

**CITY OF WAUKESHA
ADMINISTRATIVE REVIEW APPEALS BOARD**

**RE: IN THE MATTER OF THE NONRENEWAL OF
ADULT ORIENTED ESTABLISHMENT LICENSE
OF CITY NEWS AND NOVELTY, INC.**

FINDINGS, CONCLUSIONS AND DECISION

1. On November 15, 1995, City News and Novelty, Inc. applied to renew its adult oriented establishment license under the provisions of Section 8.195 of the Municipal Code of Waukesha for the license year commencing January 26, 1996. City News and Novelty, Inc., is the corporate licensee and operator of the adult oriented establishment located at 245 W. Main Street in the City of Waukesha. City News and Novelty, Inc. is subject to the provisions of Section 8.195 of the Municipal Code of Waukesha.
2. On December 19, 1995, the Common Council of the City of Waukesha passed Resolution R88-95 in which it determined not to renew the adult oriented establishment license of City News and Novelty, Inc. issued under the provisions of Section 8.195 of the Municipal Code of Waukesha.
3. Pursuant to Section 68.08, Wis. Stats., a request was made by City News and Novelty, Inc. to and for the Common Council to review its December 19, 1995 Initial Determination.
4. On January 22, 1996, the Common Council rendered by motion duly made, seconded and unanimously adopted a Decision on Review issued by letter dated January 23, 1996, in which it affirmed its December 19, 1995 Initial Determination.
5. Pursuant to Section 68.10, Wis. Stats., City News and Novelty, Inc. appealed the Decision on Review

issued by the Common Council to the City of Waukesha Administrative Review Appeals Board (hereinafter "the Board").

6. City News and Novelty, Inc. waived the time periods for this administrative review pursuant to Section 68.11, Wis. Stats., and the time period for the Board to make a final determination pursuant to Section 68.12, Wis. Stats.
7. Pursuant to Section 68.12, Wis. Stats. and Section 2.11 of the Municipal Code of Waukesha, an administrative hearing was held before the Board on April 2 and 9, and May 7 and 8, 1996 and the Board deliberated the case on June 10, 18, 25 and 28, 1996. The Common Council was represented by City Attorney Curt Meitz, City News and Novelty, Inc., the operator and licensee, was represented by attorneys Jeff Scott Olson and Percy Julian and the Board, comprised of Mayor Carol A. Opel, Ralph M. North III, and Alderman Jerome A. Seidl, was represented by Attorney John P. Macy.

The hearing was transcribed by a court reporter, witnesses were sworn, exhibits marked and preserved, and attorneys were allowed to cross examine witnesses called by the opposing side.

8. Prior to the testimony being heard, City News and Novelty, Inc. challenged the impartiality of Mayor Opel and Ald. Seidl and requested that they disqualify themselves from hearing this appeal. Both Mayor Opel and Ald. Seidl find that they did not vote upon any decision or participate in any discussion made by the Common Council in rendering its Initial Decision and Determination on Review. Further, they both find that they are not prejudiced in this matter and are impartial decision makers. Therefore, the Board rejects the challenge of City News and Novelty, Inc. in this regard.

9. Prior to the testimony being heard, the parties stipulated to the following:
 - A. Request for Review of Initial Determination was timely filed.
 - B. Request to appeal the Decision of Review was timely filed.
 - C. Hearing has been timely scheduled.
 - D. All notice requirements have been satisfied.
 - E. The court reporter would swear in the witnesses.
10. Prior to the testimony being heard, City News and Novelty, Inc. questioned the order of the hearing. The Board ruled that the Applicant would go first.
11. Prior to the testimony being heard, City News and Novelty, Inc. asked that the Board make a determination that the Common Council has the burden of proof in this matter. The Board took the issue under advisement.
12. Pursuant to Section 8.195 Municipal Code of Waukesha the purpose and rationale of licensing adult oriented establishments are as set forth in the preamble of Section 8.195 of the Municipal Code of Waukesha and are to combat and curb the adverse secondary effects brought on by adult oriented establishments; to protect the health, safety and welfare of the citizens of Waukesha from increased crime including sex related crimes; to preserve and stabilize its neighborhoods and to minimize the transmission of sexual diseases; but not to have the purpose or effect of imposing a limitation or restriction on the content of any communicative materials. Secondary effects of adult oriented establishments include contributing to physical deterioration and

blight of a neighborhood, a deleterious effect on both existing businesses around adult oriented establishments and surrounding residential areas, including increased transience and increased levels of criminal activities, including sex related crimes. In addition, studies from other communities relied upon by the Common Council found that viewing booths in adult oriented establishments have been and are being used by patrons of said establishments for engaging in sexual acts resulting in unsafe and unsanitary conditions in said booths.

