

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18114 of Ward 5 Improvement Association, pursuant to 11 DCMR §§ 3100 and 3101, from decisions of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Certificate of Occupancy No. 1001838 on April 21, 2010; Certificate of Occupancy No. 1002471 on June 22, 2010; and Certificate of Occupancy No. CO1101152 on June 24, 2011; all for a restaurant with nightclub (not a sexually oriented business establishment), in the C-M-2 District at premises 2127 Queens Chapel Road, N.E. (Square 4258, Lot 34).¹

HEARING DATES: October 26, 2010 and September 27, 2011
DECISION DATES: December 7 and 14, 2010, and February 8, March 29, July 12, September 20, and November 8, 2011

DECISION AND ORDER

This appeal was submitted on June 11, 2010 by Don Padou on behalf of the Ward 5 Improvement Association (“Appellant”) to challenge the issuance of certificates of occupancy to the Stadium Group LLC to operate a “restaurant with nightclub, not a sexually oriented business establishment” at 2127 Queens Chapel Road, N.E., on the ground that the business was operating as a sexually oriented business (“SOBE”) and therefore was not permitted as a matter of right. Following a public hearing, the Board of Zoning Adjustment (“the Board”) voted on November 8, 2011 to deny the appeal.

¹ The caption has been modified from that used in the public notice of this proceeding to reflect that the appeal was amended to encompass certificates of occupancy issued subsequently. The appeal originally challenged only one certificate of occupancy issued for the subject property in April 2010. By letters dated June 27, 2010 and August 4, 2010, the Appellant indicated that the appeal was intended to encompass a permanent certificate of occupancy issued June 21, 2010 as well as the temporary certificate of occupancy that was issued April 21, 2010 and extended on May 21, 2010, with the same basis for the appeal with respect to each certificate of occupancy. Finally, the Appellant was permitted to amend the appeal to encompass a new certificate of occupancy, issued June 24, 2011, that superseded the prior certificate.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated June 15, 2010, the Office of Zoning provided notice of the appeal to the Zoning Administrator, at the Department of Consumer and Regulatory Affairs (“DCRA”); RF Holding, LLC, the owner of the subject property; the Office of Planning; the Councilmember for Ward 5; Advisory Neighborhood Commission (“ANC”) 5B, the ANC in which the subject property is located; and Single Member District/ANC 5B09. Pursuant to 11 DCMR § 3112.14, on July 27, 2010 the Office of Zoning mailed letters providing notice of the hearing to the Appellant; the Zoning Administrator; RF Holding LLC and the Stadium Group LLC (respectively, the owner and lessee of the subject property); and ANC 5B. Notice was also published in the *D.C. Register* on July 30, 2010 (57 DCR 6720) and on August 20, 2010 (57 DCR 7663).

Party Status. The Appellant, DCRA, and ANC 5B were automatically parties in this proceeding. The Board granted a request to intervene submitted by the Stadium Group LLC (“Intervenor”) in opposition to the appeal.

ANC Report. ANC 5B did not submit a report or participate in the hearing in this proceeding.²

FINDINGS OF FACT

1. The property that is the subject of this appeal is located at 2127 Queens Chapel Road, N.E. (Square 4258, Lot 34). The property is owned by RF Holdings LLC and is leased to Stadium Group LLC for its operation of a business called the Stadium Club.
2. The Stadium Club began operation on April 22, 2010. The subject property was previously used as a warehouse.
3. The Stadium Club contains two principal areas: a restaurant and a nightclub. The nightclub portion contains a bar, an adjoining area containing low tables and chairs for patrons, three stages for dancing, one stage for a DJ booth, and a series of 12 small rooms along a hallway behind the bar, which are used for private dances. The private rooms, most of which are eight feet by eight feet in dimension, are open to the hallway and are not enclosed by doors or curtains; their use is monitored by cameras and club employees.
4. The women who perform at the club are sometimes nude and are subject to a set of rules established by the Stadium Club to govern their conduct at the nightclub. The rules, which have been in effect with some revisions since the Stadium Club opened, prohibit the

² The Board is required to give “great weight” to the issues and concerns raised by the affected ANC. Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001).) Because ANC 5B did not participate in this appeal, there was no statement of issues or concerns to which the Board can give great weight.

performers from having physical contact with patrons or with each other during performances; limit the duration of floorwork on the stage to no more than three seconds; preclude floorwork on tables (*i.e.* “the bottom of both ... feet must be flat on the table at all times”); and require that all dancing must be on designated stages or on tables at least three feet from customers. The rules specifically direct that “dancers shall not fondle or touch their genitals, pubic region, buttocks or breasts in a suggestive or erotic manner. Dancers shall not simulate (or perform) any acts of intercourse, masturbation, sodomy, bestiality or other acts intended to stimulate or arouse.” The Stadium Club’s “rules and regulations for dancers” emphasize that strict adherence to the performance rules is required, and that “failure to follow the rules of conduct will result in immediate voiding of our rental space agreement.” (Exhibits 25, 42; Hearing Transcript (“Tr.”) of October. 26, 2010, p. 192-193.)

