

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 13885, of Sandra K. Simms, pursuant to Sections 8102 and 8206 of the Zoning Regulations, from the decision of Joseph F. Bottner, Jr., Chief of the Zoning Review Branch, dated July 7, 1982, denying the issuance of a certificate of occupancy for the use of the first and second floors of the subject premises as an "amusement or entertainment center (sexually oriented)" in a C-3-A District at premises 4617 1/2 41st Street, N.W., (Square 1769, Lot 22).

HEARING DATES: February 16 and April 13, 1983
DECISION DATE: May 4, 1983

FINDINGS OF FACT:

1. The subject property is located on the west side of 41st Street between Brandywine and Chesapeake Streets near the junction of Wisconsin Avenue and Belt Road, and is known as premises 4617½ 41st Street, N.W. It is zoned C-3-A.

2. The subject property is improved with a three-story stone structure.

3. The first floor of the subject structure is occupied by the Hungry Majid Restaurant and is known as premises 4617 41st Street. The remaining two floors of the structure are occupied by the subject amusement and entertainment center.

4. At the public hearing of February 16, 1983, a motion to intervene was made by the law firm of Wilkes, Artis, Hedrick and Lane on behalf of the Advisory Neighborhood Commission 3E, the Friendship-Tenleytown Citizens Association and sixteen individuals. The Chairman granted party status as intervenors to the ANC and the Friendship-Tenleytown Citizens Association.

5. On June 15, 1982, counsel for the appellant filed an application for a certificate of occupancy to use the subject premises as an "amusement or entertainment center, (sexually oriented)."

6. By letter dated July 8, 1983, Joseph F. Bottner, Jr., Chief, Zoning Review Branch, informed counsel that the certificate of occupancy application filed on behalf of the appellant was disapproved. The letter indicated that the basis for the disapproval was that the property is zoned

C-3-A which does not permit the proposed use, and, further, that the last use of the premises was as an amusement or entertainment center, not sexually oriented, under Certificate of Occupancy No. B101123, dated March 15, 1977. The letter further advised counsel that the appellant could seek a variance from the use provisions of Section 5103.3 from the Board of Zoning Adjustment.

7. On October 1, 1982, counsel filed an application with the BZA on behalf of the owner of the property seeking the reversal of the decision of the Chief, Zoning Review Branch disapproving the certificate of occupancy and the continuation of a prior non-conforming use, sexually oriented. The application, as filed, did not properly constitute a request for a use variance, as indicated in the letter for the Chief, Zoning Review Branch, nor was it a proper appeal from that decision.

8. Pursuant to discussions with staff of the Zoning Secretariat, counsel for the appellant met with James J. Fahey, the Zoning Administrator, on November 16, 1982, to explain the circumstances of the appellant's proposal. Subsequent to that meeting, the proper form for an appeal from the decision of the Chief, Zoning Review Branch, was filed on November 16, 1983.

9. The appellant testified that she leased the subject premises in approximately June, 1981. The premises are used as an amusement or entertainment center where patrons can converse or play table games such as chess, checkers or backgammon with nude or semi-nude hostesses.

10. The use of the subject premises prior to the appellant's lease was as an "Amusement or Entertainment Center," pursuant to Certificate of Occupancy No. B101123, dated March 15, 1977. The appellant testified that the prior use of the premises was exactly the same as that which is presently operating. The appellant relied on conversations with employees of the prior tenant and the decor existing at the time she leased the premises to determine the nature of the prior use.

11. The Zoning Regulations were amended by the Zoning Commission by emergency Order No. 161, dated May 12, 1977. The emergency was extended pursuant to Order No. 180, dated September 8, 1977. The Regulations were amended on a permanent basis by Order No. 188, dated December 16, 1977, to define sexually-oriented business establishments and to prohibit such establishments in any zone district other than C-3-B and C-4. In those zones, such establishments are permitted as special exception.

12. Certificate of Occupancy No. B101123 was issued prior to the effective date of the amendment to the Zoning Regulations and does not specify whether the use was sexually-oriented or not sexually-oriented.

13. The appellant asserts that the prior use was sexually-oriented and due, to its existence prior to the amendment of the Zoning Regulations, constitutes a non-conforming use.

14. The appellant applied for a certificate of occupancy on May 7, 1981, "For the operation of an amusement and entertainment center." With the exception of the change of names, the information on the form she filled out was identical to that supplied by the previous tenant in the application for certificate of occupancy dated February 7, 1977. The appellant's application was then reviewed by the Chief of the Zone Review Branch.

