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 BRIEF IN SUPPORT OF LICENSE RENEWAL

I. THE FUNCTION OF THE ADMINISTRATIVE REVIEW APPEALS BOARD

As its name implies, the Administrative Review Appeals Board is designed as a safeguard, to decide, on review, whether an action taken by the city was proper, under the law. Although this Administrative Review Appeals Board is composed of a mayor, a council member and a citizen, it acts not as a legislative, executive or civilian body, but as a quasi-judicial body. This means simply that the Board's function, as define by Wis. Stats. Ch. 68 is to review the decision already made, and the reasons which were given for that decision, not to seek out additional reasons or justifications for the decision. In this case, that duty translates to reviewing the December 19, 1995, Resolution of the City Council to see whether the eight grounds advanced in the separate "Whereas" paragraphs are factually supported by the evidence and are legally sufficient for nonrenewal of license.

II. THE APPLICANT IS ENTITLED TO DUE PROCESS OF LAW

Both the United States Constitution and the Constitution of the State of Wisconsin insure that no property will be taken without due process of law. This protection encompasses not only

real estate type property, but also "property rights," including the right of a license holder in a business to have the license renewed. Forest County Potawatomi Community v. Doyle, 828 F.Supp. 1401, 1408 (W.D. Wis. 1993). In general, this means that before a state or city may deprive someone of a license, either by revocation or by nonrenewal of that license, certain lawful procedures must be followed first. The deprivation of a property interest (such as the ongoing interest in a license to do business) without due process of law is unconstitutional. Zinermon v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed. 2d 100 (1990).

The two most often cited elements of due process are notice and a meaningful opportunity to be heard. Manos v. City of Green Bay, 372 F.Supp. 30, 50 (E.D. Wis. 1974). In this case, the requirement of notice, first and foremost, translates into the fact that the applicant has been put on notice of the allegations against it by the city in its Resolution. Consequently, allegations which go beyond the terms set forth in the Resolution cannot be used as a basis for nonrenewal of the license because the applicant has had no notice of them.

This parallels the concept set out in the previous section that this Board's duty is only to review evidence which is presented in support of the eight allegations previously used as the basis for nonrenewal. So, at a minimum, this Board must disregard evidence presented at hearing which does not pertain directly to one or more of the eight original allegations. Some examples of evidence which must be disregarded are the evidence

presented in Exhibits 33 and 43 pertaining to the allegation involving Timothy Morgan, and Exhibits 36 and 37 pertaining to citations issued to Jamie Bahr in April of 1994 and to Charlotte Schnook issued in October, 1993, as well as Exhibit 35, a lawsuit previously filed by the applicant, City News and Novelty, Inc., against the City of Waukesha. None of these exhibits pertain to the allegations contained in the December 19, 1995, Resolution, and therefore the applicant has had no notice of them and cannot be constitutionally required to defend against them.

The principles of due process also require that any action taken to deprive the applicant of its license be actions authorized by Waukesha Municipal Ordinance § 8.195. This is another aspect of notice and due process: The applicant must have notice, by reading the ordinance, of what acts will constitute grounds for losing its license. In the simplest terms, this means that a license cannot be nonrenewed just because it is a good idea, but only on the basis of grounds set forth in § 8.195.

Unfortunately, § 8.195 is not specific as to the grounds for denying renewal of a license. Section 8.195(4)(b) sets forth standards for issuance of a license for a corporation (and by application, the standards for denial of a license). There is no section which governs the standards for granting or denying renewal of a license. Section (7) entitled "Renewal of License or Permit" says only that every license terminates after one year from date of issuance and must be renewed, and anyone seeking renewal must make application to the city clerk on a form provided by the city clerk

containing such information as is required for application for a new license not later than 60 days before the license expires. Therefore, the only guidance given to the applicant, the city council, and this Board is contained in the standards for issuance of a new license in § (4)(b). This section says that to receive a license an applicant (if a corporation) must meet the following standards: (1) all officers, directors and stockholders required to be named under ¶ (3)(b) shall be at least eighteen years of age, and (2) no officer, director or stockholder required to be named under ¶ (3)(b) shall have been found to have previously violated this section within five years immediately preceding the date of the application. There has been no contention that any officers, directors or stockholders are under eighteen years of age. Therefore, in order to have a valid nonrenewal of license, the city must show that an officer, director or stockholder of City News and Novelty, Inc., has been found to have violated this section, § 8.195, between November 15, 1990, and November 15, 1995, the date of the application.