13. Pursuant to Section 8.195 of the Municipal Code of Waukesha, the standards for issuance of license (i.e., to receive a new or renewal license to operate) are as set forth in Subsection 8.195 (4).
14. In that City News and Novelty, Inc. is a corporation, the standards for renewal are as set forth in Subsection 8.195 (4)(b) of the Municipal Code of Waukesha.
15. There is no evidence that there is a violation of Subsection 8.195 (4)(b)1 of the Municipal Code of Waukesha which requires that all officers, directors and stockholders required to be named under Subsection 8.195(3)(b) of the Municipal Code of the Waukesha shall be at least 18 years of age.
16. There is evidence that there are violations of Subsection 8.195 (4)(b)2 of the Municipal Code of Waukesha which requires that officers, directors or stockholders required to be named under Subsection 8.195 (3)(b) of the Municipal Code of Waukesha have violated Subsections of Section 8.195 of the Municipal Code of Waukesha within 5 years immediately preceding the date of the application.
 - A. Subsection 8.195 (10)(c) of the Municipal Code of Waukesha has been violated since it provides

that no employee of an adult oriented establishment shall allow any minor to loiter around or frequent in an adult oriented establishment or allow a minor to view adult entertainment as defined herein. A violation of this Subsection is a basis for nonrenewal of a license issued under Section 8.195 because Subsection 8.195 (10)(b) provides that any act or omission of an employee constituting a violation of the provisions of Section 8.195 shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or renewed and because operator is defined in Section 8.195 of the Municipal Code of Waukesha as any person, partnership, or corporation operating, conducting, maintaining or owning any adult oriented establishment. The Board finds the following specific violations:

1. On December 24, 1994, Officer Richard Piagentini observed a patron at City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha, who was a minor. Officer Piagentini made the observation while on patrol. Peggy Lindsley, the employee on duty at the time, and Daniel Bishop, a director of City News and Novelty, Inc., were both convicted of civil ordinance violations contrary to Section 8.195. Subsection 8.195(10)(c) of the Municipal Code of Waukesha on August 23, 1995. There was no evidence to refute the credible testimony of Officer Piagentini.
2. On July 23, 1995, Officer John Konkol observed S.S., a patron, at City News and Novelty, Inc. at 245 W. Main Street in the

City of Waukesha, who was a minor. Officer Konkol made the observation while on duty. Additionally, S.S. testified that she was a patron at City News and Novelty, Inc. at 245 W. Main Street in the City on July 23, 1995 and on said date she was a minor. Christopher Alverson, the employee on duty at the time, was convicted of a civil ordinance violation contrary to Section 8.195, Subsection 8.195(10)(c) of the Municipal Code of Waukesha on August 25, 1995. There was no evidence to refute the credible testimony of Officer Konkol or S.S.

3. On October 18, 1995, Officer Mark Howard, observed S.D., a patron, at City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha, who was a minor. Officer Howard made the observation during the course of a routine investigation. Additionally, S.D. testified that he was a patron of City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha on October 18, 1995 and on said date he was a minor. There was no evidence to refute the credible testimony of Officer Howard and S.D.
4. On November 29, 1995, Officer Paul Paikowski observed a patron of City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha, who was a minor. Officer Paikowski made these observations as a result of a routine inspection of the premises. He was not called to the scene by an employee of City News and Novelty, Inc. There was no evidence to refute the credible testimony of Officer Paikowski.

