CITY OF WAUKESHA
BEFORE THE COMMON COUNCIL

In re:

CITY NEWS AND NOVELTY, INC.

Adult Oriented Establishment License:

License Year Beginning January 26, 1996

APPLICANT'S BRIEF IN SUPPORT OF REQUEST FOR REVIEW OF DETERMINATION

I. THE STANDARDS FOR LICENSURE IN THE ORDINANCE MUST BE STRICTLY CONSTRUED IN FAVOR OF GRANTING THE LICENSE IF NO DISQUALIFYING FACTOR IS PROVEN.

Nothing is clearer in First Amendment jurisprudence than that, while a municipality may subject First-Amendment protected expressive activity to a license requirement, the standards for issuing that license must be specific and objective, and any applicant who meets these specific and objective standards must be issued a license. As the United States Court of Appeals for the Seventh Circuit said in Grandco Corp. v. Rockford, 536 F.2d 197 (7th Cir. 1976):

> The state may subject the exercise of First Amendment freedoms to the prior restraint of a license requirement but only where it provides 'narrow, objective and definite standards to guide the licensing authority.' Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969).

In Bayside Enterprises, Inc. v. Carson, 450 F.Supp. 696 (M.D. Fla. 1978), the Court struck down a licensing scheme for adult entertainment establishments in part because it set standards for the issuance of licenses which were too vague.

II. NONE OF THE GROUNDS SET FORTH IN THE RESOLUTION OF DECEMBER 19, 1995, RELATE TO JUDGMENTS OF CONVICTION BY COURTS OF RECORD OF PREVIOUS VIOLATIONS OF § 8.195 BY THE LICENSEE'S OFFICERS, DIRECTORS OR STOCKHOLDERS.

Pursuant to § 800.13(2), Wis. Stats., a municipal court is not a court of record. This means that its judgments may not be granted preclusive effect in collateral proceedings. The only actual convictions which have been entered against employees of City News and Novelty, Inc., were entered in municipal court. Since municipal court is not a court of record, these judgments may not be used in this collateral licensing proceeding unless and until they are affirmed by the Circuit Court for Waukesha County, where the cases in which they were entered are presently pending on appeal. The Council may not take adverse action with respect to the applicant's license based on these convictions unless and until they are affirmed in circuit court.

III. ALLEGATIONS OF VIOLATION OF § 8.195 WHICH HAVE NOT YET RESULTED IN CONVICTION IN ANY COURT ARE NOT PROPER GROUNDS FOR DENIAL.

Three of the alleged incidents of minors permitted to loiter in the applicant's premises which are set forth as grounds for denial in the resolution of December 19, 1995, have not yet resulted in convictions in any court. Section 8.195(4)(b) of the licensing ordinance permits denial of licensure only if an officer, director or stockholder "shall have been found" to have violated the licensing ordinance within the past five years. The use of the words "shall have been found" clearly indicates that some formal proceeding must have occurred in which a finding of guilt as to a

violation of the ordinance was entered by a court of record whose findings may be entitled to preclusive effect in a collateral proceeding. It is clear from the wording of the ordinance that allegations which have not yet resulted in a finding of guilt cannot form the basis for a denial of licensure.

IV. THE CONVICTION IN MUNICIPAL COURT OF PEGGY LINDSLEY FOR HAVING PERMITTED A MINOR TO ENTER CITY NEWS AND NOVELTY IS NOT A GROUND FOR NONRENEWAL BECAUSE LINDSLEY IS NOT AN OFFICER, DIRECTOR, OR SHAREHOLDER OF CITY NEWS AND NOVELTY, INC.

Since the decision at issue is not one to revoke the applicant's license, but rather simply not to renew it, and the ordinance sets forth no particular standard for renewal decisions, the city can apply only those standards set forth in § 8.195(4)(b) for issuing new licenses to corporations. This section permits denial of licensure only if an officer, director or stockholder has been found to have violated the ordinance within the past five years. Peggy Lindsley has not been shown to be an officer, director or stockholder, and thus even if her municipal court conviction could be used collaterally, it cannot be used as a basis for a nonrenewal decision under the standard set forth in the ordinance. It is true that § 8.195(10) provides that violations by employees are deemed to be violations by the operator if the operator authorized or negligently failed to prevent the violation, but in this case there is no showing that the operator authorized or negligently failed to prevent Ms. Lindsley's actions. Moreover, the operator of the business is the corporation City News and

Novelty, Inc., and corporate convictions are not disqualifiers under a standard for initial licensure.