The applicant submits that this requires the elimination of the allegations set forth in the sixth, seventh and eighth paragraphs of the Resolution. These three allegations cannot serve as the basis for license nonrenewal because they are not violations committed by any officer, director or stockholder of the applicant. Each allegation is that an individual committed a violation of Wisconsin state law, specifically lewd and lascivious behavior, on the premises of the applicant's store. Consequently these three

allegations must be disqualified for two reasons: First, the acts are violations of state law, not violations of Waukesha Municipal Ordinance. The only ground set forth in § 8.195(4)(b)2 is an existing finding of a violation of "this section," meaning this section of the ordinance. There are no provisions for denial of application for violation of state law. Second, the violations which have been alleged are violations by third parties, not by any officer, director or stockholder. Section 8.194(4)(b)2 specifically requires a violation by an officer, director or stockholder if the violation is to serve as the basis for denial of a license. Since the allegations in ¶¶ 6, 7 and 8 meet neither of these two essential criteria, they cannot serve as a legal basis for denial of the license and consequently must be disregarded.

It might seem a very good idea that licensed premises be required to prevent lewd and lascivious behavior, and perhaps it <u>is</u> a very good idea. However, whether by design or by omission, the legislative body, the city council, has not included that concept as a part of the ordinance governing licensing. Therefore, regardless of the fact that it might be a very good idea for the city to address this situation so that these circumstances could be taken into account, they cannot be used against the applicant as part of the reason to deny the applicant's license because those acts do not constitute a violation of the ordinance by an officer, director or stockholder of the corporation. Therefore, the principles of due process prohibit basing a denial of a license, even in part, on the allegations in ¶¶ 6, 7 and 8 of the Resolution.

There is a third element of the notice requirement. Any ordinance or statute which permits deprivation of property, here the license, must be a "reasonable legislative enactment for the achievement of a legitimate state object." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652 (1950). Often statutes are only held to be "reasonable" if the owner of a license is put on notice that there is a potential problem, so that the owner may take affirmative action to abate the questionable activities. If a city denies an owner the ability to pursue self-remedying measures, this result is unreasonable. City of St. Paul v. Spencer, 497 N.W.2d 305 (Minn. App. 1993). Therefore, this Board should consider whether the city, by never seeking a suspension of a license for any one of the allegations, had acted unreasonably in "saving up" all of its complaints past the point where the applicant could effectively remedy them and abate the problem. In assessing whether or not the applicant would have responded, had it been given prior notification that the city considered, say, presence of minors on the premises, a problem, the Board should note the testimony about the recent measures undertaken by the applicant, including removal of viewing booths, rearrangement of the interior of the store so that a patron is checked immediately after entering the store, and is no longer able to see sexually explicit materials until after being so checked, and the acquisition of the highly technical, more effective, age-checking video monitor. Officer Angle testified that since the rearrangement and the installation of the new ID monitor, there

have been no incidents where minors have been able to sneak into the store using false identification.

III. THE APPLICANT'S LICENSE IS ALSO PROTECTED BY CONSTITUTIONAL PROVISIONS SAFEGUARDING FREE SPEECH.

City News and Novelty, Inc., the applicant, owns a bookstore which has been considered an "adult bookstore" because some of the material it disseminates is sexually explicit. However, there are no allegations now before the Board that the material is obscene. Expression which is sexually explicit, but not obscene, is entitled to protections by the First Amendment to the United States Constitution and Article I, Sec. 8, of the Wisconsin Constitution. First and foremost among these protections is that no action can be taken against the applicant, including denial of a license, based on the content of the stock in the store. City of Renton v. Playtime Theatres, 475 U.S. 41, 106 S.Ct. 925 (1986). Any restrictions, such a nonrenewal of a license, based on the content of the bookstore presumptively violate the First Amendment. Content "neutral" regulations are acceptable "so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." City of Renton, supra, at 47, 106 S.Ct. at 928.