5. The subject property is zoned C-M-2. The C-M-2 Zone District allows use as a restaurant but does not permit sexually oriented business establishments as a matter of right. (*See* 11 DCMR § 801.2.)

6. The Zoning Regulations define “sexually oriented business establishment” in § 199 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 that presents as a substantial or significant portion of its activity, live performances, films, or other materials, that are distinguished or characterized by their emphasis on matters depicting, describing, or related to specified sexual activities and specified anatomical areas.

These 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 here, it shall not be deemed to constitute any other use permitted under the authority of this title.

7. The “specified sexual activities” referred to in the definition of “sexually oriented business establishment” are defined in § 199 as “the following activities:”

(a) Acts of human masturbation, sexual intercourse, sexual stimulation or arousal, sodomy, or bestiality; and

(b) Fondling or other erotic touching of human genitals, pubic region, buttock, or breast.

8. The “specified anatomical areas” referred to in the definition of “sexually oriented business establishment” are defined in § 199 as “parts of the human body as follows:”

(a) Less than completely and opaquely covered human genitals, pubic

region, buttock, and female breast below a point immediately above the top of the areola; and

- (b) Human genitals in a discernibly turgid state, even if completely and opaquely covered.
9. The first certificate of occupancy for the Stadium Club was issued on April 2, 2010 as a temporary certificate that approved use of the subject property as “Nightclub and Restaurant with accessory parking (Not a Sexually Oriented Business Establishment)” subject to certain conditions. Before approving issuance of the first certificate, the Zoning Administrator made a determination that the planned use of the subject property by the Stadium Club would not constitute a “sexually oriented business establishment” as defined in the Zoning Regulations because the activities, including the nude dancing, planned at the establishment would not entail any of the “specified sexual activities” set forth in the zoning definition of a sexually oriented business establishment.
 10. The Zoning Administrator testified that he paid particular – even extraordinary – attention to the application for a certificate of occupancy submitted by the Stadium Club, the first instance in his experience at DCRA involving an establishment that might be construed as a sexually oriented business establishment. Before approving the application, the Zoning Administrator conducted an analysis of whether the live performances, including the nude dancing, that the Stadium Club was planning to offer its patrons would involve both the specified sexual activities and specific anatomical areas contained in the zoning definition of a sexually oriented business establishment. The analysis included the Zoning Administrator’s review of materials provided with the application, consultation with DCRA counsel, and telephone calls and a meeting with a representative of the Stadium Club to discuss the proposed use and ensure that it was allowed as a matter of right under the Zoning Regulations. The Zoning Administrator’s discussions with the Stadium Group addressed matters such as the nature of the entertainment that would be offered; what portions of the club would be used for what purpose, considering the floor plans of the planned space; the location and the state of dress of the dancers when performing; and the planned use of the lounges behind the stage, where entertainers would perform in the nude but would be separated from patrons and were not permitted, pursuant to the rules of the establishment, to engage in sexual activities or activities falling within the definition of a sexually oriented business establishment.
 11. A letter dated April 1, 2010 from Keith Fornay, co-owner of the Stadium Club, to the Zoning Administrator reiterated the scope of the planned operation of the establishment previously described in the meeting between the Zoning Administrator and representatives of the Stadium Club. The letter stated that “the club will be in strict compliance with the zoning as well as the ABC [i.e. Alcoholic Beverage Control] Liquor license requirements. As such, there will be a 3 foot cordon between the patrons and all nude dancers. The dancers will perform their dance routines on one of four main stages which are 3 to 4 ft. off

the ground or on one of the table top platforms which are 18” off the ground. There will be NO contact of a sexual nature between the patrons and the dancers permit[ted] in the club....[W]e will have approximately 10 security personnel in and around the club at all times all having radio communications with each other and the central office. In the central office we maintain two monitors which display the views from a bank of cameras all around the establishment which give us 100% video coverage of the entire establishment such that we can immediately dispatch security to any area should any violations of our no contact rule between a naked dancer and a patron occur....” (Exhibit 22.)

12. Certificate of Occupancy No. CO1001525 was issued on April 2, 2010 as a temporary conditional certificate with an expiration date of May 3, 2010. The certificate of occupancy approved use of the subject property as “Nightclub and Restaurant with accessory parking (Not a Sexually Oriented Business Establishment)” subject to conditions that prohibited alcohol on the premises and addressed lighting, fire safety, and lot consolidation subdivision. The certificate of occupancy indicated a change of use from “retail or wholesale store – M” to “Night Club – A-2.”
13. Certificate of Occupancy No. CO1001838 was issued on April 21, 2010 to reflect an increase in the permitted occupant load (*i.e.* an increase in the maximum number of persons who may occupy the facility) of the authorized use at the subject property. The new temporary conditional certificate, which was set to expire on May 21, 2010, authorized the Stadium Group to use the subject property as “Restaurant with Nightclub with accessory parking (Not a Sexually Oriented Business Establishment)...”. The certificate was issued subject to a condition requiring recordation of an executed covenant or application for a consolidation subdivision encompassing the two subject lots. By memorandum dated May 21, 2010, the Zoning Administrator documented approval of a time extension of Certificate of Occupancy No. CO1001838 until June 21, 2010. (Exhibit 4.)
14. Certificate of Occupancy No. CO1002471 was issued on June 22, 2010 and authorized the use of the subject property by the Stadium Group as a “Restaurant with Nightclub with accessory parking (Not a Sexually Oriented Business Establishment) Maximum Occupancy Load 386; with 348 seats.” (Exhibit 12.)
15. Sometime after the Stadium Club began operation (on April 22, 2010) but before the permanent certificate was issued (on June 22, 2010), the Zoning Administrator received an email from Don Padou asserting that the use of the subject property was a sexually oriented business establishment because the “strip club” offered nude dancing. However, DCRA has interpreted the zoning definition of “specified sexual activities” as not encompassing “simple nude dancing” – *i.e.* live performances that are not characterized by their emphasis on both specified sexual activities and specified anatomical areas – and thus did not consider a communication about nude dancing as a complaint about the operation of a SOBE. The Zoning Administrator did not receive any complaints, before issuance of the permanent

