

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal of No. 14315 of Dennis Sobin, pursuant to Sections 8102 and 8206 of the Zoning Regulations, from the decision of the Administrator, Building and Land Regulation Administration, dated May 10, 1985, proposing to revoke Certificate of Occupancy, No. B141470, issued March 11, 1985, to use the subject premises as a clothing store, retail, not sexually oriented, in a C-2-A District at premises 515 - 11th Street, S.E., (Square 973, Lot 819).

HEARING DATE: July 24 and September 25, 1985
DECISION DATE: September 25, 1985

FINDINGS OF FACT:

1. The appellant, Dennis Sobin, the lessee herein, is appealing the decision of the Administrator, Building and Lands Administration, Department of Consumer and Regulatory Affairs (DCRA), dated May 10, 1985, proposing to revoke his Certificate of Occupancy to use the subject premises as a clothing store, retail, not sexually oriented.

2. The subject site is located on the west side of 11th Street between E and G Streets, and is known as premises 515 11th Street, S.E. The site is in a C-2-A District.

3. On March 11, 1985, the appellant was issued Certificate of Occupancy No. B141470 for the use of part of the first floor of the premises as a clothing store, retail, not sexually oriented. The floor area encompassed under the certificate of occupancy as part of the first floor was approximately 500 square feet.

4. On May 10, 1985 the DCRA notified the appellant by mail that it proposed to revoke the certificate of occupancy.

5. The authority cited for the proposed action in the aforesaid notice of May 10, 1985 was 29 DCR 5571, Section 111 (a), which in pertinent part read, "Any Certificate of Occupancy issued pursuant to these rules may be revoked by the Director after notice if the actual occupancy does not conform with that permitted..."

6. There were five specifications enumerated in the notice of May 10, 1985:

- (a) that the premises were being operated as a public hall without a certificate of occupancy for that use.
- (b) an investigator with the DCRA visited the subject premises and talked with an agent of the appellant who told the investigator that for a thirty-five dollar cover charge the investigator would obtain a girl to come to the premises and model some clothes for him. Also on April 2, 1985 the aforementioned investigator observed on his visit to the subject premises that the front of the building had a large glass window approximately 5 feet by 5 feet with a large sign hung inside the window stating "METS PERSONALS - MODELS WANTED." Upon entering the premises, the investigator observed a display case containing magazines, newspapers, two record albums, and three pairs of crotchless female panties. The investigator purchased a copy of the newspaper which depicts males and females engaged in intercourse, cunnilingus and fellatio indicating that the newspaper is in fact "sexually oriented". All of the above is an "non-conforming use" of the premises since the use does not conform to the certificate of occupancy issued. On or about April 11, 1985, Sgt. Richard Getz, Metropolitan Police Department (MPD), conducted a business check of the above premises and noted that the business license was not posted. In addition a physical check of the premises found nine paintings or photographs with explicit sexual overtones. Also on the premises were several mattresses and two rooms divided into cubicles. There was very little retail clothing on the scene. All of the above is a non-conforming use of the premises.
- c. On or about April 18, 1985, Office Gordon Yarboro, MPD, made a business check of the above premises and reported that there is no clothing on display for sale although there is a sign posted that clothing orders will be taken. There were also some paintings on display and a sign "Art Display". All of the above is a non-conforming use of the premises.
- d. On or about May 1, 1985, Gregory Lusby, MPD, conducted a routine business check of the above premises and reported that there were only four items of clothing hanging on a wooden rack. There were also large pictures openly displayed, three mattresses leaning against the wall of a rear

room which also contained two sexually oriented pictures on display. Office Lusby talked with Mr. Shango Forte who stated that he sometimes sleeps on the premises; he is connected with the Facts Publishing Company, which is owned by the appellant, and that Mr. Forte was going to apply for a license to draw and sell his paintings at the above address and that he was presently using the above address for his work. All of the above is a non-conforming use of the premises.

