

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 CONCLUSIONS OF LAW AND DECISION

1. This Administrative Review Appeals Board (hereinafter "Board") functions under the provisions of Wis. Stats., Ch. 68, to review the nonrenewal of the license of City News and Novelty, Inc., for the licensing year January 26, 1996, to January 26, 1997, which nonrenewal has been effected by Resolution of the City Council, dated December 19, 1995.

2. City News and Novelty, Inc., operates City News and Novelty, which has been licensed as an adult bookstore, as defined by Waukesha Municipal Ordinance § 8.195(1) (as amended on June 7, 1995).

3. City News and Novelty, in addition to holding out for sale general merchandise, is in the business of disseminating sexually explicit, non-obscene expressive materials, i.e., videos and magazines. Therefore, its activities are protected by the First Amendment to the United States Constitution and by Article I, Section 8, of the Wisconsin Constitution.

4. Licensing (and nonrenewal of a license) of City News and Novelty is governed by the provisions of Waukesha Ordinance § 8.195 subject only to constitutional limitations on the government's ability to impose prior restraints on expressive activities.

5. Because of those limitations on the government, the City bears the burden of proof to show by a preponderance of evidence that the December 19, 1995, nonrenewal of City News and Novelty's license comports with § 8.195, as well as principles of due process and constitutionally protected freedom of expression.

6. Waukesha Ordinance § 8.195 contains no provisions governing the grounds for nonrenewal of licenses. Therefore, we use § 8.195(4)(b), "STANDARDS FOR ISSUANCE OF LICENSE" as the standards governing renewal and nonrenewal of license. Section 8.195(4)(b)1, which requires all officers, directors and stockholders of the corporate applicant to be at least eighteen years of age is not at issue here. Therefore, the nonrenewal of City News and Novelty, Inc.'s, license can stand only if we find that 8.195(4)(b)2 applies.

7. This section provides that no officer, director or stockholder of the corporation shall have been found to have previously violated this section within five years immediately preceding the date of the application.

8. Therefore, as an initial matter, we note that ¶¶ 6, 7 and 8¹ of the Resolution are inappropriate as grounds for nonrenewal, inasmuch as they do not allege violations of ordinance § 8.195 committed by any officer, director or stockholder of the

¹ The December 19, 1995, resolution, as originally drafted, contains eight separate "whereas" paragraphs, none of which are numbered. We have numbered these eight paragraphs consecutively for ease of reference.

corporate applicant. Therefore, we find these three paragraphs of the resolution cannot serve as the basis for nonrenewal.²

9. Waukesha Ordinance § 8.195(4)(b)2 uses the term "shall have been found to have previously violated this section within five years preceding the date of application"; "shall have been found" or "to find" are not defined within the ordinance itself. For the purpose of license renewal/nonrenewal, we deem the term "to find" equivalent to having been convicted in a Wisconsin court of record, because to adopt any lesser standard would violate Wisconsin Statutes or constitutional provisions or both. Municipal Court in the City of Waukesha is not such a court of record.

10. The allegations in the Resolution, ¶¶ 2, 3, and 5, are insufficient for such a "finding." By the terms of the Resolution itself, as well as by the evidence at hearing on this matter, it is clear that at the time of passage of the Resolution, the December 24, 1994, violation (¶ 2) and the November 30, 1994, December 1, 1994, and December 2, 1994, violations (¶ 3) had not yet been decided by Waukesha Circuit Court. The allegations of violations on July 12, 1995, October 18, 1995, and November 29, 1995 (¶ 5) had not yet even been the subject of convictions in municipal court. Consequently the allegations in ¶¶ 2, 3, and 5 of

² We also note that the allegations contained in Resolution ¶¶ 6, 7, and 8 are the subject of a nuisance lawsuit currently pending in Waukesha Circuit Court, and consequently we feel that this also serves as a basis to eliminate them from consideration as a ground of nonrenewal, as to do otherwise might result in punishing City News and Novelty twice in separate proceedings for the same violations, which would be a violation of constitutional protections against double jeopardy.

the Resolution cannot serve as the basis for nonrenewal of the license of City News and Novelty.

11. In addition, in regard to ¶ 3 of the Resolution, we note that at the hearing, not only did the city not show by a preponderance of the evidence that City News and Novelty was guilty of three violations on the three dates set forth, but, to the contrary, the evidence of Inspector Lemke unequivocally showed that any possible infractions had been corrected on or before those dates. (See Findings of Facts).

12. The non-appearance of City News and Novelty registered agent (and applicant) Daniel Bishop at the April 2, 1996, hearing is of no legal significance because the scope of our review is limited to the December 19, 1995, Resolution and the allegations contained therein on which the City based its decision not to renew the license.

DECISION

Based on all of the documentary and testimonial evidence, our Findings of Fact and Conclusions of Law, we conclude that the reasons for the City in denying renewal to City News and Novelty are legally insufficient. Therefore, the Resolution of 12/19/95 is reversed and the license is ordered to be issued.

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 APPLICANT