certificate of occupancy on June 22, 2010, indicating that performances at the club exceeded nude dancing and involved activities in violation of the law.

16. The Office of the Zoning Administrator processes approximately 200 applications for certificates of occupancy each month. The Zoning Administrator becomes personally involved with five or six of those applications, and meets with applicants perhaps two or three times per month. After approving an application for a certificate of occupancy, the Zoning Administrator does not visit the site or make "spot checks" of an authorized use absent a reason to believe that an applicant has lied on an application about the intended use of the property.
17. In this case, the Zoning Administrator did not visit the subject property while the temporary certificates of occupancy were in effect. The Zoning Administrator testified that he did not find it necessary to confirm, after the establishment began operation, that the actual operation at the subject property was in compliance with the representations made by the Stadium Group in its application for a certificate of occupancy because no complaints were received before the permanent certificate of occupancy was issued. The Zoning Administrator noted that the certificate of occupancy would be subject to revocation if his reliance on the Stadium Group's representations was later shown to have been misplaced and that activities were occurring at the establishment that were outside the scope of the use authorized by the certificate of occupancy.
18. The Appellant submitted affidavits by two persons who attended the Stadium Club for several hours on the evening of June 16, 2010. The affidavits described the visits, especially with respect to the actions of various dancers who allegedly exposed their genitalia while dancing nude in a sexually suggestive manner and fondled themselves in close proximity to customers. The affidavits stated that dancers sometimes touched customers, who were also permitted to touch the dancers at times. (Exhibits 13, 14.) In response to a question from the Board at the public hearing, one affiant indicated that he did not feel sexually stimulated or aroused while watching the dancers on the stage in the main room at the club, but did when witnessing a private dance in one of the back rooms and was touched by the dancer. (Tr. of Oct. 26 at 222-223.) The affidavits were completed in July 2010 and were not provided to DCRA except as part of this appeal.
19. The Intervenor presented testimony by the general manager of the Stadium Club, who disputed the veracity of the affidavits submitted by the Appellant and described operations at the nightclub, including efforts made by the business managers to enforce the rules adopted by the Stadium Club and ensure that it did not operate as a sexually oriented business establishment. The Intervenor indicated that 36 cameras have been installed inside and outside the building at the subject property in part to ensure compliance with the rules. The cameras allow monitoring of the nightclub operations, including activities in the private rooms. In addition, the nightclub manager and other nightclub staff circulate every half-

hour around various parts of the nightclub, as well as outside the building, to observe the activities of performers and customers.

20. The Stadium Club submitted an application on February 9, 2011 for a new certificate of occupancy to reflect a load change. The increase in load was subject to the review and approval of the Permit Operations Division of DCRA especially for compliance with standards set forth in the Construction Codes. Although the approved use had already been established, which would normally negate the need for additional zoning review, in this case the Zoning Administrator opted “to do some further investigation to ensure that the use was still a use that’s approvable under the Zoning Regulations” and to reconfirm his prior conclusion that the use was not a sexually oriented business establishment.
21. The investigation encompassed an inspection of the Stadium Club operation by Justin Bellow, then a member of the Zoning Administrator’s staff for zoning enforcement; discussions between the Zoning Administrator and representatives of the Stadium Club to gather additional information about the Stadium Club’s rules for its performers and to discern whether those rules were clearly communicated as part of the management operation as an indication as to whether any sexually oriented activity would be tolerated; and the Zoning Administrator’s discussions with representatives of the Alcoholic Beverage Regulation Administration (“ABRA”), the licensing entity for the Stadium Club, with its own set of licensure regulations, to inquire as to whether ABRA had any evidence in the form of complaints or investigation results of any sexually oriented activity occurring at the Stadium Club. The Zoning Administrator learned that an ABRA inspector had been to the property and reported seeing no specified sexual activities occurring there, and that there had been no reports or complaints to ABRA about sexually oriented activity at the Stadium Club. Other than this appeal, DCRA has not received any complaints regarding the conduct of the dancers at the Stadium Club. (Exhibit 37; Tr. of Sept. 27 at 128-134.)
22. The Zoning Administrator testified that Mr. Bellow had performed many prior inspections, was not known to any member of the Stadium Club’s management or staff, and was sent to the establishment on March 24, 2011, unannounced, to attend a performance and report his observations to the Zoning Administrator. Before going to the facility, the enforcement staffer met with the Zoning Administrator to discuss, in detail, the definitions in the Zoning Regulations having to do with sexually oriented business establishments, specified anatomical areas, and specified sexual activities. The staffer was instructed to discern, in the context of looking at the performances, whether any of the activities listed in the zoning definitions were in fact occurring, because his report would be relevant to the Zoning Administrator’s decision on whether to issue the requested certificate of occupancy. The enforcement staffer subsequently completed a report, which was submitted to the Zoning Administrator, and also met with the Zoning Administrator to discuss, in detail, his observations about the activities occurring at the Stadium Club. (Exhibit 42; Tr. of Sept. 27 at 133-140.)