- e. The above specifications cover a period in excess of five weeks and is indicative of a lack of intention to operate a retail clothing store which is not sexually oriented, all of which is also indicative that the appellant is operating and does not intend to operate the business at the above premises in conformity with the certificate of occupancy that has been issued.

7. In the same notice the appellant was advised that if he intended to appeal the proposed action he should file an appeal with the Board of Zoning Adjustment (BZA) within ten days of receipt of the said notice. On May 28, 1985 the appellant filed an appeal with the BZA.

8. By letter dated May 24, 1985 the appellant was advised by the DCRA that the certificate of occupancy had been revoked since the appellant had not filed an appeal with the BZA in the time prescribed.

9. Section 1202 of the Zoning Regulations 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 sexually 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. Maurice Evans, investigator, DCRA was instructed on April 2, 1985 by the Division Chief of the DCRA Office, Theodore Gordor, to go to the premises, 515 11th Street, Southeast, and determine if one Dennis Sobin was operating any type of sexually-oriented business at that location. When the investigator arrived at the premises there was no

one present. The door was open. There was a sign indicating the premises were operating as "Met Personals". He observed the desk, telephone and a display counter full of magazines and periodicals, crotchless panties, and some albums. Later a gentleman came in and asked if his name was Larry. He introduced himself as Brian. The investigator thought the investigator was the gentleman by the name of Larry Humphries, an employee of Mr. Sobin. The investigator reviewed the articles with Brian that were in the display case and asked Brian if these items were for sale. Brian replied "yes". The investigator for two dollars purchased a magazine-type of newspaper titled "New York's Met Personals" dated April. The paper had pictures depicting men and women engaging in vaginal, oral and anal intercourse.

11. The investigator inquired if there were any ladies on the premises. Brian said "no," but for a fee of \$35 Brian could have one come in a couple of hours. The investigator specifically asked him, using the street terminology, could he get some trim, which is intercourse. Brian said that would be between the investigator and the lady. The conversation also indicated that they would be at full operation in about two days because they were waiting for some merchandise and people from New York to come down. The investigator asked Brian if this was Dennis Sobin's place, like the one he had on 14th Street, where he had a operation similar to the subject operation going on at that time, and he said "yes" it was Mr. Sobin's operation. He put the phone number of "Met Personals" and his name, Brian, on the magazine newspaper which the investigator had purchased. When the investigator returned to his office he called the number and the phone was answered. He asked if this was Met Personals. The phone operator said "yes". The investigator remained on the premises for about fifteen minutes. The investigator wrote a report on his inspection contemporaneous with the event.

12. On April 11, 1985 Sgt. Getz of (MPD) conducted a business check on the subject premise. He noted that the business license was not on display and had to be requested. The hostess, Kim Hawkins produced license #B-141470 for a clothing store retail, not sexually orinated. A physical check of the premises found nine paintings or photographs with explicate sexual overtones. Also on the premises was several mattresses and two rooms divided into cubicles. Very little retail clothing was on the scene. The report was shown to the appellant at the time of the public hearing. The appellant had no objection to the report being made a part of the record.

13. On May 24th, 1985 at about 2:00 P.M., Detective John Hill along with Mr. Gordon and Mr. Morrison both of the DCRA as well as Deputy Chief Krupo of the 1st Police District (Commander) and Lt. Poggi of the Morals Division

approached the premises located at 515 11th Steet, S.E. and knocked upon the door which was shortly answered by a subject who identified himself as Shango R. Forte. The subject was advised that they possessed an order revoking the certificate of occupancy which was posted on the wall and that the premises must be vacated. Mr. Shango Forte then proceeded to advise the policemen that the premises was an art studio. A small amount of art supplies and a few pieces of art work were on the scene. Mr. Forte was advised that the certificate of occupancy was not for an art studio but rather a clothing store and therefore has been revoked. While on the scene the detective observed numerous pieces of pornography, i.e. polaroid pictures of persons with no clothing and books and magazines and tabloids with pictures depicting both males with males, females with females and males with females with no clothing and involved in sexually explicit acts of various kinds. Also a mattress was observed on the floor of a small room in the rear of the premises with several more magazines and pictures similar in kind to those described above. Further, due to observations by the detective, it was believed that the polaroid pictures were taken in the front room of this premises which is the first room that is entered when walking off the street because the polaroid (on a tripod) was fixed in an area that had a red divider which obviously was exactly the same background used in the polaroid pictures observed throughout the premises. This report was show to the appellant at the public hearing. The appellant had no objection to the report being made a part of the record.