All licensing is a form of censorship, in that before the bookstore can sell one videotape or one magazine, all of which are considered speech or expression, it must obtain permission from the city. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 97 S.Ct. 1239, 43 L.Ed. 2d 448 (1975). This is what is known, in

legal jargon, as "prior restraint" -- the bookstore is restrained from selling its inventory, in advance of any sales, by certain licensing requirements. "Licensing provisions are prior restraints on speech if they permit authorities to deny the use of a forum for protected expression in advance of actual expression." Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165, 1171 (4th Cir. 1986). Because licensing in these circumstances creates the possibility that constitutionally protected speech will be suppressed, there are additional procedural safeguards which have been determined to be necessary by the United States Supreme Court in order to protect freedom of expression. In 1965 the Supreme Court announced three such protections which are required whenever there is prior restraint involving expressive materials: The burden of proof must be on the party seeking the restriction (licensing regulation); the decision must be made within a brief period of time; and the law governing whether or not the license will be granted cannot place "unbridled discretion" in the hands of the government. Freedman v. State of Maryland, 380 U.S. 51, 59, 85 S.Ct. 734, 739, 13 L.Ed. 2d 649 (1965). On many occasions, the Supreme Court has reiterated the guidelines set out in Freedman and has expanded their application. The Court has continually held that any prior restraint of a license "without narrow objective and definite standards to guide the licensing authority" is unconstitutional. Shuttlesworth v. Birmingham, 394 U.S. 147, 150, 89 S.Ct. 935, 938, 22 L.Ed. 2d 162.

The requirement that the city not use "unbridled discretion" means that in any attempt to restrict the license, the city must adhere very narrowly and very carefully to the explicit terms of the ordinance. Due to the protections of the First Amendment, it would be unconstitutional for the city council to use circumstances which are not specifically prohibited by the ordinance to justify a denial of license. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 759, 108 S.Ct. 2138, 2145, 100 L.Ed. 2d 771 (1988). For example, to allow the city council to not renew the license based on allegations of sexual activity on the part of patrons, when these violations are violations of state law, not the ordinance, and are violations by third parties, not the officers, directors or shareholders, would be to step outside the standards enunciated in the ordinance and to use unbridled discretion. This would be unconstitutional.

These First Amendment protections also address the issue of burden of proof. Although in other licensing circumstances, where the businesses licensed do not engage in protected First Amendment activities, the city could put the burden on the license holder to show that its license should be renewed, the reverse is true in this case as a result of the First Amendment protections. The Freedman case, and the cases which follow, make clear that when a city seeks to regulate protected expressive activities, such as the sale of sexually explicit videos and magazines, the city must shoulder the burden of proof. In this case, that translates into a need for the Board to require that the city show by evidence that

all of the allegations contained in the December 19, 1995, Resolution are valid and that all the procedures required of the city were met before it can allow nonrenewal.

One such requirement which appears not to have been met is the requirement, found at § 8.195(3)(c) that the applicant shall be notified whether the application is granted or denied within 21 days of the city's receiving the application. It appears that the application was filed November 15, 1995, and that the applicant was not notified until December 15, 1995, by passage of the Resolution that the city proposed to deny the application.

It is also constitutionally unacceptable that the city use, as a basis for nonrenewal, any allegations which are in any form less than a conviction in a court of record. Specifically, ¶¶ 2 and 3 (which are summarized in ¶ 4) and ¶ 5 are allegations of this nature. The allegation in ¶ 5 is of violations (in the nature of permitting minors on the premises) which are still allegations only; there have been no convictions of any kind, even in municipal court, entered as of November 15, 1995. To deny renewal of a license on the basis of allegation of a crime constitutes punishment without the requisite finding of guilt.

> Our system of justice reserves punishment to those who have been convicted -- beyond a reasonable doubt -- of an offense; collateral punishment without process has no place in our constitutional scheme.

Dumas v. Dallas, 648 F.Supp. 1061, 1074, n.36 (N.D. Tex. 1986), reversed on other grounds, as F.W./P.B.S., Inc., d/b/a Parris Adult Bookstore, et al. v. City of Dallas, 393 U.S. 215, 110 S.Ct. 596, 107 L.Ed. 2d 603 (1990).