23. According to his report, the enforcement staffer spent 40 minutes at the Stadium Club, arriving around 11:30 p.m. with the purpose of “gain[ing] insight on whether Stadium Club, LLC was conforming to their Certificate of Occupancy classification as a “Non Sexually Oriented Business Establishment.” The staffer “initially stationed [himself] at the main bar to observe the dancers’ behavior and later moved around to observe all publically [sic] accessible areas of the club.” The staffer observed approximately 12 dancers, who appeared on one of three stages and “used a pole mounted at the center of the stage to perform various maneuvers during their allotted performance time” as well as performing table dances for patrons in the seating area, a “setup [that] afforded minimal interaction between dancers and patrons, as dancers performed on tables while the patrons remained seated.” The report stated that security guards were present but “there were no incidents between dancers and patrons that required the intervention of security” while the staffer was on site. The staffer did observe “instances where a dancer would momentarily touch her breast and/or buttock, but these instances lasted for no more than a second” and “did not rise to the level of fondling” in the opinion of the zoning enforcement staffer. The report stated that the staffer “did not witness any of the dancers engaging in any acts of human masturbation, sexual intercourse, sexual stimulation or arousal, sodomy, or bestiality during [his] time at the establishment.” (Exhibit 42.) The staffer testified at the public hearing that he had not been sexually stimulated or aroused by what he observed at the Stadium Club. (Tr. of Sept. 27 at 192.)
24. The Zoning Administrator assessed the report as an indication that the enforcement staffer had seen nude dancing on both poles and tables, but no lap dances, no touching of the performers except when the dancers’ hands brushed against their own bodies momentarily in the course of a dance performance, and none of the specific acts that would constitute “specified sexual activities” within the meaning of the Zoning Regulations, including fondling. The Zoning Administrator consulted *Webster’s* dictionary for a definition of “fondling,” which is not defined in the Zoning Regulations,³ to discern the difference between “fondling” and other forms of touching before concluding that the touching actions by the performers did not constitute “fondling.” The dictionary definition read by the Zoning Administrator described “fondle” or “fondling” as “to handle tenderly, lovingly, or lingeringly or caress.” (Exhibit 42; Tr. of Sept. 27 at 133-140.)
25. Based on his conversation with the enforcement staffer about the specific details of the dancers’ activities, the Zoning Administrator concluded that the performances were in the nature of dances performed to music and not sexually oriented activities. (Tr. of Sept. 27 at 160-161.) Nothing in the staffer’s report or the Zoning Administrator’s conversation with the Stadium Club representatives caused the Zoning Administrator to conclude that the Stadium Club was operating as a sexually oriented business establishment. Rather, the totality of the information led him to conclude that the performances occurring at the

³ Pursuant to § 199.2(g), words not defined in the Zoning Regulations “shall have the meanings given in *Webster’s Unabridged Dictionary*.”

Stadium Club did not present any of the “specified sexual activities” as defined in the Zoning Regulations. (Hearing Tr. of September 27, 2011, p. 141-142.)

26. Certificate of Occupancy No. CO1101152 was issued on June 24, 2011 and authorized the use of the subject property by the Stadium Group as a “Restaurant with Nightclub with accessory parking (Not a Sexually Oriented Business Establishment) Maximum Occupancy Load 396, with 349 interior seats and a summer garden with 15 seats.” The “summer garden” – a portion of the building with a roof supported by columns, but open on the sides – allowed a change in load so that the Stadium Club could create an outdoor area where patrons may smoke. (Exhibits 42, 38.)
27. The Ward 5 Improvement Association describes itself as an unincorporated non-profit association with “a civic purpose: to engage in civic activities intended to improve the quality of life of Ward 5 residents and business owners.” Membership in the association, which is “open to any resident or business owner of Ward 5 upon a majority vote by existing members,” presently includes the First Christ Apostolic Church, located on a site abutting the subject property, and two individuals living approximately 1,000 feet from the subject property as well as Don Padou, the president of the association, and Abigail Padou, its secretary, who live approximately 1.5 miles away. The members were involved beginning at least in early April 2010 in activities pertaining to the Stadium Club, although the association was not formally created until this appeal was filed. (Exhibits 1, 22 at attachment 4; 27; Hearing Tr. of October 26, 2010 at 146.)

