

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 16279 Application of Abe Mason and J.M.M. Corporation, pursuant to 11 DCMR 3107.2, for a variance from the use provisions (Subsection 721.2) to allow a Sexually-Oriented Business Establishment, "Member Only Private Video Club-Rental-Retail Amusement Arcade" in a DD/C-2-C District at premises 919 5th Street, N.W. (Square 516, Lot 325).

HEARING DATE: November 19, 1997
DECISION DATE: November 19, 1997 (Bench Decision)

ORDER

SUMMARY OF EVIDENCE:

The property which is the subject of this application is located at 919 5th Street, N.W. The prior owner was the Trading Post. The applicant formerly leased the site from the prior owner and operated a video rental store.

Two certificates of occupancy (Cs of O) were issued on the site. Certificate of Occupancy No. B176128 was issued on November 13, 1996 to Jose Montiel allowing a video membership store, not sexually oriented, and C of O No. B17613 dated November 19, 1996 was issued to J.M.M. Corporation, the applicant, allowing the same use as the first C of O. The applicant purchased the property on March 12, 1997.

The applicant proposes to operate a sexually oriented members only video store at the site. The applicant is seeking a use variance for this purpose.

ISSUES AND ARGUMENTS:

- 1. Whether there exists a unique or exceptional situation or condition related to the property which creates a undue hardship for the owner in complying with the Zoning Regulations?**

The applicant testified that, according to officials at the Department of Consumer and Regulation Affairs (DCRA), to be in compliance with the law for operating a non-sexually oriented video store, the applicant could have 30 percent non-sexually oriented videos located in the open area at the site, and 70 percent sexually oriented videos located behind the screen wall at the site.

The applicant stated that the certificate of occupancy allowing a non-sexually-oriented business was applied for in error. The application should have been for a sexually-oriented business.

The applicant testified that its operation did not comply with the 30 percent to 70 percent ratio and that they were operating a sexually-oriented business without being aware that the business was in violation of the law. The applicant was cited for the violation. The applicant seeks a use variance to bring the business into compliance.

2. Whether the property can be used for any permitted purpose?

The applicant testified that since March 15, 1997, the site has operated as a non-sexually oriented video store, pending approval of this Board.

3. Whether a variance granting the application would be of substantial detriment to the public good?

The applicant maintained that allowing the proposed use would not create problems for the area in terms of traffic, parking or loitering. He testified that when there are problems outside of the establishment, he calls the police. He also testified that he patrols the outside premises to keep loitering down.

One witness who testified in opposition to the application is a patrol sergeant with the 1st District, Metropolitan Police Department. He stated that he patrols the area that encompasses the subject site. He stated that the nature of the business is not conducive to the area and creates problems with public safety on a daily basis. The business has attracted transvestites and others who stop on their way into the downtown area, whether walking or driving. He maintained that it is a source of disharmony in the community.

He noted that the site is located off of a major thoroughfare, K Street and Massachusetts Avenue at the 400 and 500 blocks. Given that it is a major thoroughfare for pedestrian and vehicular traffic for tourists, residents and visitors, it is one of the first sites visible by those coming into the city. It was his view that this business would not be a positive way to represent our city.

He cited a number of criminal activities that were reported in the area, and stated that the type of business being proposed is not conducive to the community's needs and wants.

The applicant challenged the witness's involvement in the area and denied that this business can be linked to the criminal activity discussed.

FINDINGS OF FACT:

Based on the evidence of record, the Board finds as follows:

1. The property is not unique.
2. The applicant is currently operating a non-sexually oriented business that complies with the Zoning Regulations.

3. The problems enumerated by the police department representative are likely to continue if a sexually-oriented business is allowed to operate at the site.

CONCLUSIONS OF LAW AND OPINION:

Based on the evidence of record, the Board concludes that the applicant is seeking a variance from the use provisions to allow a sexually-oriented business in a DD/C-2-C District. The granting of such a variance requires a showing through substantial evidence in the record that there exists a unique or exceptional situation or condition related to the property which creates an undue hardship for the owner in using the property in compliance with the Zoning Regulations. The applicant must also demonstrate that granting the relief requested would not be of substantial detriment to the public good, nor would it impair the intent, purpose and integrity of the Zoning Regulations and Map.

The Board is of the opinion that the applicant has not met this burden of proof. The Board notes that the applicant is currently operating a permitted use at the site, demonstrating that the property can be put to a use that does not require a variance.

The Board concludes that the applicant has failed to demonstrate that there is an exceptional situation or condition in the property that causes an undue hardship regarding the use of the property. Further, the Board concludes that the relief cannot be granted without substantial detriment to the public good and without impairing the intent, purpose and integrity of the Zoning Regulations and Map.

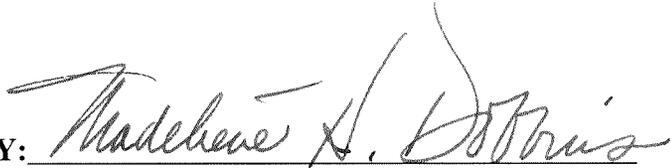
The Board concludes that Advisory Neighborhood Commission (2C) did not submit a written report to which "great weight" can be given.

Accordingly, it is hereby **ORDERED** that the application be **DENIED**.

VOTE: 3-0 (Betty King, Susan Morgan Hinton and Sheila Cross Reid to deny; Laura M. Richards not present, not voting).

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

ATTESTED BY:



MADELIENE H. DOBBINS

Director

FINAL DATE OF ORDER: FEB 18 1998

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UNDER 11 DCMR 3103.1, "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."

ord16279/TWR/LJP

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



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As Director of the Board of Zoning Adjustment, I certify and attest that on
FEB 18 1998 a copy of the order entered on that date in this matter was
mailed first class, postage prepaid to each party who appeared and participated in the public
hearing concerning this matter, and who is listed below:

James T. Wright
805 Florida Avenue, N.W.
Washington, D.C. 20001

Mr. Carl N. Lynch
Mr. Jose Montiel
919 5th Street, N.W.
Washington, D.C. 20001

Sergeant Herbert Barnes
Metropolitan Police Department
415 4th Street, S.W.
Washington, D.C. 20024

Attested By: _____

A handwritten signature in cursive script, reading "Madeliene H. Dobbins", written over a horizontal line.

MADELIENE H. DOBBINS

Director

Date: FEB 18 1998

Attest/ljp