15. The appellant alleges that she was informed by the Chief, Zoning Review Branch, subsequent to this review, that a new law had been passed since the issuance of Certificate of Occupancy No. B101123 and that her application for certificate of occupancy must include the phrase "not sexually oriented." The appellant described the use of the premises and expressed her desire to continue that use. The Chief, Zoning Review Branch instructed her to include the phrase on her application if she wanted a certificate of occupancy. The appellant stated to the Board that she was unfamiliar with the Zoning Regulations and believed that inclusion of the phrase on the application was merely a technicality and would not preclude the operation of the business as proposed. Accordingly, the appellant added the phrase "not sexually oriented" to the application for a certificate of occupancy. Certificate of Occupancy No. B125374, dated June 9, 1981, "For operation of an Amusement and Entertainment Center (Not Sexually Oriented)" was subsequently issued.

16. The appellant began operation of the business, as described, under Certificate of Occupancy No. 125374, in June of 1981. In May, 1982, the appellant was informed by the Metropolitan Police that she did not have a business license. The appellant was issued a business license for a billard parlor because she provided game tables. The police returned and informed the appellant that she had the wrong type of business license. At that time, the police took the appellant's certificate of occupancy and the appellant closed the business.

17. The appellant applied for a duplicate of certificate of occupancy on May 20, 1982, and obtained the proper business license. Certificate of Occupancy No. B130636, dated May 20, 1982, "For the operation of an Amusement or

Entertainment Center (Not Sexually Oriented)" was issued as a duplicate to No. B125374 and the appellant re-opened the business. The police returned and the appellant was cited for not displaying the original certificate of occupancy. There was no indication from the police that the certificate was improper in any way. Other than the aforementioned citation, the appellant testified that she had never been cited for violation of any municipal regulations.

18. The appellant, when attempting to obtain another duplicate certificate of occupancy, was informed by an employee of the Zoning Review Branch that her present certificate of occupancy was invalid and that the appellant's business was operating in violation of the Zoning Regulations because the certificate of occupancy specified "not sexually oriented." The appellant was also informed at that time, that the continuation of the prior use may have been possible under the "grandfather" rights applicable to legally non-conforming uses. No certificate of occupancy was issued at that time.

19. On June 15, 1982, counsel for the appellant filed an application for a certificate of occupancy for an amusement entertainment center sexually-oriented. As described in Finding of Fact No. 6, that application was disapproved, and the instant appeal was subsequently filed.

20. The real estate agent who manages the subject premises testified that the prior use of the premises as the Cat's Pajamas, operated by General Promotions, Inc., was initially as a massage parlor. The massage parlor use was discontinued when the law governing massage parlors was changed to prohibit touching or fondling between members of the opposite sex. The use was then changed to an entertainment center which offered games in the nude. The prior tenant was later evicted for non-payment of rent and the premises were subsequently leased to the appellant in April of 1981. There were no intervening tenants between the occupation of the premises by General Promotions, Inc., and the appellant. The real estate agent leased the premises to the appellant with the understanding that the use of the premises as an entertainment center with games in the nude would be continued.

21. The appellant asserted that the use of the premises as a sexually oriented business prior to the amendment of the Zoning Regulations in May of 1977, resulted in the existence of a non-conforming use. She argued through counsel that:

- A. Her intention in applying for a certificate of occupancy in May, 1981, was for the purpose of continuing that sexually-oriented use;

- B. The phrase "not sexually oriented" was added to the application only in response to the demand of the Chief, Zoning Review Branch;
- C. The letter dated June 8, 1982, bases the disapproval on the fact that Certificate of Occupancy No. 101123 was not issued for a sexually oriented business;
- D. It has been demonstrated that the use of the premises under Certificate of Occupancy No. B101123 was sexually oriented; and
- E. She is therefore entitled to continue the use of the premises as a sexually oriented business under the provisions of Sub-section 7102.1 of the Zoning Regulations.

22. Subsequent to the meeting held on November 16, 1982, between counsel for the appellant and the Zoning Administrator, the Zoning Administrator issued a letter, dated December 13, 1982. That letter reaffirmed the decision made by the Chief, Zoning Review Branch in his letter of July 8, 1982, based on research of previously issued certificate of occupancy's for the subject premises and the requirements of the Zoning Regulations.

23. At the public hearing of February 16, 1983, the Zoning Administrator reaffirmed the conclusions made in his letter of December 13, 1982. The Zoning Administrator contended that the letter of disapproval of the application for certificate of occupancy dated July 8, 1982, was proper for the following reasons:

- a. Two certificates of occupancy were properly issued for the use of the subject premises for an amusement or entertainment center, not sexually oriented, which is a permitted use in the C-3-A District.
- b. The prior use of the premises was never registered as a non-conforming use.
- c. Even if the prior use had been legally non-conforming, the appellant lost her rights to continue such use when she obtained a certificate of occupancy for a conforming use, and reaffirmed the loss by applying for a duplicate certificate of occupancy for the conforming use.