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by § 8 of the Zoning Act to “hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal” made by any administrative officer in the administration or enforcement of the Zoning Regulations. D.C. Official Code § 6-641.07(g)(1) (2008 Repl.).) (*See also* 11 DCMR § 3100.2.) Appeals to the Board of Zoning Adjustment “may be taken by any person aggrieved, or organization authorized to represent that person, ... affected by any decision of an administrative officer...granting or withholding a certificate of occupancy...based in whole or part upon any zoning regulations or map” adopted pursuant to the Zoning Act. (D.C. Official Code § 6-641.07(f) (2008 Repl.).) (*See also* 11 DCMR § 3200.2.) In an appeal, the Board may “reverse or affirm, wholly or partly; or may modify the order, requirement, decision, determination, or refusal appealed from; or may make any order that may be necessary to carry out its decision or authorization; and to that end shall have all the powers of the officer or body from whom the appeal is taken.” (11 DCMR § 3100.4.)

Jurisdictional and Procedural Motions

Jurisdictional Motions. The Intervenor and DCRA both filed motions asserting that the Board

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lacked jurisdiction to hear this appeal due to the identity of the Appellant and the timing of the appeal. The Board finds no merit in the arguments raised in those motions.

The Board concludes that the Ward 5 Improvement Association is a “person aggrieved” for purposes of bringing this appeal. Membership in the association includes a church located on a site abutting the subject property as well as individual members, and members of the association have been engaged in various activities pertaining to the planned use of the subject property by the Stadium Club, particularly with respect to its liquor license and zoning classification. The filing of this appeal represents another effort by the members to ensure that the use of the subject property is consistent with applicable regulations, and thus the Ward 5 Improvement Association is affected more than the general public by the decision to issue a certificate of occupancy to the Stadium Club. *See Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 922-923 (D.C. 1980) (Board’s decision to allow appeal by neighborhood association and individual upheld where the individual lived immediately behind the subject site and the association represented residents of both the immediate and general area and had a history of appearing in zoning matters before the Board; administrative appeals do not necessarily depend on the elements of standing that judicial review would require, and a property owner has a sufficient interest in the zoning of adjoining property to permit an appeal on the basis of that interest alone, without additional allegations of interest or injury). Moreover, the Zoning Regulations do not preclude the filing of an appeal by an entity that is not incorporated, or require the formal formation of an association any specific time in advance of the filing of an appeal. Accordingly, the Board was not persuaded by the Intervenor or DCRA that the Ward 5 Improvement Association was not eligible to bring this appeal.⁴

Similarly, the Board was not persuaded by DCRA’s motion to dismiss the appeal as untimely. While DCRA argues that the Appellant knew about the Stadium Club’s plans for the subject property by early March 2010, the Board notes that the nightclub use did not begin operation until April 22, 2010, after issuance of the second temporary certificate of occupancy. The Appellant apparently did not know, and had no reason to know, that another temporary certificate had been issued earlier. Actual operation of the nightclub put the Appellant on notice that a certificate of occupancy had been (or should have been) issued for the property. This appeal was filed within 60 days of the issuance of the April 21 certificate of occupancy, and therefore the Board finds the appeal timely.

Motion in limine. The Intervenor requested that the Board limit the evidence to be adduced in the appeal to matters reviewed by and relied upon by the Zoning Administrator in approving the

⁴ The Board was not persuaded by the Appellant’s argument that the Ward 5 Improvement Association, “and its members, are in the ‘zone of interest’ created by the statutes and regulations governing sexually oriented businesses generally and strip clubs specifically and, therefore, have standing to assert those interests” (quoting *Brentwood Liquors v. DC ABC Board*, 661 A.2d 652 (D.C. 1995).) This contention does not address the relevant “person aggrieved” standard set forth in the Zoning Act and Regulations, and is not germane to this appeal since, as discussed in this order, the use of the subject property authorized by the certificate of occupancy at issue is not a sexually oriented business generally or a strip club specifically.

certificates of occupancy, and particularly requested that the Board exclude the affidavits submitted by the Appellant purporting to describe events at the Stadium Club occurring after issuance of the first permanent certificate of occupancy. The Appellant acknowledged that the Zoning Administrator did not have the affidavits when the initial temporary certificate of occupancy was issued, but noted that the appeal also encompassed the permanent certificate of occupancy, which was issued later. Especially in light of the eventual amendment of the appeal to include the latest certificate of occupancy, the Board determined to deny the Intervenor's motion *in limine* and admit the affidavits into evidence. The Board recognized the limited evidentiary value of those affidavits, since the information they contained was not provided to DCRA before issuance of the first permanent certificate of occupancy and was disputed in testimony at the public hearing. Throughout this appeal, the Board has considered the distinction between a determination made by the Zoning Administrator before approving issuance of a certificate of occupancy (which is germane to the Board's decision on an appeal of the decision to issue a certificate of occupancy) relative to information that becomes known after an establishment begins operation (which is not relevant to such an appeal but could provide the basis for an enforcement action if an entity is operating outside the scope of its authorized use).⁵

Mootness. The Intervenor also asked the Board to dismiss the appeal on the ground of mootness, citing the issuance of a new certificate of occupancy to the Stadium Group that superseded the prior certificate, which had been the subject of the appeal. DCRA argued that issuance of the newest certificate of occupancy rendered part of the case moot, since the prior certificate was no longer in effect and the circumstances as to how it was issued were no longer relevant. DCRA also argued that the Appellant should not be permitted to amend the appeal to include the newest certificate of occupancy because it represented a new zoning decision under 11 DCMR § 3100.2.

