

CITY OF WAUKESHA
MUNICIPAL ADMINISTRATIVE REVIEW APPEALS BOARD

In the Matter of the Nonrenewal of
City News and Novelty, Inc., License
for the Year January 26, 1996, through
January 26, 1997

APPLICANT'S PROPOSED FINDINGS OF FACT

1. It is uncontested that City News and Novelty, Inc., is a corporation which owns a business, which has been licensed by the City since 1990 pursuant to provisions of Waukesha Municipal Ordinance § 8.195(1) as an adult bookstore. An application for renewal was timely filed for the January 26, 1996 -January 26, 1997, licensing year by Daniel Bishop, Registered Agent for City News and Novelty, Inc. By resolution dated December 19, 1995, the City Council denied renewal of the license.

2. The City based its decision for nonrenewal on an alleged December 24, 1994, violation, permitting minors to loiter (¶ 2 of the Resolution), three alleged violations in regard to unobstructed view of a video viewing booth on November 30, 1994, December 1, 1994, and December 2, 1994 (¶ 3); allegations that minors were permitted to loiter on the premises on July 23, 1995, October 18, 1995, and November 29, 1995 (¶ 5), a patron having been convicted of lewd and lascivious conduct for having exposed himself to an employee at City News and Novelty on September 12, 1994 (¶ 6), a patron having been engaged in sexual conduct inside a viewing booth at City News and Novelty on February 28, 1995 (¶ 7), and a

patron having engaged in sexual conduct inside a viewing booth at City News and Novelty on March 12, 1995 (¶ 8).

3. In regard to the allegations of ¶ 2, the December 24, 1994, incident, as of the date the Resolution was passed, no conviction had been entered in a court of record. Both testimony and Exhibit 26 indicate that two citations involving this incident were given, and following trial in municipal court, convictions were entered and fines paid; however the matter is on appeal to circuit court and no decision had been rendered by December 19, 1995.

4. As to the allegations contained in ¶ 3, no conviction had been entered in a court of record pertaining to the November 30 and December 1 and 2, 1994, obstructed view violations which are alleged. Exhibit 26 establishes three citations issued to Daniel Bishop, three municipal court convictions and payment of fines, but no circuit court convictions on the circuit court appeals.

5. Furthermore, in regard to the allegations in ¶ 3, the testimony of Inspector Lemke established no such violations. Exhibit 24, a memo from Inspector Lemke to City Attorney Meitz, established that as of November 30, 1994, "the booth opening had been cut back with the exception of the end panel. The opening still had a narrow upright piece at the ends of the booths. I questioned whether this was permissible." And on December 9, "I took pictures of the booths to determine if the remaining portion

blocked the view into the booths which they did not." Additionally, Inspector Lemke's handwritten memo, Exhibit 25, prepared on December 9, 1994, indicates that photographs were taken of the booths confirming that "all booths are now consistent with what I observed in previous years." In his testimony, Inspector Lemke confirmed that by November 30, 1994, all partitions had been cut back except the end panel which was six inches and appeared to be the same size as the original piece. He went back to the store on December 9. At that time the booths were in the same shape they had been on November 30, 1994, which was identical to the shape they had been in when they passed inspection in 1991, 1992, and 1993. (Tr., I, p. 273)¹ Consequently, we find that the allegation in Resolution ¶ 3 is not supported by the evidence.

6. Regarding the three allegations contained in ¶ 5 of the Resolution, we find that no convictions of any kind have been demonstrated, although municipal citations have been issued on each.

7. In regard to the allegations in ¶¶ 6, 7 and 8, we find that each patron was convicted as alleged. However, we also find that the three persons convicted were each patrons of City News and Novelty, not officers, directors or shareholders and

¹ The hearing in this matter took place on four separate occasions; consequently there are four separate transcripts. References to the transcript of the April 2, 1996, hearing will be noted as Tr., I; the April 9, 1996, hearing, Tr., II; the May 7, 1996, hearing, Tr., III; the May 8, 1996, hearing Tr., IV, followed by the appropriate page number.

furthermore that they were each convicted of violations of Wisconsin Statutes, not of violations of Waukesha Municipal Ordinance § 8.195. (See Exhibits 1, 2, 3, 4, and 5 as well as the testimony of Officer DeJarlais (Tr., I, 150-151) and Detective John Gibbs (Tr., I, 286-287)).

8. In addition, we find that this activity, while extremely serious in terms of the ethical, social, and health consequences, is unlikely to re-occur inasmuch as the video viewing booths have been removed. (See the testimony of Officer Dennis Angle, Tr., III, 87; also stipulation of counsel, Tr., I, 169-170).