24. The Zoning Administrator testified that all applications for certificates of occupancy must specify whether the use is sexually or not sexually oriented before they are approved. If an applicant for a certificate is uncertain as

to whether the proposed use is sexually oriented, a copy of the Zoning Regulations which sets forth the definition of the term for zoning purposes is available in his office. There was no evidence before the Zoning Administrator that the previous of the subject premises was sexually oriented.

25. The Chief of the Zoning Review Branch was unable to attend the public hearing of February 16, 1983, due to illness. The Zoning Administrator asserted that he holds the ultimate responsibility for interpreting and enforcing the Zoning Regulations and is representative of the Zoning Review Branch.

26. Counsel for the appellant requested that a further public hearing be held for the purpose of accepting testimony from the Chief, Zoning Review Branch, and cross-examination thereof. The basis for the request was that the Chief, Zoning Review Branch had direct contact with the appellant and it was his decision which was being appealed.

27. The statement of the intervenors, received on February 8, 1983, supported the decision of the Chief, Zoning Review Branch. The intervenors' position was that, assuming a lawful non-conforming use existed, the appellant lost the right to continue such use because of a change to a conforming use or abandonment. The intervenor further noted that the use did not comply with the established criteria set forth in Paragraph 5103.47 governing the special exception necessary to establish a sexually-oriented business in the C-3-B and C-4 Districts, in that the subject premises is located within 600 feet of a residential district, is located within 600 feet of a church, school, library and playground, is located within 300 feet of another sexually-oriented business and would have an adverse impact on the character of the neighborhood in terms of noise, traffic and other conditions.

28. A Metropolitan Police officer testified at the public hearing of February 16, 1983, on behalf of the intervenors. The officer testified that an employee of the subject amusement or entertainment center was arrested in December of 1983 for soliciting for lewd and immoral purposes. In addition, the officer testified that the principals of the prior tenant, General Promotions, Inc., were forced to vacate the premises due to non-payment of rent because they were incarcerated for illegal activities which occurred at the subject premises.

29. The Board finds that the testimony presented on behalf of the intervenors by the police officer, set forth in Finding of Fact No. 29, relate only to police enforcement, do not show the direct involvement of the appellant,

and are irrelevant to the issues of the appeal before the Board.

30. In addition to the statement of the intervenor on its behalf, Advisory Neighborhood Commission 3E, by letter dated February 4, 1983, and by representatives at the public hearing of February 16, 1983, indicated its support of the decision of the Chief, Zoning Review Branch, in denying the request for the issuance of a certificate of occupancy for use of the subject premises as an amusement or entertainment center, sexually-oriented, based on the following:

- a. There is some doubt as to whether or not the pre-existing use would constitute a valid non-conforming use because of some claims by citizens that that use was limited to legitimate, therapeutic massage.
- b. Assuming that a valid non-conforming use did exist, that use was abandoned and discontinued as evidenced by lengthy periods of vacancy and the existence of a certificate of occupancy for a permitted, not sexually-oriented use for a period of more than one year.
- c. The citizens in the immediate neighborhood are opposed to the use of the subject premises for a sexually-oriented business because of its proximity to nearby schools and churches and the adverse impact it would have on adjacent, legitimate businesses.
- d. The owner of the subject premises also holds title to a second illegal sexually-oriented business within the same block. There has been presumptive evidence of illegal activity taking place at the subject premises.
- e. The owner of the subject premises has forced several businesses in the area to vacate due to drastic rent increases and should not be rewarded by the sanctioning of a non-conforming use at this location.

31. At the conclusion of the appellant's case, and testimony by the Zoning Administrator and the intervenor, the Chairman ruled that the case be held open for the testimony of the Chief, Zoning Review Branch. A further hearing, limited to the testimony of the Chief, Zoning Review Branch and cross-examination thereof, was accordingly scheduled for April 13, 1983.

32. At the public hearing of April 13, 1983, the Chief, Zoning Review Branch, outlined the procedures for review of

applications for certificates of occupancy by his office as follows:

- a. The zoning classification of the property is checked.
- b. The prior use of the property is checked.
- c. The application is checked for completeness.
- d. The application is requested to specify whether the use is sexually oriented or not sexually oriented.
- e. Applications which are properly filed and are for a permitted use are approved for zoning purposes.
- f. If there is a question of any kind regarding the application, the application is held, research is made, and a letter is sent to the applicant setting forth the action taken.