B. Subsection 8.195(9) of the Municipal Code of Waukesha has been violated since Subsection 8.195(9)(b)2 requires that every booth, room or cubicle shall have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying the same. A violation of this Subsection is a basis for nonrenewal of a license issued under Section 8.195 because Subsection 8.195 (10)(f) states that the operator shall insure compliance of the establishment and its patrons with the provisions of Section 8.195 of the Municipal Code of Waukesha and operator is defined as any person, partnership, or corporation operating, conducting, maintaining or owning any adult oriented establishment. The Board finds that the following specific violation:

1. On November 7, 1994, Building Inspector Marv Lemke observed at 245 W. Main Street in the City of Waukesha that wood panels had been installed perpendicular to the front of the interior partition of viewing booths between 9 and 11 inches in width having the effect of narrowing the booth openings by approximately 1/3 since his previous inspection the year before. The wood panels narrowed the opening of the booths and obstructed the view of someone looking into the booth contrary to the requirement that at least one side be totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying the same. The wood panels were not necessary for the structural stability of the booth. Daniel L. Bishop, a director of City News and Novelty, Inc. was convicted

of three (3) civil ordinance violations contrary to Section 8.195, Subsection 8.195(9)(b)(2) of the Municipal Code of Waukesha on August 23, 1995. There was no evidence to refute the credible testimony of Building Inspector Lemke.

C. Subsection 8.195(9) of the Municipal Code of Waukesha has been violated since Subsection 8.195(9)(c) requires that no occupants of a booth, room or cubicle shall engage in any type of sexual activity. A violation of this Subsection is a basis for nonrenewal of a license issued under Section 8.195 because Subsection 8.195 (10)(f) states that the operator shall insure compliance of the establishment and its patrons with the provisions of Section 8.195 of the Municipal Code of Waukesha and operator is defined as any person, partnership, or corporation operating, conducting, maintaining or owning any adult oriented establishment. The Board finds the following specific violations:

1. On February 28, 1995, Officer John Gibbs observed a patron of City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha, masturbating in a viewing booth. Officer Gibbs made these observations as a result of a routine inspection of the premises. He was not called to the scene by an employee of City News and Novelty, Inc. There were no employees in the booth area when the Officer made his observation. The patron was convicted of the criminal charge of lewd and lascivious conduct contrary to Section 944.20 Wis. Stats. There was no testimony presented to refute the credible testimony of Officer Gibbs.

2. On March 11, 1995, Officer Paul De Jarlais observed a patron at City News and Novelty, Inc. at 245 W. Main St. in the City of Waukesha, masturbating in a viewing booth. Officer De Jarlais made these observations as a result of a routine inspection of the premises. He was not called to the scene by an employee of City News and Novelty, Inc. There were no employees in the booth area when the Officer made his observation. The patron was convicted of the criminal charge of lewd and lascivious conduct contrary to Section 944.20, Wis. Stats. There was no testimony presented to refute the credible testimony of Officer De Jarlais.
17. In consideration of the issue of which party bears the burden of proof, the Board concludes that City News and Novelty, Inc., as applicant, had an initial burden of showing, as a minimum, that all jurisdictional requirements to effectuate an appeal to the Board pursuant to Chapter 68, Wisconsin Statutes, were satisfied.
18. In consideration of the issue of which party bears the ultimate burden of proof, the Board has considered special policy considerations, judicial estimate of probabilities, convenience, fairness factors and the natural tendency to place the burden on the party desiring change. The Common Council has permitted City News and Novelty, Inc. to continue its business operation pending the determination of the Board after a due process hearing. Therefore, the City desires a change in the status quo. Moreover, special policy considerations argue strongly in favor of requiring the City to set out facts in support of the Common Council's decision not to renew. The City has the convenience of facts at its command and is

able to provide the Board with information in support of its belief that nonrenewal is appropriate. Finally, the notion of requiring a party to prove lack of violations is of questionable fairness. Therefore, the Board concludes that the City bears the ultimate burden of proof.

19. The Board further concludes that, irrespective of the order of proof during the hearing, all due process requirements have been satisfied in that both parties were afforded full opportunity to present any and all evidence in support of their respective positions; neither party was prejudiced in any manner by the order of proof; and the hearing afforded both parties a constitutionally sufficient, fair and orderly administrative procedure to review the determination of the Common Council.
20. Based on the foregoing findings and conclusions and all of the documentation and testimonial evidence, the Board decides that there is substantial evidence in the record and a reasonable basis to conclude that the decision of the Common Council be upheld and that the adult-oriented establishment license of City News and Novelty, Inc. not be renewed for the license year 1996. The Board, therefore, affirms that decision.

These Findings, Conclusions and Decision of the City of Waukesha Administrative Review Appeals Board are unanimously adopted this 28th day of June, 1996.

/s/ Carol A. Opel
Carol A. Opel, Mayor

/s/ Jerome A. Seidl
Jerome A. Seidl, Alderman

/s/ Ralph M. North III
Ralph M. North III, Citizen