The issuance of a citation is not evidence of an applicant's guilt but merely indicates that an accusation has been made. United States v. Calandra, 414 U.S. 338, 344-45, 94 S.Ct. 613, 618, 38 L.Ed. 2d 561 (1974). It has long been established that no branch of the government can limit expression which is protected by the First Amendment without bearing the burden of showing that its restriction is justified; this burden cannot be carried by a mere allegation or issuance of a citation. Philadelphia Newspaper v. Hepps, 106 S.Ct. 1558, 1564, 89 L.Ed. 2d 783 (1986); Dumas v. Dallas, supra, at 1074, n.37. Courts have universally held that a mere accusation cannot "carry the heavy burden implicit in suppressing speech that is protected by the First Amendment." Dumas v. Dallas, at 1074. Consequently, the allegations that minors were permitted to loiter on the premises on three occasions in 1995 cannot be used as a basis for denial of the license and must be totally disregarded.

The allegations in ¶¶ 2 and 3 suffer from a similar defect. Although the citations issued on December 24, 1994 (¶ 2), and on November 30, 1994, December 1, 1994, and December 2, 1994 (¶ 3), had resulted in Waukesha Municipal Court as of November 15, 1995, municipal court is not a "court of record." See, Wis. Stat. § 800.13(2), ". . . a municipal court is not a court of record." A court of record is one in which a court reporter transcribes exactly every word said; this then becomes a permanent record from which a review may be taken. By contrast, in municipal court an electronic recording is made of proceedings. Although much of what

transpires is recorded, much is always lost, as people have a tendency to interrupt one another and speak at the same time, and as no court reporter is present to untangle the conversations as they go, many words are lost or garbled. A defendant who is convicted in municipal court is entitled to a trial de novo as a matter of law in circuit court. Circuit courts are constitutionally granted plenary jurisdiction over "all matters civil and criminal within the state," Wisconsin Constitution, Art. VII, Sec. 8, whereas municipal courts are courts of lesser jurisdiction. Kotecki & Radtke v. Johnson, 531 N.W.2d 606, 610 (Wis. App. 1995). There are numerous distinctions between circuit courts and municipal courts, one of which is that municipal judges are not required even to be licensed to practice law. Further, circuit court judges are prohibited from holding any other office by the constitution. But the most significant difference is that of an effective transcript. An accurate transcript has been held to be constitutionally required in order to effectuate an individual's right of access to the courts. Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), rehearing denied, 76 S.Ct. 844. Consequently, a conviction which is not a conviction in a court of record cannot constitute a "finding" that a violation has occurred, especially in the context of encroachment on freedom of expression.

IV. THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT NONRENEWAL OF THE LICENSE.

In addition to the legal points set forth above, there has been a failure of evidence on the city's part to meet its burden to show that nonrenewal of the license has been justified.

For example, the Board should consider the allegation in ¶ 3, that on three occasions in November and December, 1994, City News and Novelty violated the provisions of the open booth/unobstructed view section of the ordinance. The testimony of Housing Inspector Lemke was absolutely clear on this point, that on the days set forth in the allegation, November 30, December 1, and December 2, 1994, any violation which had occurred had been corrected. (Tr., I, 273, 282, also Exhibits 23 and 24 which substantiate the testimony.)

In reviewing whether or not the city council could "find" that the applicant, City News and Novelty, Inc., was in violation based on the allegation in ¶ 2, it is essential to understand that the citation against Peggy Lindsley, alleged to be an employee of City News and Novelty, cannot be taken into account unless there is an additional finding that her failure to exclude a minor was an act or omission which occurred with authorization, knowledge or approval of the operator (City News and Novelty, Inc.), or as a result of the operator's negligent failure to supervise her conduct. Section 8.195(10)(a). The testimony, for example, of David Hull that employees are trained that they must check ID and can only accept legitimate forms of photo ID, as well as the evidence from Sgt. Piagentini's police report that the juvenile in that case, one week shy of the age of legitimacy, used a false photo ID to fake her way onto the premises, does not support a finding of either authorization, knowledge or approval of Ms. Lindlsey's error or negligent failure to supervise.