33. The Chief, Zoning Review Branch, acknowledged approving the application for a certificate of occupancy filed on May 7, 1981, for zoning purposes. That application described the use as an amusement or entertainment center not sexually oriented, which is a permitted use in the C-3-A District. The Chief, Zoning Review Board, did not specifically remember the details of the subject application or the appellant. He testified that the form and content of the application was in no way unusual.

34. In the letter of July 8, 1982, referenced in Finding of Fact No. 6, the indication that the last use of the subject premises was as an amusement or entertainment center, not sexually oriented, was based on the review of the prior certificate of occupancy by the Zoning Review Board which included Certificate of Occupancy No. B101123, and the two duplicates issued thereafter which indicated that the use was not sexually oriented.

35. The record contains numerous letters and petitions supporting the decision to deny the certificate of occupancy for a sexually oriented business by the Chief, Zoning Review Branch.

36. In addressing the concerns of the ANC and the other intervenor, the Board finds that the practices of the owner of the subject premises, with regard to this and other properties in the block, have no bearing on the issue before the Board in this appeal and, therefore, cannot be considered in relation to this case.

37. With regard to the prior use of the subject premises, the Board finds that Certificate of Occupancy No. B101123 clearly evidences its use as an amusement or entertainment center but does not specify whether that use was sexually or not sexually oriented. Such use was instituted before there was a basis in the Zoning Regulations to distinguish between sexually oriented and non-sexually oriented establishments.

38. The appellant contended that she was told that she could not obtain a certificate of occupancy unless her application stated "not sexually oriented." She added those words to her application. Even if it was not clear to the appellant what "sexually oriented" meant, the use of the negative "not" plainly and clearly indicates that, whatever "sexually oriented" was, the proposed use did not fit into the category.

39. The appellant does not dispute that her use as applied for on June 15, 1982, clearly was for a "sexually oriented" establishment.

40. The Board concurs with the conclusion of the ANC and intervenor that the issuance to the appellant of the original and then a duplicate certificate of occupancy for a non-sexually oriented C-3-A use, regardless of the prior use of the premises, voided the appellant's right to continue the previous use.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing Finding of Fact and the evidence of record, the Board concludes that the decision of the Chief, Zoning Review Branch, was properly made based on the evidence of past use of the subject premises and the requirements of the Zoning Regulations.

The Board concludes that there is no probative evidence of record which evidences that the previous use of the subject premises was for a sexually oriented business. The testimony of the real estate agent set forth in Finding of Fact No. 20 indicates that the prior tenant changed the use of the subject premises from a massage parlor to an amusement and entertainment center as evidenced by Certificate of Occupancy No. B101123. An amusement or entertainment center was and is a permitted C-3-A use. The use of the premises as a sexually oriented business prior to the amendment to the Zoning Regulations governing such uses in 1977 was never legitimized through proper registration of the use of the subject premises as a non-conforming use within six months of the change in Zoning Regulations, as required by Sub-section 7110.3 of the Regulations then in effect. Therefore, the use is not entitled to the grandfather rights contained in Sub-section 7102.2.

Further, there is no clear indication as to whether the Certificate of Occupancy No. B101123 was initially issued for an amusement or entertainment center, sexually oriented.

The Board further concludes that the issuance of a certificate of occupancy to the appellant subsequent to the adoption of the change in the Zoning Regulations governing sexually oriented businesses is a clear indication that the use of the subject premises was for a use permitted in the zone district in which the subject premises is located. Sub-section 7103.3 of the Zoning Regulations provides that when an existing non-conforming use has been changed to a conforming or more restrictive use, it shall not be changed back to a non-conforming or less restrictive use.

The Board further concludes that the testimony of the Chief, Zoning Review Branch, set forth in Finding of Fact No. 32, indicates that the procedure for filing application for certificates of occupancy requires all applicants to specify whether the use proposed is sexually oriented or not. There is no conclusive evidence of record as to the reason why the appellant indicated that the use was not sexually oriented on her application for a certificate of occupancy filed in May, 1981, if in her opinion it was. The appellant's testimony is contrary to the normal procedures used. The Chief, Zoning Review Branch, indicated that the form and content of the application were not unusual. The Board can find no basis in the record to believe that the appellant could have understood that requesting a "not sexually oriented" business could allow her to operate the same business that she now concedes is a "sexually oriented" business.

The Board concludes that it has afforded the great weight required by statute to the issues and concerns of the Advisory Neighborhood Commission. Accordingly, it is ORDERED that the appeal is DENIED and the decision of the Chief, Zoning Review Branch, is UPHELD.

VOTE: 5-0 (Carrie Thornhill, William F. McIntosh, Walter B. Lewis and Charles R. Norris to DENY; Douglas J. Patton DENY by PROXY).

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

ATTESTED BY:



STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: _____

OCT 27 1983

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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