9. As to the several allegations of minors being on the premises, we find that on several occasions City News and Novelty has been targeted by young people aged 16 and 17 who are desirous of effecting entry for various reasons, including theft of merchandise. (See, for example, the testimony of juvenile Justin Uphill, Tr., II, 132-138)

10. Viewing the evidence as a whole, it is apparent that whatever problems City News and Novelty has experienced can be divided into three broad areas: sexual activity on the part of patrons in the viewing booth area, minors entering the premises, whether with false ID or surreptitiously, and possibly a brief period of obstruction to view of the booths. The first and third of these problems appear to have been taken care of by the elimination of the viewing booths.

11. The most significant potential problem is that of minors unlawfully being on the premises. City News and Novelty appears to have taken this problem very seriously, both by its instructions to its employees (Tr., I, 110-118; Exhibits 6-10) and by the recent acquisition of a video monitor to magnify and record the identification card presented (Officer Angle's testimony, 139-140; also Officer Angle's testimony that since the installation of the new equipment, there appear to have been no problems with minors on the premises. Tr., I, 131; 139-140), as well as the recent modifications made at the request of the district attorney to the interior of the store so that customers are checked immediately upon entry to the store and sexually explicit materials are no longer immediately visible from the checkpoint. (Tr., I, 120, 122)

12. While we conclude that none of the possible violations of minors on the premises can be used as a basis for nonrenewal of the license (because none are convictions in a court of record), we are concerned with this potential problem area, and emphasize that City News and Novelty should continue, and possibly enhance, its efforts at finding solutions to this problem.

13. It is apparent from the testimony that City News and Novelty is not the only licensed business in which minors have found ingenious methods of attaining illicit entry (see testimony of Saressa Stolpa, who, if believed, has been going into taverns with false identification since she was approximately fifteen years

old, Tr., I, 51-53) and we urge continued vigilance on the part of business owners throughout Waukesha toward this problem.

14. The testimony of City News and Novelty employee David Hull we find to be basically credible. Certain testimony was offered in an effort to rebut portions of Hull's testimony. The testimony of juvenile Tim Morgan about the events of March 7, 1996, was offered apparently to contradict Hull's testimony that he is careful about checking ID. However, the testimony of Tim Morgan was internally inconsistent with other portions of his oral testimony (for example, he first testified that upon entering City News and Novelty his friend "walked in like right behind me, but then he was carded and he left then," Tr., III, 48, and later testified that his friend Jeremy went to Star Ship while he himself went to City News and Novelty where he hung around waiting for Jeremy, Tr., III, 74-75). In addition, Morgan's oral testimony at the hearing conflicted with the evidence which he gave in his written police report, Exhibit 34. For example, in his oral testimony, Morgan testified that he went to City News and Novelty after his AA meeting (Tr., III, 47, 69-70), but in his police report he said he went to City News and Novelty, then to the AA meeting (Exhibit 34, Tr., III, 64). Based on these critical inconsistencies, as well as Morgan's admission that he " has a really bad memory" (Tr., III, 81) we find that his testimony is not credible and is not sufficient to rebut the testimony of David Hull, the purpose for which it was offered.

15. Additionally, David Hull testified that it is the general policy of City News and Novelty to have two employees on duty during the second shift, from 4:00 p.m. to midnight. The city attempted to refute this testimony by evidence from Officers Konkol, Howard and Angle. However, as all three of these officers work third shift (from midnight to 8:00 a.m.), Tr., II, 28, 74, Tr., III, 92, this testimony was essentially un rebutted.

16. The city attempted through each of its police officer witnesses to show that City News and Novelty was unable to monitor the activities of customers in the viewing booths, and presumably, was therefore lax in its efforts to curtail sexual activity in the booths. However, this evidence would pertain only to the allegations in ¶¶ 6, 7 and 8 of the Resolution. As we find that these three allegations cannot, as a matter of law, serve as the basis for nonrenewal because they are not violations of municipal ordinance § 8.195 and are not violations on the part of the directors, officers, or stockholders of the corporate applicant (see Conclusions of Law), this issue is immaterial.

Dated this 28th day of May, 1996.

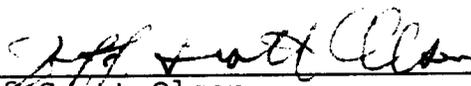
Respectfully submitted,

CITY NEWS AND NOVELTY, INC., Applicant

By

JEFF SCOTT OLSON
Attorney at Law
State Bar Number 1016284
Suite 403
44 E. Mifflin St.
Madison, WI 53703
(608) 283-6001

JULIAN, OLSON & LASKER, S.C.
PERCY L. JULIAN, JR.
State Bar Number 1010190
330 E. Wilson St.
P.O. Box 2206
Madison, WI 53701-2206
(608) 255-6400



Jeff Scott Olson
ATTORNEYS FOR CITY NEWS AND NOVELTY, INC.