The Appellant asked the Board to deny the Intervenor's motion to dismiss, and instead to permit the Appellant to amend the appeal to include the newly issued certificate of occupancy "because both the old and new Certificates of Occupancy are the same in all essentials relevant to this appeal and the issuance of the new Certificate of Occupancy in no way disposes of the grounds for appeal." The Board concurred with the Appellant that issuance of the latest certificate of occupancy did not dispose of the grounds for the appeal and therefore permitted the requested amendment.

⁵ See Appeal No. 17439 of ANC 6A (order issued March 30, 2007) (issue before the Board is whether the facts known to the Zoning Administrator when the certificate of occupancy was issued could have reasonably led him to believe that the proposed use was to be a restaurant and not a fast food restaurant; appellant's assertions about how the establishment was operating subsequently were not the focus of the appeal); Appeal No. 13715 of Dennis P. Sobin (order issued December 3, 1982) (in an appeal of a decision by the Zoning Administrator, the Board will make its determination based only on evidence that Zoning Administrator had at the time the decision was made, and will not look behind the evidence submitted to the Zoning Administrator or take into account evidence and facts adduced at a public hearing on the appeal that were not before the Zoning Administrator).

The Merits

With regard to the merits of the appeal, the Appellant argues that the Zoning Administrator erred by issuing, to a “strip club,” a certificate of occupancy for an entity described as “not a sexually oriented business establishment.” Specifically, the Appellant claimed error initially because the “strip club” operated at the subject property offers nude dancing and is therefore a sexually oriented business establishment, and subsequently because the operation at the Stadium Club satisfied both elements of a sexually oriented business establishment as defined in the Zoning Regulations, *i.e.* because “the strippers ... expose ‘specified anatomical areas’” and because “both ‘fondling’ and ‘sexual stimulation or arousal’ take place” at the Stadium Club.⁶

Based on the findings of fact, the Board was not persuaded by the Appellant that an error occurred in the determination by the Zoning Administrator that the proposed use of the subject property by the Stadium Club would not constitute a “sexually oriented business establishment.” The Board concurs with DCRA that nude dancing itself is not a “specified sexual activity” as defined in the Zoning Regulations, and therefore finds no merit in the Appellant’s initial contention that the certificate of occupancy for the subject property must reflect its use as a sexually oriented business establishment merely because the “strip club” provides a venue for nude dancing. The Board concludes that the Zoning Administrator conducted an appropriate analysis of the planned use before approving the requested certificate of occupancy, and finds that no error was made in the Zoning Administrator’s determination that the planned use of the property was not as a sexually oriented business establishment.⁷

Although the Appellant repeatedly refers to the use of the subject property as a “strip club,” that term was not used on any of the certificates of occupancy issued to the Stadium Club. Pursuant to § 3203.8(a), an approved use must be designated on a certificate of occupancy in terms of a use classification established by the Zoning Regulations. A “strip club” is not a use

⁶ The Appellant also asserted that the “Zoning Administrator failed to apply applicable zoning regulations governing the location of sexually oriented businesses and has, instead, relied upon a repealed liquor license provision to find that the Stadium Club is not a sexually oriented business.” The Board finds no merit in this assertion. Considering especially his testimony at the public hearing, the Board concludes that the Zoning Administrator’s decision was based solely on the Zoning Regulations. The record reflects that other employees of DCRA and representatives of the Stadium Group sometimes referred to regulations applicable to alcoholic beverage control, but those regulations played no role in the analysis and decision made by the Zoning Administrator.

⁷ The Appellant’s revised argument contends that the Stadium Club use satisfies both elements of the definition of a SOBE because the performers expose “specified anatomical areas” – a fact known to the Zoning Administrator about the planned use – and because “both ‘fondling’ and ‘sexual stimulation or arousal’ take place” at the Stadium Club. The latter assertion is an allegation about the actual operation of the establishment, and is not a fact that could have been known to the Zoning Administrator while assessing the merits of the application for a certificate of occupancy for the future use of the subject property in April 2010 when the determination was initially made. The Board makes no findings in this order about the actual operations of the Stadium Club, but notes that the Zoning Administrator is authorized to enforce the Zoning Regulations to ensure that the use of a particular property does not exceed the scope authorized by its certificate of occupancy. *See, e.g.,* Appeal No. 18027-A of Mehmet Kocak and Philly Pizza & Grill, Inc. (order issued December 1, 2010).

