy were issued. In this instance Zoning Commission Order No. 188, effective December 18, 1977, antedated the issuances of the Certificates of Occupancy for the subject premises.

Lastly, the Board is concerned with oral opinions of the Zoning Administrator that have not been made available to the public. Such oral opinions as well as written opinions should be compiled by the Zoning Administrator. The Board therefore hereby requests the Zoning Administrator to prepare and issue a compilation of the administrative rulings of the Zoning Administrator, which deals with the interpretation of the Zoning Regulations where there are no specific guidelines in the Regulations. Accordingly, it is ORDERED that the appeal is UPHeld, that mechanical amusement machines not be permitted as accessory uses to bookstores in C-2 Districts and that the Zoning Administrator is directed to revoke the Certificates of Occupancy for premises 1812 Adams Mill Road and 1792 Columbia Road, N.W.

VOTES: 4-0 That mechanical amusement machines are not accessory uses to bookstores in C-2 Districts (William F. McIntosh, Chloethiel Woodard Smith, Leonard L. McCants and Charles R. Norris to so find, John G. Parsons not present, not voting). 4-0 That the Certificates of Occupancy for 1812 Adams Mill Road and 1792 Columbia Road, N.W. were issued in error and that such Certificates of Occupancy be revoked (William F. McIntosh, Charles R. Norris, Leonard L. McCants and Chloethiel Woodard Smith to so find, John G. Parsons not present, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: Steven E. Sher
STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: 22 JAN 1979