V. THE CONVICTIONS OR PROSECUTIONS OF PATRONS OF CITY NEWS AND NOVELTY FOR VIOLATIONS OF WISCONSIN STATUTES OTHER THAN § 8.195 OF THE WAUKESHA MUNICIPAL CODE ARE NOT AVAILABLE GROUNDS FOR NONRENEWAL UNDER THE ORDINANCE.

The December 19, 1995, resolution lists several pending or completed prosecution of patrons for improper activity within the store as grounds for nonrenewal. There is nothing in the standards for licensure which permits denial because of the unlawful activities of patrons. Nor is there any provision, as in the case of employees, which makes the operator or the officers, directors or shareholders vicariously liable for violations by employees. The applicant was the victim of these violations, and they should not be employed as grounds for nonrenewal.

VI. SINCE THE COUNCIL'S DETERMINATION OF VIOLATIONS OF THE ORDINANCE IS THE FIRST SUCH DETERMINATION AGAINST CITY NEWS AND NOVELTY, INC., AND SINCE ANY VIOLATIONS WERE COMMITTED BY EMPLOYEES, THE MAXIMUM PENALTY UNDER THE ORDINANCE IS A ONE-MONTH REVOCATION.

The city proposes to deny the annual licensure of the applicant's business which would have the effect of closing it in perpetuity. Were this a revocation proceeding, the city would be limited by § 8.195(8)(a)2 of the ordinance which provides that where a violation is committed by an employee without the actual or constructive knowledge of the operator, in this case the corporation City News and Novelty, Inc., the maximum penalty is a one-month suspension of licensure. Clearly, in the nonrenewal context, the maximum penalty for a similar violation should not exceed the

maximum penalty which could be exacted in a revocation proceeding. Since this proceeding will represent the first finding of any violation of the ordinance against the applicant, any violation or violations found will constitute a "first offense" within the meaning of the ordinance, and the maximum penalty which may be imposed is a one-month suspension, or in this case, perhaps a one-month delay in the issuance of a new license.

VII. SINCE NO EVIDENCE IS AVAILABLE OF THE APPLICANT'S AUTHORIZATION OR APPROVAL OF ANY VIOLATION OF THE ORDINANCE OR OF THE APPLICANT'S NEGLIGENT FAILURE TO PREVENT SUCH VIOLATION, NONE OF THE ALLEGED VIOLATIONS ARE PROPER GROUNDS FOR NONRENEWAL.

Section 8.195(10)(a) of the licensing ordinance provides that acts or omissions by employees are attributable to the operator only if they occur with the operator's authorization, knowledge or approval or as a result of the operator's negligent failure to supervise the employee's conduct. Section 8.195(10)(b) indicates that acts or omissions of employees are attributable to the operator for purposes of determining whether a license shall be revoked, suspended or renewed. It is clear that these two sections must be read together such that ordinance violations by employees are attributable to the operator for the purpose of a nonrenewal decision only if the operator was somehow culpable. This conclusion is compelled by the foregoing provision which limits the penalty for employee violations where the operator was not somehow culpable to a 30-day suspension in the case of revocation proceedings. Since there was no evidence that the operator, City News and Novelty, Inc., has been culpable in any of the alleged violations

of the ordinance listed in the December 19, 1995, resolution, no nonrenewal decision can lawfully be premised upon such violations.

CONCLUSION

The purpose of this brief was to explain at somewhat greater length some of the points raised in the applicant's request for review. The omission of any point from this brief is not intended as a waiver of that point. In particular, the omission of any constitutional arguments is not intended as a waiver of said arguments, because the applicant understands that the council does not have jurisdiction to declare any portion of the city's ordinances unconstitutional. The applicant intends to raise the constitutional issues in an appropriate forum. Based upon the foregoing arguments alone, however, the applicant prays the Common Council to reverse its earlier decision and determine to grant the applicant's annual license.

Dated this 19th day of January, 1996.

Respectfully submitted,

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