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classification established by the Zoning Regulations and thus cannot constitute an approved use. The certificates of occupancy at issue in this appeal designated the authorized use as “restaurant with nightclub.”⁸ Since a strip club can never constitute an approved use, the Board finds no merit in the Appellant’s assertion that “strip clubs are *per se* sexually oriented businesses.”⁹

While assessing the initial application submitted for a certificate of occupancy for the restaurant/nightclub use, the Zoning Administrator knew that nude dancing was planned at the venue, and that the presence of nude dancing alone does not constitute a sexually oriented business establishment. *See* Appeal No. 13967 of California Steak House, Inc. (order issued November 22, 1983).¹⁰ The Zoning Administrator was also aware that the proposed use *might*

⁸ The Zoning Regulations contain several references to “nightclubs,” including in the definition of “cabaret” set forth in § 199. *See also* §§ 1323.2(h) (“Bar, nightclub, or cocktail lounge” are preferred uses in the Arts subdistrict of the H Street Northeast neighborhood commercial overlay district); § 1704.1(b)(1) (purposes of the Downtown Arts district include creation of a strong arts-entertainment corridor comprising a “spine of theaters, movie theaters, restaurants, nightclubs, and arts-related retail uses along E Street from 6th to 14th Street, N.W.); § 1711.1(o) (preferred arts uses and arts-related retail and support uses in the Downtown Development overlay district include “Drinking Place, including bar, nightclub, or cocktail lounge”); §§ 1732.2(aa) and 1732.4(c) (uses that may be established on the ground floor of a building in the Mount Vernon Triangle District include “Drinking place, including bar, nightclub or cocktail lounge); and § 1908.1(m) (preferred arts uses and arts-related uses in the Uptown Arts-Mixed Use (ARTS) overlay district include Drinking Places, including bar, nightclub, or cocktail lounge).

⁹ The Appellant also argued that the Stadium Club “is a sexually oriented business because the point of the dancers is to arouse the customers.” While disclaiming an argument that nude dancing is *per se* sexually oriented, the Appellant asserted that “[s]trip club dancing is different than dancing. ... [T]he point of a strip club, its name tells you the point, is to arouse the customers. That means that both prongs of the test are met. The dancers are naked, and their actions are meant to arouse.” (Hearing Tr. of September 27, 2011, p. 205.) The Board finds no merit in the Appellant’s distinction between “strip club dancing” and other nude dancing for purposes of this appeal. Rather, the Board concludes that the Zoning Administrator appropriately assessed all information available to him, including detailed discussions with representatives of the Stadium Club about the planned performances and information about the layout of the restaurant/nightclub (and, later, an assessment of the establishment’s rules for performers) in making a determination that the planned use of the establishment was not a SOBE because the “specified sexual activities” component would not be present. The Board heard testimony from two witnesses, the Appellant’s affiant and the DCRA inspector, that they were not aroused by most, if not all, of the performances they witnessed. The Board notes that the Stadium Club performers have been instructed by management to avoid specific actions intended to arouse patrons, and finds that the Zoning Administrator reasonably distinguished “fondling” from other forms of touching when assessing the observations made by the DCRA inspector. Accordingly, the Board finds no error in the Zoning Administrator’s determination that the planned performances at the Stadium Club would not meet the definition of “specified sexual activities” despite the Appellant’s characterization of the “strip club” and performances by “strippers.”

¹⁰ This order concerned an appeal by California Steak House, Inc., of the revocation of its certificate of occupancy at an establishment in which live nude dancing constituted a substantial or significant portion of its activity and the live performances included displays of “specified anatomical areas.” In that case, inspectors observed activities they considered “specified sexual activities” because the type of activity constituted “sexual stimulation or arousal.” The Board concluded that “sexual stimulation or arousal” does not have to include touching (the inspectors observed no fondling or other erotic touching at the California Steak House), but concurred with the inspectors that the activities occurring at the establishment clearly went “beyond the limits of dancing in the nude” because the positions assumed by the women and the manner in which the women displayed themselves were “clearly designed to

constitute a sexually oriented business establishment depending on the operation of the business. In this case, the Zoning Administrator undertook an especially thorough analysis of all available information and properly made a determination that the planned use of the subject property would not constitute a sexually oriented business establishment, as defined in the Zoning Regulations, because one required element of the zoning definition of a SOBE, “specified sexual activities,” would not be present. When the establishment applied for another certificate of occupancy to increase its permitted load, the Zoning Administrator took additional measures to reassess his initial determination that the establishment was capable of operation as a restaurant/nightclub that is not a sexually oriented business establishment. Again considering all available information, the Zoning Administrator found no reason to alter his initial determination. The Board concludes that the Zoning Administrator acted reasonably in making those determinations, and finds no error in the issuance of the certificates of occupancy to the Stadium Club.