14. The appellant argued that the notice of May 10, 1985 was the first time that he became aware of the alleged non-conforming uses on the subject premises. There had, in his opinion, never been any arrests on the premises. When the matter was made known the appellant ceased such activities such as a coverage charge which the appellant termed as a tip or gratuity. The finding of sexual paraphernalia such as the split crotch panties and a copy of the Met Personals newspaper, in his opinion, was not beyond what a retail clothing store that specializes in novelty retail clothing would carry. The paintings were merely on display and were not sold. The artist was an employee of the appellant and was permitted to paint when business was slow. In some of the paintings the model was attired in the "novelty clothing" for sale on the premises. The appellant further argued that originally there had been much more clothing but the original partners of his who owned most of the stock and himself had a dispute and the partners pulled out of the enterprise and took all of their stock with them. The appellant maintained a catalogue from which customers could order. Also the sign in the window advertising "models wanted" was used because it was planned to do some fashion shows. It was removed. As to the mattresses on the premises they were merely being stored for another person.

They were located in the rear of the store with some of the applicant's personal collection of erotica. The appellant also argued that the subject certificate of occupancy does not cover the rear portion of the store. In the opinion of the appellant there were other enterprises in the District of Columbia, his competitors, that carried much more provocative clothing and novelty items than his establishment and they were not prosecuted.

15. The Board finds that the specification as to the use of the premises as a public hall is not properly before the Board.

CONCLUSIONS OF LAW AND OPINION:

In addressing the merits of the appeal, the Board must determine whether the officials of the District of Columbia who ruled on this matter properly interpreted and applied the provisions of the Zoning Regulations. If the subject business does fall within the definition of a "sexually oriented business establishment," then the District was correct in revoking the certificate of Occupancy.

A "sexually oriented business establishment", according to Section 1202 of the Zoning Regulations, is one "which has as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals, films, materials and articles..... which are distinguished or characterized by their emphasis on matters depicting, describing or related to specified sexual activities and specified anatomical areas.

The Board concludes that the portion of Section 1202 pertaining to live performances is not pertinent in this appeal and not before the Board. Based on the evidence presented by representatives of the District of Columbia Government and from statements of the appellant himself the Board concludes that the existence and sale thereof of the magazine-type of newspaper "New York Met Personals" on the premises constituted a sexually oriented business establishment. The area devoted to the clothing store was approximately 500 square feet. The record evidences that at times the amount of clothing on display ranged from zero to four items. The clothing items consisted of novelty clothing such as crotchless panties. There was also a clothing catalogue from which clothing and novelty items could be purchased. Also on display on the premises were paintings allegedly not for sale. There were also two albums, magazines and newspapers. Based on the scarcity of clothing items for sale on the premises the Board concludes that the sale of the aforementioned newspaper which depicted males and females engaged in inter-

course, cunnilingus and fellatio constituted a significant portion of the stock-in-trade of this establishment. The Board thus concludes that the District of Columbia committed no error in its determination that the establishment was a sexually oriented business establishment, and was therefore operating without a proper certificate of occupancy. The Board concludes that the proposed revocation of the certificate of occupancy was proper. Accordingly it is ORDERED that the appeal is DENIED and the decision of the Administrator, Building and Land Regulation is UPHeld.

VOTE: 3-0 (Patricia N. Mathews, William F. McIntosh and Charles R. Norris to deny and uphold; Carrie L. Thornhill and Douglas J. Patton not present, not voting).

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

ATTESTED BY:


EDWARD L. CURRY
Acting Executive Director

FINAL DATE OF ORDER: SEP 23 1986

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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