

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



Appeal No. 13715, of Dennis P. Sobin, pursuant to Section 8102 and 8206 of the Zoning Regulations, from the decision of the Chief of the Zoning Review Branch dated November 4, 1981, denying an application for a certificate of occupancy on the grounds that the proposed use is a sexually-oriented business establishment in a C-M-2 District on the first floor of the premises 36 N Street, S.E., (Square 700, Lot 841).

HEARING DATE: May 12, 1982  
DECISION DATE: June 2, 1982 and September 6, 1982

FINDINGS OF FACT:

1. The site is located on the north side of N Street between Half and South Capitol Streets and is known as premises 36 N Street, S.E. It is in a C-M-2 District.

2. The Chief of the Zoning Review Branch, by letter of November 4, 1981, advised the appellant that his two applications for certificates of occupancy for the use of the first floor of the subject premises as:

- (1) "Publishing Offices (compilation and editing of sexually-oriented magazines, newsletters, other publications and subscription services), no retail sales on premises," and
- (2) "(Erotic Museum), publication, sale of sexually-oriented newspapers, magazines, newsletters, related informational and educational services,"

were disapproved on the grounds that the property is located in a C-M-2 District which does not allow a sexually-oriented business establishment. The applicant was further advised that he would be required to seek a variance from the provisions of Paragraph 6101.31 of the Zoning Regulations for the proposed uses.

3. On October 12, 1981, the appellant filed an appeal with the BZA from the decision as to item (1) above, publishing offices. The appellant filed no appeal from item (2), erotic museum.

4. The appeal inadvertently was advertised as an appeal from both decisions of the Chief of the Zoning Review Branch. The Board acknowledged the mistake and proceeded to hear the appeal on item (1) on its merits.

5. Advisory Neighborhood Commission 2D, by letter of March 17, 1982, advised that the Commission had voted at its March 1, 1982, meeting to endorse the decision of the Chief of the Zoning Review Branch to deny use of 36 N Street, S.E. for a publishing office and erotic museum. The ANC reported that there are now several "clubs" in the immediate area of 36 N Street, S.E. They attract a great deal of traffic on weekends, creating a number of problems for area residents and long-established merchants. In addition to the noise and congestion of increased traffic, there are parking problems. Patrons at these establishments encroach upon the space of residents and other local businesses. Compounding these nuisances, residents have complained that club patrons sometimes get into fights outside the clubs. Because the Commission felt that there are already too many clubs in the area, that these clubs create a variety of public nuisances, and that the proposed uses for 36 N Street will exacerbate these problems, the Commission recommended that the Board uphold the Zoning Review Branch and reject Mr. Sobin's appeal.

6. The appellant moved to strike the ANC letter from the record. He argued that the letter addressed itself only to the use of the premises as an erotic museum and not to the issue before the Board, which was the use of the premises as a publishing office, no retail sales on premises. The appellant argued that the ANC letter was based on the misunderstanding that both uses were contemplated for the subject premises. The Board ruled that the ANC letter was not relevant to the appeal. The Board determined that the letter would remain in the record and the Board would give the letter the weight it deserved.

7. The appellant seeks to locate publishing offices for a monthly adult newsletter and other adult publications on the first floor of his townhouse. The publications the appellant intends to compile on the premises would deal substantially with "adult" subject matter -- articles on sexual behavior, candid interviews with well-known figures concerning their personal lives, articles on and advertisements for adult entertainments in the District of Columbia, news about the adult entertainment industry, "personal" classified advertisements, photographs and graphics depicting nudity -- and would involve, in addition, a significant number of news articles and commentary of more general interest concerning current events and contemporary political and social issues. There would be no retail sales of copies of the publications on the premises, no printing

of the publications and the office would not be open to the general public. Photography would be done substantially at the site of the story. Only reference copies of publications would be stored at the premises.

8. Paragraph 6101.31 permits the following uses as a matter-of-right in a C-M District:

Any Commercial use permitted in the C-4 District under Sub-section 5404.3, except establishments which have as a principal use the administration of massages, sexually oriented business establishments, and chanceries and international agencies.

9. Section 1202 defines a "sexually-oriented business establishment" as:

An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals, films, materials and articles or an establishment which presents as a substantial or significant portion of its activity, live performances, films, or other material which are distinguished or characterized by their emphasis on matters depicting, describing or related to specified sexual activities and specified anatomical areas. Such establishments may include, but are not limited to bookstores, newsstands, theaters and amusement enterprises. If an establishment is a sexually oriented business establishment, as defined herein, it shall not be deemed to constitute any other use permitted under the authority of these Regulations.

10. The appellant argued that the definition in Section 1202 appears on its face to cover only establishments that engage in retail activity or which provide amusements to the general public. The term "stock in trade" denotes material offered for sale to the public. The definition specifically lists only establishments which by their nature are designed to attract the general public as customers; i.e., "bookstores, newsstands, theaters and amusement enterprises."

11. The appellant desires to establish private offices to carry on publishing activities such as the compiling and editing of periodicals and related business such as the handling of subscription accounts. The appellant specifically stated that there will be no retail sales on the premises. The appellant's business will not involve offering live performances, presenting films or providing any other type of amusement to the public at the N Street,

S.E. location. The general public will neither be attracted to nor have access to the premises.

12. The Zoning Administrator testified that when the application was filed for a Certificate of Occupancy for the proposed subject use, it was his interpretation that the use included onsite printing of articles, storage of sexually-oriented materials and, since there was a subscription service, sales. The use was deemed something more than typing and editing. No further evidence was submitted to the office of the Zoning Administrator to clearly define what was being proposed nor did the appellant request further interpretation. The Zoning Administrator testified that if there was no printing, no stock-in trade (copies of issues) and no sales on the premises, in his opinion the use would be permitted and he would approve issuance of a Certificate of Occupancy.

CONCLUSIONS OF LAW AND OPINION:

Based on the entire record, the Board is of the opinion that at the time of the disapproval of the application for a certificate of occupancy for the proposed use, the Zoning Administrator did not have before him all the evidence that was adduced at the public hearing. The application was determined, as found in Finding of Fact No. 12, on the misunderstanding that there would be printing of the activities on the site, that there would be storage of stock-in-trade and there would be sales of the stock-in-trade. The Zoning Administrator would have approved for zoning purposes the use of the premises for the purpose of the typing and editing of publications and subscription services. The Board concludes that based on the very limited evidence submitted to the Zoning Administrator by the appellant as to the true nature of the proposed operation, the Zoning Administrator was compelled to deny the application for a Certificate of Occupancy. If the Zoning Administrator had the evidence before him that was adduced at the hearing on the subject appeal, the Zoning Administrator testified that he would have issued the Certificate of Occupancy. The Board will make its determination based only on the evidence that the Zoning Administrator had before him at the time of his decision. The Board will not look behind the evidence submitted or take into account evidence and facts that were not before the Zoning Administrator. The Board concludes that the use as described in the testimony at the public hearing, which the appellant actually intended to make of the premises was not fully revealed to and was consequently not ruled upon by the Zoning Administrator. Accordingly, it is ORDERED that the appeal is hereby DISMISSED as not being properly before the Board. The appellant is free to file a new application for a certificate of occupancy with the proper authorities of the District of Columbia.

VOTE: 3-0 (William F. McIntosh, Connie Fortune, Charles R. Norris to dismiss, Douglas J. Patton not voting, not having heard the case, Walter B. Lewis 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: DEC - 3 1982

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

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