The Zoning Administrator consulted many sources of information relevant to the application before making his initial determination that the planned use of the subject property would not constitute a sexually oriented business establishment, and the Board concludes that the Zoning Administrator acted reasonably in making this determination. Information considered by the Zoning Administrator included materials provided with the application for a certificate of occupancy, consultation with agency counsel, and discussions with representatives of the Stadium Club to discuss the proposed use in considerable detail. Based on that information, the Zoning Administrator conducted an analysis of whether the live performances, including the nude dancing, would involve both the specified sexual activities and specific anatomical areas contained in the zoning definition of a sexually oriented business establishment. In view of his testimony at the public hearing, the Board finds that the Zoning Administrator was well-informed about the relevant definitions contained in the Zoning Regulations, and was familiar with past decisions by the Board interpreting those definitions, especially the *California Steak House* appeal. The Board does not agree with the Appellant that the Zoning Administrator’s “investigatory steps ... to assure himself that [the] Stadium Club was not a SOBE” were not “capable of establishing whether or not [the] Stadium [Club] was a SOBE.” The Zoning Administrator had sufficient information to make the determination as an informed judgment based on the Zoning Regulations. He understood the definition of a sexually oriented business establishment laid out in § 199, specifically with respect to what types of activity would fall within the definition relative to the types of performances planned at the subject property. The Zoning Administrator reasonably relied on representations made by the Stadium Group about the planned performances, particularly since those representations were made after discussions with the Zoning Administrator about the specific requirements of the Zoning Regulations and since the Stadium Group certified on its application that the establishment would operate as a restaurant/nightclub with nude dancing but not within the scope of a sexually oriented business establishment.

stimulate or arouse patrons.” The Board dismissed the appeal as untimely, and indicated that otherwise the appeal would have been denied on its merits.

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In this case, because the Stadium Club sought a second permanent certificate of occupancy to reflect a load change, the Zoning Administrator had an additional opportunity to assess the authorized use of the subject property after actual operation of the establishment had begun. Although no new zoning issue was raised by the load change, the Zoning Administrator undertook several additional measures to reinforce the validity of his initial determination that the restaurant/nightclub would not constitute a sexually oriented business establishment. The Zoning Administrator sent a staffer to conduct an undercover investigation after meeting with the staffer to discuss the details of the applicable provisions of the Zoning Regulations, properly consulted the dictionary to inform his distinction between “fondling” and touching that does not constitute “fondling,”¹¹ had discussions with officials at another regulatory agency to assess the establishment’s compliance with other operating requirements outside of zoning, determined that no complaints had been received at DCRA about the Stadium Club operations, had additional discussions with representatives of the Stadium Club, became familiar with the establishment’s rules for performers, and was satisfied that measures were put in place by the managers of the establishment to encourage compliance and enforce the rules against any violators. The rules were devised by persons at the Stadium Club who are knowledgeable about the applicable zoning and alcoholic beverage regulations, and are designed to prevent conduct that the club management knows could jeopardize the establishment’s permission to operate. Further, there was no evidence presented that a substantial or significant portion of activities at the Applicant’s business qualified it as a SOBE within the definition of §199.

The Board does not find that the Zoning Administrator should have undertaken additional measures to assess the planned use of the subject property before issuing the permanent certificates of occupancy, such as visiting the restaurant/nightclub in person to perform an inspection, viewing tapes from cameras installed at the establishment, or looking at its website.¹² The Zoning Administrator does not visit or inspect properties for which certificates of occupancy have been issued absent the receipt of a complaint or some reason to believe that misrepresentations were made in the application for a certificate of occupancy. Especially in light of the possibility of enforcement action in the event that the Zoning Administrator subsequently obtains information suggesting that an establishment is operating outside the scope of its authorized use, the Board concurs with DCRA and the Intervenor that the Zoning Administrator acted reasonable in not undertaking any additional measures suggested by the

¹¹ The Board finds no error by the Zoning Administrator in making this distinction. The Zoning Administrator reasonably concluded that “fondling,” as defined in the dictionary, has a temporal aspect “so that there has to be some time spent on the touching activity to be considered fondling, and a brushing of the body, which is a very short period of time, does not have the time frame that a fondling activity would have.” (Hearing Tr. of September 27, 2011, p. 140.)

¹² The Appellant relies on a provision of the Construction Code, 12A DCMR § 110.2.2, to argue that, in light of the prior use of the subject property as a warehouse, the Zoning Administrator was required to investigate the new use proposed by the Stadium Group when applying for a certificate of occupancy. The Board’s jurisdiction is limited to claims of error made in the administration and enforcement of the Zoning Regulations, and the Appellant cites no provision in Title 11 that imposes a duty to inspect on the Zoning Administrator. Rather, the relevant provision of the Zoning Regulations, § 3203, does not prescribe any specific duties or procedure to be employed by the Zoning Administrator in deciding whether to approve an application for a certificate of occupancy.

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Appellant to ensure that the Stadium Club was not operating as a sexually oriented business establishment.

Based on the findings of fact and conclusion of law, the Board concludes that the Appellant has not satisfied the burden of proof with respect to the claim of error in the issuance of certificates of occupancy to the Stadium Group LLC to operate a “restaurant with nightclub, not a sexually oriented business establishment” at 2127 Queens Chapel Road, N.E., on the ground that the business was operating as a sexually oriented business establishment and therefore was not permitted as a matter of right. Accordingly, it is therefore **ORDERED** that the appeal is **DENIED**.

VOTE: **4-1-0** (Konrad W. Schlater, Lloyd J. Jordan, Nicole C. Sorg, and Jeffrey L. Hinkle to Deny the appeal; Meridith H. Moldenhauer opposed to the motion to deny.)

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

A majority of Board members approved the issuance of this order.

ATTESTED BY: _____



SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: August 24, 2012

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.