It should be noted that it is a principle of statutory construction that separate sections of a statute or ordinance must be read in congruence with one another, and so is to avoid an absurd result. Therefore, the provisions of § 8.195(10)(b) which state that any act or omission of any employee constituting a violation of the provisions of this section 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, must be read in conjunction with the preceding paragraph, which states that every act or omission by the employee constituting a violation of this provision is deemed an act or omission of the operator only if it occurs with the authorization, knowledge or approval of the operator or as a result of the operator's negligent failure to supervise the employee's conduct. When ¶ (b) is read in conjunction with ¶ (a), there is no contradiction between the two paragraphs; this is the only construction of the two paragraphs, taken together, which makes logical sense. It is an element of statutory construction that an absurd reading of a statute or ordinance is to be avoided. Consequently, the error of Ms. Lindsley could only be held against the applicant if the evidence had supported a finding of authorization or of negligent failure to supervise. As it does not, this must be disregarded as a basis for nonrenewal of license.

Similarly, there has been a failure to proof at the hearing that Daniel Bishop, or any officer, director or stockholder of the applicant had knowledge of or approved any of the violations

alleged, or was negligent. Not only did the city fail to establish such knowledge and/or negligence but the testimony showed that the applicant has been diligent in its continuing efforts to avoid minors sneaking onto the premises by all manner of devious means and has removed the video viewing booths. In addition, the applicant has placed signs in conspicuous places, notably the front entrance, just inside the front entrance, the back door, and by the cash register, all of which warn incoming customers that they must be eighteen and that IDs will be checked. Furthermore, the evidence clearly established that the applicant took the precautionary measure of limiting access to one entrance only, at the front, and turning the side door into an emergency exit only, thus making the checking of IDs more streamlined. To show that an employee made an error which resulted in a violation is one thing; to attribute that error to the operator requires another level of evidence, sufficient to support a finding of knowledge, approval, or negligent supervision. Also, testimony established that employees who have permitted minors to get past them and have been ticketed for minor-on-the-premises have been terminated and are no longer employees of the applicant. Consequently even if this Board finds such a violation, the applicant submits that such a finding cannot be used against it.

V. THE BOARD'S DUTY AT THIS POINT

Thus, it is the applicant's position, that none of the allegations against it, contained in ¶¶ 3, 4, 5, 6, 7 and 8 of the Resolution, as a matter of law can be used as the basis for

nonrenewal of its license. However, should this Board decide differently, and rule that certain allegations are capable of being used as a basis, the applicant contends that, based on the language of the "now therefore be it resolved" paragraph, which states, "Based upon the aforementioned convictions and violations, and sexual activity occurring in the viewing booths on the premises which occurred during the license year 1995 the Common Council of the City of Waukesha hereby denies the renewal. . . . ," it is apparent that the decision of the council was based on its perception of an ongoing, uncorrected pattern of problems, not on any one violation. Had the council "found" only one or two infractions, it much more likely would have voted for a 30-day suspension of license, as is permitted by § 8.195(8)(a)2. That is to say, should this Board find, for example, that certain of the allegations contained in the resolution, say, those contained in ¶¶ 6, 7 and 8, cannot, by their very nature, be used as the basis for a denial of licensure, this Board must reverse the nonrenewal because it cannot say that, with certain offenses removed from the picture, the city would have made the same finding. There are basically six violations alleged, of which three (6, 7 and 8) are clearly not the type of violations contemplated by the ordinance, and of which one (¶ 3) clearly did not happen. Therefore, at a minimum, four out of the six violations must be disregarded for purposes of license nonrenewal. The applicant urges this Board to also disregard the remaining allegations, in ¶¶ 2 and 5, but asserts that even if those allegations are accepted by the Board,

they alone cannot serve as the basis for a decision which was based upon a much larger perceived pattern of violations. Or, put another way, if the city is unsuccessful in carrying its burden as to all six allegations, the license nonrenewal must be reversed. This Board can review the city's decision, but cannot second-guess what the city's decision would have been absent some of the allegations. Therefore, because certain allegations must be disregarded as a matter of law, because other allegations have been factually shown not to have occurred as alleged, or alternatively have not occurred with the knowledge, approval, or participation of, or due to negligence of, the applicant, and because the city relied on the sum of the allegations, at least some of which are not lawful bases for nonrenewal, the nonrenewal of licensure must be reversed.

Dated this 28th day of May, 1996.

Respectfully submitted,

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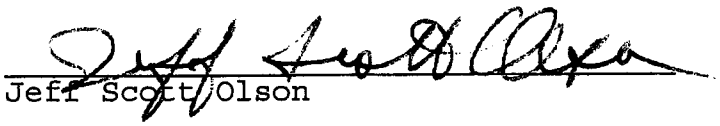

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